Case No. _____

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

FELICE J. FIORE and SPEEDVEGAS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE NANCY L. ALLF, District Judge,

Respondents,

and

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY-SCOTT, daughter and heir of the decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, Individually, and as surviving spouse of CRAIG SHERWOOD, deceased; GWENDOLYN WARD, as Mother and Natural Guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, decease,

Real Parties in Interest.

PETITIONERS' APPENDIX
VOLUME 3
PAGES 501-750

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Docket 83590 Document 2021-28832

CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

	Declaration of Regina Zernay			
11	Plaintiffs Opposition to Defendant Felice Fiore's Motion for Summary Judgment	05/28/21	4	910–922
12	Plaintiffs' Opposition to Defendant SpeedVegas's Motion for Summary Judgment	05/28/21	4 5	923–1000 1001–1240
13	The Ben-Kely Plaintiffs' Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	06/03/21	5 6	1241–1250 1251–1389
14	Reply in Support of Motion for Summary Judgment as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, and Nathalie Ben-Kely Scott	06/28/21	6	1390–1401
15	Reply in Support of Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	06/28/21	6	1402–1413
16	Reply in Support of Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant SpeedVegas, LLC; Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	06/28/21	6	1414–1437
17	The Ben-Kely Plaintiffs' Supplemental Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	07/01/21	6	1438–1442

18	Objection and Motion to Strike Ben-Kely Plaintiffs' Supplemental Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	07/06/21	6	1443–1446
19	Recorder's Transcript of Proceedings Re: Motions	07/06/21	6 7	1447–1500 1501–1527
20	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant Felice J. Fiore, Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	07/21/21	7	1528–1542
21	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant SpeedVegas LLC, Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	07/21/21	7	1543–1557
22	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant Felice J. Fiore, Against Plaintiffs Estate of Gil Ben-Kely by Antonella Ben-Kely, the duly appointed representative of the Estate and as the widow and heir of decedent gil Ben-Kely; Shon Benkely, son and heir of decedent Gil Benkely; Nathalie Ben-Kely-Scott, daughter and heir of the decedent Gil Ben-Kely)	10/01/21	7	1558–1570
	Case No. A-18-779648-C			
23	Complaint	08/17/18	7	1571–1590

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

8	Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, and Nathalie Ben-Kely Scott; Affidavit of Felice J. Fiore, Jr.; Declaration of Regina Zernay	05/14/21	2 3	303–500 501–530
9	Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood; Affidavit of Felice J. Fiore, Jr.; Declaration of Regina Zernay	05/14/21	3	531–747
10	Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant SpeedVegas, LLC; Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood; Declaration of Regina Zernay	05/14/21	3 4	748–750 751–909
22	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant Felice J. Fiore, Against Plaintiffs Estate of Gil Ben-Kely by Antonella Ben-Kely, the duly appointed representative of the Estate and as the widow and heir of decedent gil Ben-Kely; Shon Benkely, son and heir of decedent Gil Benkely; Nathalie Ben-Kely-Scott, daughter and heir of the decedent Gil Ben-Kely)	10/01/21	7	1558–1570
20	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant Felice J. Fiore, Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	07/21/21	7	1528–1542

21	Notice of Entry of Order (Order Denying Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Defendant SpeedVegas LLC, Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood	07/21/21	7	1543–1557
18	Objection and Motion to Strike Ben-Kely Plaintiffs' Supplemental Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	07/06/21	6	1443–1446
11	Plaintiffs Opposition to Defendant Felice Fiore's Motion for Summary Judgment	05/28/21	4	910–922
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16	Reply in Support of Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant SpeedVegas, LLC; Against Plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane	06/28/21	6	1414–1437

	Sherwood			
3	Second Amended Complaint	02/20/18	1	76–130
13	The Ben-Kely Plaintiffs' Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	06/03/21	5 6	1241–1250 1251–1389
17	The Ben-Kely Plaintiffs' Supplemental Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott	07/01/21	6	1438–1442
4	Third Amended Complaint	01/15/19	1	131–184

CERTIFICATE OF SERVICE

I certify that on October 7, 2021, I submitted the foregoing "Petitioners' Appendix" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

On consideration whereof, the judgment of the Fulton County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

CONNORS, P.J., and RESNICK, J., concur.

All Citations

17 Ohio App.3d 75, 477 N.E.2d 638, 17 O.B.R. 135

Footnotes

* A motion to certify the record to the Supreme Court of Ohio was overruled on September 12, 1984 (case No. 84–1023).

1 In the third paragraph of the syllabus in *Thrash,* the court held:
"Where the owner of a used motor vehicle sells the same 'as is' to a dealer in those articles for such disposition as the dealer may make of it, such owner may not ordinarily be held liable for injuries occasioned to one who purchases the vehicle from the dealer or for injuries to another, because of faults or imperfections in the vehicle which existed or occurred during the time it was in the possession of such owner."

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EXHIBIT “23”

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225 Pa.Super. 362
Superior Court of Pennsylvania.

Elizabeth M. McKENNA and Francis P. McKenna, Appellants,
v.
ART PEARL WORKS, INC. c/o Herman Golden, Registered Agent and
Bernard Dorfmann and Adelphia Button Company, Additional Defendant.

Sept. 19, 1973.

Synopsis

Employee of buyer of punch press and her husband filed suit in trespass and assumpsit against corporate seller and its agent to recover for injuries received while operating punch press. The Court of Common Pleas, Philadelphia County, June Term, 1971, No. 1436, Ned L. Hirsh, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Superior Court, No. 613 October Term, 1973, Hoffman J., held that corporate president who handled sale of punch press could not be held personally liable for employee's injuries and that complaint raised material issues of fact as to whether corporate seller was guilty of negligence, precluding summary judgment.

Reversed and remanded.

Attorneys and Law Firms

****678 *363** Elizabeth M. McKenna, Philadelphia, for appellants.

Saul D. Levit, Philadelphia, for appellees.

Before WRIGHT, President Judge, and WATKINS, JACOBS, HOFFMAN, SPAULDING, CERCONE, and SPAETH, JJ.

Opinion

HOFFMAN, Judge.

Appellants contend that the trial court erred in granting appellees' motion for summary judgment on the amended complaint.

The instant suit arose out of an accident occurring on December 10, 1969, in which the wife-appellant sustained injuries while operating a punch press in the course of her employment at the Adelphia Button Company. The punch press had been purchased from the Act Pearl Works, Inc., through its authorized agent ***364** Bernard Dorfmann. Appellants filed their Complaints in Trespass and Assumpsit against the appellees, Art Pearl Works, Inc., and Bernard Dorfmann individually. Appellees' motion for summary judgment as to appellants' second amended complaints, was granted on January 30, 1973, by the Honorable Ned L. Hirsh of the Court of Common Pleas of Philadelphia County, who based his decision on the deposition of the individual appellee, appellees' affidavit, and the pleadings. Appellants appeal to this Court questioning only those portions of ****679** the lower court's Order granting summary judgment in favor of the appellees on the second amended complaint in trespass.

A summary judgment may be sustained (only) 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Pa.R.C.P. 1035(b), 12 P.S.Appendix. 'The burden of demonstrating that no genuine issue of material facts exists is on the moving party and the record must be examined in the light most favorable to the nonmoving party. Schacter v. Albert, 212 Pa.Super. 58, 239 A.2d 841 (1968) . . . In passing upon a motion for summary judgment, the trial court's function is not to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. All doubts

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as to the existence of a genuine issue of material fact must be resolved against the moving party.' McFadden v. American Oil Co., 215 Pa.Super. 44, 48—49, 257 A.2d 283, 286 (1969).

The issue, therefore, is whether the appellants raised any genuine issues of material fact to negate the propriety of summary judgment on their amended complaint.

Plaintiffs' Complaint in Trespass sets forth with sufficient clarity and definiteness the identity of the ***365** parties, the circumstances of the sale of the punch press to wife-plaintiff's employer, and the injury on December 10, 1969. Plaintiffs' allegations state causes of action based on strict liability in tort and common law negligence.[1] In their Motion for Summary Judgment, defendants admit to the sale of the punch press and the resulting injury. They deny, however, that they are liable to the plaintiffs on a strict liability theory. We agree.[2] Defendants go further, however, and deny liability on any other tort theory. They deny corporate liability, saying that the corporation had ceased doing business in 1964 after a sale of its business assets. Likewise, individual liability is denied, as it is alleged that Bernard Dorfmann at all times acted as an authorized agent for the corporation.

We believe the lower court properly granted the Motion for Summary Judgment with respect to Bernard Dorfmann. Despite the fact that Mr. Dorfmann admitted that he was the president of Art Pearl Works, Inc., and that the corporation was a family business with the shares of stock divided among various family members, we are not persuaded that this is an appropriate case to pierce the corporate veil, as appellants would have us do.

***366** Under the law, there is no authority to look through the corporate appellee to the individual appellee. We have said that the 'equitable doctrine of piercing the corporate veil (should be employed) to prevent the perpetration of wrong; to prevent its use as a shield for illegal and wrongul conduct; or where its use, as a technical device, brings about injustice or an inequitable situation so that justice and public policy demand it be ignored. However, we have not done so where the rights of innocent parties are involved and the corporation is used for a legal purpose, as otherwise the entire theory of the corporate entity would be made useless.' Price Bar, ****680** Inc. Liquor License Case, 203 Pa.Super. 481, 484, 201 A.2d 221, 222 (1964).

000504

In the instant case, the evidence discloses that the corporate appellee, in an effort to terminate its business operations, sold all its corporate assets. There is absolutely no evidence or averment of fraud, criminal conduct, or other Ultra vires activity on the part of the corporate appellee in any of these transactions. Absent evidence that said corporation was being used for some illegal purpose, we cannot say that the mere fact that appellee sold a defective machine, which subsequently injures an employee of the buyer, would justify holding the selling agent personally liable. The fact that stock is closely held or even held by one stockholder should not, in itself, alter the proposition that the corporation is distinct from its shoreholders. Brown v. Gloeckner, 383 Pa. 318, 118 A.2d 449 (1955); Homestead Boro. v. Defense Plant Corp., 356 Pa. 500, 52 A.2d 581 (1947).

As for the liability of the corporate appellee, we take a different position. While it is true that s 402A liability may not be imposed in the instant case (see footnote 2), plaintiffs, in their Answer and Memorandum contra defendants' Motion for Summary Judgment, aver that defendants' denial of liability is conclusory, and that a cause of action based on common law negligence ***367** is sufficiently stated and proved to sustain their Complaint.

Plaintiffs allege in their Second Amended Complaint that defendants sold and supplied a defective punch press knowing or having reason to know of its unreasonably dangerous condition; reasonably foreseeing that an employee, such as the plaintiff, would use the product ignorant of its dangerous condition; in failing to warn or correct the dangerous condition; and, knowing or having reason to know that said product could not be made safe for use by the plaintiff.

Under the Restatement of Torts (2d) and our decisional law,[3] plaintiffs' complaint raises material issues ***368** of fact, which if read in a light most favorable to the plaintiffs, and if proven would form ****681** sufficient basis for recovery on principles of common law negligence. Having supplied an allegedly defective product to wife-plaintiff's employer, the corporate appellee, Art Pearl Works, Inc., is subject to liability for tortious conduct resulting in wife-plaintiff's injury. Appellants should be permitted to proceed with discovery and, if tenable, to trial.[4]

For the reasons stated above, we reverse the order of the lower court granting the Corporate appellee's motion for summary judgment on the Second Amended Complaint in Trespass, and remand for further proceedings. In all other respects, the order of the lower court is affirmed.

All Citations

225 Pa.Super. 362, 310 A.2d 677

Footnotes

1 Plaintiffs allege that defendants sold to the Adelphia Button Company a punch press in a defective condition. They set forth, inter alia, that defendants were negligent in that they failed to exercise reasonable care by 'selling the said press to her employer knowing or having reason to know that the press was or was likely to be dangerous when used by the plaintiff, a person for whose use it was supplied.'

2 In their Motion for Summary Judgment, defendants point out that Art Pearl Works, Inc. was a button manufacturer, as was the Adelphia Button Company. As such, defendant was not in the business of selling punch presses. Strict liability in tort under s 402A of the Restatement of Torts (2d) does not attach to a 'seller' unless it is in the business of selling said product.

3 Section 388 of the Restatement of Torts (2d), reads as follows:
's 388. Chattel Known to Be Dangerous for Intended Use.
One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.'
Section 389 provides:
's 389. Chattel Unlikely to Be Made Safe for Use.
One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has infomed the other for whose use the chattel is supplied of its dangerous character.'
Section 392 states:
's 392. One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should except to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.' See also, Fullard v. Urban Redevelopment Authority of Pittsburgh, 222 Pa.Super. 184, 293 A.2d 118 (1972).

4 The corporate appellee argues that it cannot be held liable to the appellants as it no longer exists as a corporate entity. Despite the production of a verification from the New Jersey Department of State indicating that it remains an active corporation, the appellee contends that its failure to pay corporate taxes for three consecutive years automatically voids its corporate standing. 18 N.J.S.A. s 7—122. We do not believe a corporation may escape liability to litigants or other creditors by automatic extinction, without either formal proceeding or legal notice. The mere sale of the corporate assets is not a dissolution of the corporation. Levin v. Pittsburgh United Corp., 330 Pa. 457, 199 A. 332 (1938).

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EXHIBIT “24”

400 N.W.2d 909
Supreme Court of South Dakota.

Garold PETERSON, Plaintiff and Appellant,
v.
SAFWAY STEEL SCAFFOLDS COMPANY of South Dakota and Hi-Lo Powered Scaffolding, Inc., Defendants and Appellees.

No. 15340.
|
Feb. 18, 1987.

Synopsis

Worker brought action against manufacturer and commercial lessor of scaffolding equipment which he was using at time of his injuries. The Circuit Court, Second Judicial Circuit, Minnehaha County, Gene Paul Kean, J., entered summary judgment in favor of manufacturer and lessor, and worker appealed. The Supreme Court, Wuest, C.J., held that evidence presented genuine issues of material fact, precluding summary judgment in favor of manufacturer and lessor.

Reversed and remanded.

Henderson, J., concurred specially and filed opinion.

Sabers, J., concurred in part and dissented in part and filed opinion.

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Attorneys and Law Firms

***910** Bradley G. Bonynge, Sioux Falls, for plaintiff and appellant.

Arlo D. Sommervold of Woods, Fuller, Shultz & Smith, P.C., Sioux Falls, for defendant and appellee Safway Steel Scaffolds Co. of South Dakota.

Danforth, Danforth & Johnson, Sioux Falls, for defendant and appellee Hi-Lo Powered Scaffolding, Inc.

Opinion

WUEST, Chief Justice.

This is an appeal from the trial court's grant of summary judgment against the plaintiff in a personal injury case. He appeals. We reverse.

***911** Appellant, Garold Peterson (Peterson), was an employee of Gage Brothers Concrete Products in Sioux Falls, South Dakota. On September 28, 1983 Peterson and a co-worker, Warren Kramer (Kramer), were washing and inspecting concrete panels on a Citibank building utilizing scaffolding equipment leased from Safway Steel Scaffolds Company (Safway) and manufactured by Hi-Lo Powered Scaffolding, Inc. (Hi-Lo), defendants and appellees.

The scaffold equipment and four roof hooks were on the job site when appellant and Kramer arrived the morning of the accident. The two men set up the equipment employing the roof hooks. Upon raising the stage upward, however, the men discovered that it was being drawn too close to the side of the building. Kramer, appellant's supervisor, discussed the problem with Fred

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000507

Gage his supervisor and former safety director of Gage Brothers. Gage decided to go along with Kramer's suggestion to utilize parapet clamps instead of roof hooks since the parapet clamps suspended the cables further away from the side of the building.

Kramer had some prior experience with the parapet clamps and the scaffolding that was being used, but appellant had never worked on scaffolding and had no experience with the equipment. Therefore, Kramer instructed appellant how to rig the clamps so that while appellant moved the clamps on the roof Kramer could move the stage at ground level to begin work on another section of the building. However, Kramer in fact did not know how to properly use the parapet clamp, and both he and the appellant rigged the clamps to the top of the parapet wall in a backwards position. The end of the clamp that was designed to absorb the weight of the scaffolding faced inward instead of outward, and the end of the clamp that was supposed to face inward to receive a tieback cable or anchoring line was used to suspend the scaffolding. While Kramer had used the clamps in this manner on several other occasions, a tieback cable had always been attached to the clamps as required. On this occasion, a tieback was not used because there were no anchor points on the roof. Moreover, since the parapet wall was not tall enough or thick enough to properly accept the clamp, the workers improvised by placing blocks of wood against the wall and tightening the clamps against them.

Kramer rented the parapet clamps from Safway, but he was not given the safety, operating, maintenance and parts manual. Safway had allegedly given such a manual to a Gage Brothers employee previously when the other scaffolding equipment was rented and delivered to the job site. However, any manual that may have been given to the employee was apparently not left at the job site with the other equipment, but may have been given to Fred Gage.

As Kramer and the appellant raised the scaffolding for the third time, the appellant looked up and noticed that the clamp on his end was bending inwards. He shouted a warning to Kramer and reached for the motor to lower the scaffolding, but before he could do so the clamp came off the wall and the platform fell. Kramer and the appellant fell approximately five feet until they were caught by their safety lines. Appellant's arm was injured when it either became caught in the safety rope or was struck by a piece of equipment.

000508

Appellant brought suit against Safway under strict liability, negligence and warranty theories. Safway filed a third party complaint against Hi-Lo seeking indemnity for any recovery against it by the appellant and requesting a determination of the relative degrees of fault as between Safway and Hi-Lo. Appellant later joined Hi-Lo with Safway as a defendant by an amended complaint. Both defendants moved for summary judgment, which was granted.

Appellant states in his brief that while he raises only the strict liability issue against both defendants, he does not mean to imply that he waives an appeal of the warranty and negligence claims. However, having failed to raise any argument or authority in support of the warranty and negligence claims, we hold he has abandoned any appeal on those issues. " ***912** SDCL 15–26A–60(4) and (6) require that appellant's brief contain a concise statement of the legal issues, related argument and citation of authorities supporting the argument ... Appellant's failure to comply with SDCL 15–26A–60 is a waiver of all issues not raised, briefed and argued." *Graham v. State,* 328 N.W.2d 254 (S.D.1982). We review the strict liability issues.

South Dakota adopted the rule of strict liability in tort as expressed in RESTATEMENT (SECOND) TORTS § 402A (1965), in *Engberg v. Ford Motor Co.,* 87 S.D. 196, 205 N.W.2d 104 (1973). *See Zacher v. Budd,* 396 N.W.2d 122 (S.D.1986); *Hamaker v. Kenwel-Jackson Machine, Inc.,* 387 N.W.2d 515 (S.D.1986).

> 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 * * *.

*REST.*2d, *supra,* § 402A(1). Strict liability requires that the product be defective and unreasonably dangerous. *Zacher, supra.* "The rule in this section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesaler or retail dealer or distributor ..." *REST.*2d, *supra,* comment *f.*

Three broad classes of defects have emerged: manufacturing defects where individual products within a product line are improperly *constructed, design* defects involving the entire product line, and defect by *failure to properly warn* or instruct users

of a product where such failure renders the product hazardous. 2 Frumer & Friedman, Products Liability § 3.03[4][f][i] (1986). The warning issue is important. The warnings contained on a product, as well as warnings that are missing, are just as important in strict liability as in negligence and warranty. This is because an otherwise properly manufactured and well-designed product may be found to be defective without an adequate warning. *Frumer, supra,* § 3.03[4][f][vi].

In strict liability the plaintiff need not prove scienter of the defendant, i.e., that defendant knew or should have known of the harmful character of the product without a warning. *Lancaster Silo & Block Co. v. Northern Propane Gas Co.,* 75 A.D.2d 55, 427 N.Y.S.2d 1009 (1980). Liability arises from selling any product in a defective condition unreasonably dangerous to the user or consumer. It is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability. *Jackson v. Coast Paint and Lacquer Co.,* 499 F.2d 809 (9th Cir.1974).

"In a products liability action based on negligence, the proof must show that the manufactuer or seller failed to exercise reasonable care to inform those expected to use the product of its condition or the facts which make it likely to be dangerous." *Jahnig v. Coisman,* 283 N.W.2d 557, 560 (S.D.1979); RESTATEMENT (SECOND) OF TORTS § 388 (1965). "Strict liability in products liability cases, on the otherhand, relieves the plaintiff of the burden of proving negligence by the manufacturer." *Jahnig, supra; Engberg v. Ford Motor Co.,* 87 S.D. 196, 205 N.W.2d 104 (1973); *REST.*2d, § 402A, Comment *a.* The issue under strict liability is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the reasonableness of the failure to warn judged by negligence standards. *Hamilton v. Hardy,* 37 Colo.App. 375, 549 P.2d 1099 (1976). "For purposes of the strict tort claims, but not for purposes of the negligence claim, knowledge of the potential risk is imputed to the manufacturer. The manufacturer cannot defend, as he could in a negligence case, on grounds that, at the time of production, he neither knew nor could have known of the risk." R. Dugan, Reflections on South Dakota's Trifucated Law of Products Liability, 28 S.D.L.Rev. 259 (1983); *See Beshada v. Johns-Manville Products Corp.,* 90 N.J. 191, 447 A.2d 539 (1981); *Freund v. Cellofilm Properties Inc.,* 87 N.J. 229, 432 A.2d 925, 929–31 (1981).

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***913** Whether a manufactuer knew or should have known of a particular risk involves technical issues which do not easily admit to evidentiary proof and which lie beyond the comprehension of most jurors. By placing the risk of ignorance upon the manufactuer, the rule advances the policy of enterprise liability underlying strict tort liability.

Dugan, supra; See, e.g., GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn.1980); *REST.*2d, § 402A, *supra,* Comment *c.*

It provides the manufacturer with an incentive to conduct the research necessary to provide safer design and warnings, matters uniquely with in his control. Through insurance and increased product prices, this approach shifts the cost of unknowable and unpreventable risks from the injured party to the consuming public. On the other hand, in that risk-utility-cost considerations remain relevant for the manufacturers ultimate liability, the rule accords with the sentiment against insurer-like liability for manufacturers. Finally, the distinction overcomes the anomaly that, as applied without regard to the distinction, section 402A adds little or nothing to the manufacturer's negligence liability in the most common products cases.

Dugan, supra.

Hi-Lo argues that plaintiff misused its product and therefore it should not be strictly liable. Misuse may involve using a product for an unintended function or using the product for its intended purpose but in an improper manner. Simply because the product is misused does not necessarily bar a cause of action based on strict liability. " '[O]ne who manufactures or sells a product has a duty not only to warn of dangers inherent in a product's intended use but also to warn of dangers involved in a use which can be reasonably anticipated.' " This duty to warn applies in cases based on negligence and strict liability in tort. *Zacher, supra,* at 135 (quoting *Olson v. A.W. Chesterton Co.,* 256 N.W.2d 530 (N.D.1977)). However, a different test is applied under strict liability when the defendant manufacturer attempts to defend on the basis of a misuse of his product. Instead of imputing knowledge of all potential misuses of the product, when a misuse occurs it becomes a question of whether there was "reason to anticipate" or if it was "foreseeable". "Where a manufacturer or seller has reason to anticipate that danger may result from a particular use of his product, and he fails to give adequate warnings of such a danger, the product sold without such warning is in a defective condition within the strict liability doctrine." *Jahnig, supra;* RESTATEMENT (SECOND) OF TORTS, § 402A, Comment *h.* "A manufacturer may be held liable where the misuse by the customer was reasonably foreseeable.... Whether the use or misuse was reasonably foreseeable is ultimately a jury question." *Zacher, supra.*

The issues of "unreasonably dangerous" under Section 402A and "foreseeable misuse" are an introduction of negligence concepts to strict liability theory. However, a manufacturer or seller is not an insurer, and so there is a standard by which the value in a product is compared with the level of dangerousness it may possess. There is also a standard to determine what types of misuse the consumer public would find to be foreseeable. These issues of reasonableness and foreseeability in strict liability are usually jury issues.

The manufacturer, Hi-Lo, defends the grant of summary judgment by citing SDCL 20–9–10, which provides:

> No manufacturer, assembler or seller of a product may be held liable for damages for personal injury, death or property damage sustained by reason of the doctrine of strict liability in tort based on a defect in a product, or failure to warn or protect against a danger or hazard in the use or misuse of such a product, or failure to properly instruct in the use of such product, where a proximate cause of the injury was an alteration or modification of such product made under all of the following circumstances:
>
> ***914** (1) The alteration or modification was made subsequent to the manufacture, assembly or sale of the product;
>
> (2) The alteration or modification altered or modified the purpose, use, function, design or manner of use of the product from that originally designed, tested or intended by the manufacturer, assembler or seller; and
>
> (3) It was not foreseeable by the manufacturer, assembler or seller of the product that the alteration or modification would be made, and, if made, that it would render the product unsafe.

The statute removes a manufacturer, assembler or seller from liability for defects where there is "an alteration or modification of such product". Appellees argue that there was a modification because the two workers not only failed to make use of tie back cables, but they also improvised with blocks of wood in securing the parapet clamps. While these actions may have had a definite impact on the effectiveness of the clamps, this was not a modification of the product itself. The statute covers situations where a consumer makes modifications of a product which defeat the safety which is engineered into that product. A consumer creates manufacturer immunity under SDCL 20–9–10 by changing the product from its original form, not by using it improperly. Even if we were to accept Hi-Lo's view, section (3) brings in foreseeability, which is a jury issue. For the reasons stated above, we hold the trial court erred in granting summary judgment to the manufacturer, Hi-Lo on the issue of strict liability.

The rule stated in RESTATEMENT (SECOND) OF TORTS § 402A applies to anyone engaged in business of selling products for use or consumption. It applies to manufacturers, wholesalers, dealers or distributors but does not apply to the occasional seller, as where an automobile owner sells his car to his neighbor or to a dealer in used cars. RESTATEMENT 2d § 402A, Comment *if* ; Frumer, *supra,* § 3.03[4][b][i].

Many jurisdictions have applied strict liability in tort to commercial lessors. See the cases cited in *Miles v. General Tire & Rubber Co.,* 10 Ohio App.3d 186, 460 N.E.2d 1377 (1983), *Francioni v. Gibsonia Truck Corp.,* 472 Pa. 362, 372 A.2d 736 (1977), and 52 A.L.R.3d 121 (1973). "There is no logical reason to distinguish commercial lessors from manufacturers or sellers for the application of strict liability for dangerously defective goods." *Miles, supra.* Commercial lessors, like manufacturers and sellers, regularly introduce potentially dangerous products into the stream of commerce for profit and similarly are in a better position than lessees to insure against the risk of injuries from products in which they deal regularly. *Miles, supra; Santiago v. E.W. Bliss Div.,* 201 N.J.Super. 205, 492 A.2d 1089 (A.D.1985).

> The nature of a commercial transaction by which a product is placed in the stream of commerce is irrelevant to the policy considerations which justify strict liability. A lessor is subject to strict liability because his position in the "overall production and marketing enterprise" is no different from that as a seller.

Crowe v. Public Bldg. Com'n of Chicago, 74 Ill.2d 10, 23 Ill.Dec. 80, 383 N.E.2d 951, 953 (1978).

Safway makes no claim it was not a seller, and as a matter of fact, Safway volunteers it should be considered a seller in order to avoid strict liability under SDCL 20–9–9, which states:

> No cause of action based on the doctrine of strict liability in tort may be asserted or maintained against any distributor, wholesaler, dealer or retail seller of a product which is alleged to contain or posses a latent defective condition unreasonably dangerous to the buyer, user, or consumer unless said distributor, wholesaler, dealer or retail seller is also the manufacturer or assembler of said product or the maker of a component part of the final product, or unless said dealer, wholesaler or retail seller knew, or, in ***915** the exercise of ordinary care, should have known of the defective condition of the final product. Nothing in this section shall be construed to limit any other cause of action from being brought against any seller of a product.

We interpret SDCL 20–9–9 that a seller may be strictly liable, but only if he knew or through "ordinary care" should have known of the defective condition of the product. In essence SDCL 20–9–9 says there may be strict liability, but as a matter of proof, knowledge of the defective condition will not be *imputed* to a nonmanufacturing middleman as would otherwise be the case under strict liability.

We hold Safway open to strict liability if it "knew, or in the exercise of reasonable care, should have known of the defective condition of the final product." This is a factual issue which must be resolved by the jury. There was evidence from an alleged expert that a warning should have been placed on the parapet clamps so a person using the clamps would not use them backwards or without a tie line. Since Safway was in possession of the clamps, it could be inferred they knew, or in the exercise of reasonable care, should have known the clamps were in a defective condition by not having the warning appear on the clamps. There are also jury questions as to proximate cause and misuse of the clamps.

The summary judgment is reversed and the case remanded for trial on the strict liability issue.

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MORGAN, J., and FOSHEIM, Retired Justice, concur.

HENDERSON, J., concurs specially.

SABERS, J., concurs in part and dissents in part.

MILLER, J., not having been a member of the Court at the time this action was submitted to the Court, did not participate.

HENDERSON, Justice (concurring specially).
This appellant has not presented either argument or authority in support of negligence claims. Therefore, he has not preserved his appellate record. We have held that an error not briefed or argued is deemed abandoned. *See Shaffer v. Honeywell, Inc.,* 249 N.W.2d 251 (S.D.1976).

In *Smith v. Smith,* 278 N.W.2d 155, 162 (S.D.1979), this author concurred specially and filed an opinion. In the same *Shaffer,* 249 N.W.2d 251, cited above, this Court affirmed its position taken in *Engberg,* 205 N.W.2d 104, which is cited in the majority opinion. Basically, as I pointed out in my special concurrence, strict liability was not created in this state by legislative fiat; rather it was the progeny of the judiciary. This case is going back to the trial court for trial on strict liability. There are numerous foreign authorities cited in the majority opinion and perhaps we could well stay at home.

Specifically, again referring to the *Smith* case, and referring to the said special concurrence, I should like to point out that the *Smith* case was the first time that this state ever addressed the question of the defenses available on a case brought under the strict liability. In said special concurrence, to which I allude again, I expressed that so far as my legal views were concerned:

> I would hold that in the State of South Dakota under a given set of facts that:
>
> (a) assumption of the risk; or

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(b) misuse of the product

are available as defenses in strict liability cases.

Smith, 278 N.W.2d at 162 (Henderson, J., specially concurring). As regards the defenses of contributory negligence, comparative negligence, and contributory fault, I attempted to break these down as not being available in the defense of a strict liability case. In *Smith,* 278 N.W.2d at 162, this author noted:

I would further hold that in the State of South Dakota under a given set of facts that:

***916** (a) the classical negligence defenses are not available in the defense of a strict liability case. The judicially created tort of strict liability is not founded in negligence;

(b) inasmuch as the strict liability theory is not based on negligence, that contributory negligence cannot be interposed as a defense;

(c) although South Dakota has the comparative negligence doctrine, which is akin to the comparative fault theory now adopted by California and Alaska to reduce a plaintiff's recovery, this is not available as a defense in a strict liability action; and

(d) "contributory fault" is just another way of saying "contributory negligence" and should not be available as a defense to a case founded on strict liability.

I also tried to gather authorities on this subject and discuss the division of authority regarding defenses which are available in strict liability cases.

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Within the *Smith* special concurrence, at 163, which I still believe today, I expressed:

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A manufacturer or distributor or retailer should not be at the mercy of a fool. So, lest it be considered that they are under a legal handicap by elimination of the classical negligence defenses, contributory negligence, comparative negligence or comparative fault defenses, these target defendants can plead and prove assumption of the risk or misuse of the product.

SABERS, Justice (concurring in part and dissenting in part).

I concur in part and dissent in part.

I think this court is overreacting to SDCL 15–26A–60 which results in decisions that rely too heavily on waiver of a point or argument by failure to cite authorities.

For example, in this case appellant's brief relies on theories of negligence and breach of warranty as well as strict liability in tort. At page seven, appellant's brief states:

For purposes of simplicity the theory of strict liability in tort will be emphasized in this argument. Plaintiff does not wish to imply that the theories of negligence and breach of warranty are not equally applicable to his claim by reason of this emphasis.

In other words, appellant is really saying that the arguments and authorities apply to all three theories even though he's choosing not to restate them three separate times. In my opinion he shouldn't have to either, even if he didn't express this as well as he might have.

On remand, appellant should have an opportunity to prove all three theories of liability.

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All Citations

400 N.W.2d 909, 55 USLW 2524, Prod.Liab.Rep. (CCH) P 11,313

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EXHIBIT “25”

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249 S.W.3d 400
Supreme Court of Texas.

NEW TEXAS AUTO AUCTION SERVICES, L.P. d/b/a Big H Auto Auction, Petitioner

v.

Graciela GOMEZ DE HERNANDEZ, et al, Respondents.

No. 06–0550.
|
Argued Oct. 17, 2007.
|
Decided March 28, 2008.

Synopsis

Background: Relatives of motorist killed in rollover accident brought products liability action against tire company, automobile manufacturer, auctioneer, and others. The 332nd District Court, Hidalgo County, Mario E. Ramirez, Jr., J., granted summary judgment to auctioneer and severed that claim. Relatives appealed. The Corpus Christi-Edinburg Court of Appeals, 193 S.W.3d 220, Rodriguez, J., reversed.

Holdings: On petition for review, the Supreme Court, Brister, J., held that:

auctioneer could not be held strictly liable for defect that allegedly caused fatal rollover accident, even though auctioneer held title to vehicle when it was sold at auction; and

auctioneer did not have a duty to replace tires on vehicle pursuant to a recall.

Judgment of Court of Appeals reversed.

Attorneys and Law Firms

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Phillip Dye Jr., Vinson & Elkins, L.L.P., Houston, Brendan K. McBride, Prichard Hawkins McFarland & Young, L.L.P., San Antonio, Michael W. Dunagan, Jameson & Dunagan, P.C., Dallas, Kathleen Cassidy Goodman, Boerne, TX, for Amicus Curiae.

Opinion

JUSTICE BRISTER delivered the opinion of the Court.

Auctioneers are usually neither buyers nor sellers, but agents for both.[1] ***402** While they are obviously engaged in sales, the only thing they sell for their own account is their services; the items they auction are generally sold for others. In this case, the court of appeals held an auto auctioneer could be liable in both strict liability and negligence for auctioning a defective car. But

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product-liability law requires those who *place* products in the stream of commerce to stand behind them; it does not require everyone who *facilitates* the stream to do the same. Accordingly, we reverse.

I. Background

The 1993 Ford Explorer at issue here was repossessed by a finance company, who consigned it for sale in Houston by Big H Auto Auction.[2] Big H sold the car at auction for $4,000 on October 12, 2000, receiving a fee of $145 from the seller and $90 from the buyer. When the buyer discovered a discrepancy in the car's odometer,[3] a quick arbitration was held and an arbitrator found Big H had made a clerical error, rescinded the sale, and ordered Big H to buy the car back. Big H took title to the car and sold it again at auction on October 17, 2000 for $3,100 to Houston Auto Auction, which auctioned the car a week later to Progresso Motors,[4] which sold it three days later to Jose Angel Hernandez Gonzalez in Progresso, Texas. About a year later, Gonzalez was killed in a rollover accident in Mexico.

Twelve plaintiffs (Gonzalez's wife, parents, children, and six others whose relationship to him is unclear)[5] filed suit in Hidalgo County against the car manufacturer (Ford Motor Co.), tire manufacturer (Bridgestone/Firestone Corp.), Progresso Motors, and the two auto auctioneers. The trial court granted summary judgment for Big H and severed that claim. The court of appeals reversed, finding Big H was not entitled to summary judgment on either the plaintiffs' strict liability or negligence claims.[6] We address each claim in turn.

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II. Strict Liability

Modern American product-liability law is derived primarily from section 402A of the Second Restatement of Torts,[7] "the most influential section of any Restatement of the Law on any topic,"[8] and perhaps in all of tort jurisprudence.[9] This Court adopted section 402A in 1967 in ***403** *McKisson v. Sales Affiliates,* holding those who sell defective products strictly liable for physical harm they cause to consumers.[10]

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From the beginning, section 402A did not apply to everyone. By its own terms, section 402A limits strict liability to those "engaged in the business of selling" a product:

> 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.[11]

Like many other short statements of legal doctrine, this one has been construed through the years to mean both more and less than what the plain words appear to say. For example, although section 402A appears to limit recovery to users or consumers of a defective product, we long ago extended it to innocent bystanders as well.[12] Similarly, section 402A explicitly applies only to those whose business is "selling" a product, but from the outset we have applied it more broadly. Thus, in *McKisson* itself we held strictly liable a distributor who handed out free samples, reasoning that the samples were distributed with "the expectation of profiting therefrom through future sales." Since then, we have applied strict liability to manufacturers,[13] distributors,[14] lessors,[15] bailors,[16] and dealers.[17]

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On the other hand, we have limited the scope of those "engaged in the business of selling" to those who actually placed a product in the stream of commerce.[18] "Imposition of strict liability demands more than an incidental role in the overall marketing program of the product."[19] An advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries all might be "engaged" in product sales, but they do not themselves sell the products. Since *McKisson,* we have applied strict liability only to businesses that are "in the same ***404** position as one who sells the product."[20]

The reason for this limitation arises from the justifications for strict liability itself, namely: (1) compensating injured consumers, (2) spreading potential losses, and (3) deterring future injuries.[21] Businesses that play only an incidental role in a product's placement are rarely in a position to deter future injuries by changing a product's design or warnings. If required to spread risks, they must do so across far more products than the one that was defective. And while many businesses may be able to pay compensation, consumers normally expect a product's manufacturer to be the one who stands behind it.

The Third Restatement of Torts adopted in 1998 recognized these developments in products law, expanding strict liability to those "engaged in the business of *selling* or otherwise *distributing* products,"[22] and defining those terms as a business that either "transfers ownership" or "provides the product."[23] In a comment, the Third Restatement specifically excluded auctioneers:

> Persons assisting or providing services to product distributors, while indirectly facilitating the commercial distribution of products, are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. *Sales personnel and commercial auctioneers are also outside the rules of this Restatement.*[24]

Nevertheless, the court of appeals held section 402A applied to auctioneers because Texas law "requires only that the defendant be responsible for introducing the product into the stream of commerce."[25] It is true we have sometimes referred to strictly liable defendants as "introducing" products into the stream of commerce[26] although more often we have referred to them as "placing" them in that current[27] as has the Legislature.[28] But ***405** both concepts were intended to describe producers, not mere announcers like an auctioneer or an emcee at a trade show who "introduces" a product to a crowd but has nothing to do with making it.[29]

The court of appeals also pointed to chapter 82 of the Civil Practices and Remedies Code to support its conclusion. But that chapter was not intended to replace section 402A or the common law except in limited circumstances.[30] Moreover, its broad definitions were drafted to provide indemnity for all retailers, even if they are not proper defendants in an underlying products claim.[31] To the extent chapter 82 addresses product claims generally, it reflects a legislative intent to restrict liability for defective products to those who manufacture them.[32]

The Plaintiffs' counsel concedes that auctioneers are generally not sellers under section 402A, but distinguished this case because Big H actually held title to the Explorer when it was finally sold at auction. But it was undisputed that Big H normally never took title to the cars it auctioned, and did so here only because an arbitrator ordered it to do so. Section 402A applies to those whose *business* is selling, not everyone who makes an occasional sale.[33]

Courts in other jurisdictions have consistently held that auctioneers are not subject to section 402A.[34] We agree, and ***406** hold that because Big H was not in the business of selling automobiles for its own account, it cannot be held strictly liable.

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III. Negligence

The plaintiffs alleged Big H was negligent in failing to replace the tires on this Explorer pursuant to a recall issued a few weeks before the auction took place. We agree with the trial court that Big H had no such duty on the facts here.

The existence of a legal duty is a question of law for the court.[35] In determining whether a duty should be recognized, we consider a number of factors including the risk of injury compared to the burden on the defendant and social utility of the conduct involved.[36] We have also considered whether one party has superior knowledge of the risk, or a right to control the actor whose conduct precipitated the harm.[37]

Unquestionably, ignoring a recall may run the risk of severe injury. But there are a huge number of recalls,[38] and the risks they involve varies widely.[39] Federal law generally places the duty on manufacturers of products to report potential defects, notify the public, and make necessary repairs.[40]

By contrast, imposing a duty on auto auctioneers to discover and repair defects would require them to go into a side business other than their own. The evidence establishes that Big H auctions about 1,000 vehicles each week, with many of them moving on and off the premises in a matter of hours. It does not inspect or repair vehicles unless a customer specifically requests and pays for such services. Many of the cars sold at its auctions need repairs, and some have to be towed on and off the auction block.

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Moreover, Big H does not sell to the public. Only licensed, bonded, commercial dealers are permitted to buy or sell vehicles at Big H's auctions. Accordingly, whatever access to recall information Big H may have, the dealers who buy at the auction, prepare the cars for display, and sell them to the public would have at least the same access. Moreover, Big H's knowledge is clearly inferior to that of the ***407** car and tire manufacturers the plaintiffs sued for these same defects, and there is no indication that Big H had any control over how those manufacturers made their products.

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Additionally, Big H made no warranties of its own at the auction, serving merely as a conduit for warranties made by sellers. The car here was sold under a red light, indicating the car was being sold "as is." Generally, those who buy a product "as is" accept the risk of potential defects, and thus cannot claim a seller's negligence caused their injuries.[41] Imposing a different duty here would effectively prohibit car dealers from selling cars "as is." And as one federal court has pointed out, imposing such a duty on auctioneers would seem to require imposing it on every person who ever sold a used car, as there is "no sensible or just stopping point."[42] We decline to impose so sweeping a duty.

The plaintiffs' summary judgment response included deposition testimony from a representative of Houston Auto Auction (the buyer from Big H) that had he possessed actual knowledge of the defect here (which he denied), he would have done "something to at least give notice to the buyer that there are Firestone tires, don't drive on them, or take them off." But Houston Auto Auction was more than a mere auctioneer; its business included buying and selling cars for its own account, and it made sales to the general public as well as dealers. Moreover, one's moral duty to warn of known dangers does not impose a legal duty to discover and remedy unknown dangers too.[43]

* * *

Accordingly, the court of appeals erred in concluding Big H owed the plaintiffs a duty under either section 402A or in negligence. We reverse the court of appeals' judgment and reinstate the trial court's take-nothing judgment for Big H.

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All Citations

249 S.W.3d 400, 51 Tex. Sup. Ct. J. 664

Footnotes

1 *Brock v. Jones,* 8 Tex. 78, 79–80 (1852) ("The auctioneer may be the agent of both parties.").

2 Big H Auto Auction is the assumed name of defendant New Texas Auto Auction Services, L.P.

3 The car's mileage was listed as 34,075 miles rather than the actual 84,075 miles.

4 Progresso Motors is the assumed name of defendant Eleazar Perez.

5 The plaintiffs listed the surviving spouse as Graciela Gomez De Hernandez, her children Jose Angel Hernandez Gomez and Elizabeth Hernandez Gomez, another child Arely Hernandez, and his parents Olvido and Juan Hernandez; the last three have settled and are not involved in this appeal. Listed as intervenors below are Guillermo Mujica Gutierrez, Marta Covarrubias Gutierrez, Juan Lorezo Gutierrez Hernandez, Victor Manuel Maldonado Castañon, Pedro Alfonso Castillo Cardenas, and Jacinto Loyde Frayde.

6 193 S.W.3d 220.

7 Restatement (Second) of Torts § 402A (1965).

8 David G. Owen, *The Puzzle of Comment J,* 55 Hastings L.J. 1377, 1377 n. 1 (2004) (noting that "section 402A had been cited in judicial opinions more often than any other section of any Restatement").

9 1 M. Stuart Madden, Products Liability § 6.1, at 190 (2d ed.1988) (calling section 402A "the most influential development ever experienced in tort jurisprudence").

10 416 S.W.2d 787, 789 (Tex.1967).

11 Restatement (Second) of Torts § 402A(1) (emphasis added).

12 *Darryl v. Ford Motor Co.,* 440 S.W.2d 630, 633 (Tex.1969) ("We hold that recovery under the strict liability doctrine is not limited to users and consumers.").

13 *McKisson,* 416 S.W.2d at 790 n. 3 ("Strict liability in tort lies against a distributor as well as a manufacturer.").

14 *Id.* ("Strict liability in tort lies against a distributor as well as a manufacturer.").

15 *Rourke v. Garza,* 530 S.W.2d 794, 800 (Tex.1975).

16 *See Armstrong Rubber Co. v. Urquidez,* 570 S.W.2d 374, 377 (Tex.1978) (distinguishing cases in which bailment for mutual benefit accompanied a sale of goods or services, and thus fell under section 402A).

17 *Henderson v. Ford Motor Co.,* 519 S.W.2d 87, 92 (Tex.1974) ("The car manufacturer and its dealer are liable for unreasonably dangerous products....").

18 *See, e.g., Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608, 616 (Tex.1996) (holding section 402A inapplicable to company that licensed design but did not manufacture tire that caused injury); *Armstrong Rubber,* 570 S.W.2d at 376 (holding section 402A inapplicable to tire sent to test track for testing).

19 *Firestone Steel,* 927 S.W.2d at 616.

20 *McKisson,* 416 S.W.2d at 792; *see FFE Transp. Servs., Inc. v. Fulgham,* 154 S.W.3d 84, 89 (Tex.2004) (holding section 402A inapplicable to trailers trucking company supplied for its drivers); *Firestone Steel,* 927 S.W.2d at 616 (holding section 402A inapplicable to tire designer that licensed concept royalty-free).

21 Restatement (Second) of Torts § 402A cmt. c (1965); W. Page Keeton et al., Prosser and Keeton on Torts § 98, at 692–93 (5th ed.1984); *see, e.g., Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 425 (Tex.1984) (noting that "failure to allocate accident costs in proportion to the parties' relative abilities to prevent or to reduce those costs is economically inefficient"); *Boatland of Houston, Inc. v. Bailey,* 609 S.W.2d 743, 750 (Tex.1980) ("One of the policy reasons for the doctrine of strict liability is that the manufacturer or supplier can spread the losses occasioned by the supplier's defective product"); *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.,* 572 S.W.2d 308, 312 (Tex.1978) ("Strict liability arose initially to compensate consumers for personal injuries caused by defective products...."); George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished,* 26 Rev. Litig. 799, 809–10 (2007); David Krump & Larry A. Maxwell, *Should Health Service Providers Be Strictly Liable for Product–Related Injuries? A Legal and Economic Analysis,* 36 Sw. L.J. 831, 848 (1982).

22 Restatement (Third) of Torts § 1 (1998).

23 *Id.* § 20.

24 *Id.* cmt. g (emphasis added).

25 193 S.W.3d 220, 225–26.

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26 *FFE Transp. Servs., Inc. v. Fulgham,* 154 S.W.3d 84, 88 (Tex.2004); *Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608, 616 (Tex.1996); *Rourke v. Garza,* 530 S.W.2d 794, 800 (Tex.1975).

27 *Torrington Co. v. Stutzman,* 46 S.W.3d 829, 844 (Tex.2000); *Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 438 (Tex.1997); *Houston Lighting & Power Co. v. Reynolds,* 765 S.W.2d 784, 785 (Tex.1988); *Morgan v. Compugraphic Corp.,* 675 S.W.2d 729, 732 (Tex.1984); *Armstrong Rubber Co. v. Urquidez,* 570 S.W.2d 374, 376 (Tex.1978); *Gen. Motors Corp. v. Hopkins,* 548 S.W.2d 344, 352 (Tex.1977).

28 *See* Tex. Civ. Prac. & Rem.Code § 82.001(3).

29 *See Gaulding v. Celotex Corp.,* 772 S.W.2d 66, 68 (Tex.1989) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury."); *see also Firestone Steel,* 927 S.W.2d at 614 ("It is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce.").

30 *See, e.g.,* Tex. Civ. Prac. & Rem.Code § 82.005(e) ("This section is not declarative, by implication or otherwise, of the common law with respect to any product and shall not be construed to restrict the courts of this state in developing the common law with respect to any product which is not subject to this section.").

31 *See, e.g., Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 867 (Tex.1999) (holding defendant who did not sell product that injured plaintiff was nevertheless entitled to indemnity).

32 *See* Tex. Civ. Prac. & Rem.Code § 82.003(a) (providing that with certain exceptions, "[a] seller that did not manufacture a product is not liable for harm caused to the claimant by that product"). As this suit was filed in 2002, it is not governed by these provisions. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(c), 2003 Tex. Gen. Laws 899 ("An action filed before July 1, 2003, is governed by the law in effect immediately before the change in law made by [the above provisions], and that law is continued in effect for that purpose.").

33 Restatement (Second) of Torts § 402A cmt. f ("This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like."); *see also Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1219 (5th Cir.1985).

34 *Pelnar v. Rosen Sys., Inc.,* 964 F.Supp. 1277, 1281 (E.D.Wis.1997); *Antone v. Greater Ariz. Auto Auction,* 214 Ariz. 550, 155 P.3d 1074, 1079 (Ariz.Ct.App.2007); *Musser v. Vilsmeier Auction Co.,* 522 Pa. 367, 562 A.2d 279, 283 (1989); *Brejcha v. Wilson Mach., Inc.,* 160 Cal.App.3d 630, 206 Cal.Rptr. 688, 694 (1984); *Tauber–Arons Auctioneers Co. v. Superior Court,* 101 Cal.App.3d 268, 161 Cal.Rptr. 789, 798 (1980).

35 *Tri v. J.T.T.,* 162 S.W.3d 552, 563 (Tex.2005).

36 *Edward D. Jones & Co. v. Fletcher,* 975 S.W.2d 539, 544 (Tex.1998); *Greater Houston Transp. Co. v. Phillips,* 801 S.W.2d 523, 525 (Tex.1990).

37 *Graff v. Beard,* 858 S.W.2d 918, 920 (Tex.1993).

38 The National Highway Traffic Safety Administration reports that since 1966 more than 390 million cars, trucks, buses, recreational vehicles, motorcycles, and mopeds, as well as 46 million tires, 66 million pieces of motor-vehicle equipment, and 42 million child safety seats have been recalled. *See* Nat'L Highway Traffic Safety Admin., Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know I (2006), *available at* http://wwwodi.nhtsa.dot.gov/recalls/recallprocess.cfm.

39 *See id.* at 3 (listing safety-related defects including steering defects that may cause loss of control, fuel-system defects resulting in potential for fire, cooling-fan defects that could injure mechanics working on engines, and windshield-wiper defects).

40 *See, e.g.,* 15 U.S.C. § 2064(b)(2), (b)(3) (stating that if manufacturer becomes aware of substantial product hazard, it must immediately inform Consumer Product Safety Commission who may order the product repaired, replaced, or refunded); 40 C.F.R. § 159.184(a), (b) (recognizing manufacturer's duty to report incidents involving pesticide's toxic effects that may not be adequately reflected on its labels); 14 C.F.R. § 21.3 (imposing on aviation manufacturers an affirmative duty to report failures of parts it manufactures).

41 *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.,* 896 S.W.2d 156, 161 (Tex.1995).

42 *Pelnar v. Rosen Sys., Inc.,* 964 F.Supp. 1277, 1284 (E.D.Wis.1997).

43 *See Buchanan v. Rose,* 138 Tex. 390, 159 S.W.2d 109, 110 (1942) ("[A] mere bystander who did not create the dangerous situation is not required to become the good Samaritan and prevent injury to others. Under the last rule, a bystander may watch a blind man or a child walk over a precipice, and yet he is not required to give warning. He may stand on the bank of a stream and see a man drowning, and although he holds in his hand a rope that could be used to rescue the man, yet he is not required to give assistance. He may owe a moral duty to warn the blind man or to assist the drowning man, but being a mere bystander, and in nowise responsible for the dangerous situation, he owes no legal duty to render assistance.").

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EXHIBIT “26”

West's Delaware Code Annotated
Title 6. Commerce and Trade
Subtitle II. Other Laws Relating to Commerce and Trade
Chapter 18. Limited Liability Company Act
Subchapter III. Members

6 Del.C. § 18-303

§ 18-303. Liability to third parties

Currentness

(a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

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Credits
68 Laws 1992, ch. 434, § 1. Amended by 69 Laws 1994, ch. 260, § 22.

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Notes of Decisions (1)

6 Del.C. § 18-303, DE ST TI 6 § 18-303
Current through ch. 241 of the 150th General Assembly (2019-2020). Some statute sections may be more current, see credits for details. Revisions to 2020 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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EXHIBIT “27”

2011 Ark. App. 243
Court of Appeals of Arkansas.

Robert S. HARRIS, Jr., Appellant
v.
Tim JOHNSON, Appellee.

No. CA 10–742.
|
March 30, 2011.

Synopsis

Background: Construction worker, who was injured when the boom from a crane leased to his employer fell on him, appealed from order of the Workers' Compensation Commission (WCC) concluding that the WCC had jurisdiction over worker's third-party tort claims against lessor of crane and lessor's majority shareholder and president and that exclusive-remedy provision of the Workers' Compensation Act precluded third-party tort recovery. The Court of Appeals, 2009 Ark. App. 755, 350 S.W.3d 801, David M. Glover, J., reversed and remanded. On remand, the WCC determined that it lacked jurisdiction over the third-party tort claims. Lessor's majority shareholder and president appealed.

The Court of Appeals, Doug Martin, J., held that WCC was without jurisdiction on remand to take action beyond the dictates of appellate court's mandate that WCC lacked jurisdiction over the third-party tort claims.

000524

Judgment of Court of Appeals affirmed.

Robert J. Gladwin, J., concurred and filed opinion.

David M. Glover, J., concurred and filed opinion.

Larry D. Vaught, C.J., filed a dissenting opinion.

See also, *Erin, Inc. v. White County Circuit Court,* 369 Ark. 265, 253 S.W.3d 444.

Attorneys and Law Firms

****411** Matthew Richard House, Little Rock, for appellant.

John Elmo Patterson, Searcy, Gene Andrew Ludwig, Neil Chamberlin, Will Bond, Little Rock, for appellee.

Opinion

DOUG MARTIN, Judge.

***1** This appeal is the latest in a series of appeals stemming from litigation between appellee Tim Johnson and appellant Robert Harris. *Johnson v. Ark. Steel Erectors,* 2009 Ark. App. 755, 350 S.W.3d 801; *Erin, Inc. v. White County Circuit Court,* 369 Ark. 265, 253 S.W.3d 444 (2007). In the present appeal, Harris argues that the Workers' Compensation Commission erred in determining that it lacked jurisdiction over Johnson's tort claims against Harris and his company, Erin, Inc.

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The underlying facts are largely undisputed. In December 1983, Harris formed Erin, Inc. ("Erin"), a for-profit company engaged in the business of leasing construction equipment. Since Erin's formation, Harris has served as its president, registered agent, chief job-site manager of operations, and sole shareholder. On April 29, 1996, Harris also formed Arkansas Steel Erectors, Inc. (ASE), which assumed many of Erin's administrative and job-management responsibilities, although Erin retained ownership of a truck crane used in various construction ***2** jobs. Harris served as ASE's president, registered agent, and chief job-site manager. He was also ASE's sole shareholder until 2003 and has remained a majority shareholder since that time. Both Erin and ASE carried workers' compensation insurance from July 20, 2002, to July 20, 2003. *Erin, Inc. v. White County Circuit Court,* 369 Ark. at 266, 253 S.W.3d at 445.

Other pertinent facts are set out in this court's decision in *Johnson v. Arkansas Steel Erectors,* 2009 Ark. App. 755, 350 S.W.3d 801, as follows:

> Erin, Inc. and ASE exist as separate corporations, having separate employer-identification numbers and filing separate tax returns. On its 2002 tax return, Erin, Inc. did not pay any labor costs for [Johnson], and, in fact, reported no costs of labor. On the other hand, ASE's 2002 tax return showed that it paid the cost of [Johnson's] and other employees' labor. Erin, Inc. leases out equipment used in the construction of steel frames on commercial building projects.

Johnson, 2009 Ark. App. 755, at 4–5, 350 S.W.3d at 803.

In late 2002, Johnson applied for a job with ASE and was employed by ASE to work at a job site at the White County Medical Center in Searcy. On March 27, 2003, Johnson sustained injuries as a result of an accident at the medical center. During a construction project on which Johnson worked, a pendant line on a crane boom snapped, causing the boom to fall and strike his head. According to his claim for compensation, he sustained multiple fractures to his skull, ribs, pelvis, legs, and feet. On April 9, 2003, Johnson filed a claim against ASE with the Workers' Compensation Commission, alleging that he suffered workplace injuries on March 27, 2003. The insurance company, Commerce & Industry, paid Johnson a ****412** cumulative sum totaling $384,446.33. *Erin, Inc. v. White County Circuit Court,* 369 Ark. at 266, 253 S.W.3d at 445.

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***3** On February 27, 2006, Johnson filed an amended complaint in White County Circuit Court, alleging that Erin was liable in tort for his injuries.[1] On March 24, 2006, Johnson filed a second amended complaint, alleging that both Erin and Harris had negligently caused his injuries; he did not, however, allege that his employer, ASE, was liable. Erin and Harris filed an answer and motion to transfer the question of the jurisdiction of the case to the Workers' Compensation Commission. The circuit court denied the motion to transfer, and Erin and Harris filed a petition for writ of prohibition with the supreme court, arguing that the circuit court lacked jurisdiction to deny their motion to transfer Johnson's claims to the Commission and that only the Commission could determine its jurisdiction over Johnson's claims. *Id.* at 266–67, 253 S.W.3d at 446.

The supreme court granted the writ, noting first that the exclusive remedy of an employee or his or her representative on account of injury or death arising out of and in the course of employment is a claim for compensation under Arkansas Code Annotated section 11–9–105 (Repl.2002), and that the Commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort. *Id.* at 269, 253 S.W.3d at 447–48 (citing *Van Wagoner v. Beverly Enters.,* 334 Ark. 12, 970 S.W.2d 810 (1998)). The court then concluded that the question of whether Harris and Erin were third parties under Arkansas Code Annotated section 11–9–410(a) (Repl.2002) or a "persona" under section 11–9–105(a) was a question for the Commission. *Id.* at 271, 253 S.W.3d at 449.

***4** After the issuance of the writ, the case was transferred to the Commission for a determination of jurisdiction. On November 30, 2007, an administrative law judge (ALJ) entered an order finding that the Commission had jurisdiction of the claim; that Johnson sustained a compensable injury on March 27, 2003; and that Erin and Harris were a "persona" and thus protected by the exclusive-remedy provisions of section 11–9–105(a). Therefore, the ALJ concluded that jurisdiction was properly before the Commission. Johnson appealed the ALJ's decision, and the Commission issued an opinion on July 14, 2008, upholding the findings of the ALJ.

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One commissioner dissented, however, finding that "although Mr. Harris owns both Arkansas Steel Erectors and Erin, Inc., as there was no employment relationship between Erin, Inc., and ... Johnson at the time of the accident, Erin, Inc., and Harris as sole owner of Erin, Inc., are not protected by the 'exclusive remedy' of the Workers' Compensation Act." Noting that the Commission has jurisdiction only when there is an employment relationship between the litigants and that the Commission properly had jurisdiction over Johnson's workers' compensation claim against ASE, his employer, the dissenting commissioner stated that there was no evidence to support a finding that there was any employment relationship between Johnson and Erin when the crane owned by Erin fell on Johnson. Because Harris was the sole owner of Erin, and nothing showed that Harris was acting in his capacity as an employer for Erin, the dissent asserted that there was no evidence to support the conclusion that Harris's "persona" as owner of ASE was the same as his "persona" as owner of Erin, and his persona as owner ****413** of Erin did not make him an employer under the workers' compensation statutes. ***5** Therefore, the dissent concluded that the Commission did not have jurisdiction over Johnson's tort claim against Erin and Harris.

Johnson appealed this decision to the court of appeals, which reversed and remanded, stating that it agreed with Johnson's argument that "the Commission erred in concluding that it had jurisdiction over his tort claims against Erin, Inc. and Harris and in deciding that Erin, Inc. and Harris were immune under Ark.Code Ann. § 11–9–105(a)." *Johnson v. Ark. Steel Erectors,* 2009 Ark. App. 755, at 2, 350 S.W.3d 801, 802. Noting that the General Assembly may limit tort liability only when there is an employment relationship between the parties, *id.* at 9, 350 S.W.3d at 806, the court concluded as follows:

> In the instant case, as so clearly discussed in the dissenting commissioner's opinion, there was no evidence in the record to support a finding that there was any employment relationship between appellant and Erin, Inc., when Erin, Inc.'s crane crushed appellant. Neither was there any evidence in the record to support a determination that Harris's "persona" as majority owner of ASE was the same as his "persona" as sole owner of Erin, Inc. That is, Harris's "persona" as majority owner of ASE makes him [Johnson's] employer under our workers' compensation laws, but his "persona" as the sole owner of Erin, Inc., does not. The fact that Harris owns both ASE and Erin, Inc. cannot create an employment relationship between [Johnson] and Erin, Inc. that did not, in fact, exist.

Id. at 10, 350 S.W.3d at 806.[2]

Following the court of appeals' opinion remanding the matter to the Commission, the Commission entered an opinion on February 18, 2010, stating that, "[i]n accordance with the court's mandate, the Full Commission reverses the administrative law judge's finding that Erin, Inc. is protected by the exclusive-remedy provisions of Ark.Code Ann. § 11–9–105(a). Thus, ***6** the Workers' Compensation Commission does not have jurisdiction over the claimant's tort claim against Erin, Inc." On March 1, 2010, Johnson filed a motion to modify the opinion, arguing that the Commission's ruling should also have encompassed Harris.

On March 25, 2010, the Commission issued a 2–1 order. The majority found that Johnson's motion should be granted and modified the February 18, 2010 order so that it provided that the Commission did "not have jurisdiction over [Johnson's] tort claims against Erin, Inc. and Mr. Harris, in his persona as sole owner of Erin, Inc." The majority reasoned that Harris had two personas: the first was as owner of ASE, the employer for workers' compensation purposes, such that Harris was protected by the exclusive-remedy provision of the Workers' Compensation Act. Harris's second persona was as sole owner of Erin, Inc., which was not Johnson's employer. The majority stated that, as there was "no employer/employee relationship between Erin, Inc. and Mr. Harris in his persona as sole owner of Erin, Inc., Mr. Harris cannot be covered by the exclusive remedy provision of the Arkansas Workers' Compensation Act for the purposes of a tort claim against him and Erin, Inc." Thus, the Commission concluded that it did not have jurisdiction over Johnson's tort claims against Harris and Erin. A concurring opinion agreed but stated that the court of appeals' opinion "[did] not clearly hold, in the last paragraph of its ****414** November 11, 2009 opinion, that [Johnson] may proceed with a tort claim against ... Harris."

The dissenting opinion asserted that the majority had "read something into the court of appeals' opinion that was not there" in granting Johnson's motion. The dissent stated that the final paragraph of the court of appeals' decision "only holds that Erin, Inc. is not ***7** [Johnson's] employer, because Harris's relationship as owner of [Johnson's] employer does not bootstrap an

000526

employment relationship between [Johnson] and other businesses owned by Harris." The dissent opined that the real question at issue was whether Harris's dual personas allowed him to be sued in tort, yet maintain his exclusive-remedy protection under the workers' compensation laws, concluding that the dual-persona exception had been definitively abrogated by the General Assembly.

Harris filed a timely notice of appeal from the Commission's decision, and he now argues that the majority of the Commission erred in its interpretation of section 11–9–105(a). In essence, Harris contends that the dual-persona doctrine has been abrogated by the General Assembly and that the Commission erred by applying the doctrine in this case to find that Harris is not immune from tort liability.

We decline to reach the merits of Harris's argument. In finding that it lacked jurisdiction over Johnson's claims against Harris and Erin, the Commission was doing nothing more than complying with this court's mandate in *Johnson v. Arkansas Steel Erectors, supra.* In that opinion, this court held that it "agree[d]" with Johnson's argument that the Commission erred in concluding that it had jurisdiction over his tort claims against *Erin and Harris* and in deciding that *Erin and Harris* were immune under section 11–9–105(a). *Johnson,* 2009 Ark. App. 755, at 2, 350 S.W.3d at 802 (emphasis added). In addition, this court stated that it was undisputed that Harris was the sole shareholder of Erin, and that Erin, which "did not pay labor costs for appellant and, in fact, reported no costs of labor," was not Johnson's employer. *Id.* at 4, 350 S.W.3d at 803. In the final paragraph of the opinion, this court held that "Harris's ***8** 'persona' as majority owner of ASE makes him [Johnson's] employer under our workers' compensation laws, but his 'persona' as the sole owner of Erin, Inc., does not." *Id.* at 10, 350 S.W.3d at 806. Thus, it is clear that this court held that neither Harris nor Erin was Johnson's employer. In accordance with this court's opinion, the Commission entered an order finding that it lacked jurisdiction over Johnson's claims against Harris and Erin and that jurisdiction was properly in the circuit court of White County.

000527

Arkansas law is well settled that the trial court (or, as in the present case, the Commission) must, upon remand, execute the mandate. *Johnson v. Bonds Fertilizer, Inc.,* 375 Ark. 224, 234, 289 S.W.3d 431, 437 (2008) (citing *Wal–Mart Stores, Inc. v. Regions Bank Trust Dep't,* 356 Ark. 494, 156 S.W.3d 249 (2004)). The question of whether the lower court followed the appellate court's mandate is not simply one of whether the lower court was correct in its construction of the case but also involves a question of the lower court's jurisdiction. *Turner v. Northwest Ark. Neurosurgery Clinic, P.A.,* 91 Ark. App. 290, 297–98, 210 S.W.3d 126, 133 (2005) (citing *Dolphin v. Wilson,* 335 Ark. 113, 983 S.W.2d 113 (1998)). The lower court is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate. *Id.* at 298, 210 S.W.3d at 133. Any proceedings on remand that are contrary to the directions contained in the mandate from the appellate court may be ****415** considered null and void. *Id.* "[E]ither new proof or new defenses cannot be raised after remand when they are inconsistent with this court's first opinion and mandate. Indeed, to allow such to occur undermines the finality of this court's decision and denies closure on matters litigated." *Id.* (quoting *Dolphin,* 335 Ark. at 120, 983 S.W.2d at 117).

***9** In *Wal–Mart Stores, Inc. v. Regions Bank Trust Dep't, supra,* the supreme court reviewed the history of the mandate rule, stating that

> [t]he inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the supreme court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the supreme court.

Wal–Mart, 356 Ark. at 497, 156 S.W.3d at 252 (quoting *Fortenberry v. Frazier,* 5 Ark. 200, 202 (1843)).[3]

The *Wal–Mart* court further noted that the mandate rule "binds every court to honor rulings in the case by superior courts." *Id.* at 497–98, 156 S.W.3d at 252 (citing *Casey v. Planned Parenthood,* 14 F.3d 848, 856 (3d Cir.1994)). Accordingly, a trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. *Johnson,* 375 Ark. at 234, 289 S.W.3d at 438 (citing *Wal–Mart, supra*). The *Johnson* court further explained

that directions by an appellate court to the lower tribunal—which in *Johnson* was likewise the Workers' Compensation ***10** Commission—as expressed by the opinion and mandate must be followed exactly and placed into execution. *Id.; see also Williams v. Davis,* 2009 Ark. App. 850, 373 S.W.3d 381 (holding that the inferior court cannot vary the appellate court's mandate; examine it for any other purpose than execution; give any other relief; review for error any matter decided on appeal; or meddle with it, other than to settle what has been remanded); *Dolphin v. Wilson, supra* (holding that the lower tribunal is only authorized to carry out the appellate court's mandate, and the trial court may be powerless to undertake any proceedings beyond those specified).

In his argument on appeal, Harris is essentially asking this court to reverse the Commission's decision because, he contends, the Commission was wrong in "interpreting" section 11–9–105(a) to conclude that he was not immune from suit. The Commission, however, was not asked to interpret the statute; rather, the Commission was required to comply with this court's mandate, which was to find that neither Harris nor Erin was Johnson's employer. Despite Harris's argument that ****416** the dual-persona doctrine was inapplicable, the Commission was powerless to look behind the order or do anything other than implement it. *See Wal–Mart, supra* (holding that the lower tribunal can give no other or further relief as to any matter decided by the supreme court, even where there is error apparent); *Williams v. Davis, supra* (holding that the inferior court cannot vary the appellate court's mandate; examine it for any other purpose than execution; give any other relief; or *review for error any matte decided on appeal*).

Accordingly, because the Commission was without jurisdiction to take action beyond the dictates of this court's mandate in *Johnson v. Arkansas Steel Erectors, supra,* we affirm.

***11** Affirmed.

000528

ABRAMSON and HOOFMAN, JJ., agree.

GLADWIN, J., concurs.

GLOVER, J., concurs.

VAUGHT, C.J., dissents.

ROBERT J. GLADWIN, Judge, concurring.

I concur that this case must be affirmed, but believe that it must be affirmed under the law-of-the-case doctrine. I agree with Chief Judge Vaught's analysis that Harris was protected from the tort suit by Ark.Code Ann. § 11–9–105(a) (Repl.2002). However, our court held otherwise. *See Johnson v. Ark. Steel Erectors,* 2009 Ark. App. 755, 350 S.W.3d 801. Therefore, we are bound by that decision under the law-of-the-case doctrine. *See Green v. George's Farms, Inc.,* 2011 Ark. 70, 378 S.W.3d 715.

DAVID M. GLOVER, Judge, concurring.

The majority opinion does an excellent job of describing the clarity of our November 11, 2009 opinion and applying the law-of-the-case doctrine. I will not repeat that discussion here other than to say that I find no basis for either appellant's or the dissenting opinion's claim that the November 11 opinion was unclear regarding Mr. Harris's lack of immunity under the exclusive-remedy provisions of our workers' compensation laws.

I write separately to make clear my disagreement with the dissent's criticism of the merits of the November 11, 2009 opinion. I begin, just as we did in our earlier opinion, with ***12** our state constitution. Article 5, section 32 of our constitution imposes restraints on the legislature. Our 2009 opinion was clear in explaining that our constitution (Amendment 26 to article 5, section 32) limits to employment situations the legislature's power to prescribe the amount of compensation that can be recovered for injuries resulting in death or injuries to persons or property.

Arkansas Code Annotated section 11–9–105(a), in furtherance of Amendment 26, provides:

> The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner *acting in his or her capacity as an employer, or prime contractor of the employer,* on account of the injury or death, and the negligent acts of a co-employee shall not be imputed to the employer. No role, capacity, or persona of any employer, ****417** principal, officer, director, or stockholder *other than that existing in the role of employer of the employee* shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas *the employer* may be deemed to have.

This statute correctly describes the limits of the workers' compensation exclusive-remedy provisions, consistent with the constitutional mandate and making clear, in my opinion, that "[n]o role, capacity, or persona of any employer, principal, officer, director, or stockholder *other than that existing in the role of employer of the employee* shall be relevant for consideration for purposes of this chapter." It is the existence of an *employment relationship* that lies at the foundation of entitlement to the exclusive remedies of the workers' compensation laws, and Mr. Johnson was in no way, shape, or form employed by Erin, Inc.

***13** In my view, our legislature did not exceed the workers' compensation exception in the constitution with the passage of Act 796 of 1993 unless, of course, a court were to attach the dissent's interpretation of section 11–9–105(a). It is basic law that our constitution trumps our legislature. To its credit, our legislature has stayed within the narrow workers' compensation exception of our constitution. Though Act 796 of 1993 dramatically changed burdens of proof affecting presentation of claims, it did so within the constitutional parameter. Our workers' compensation laws govern solely an employee's relationship with his employer. Absent such an employee-employer relationship, "the right of trial shall remain inviolate." Ark. Const., art. II, § 7. We were not only clear, we were also correct in deciding that Erin, Inc., and Mr. Harris were not immune in *Johnson v. Arkansas Steel Erectors,* 2009 Ark. App. 755, 350 S.W.3d 801.

000529

LARRY D. VAUGHT, Chief Judge, dissenting.

I dissent because I believe that neither the mandate rule nor the law of the case governs the resolution of this case. The majority opinion sets out the factual and procedural history faithfully. However, I disagree with the majority's ultimate conclusion that our prior opinion *clearly* held that Harris was not protected by the exclusive-remedy provision.

When our mandate was issued, the Workers' Compensation Commission attempted to follow our direction, yet read it to *only* allow suit against Erin, Inc. After Johnson filed a motion to modify, because he interpreted the mandate to allow suit against Harris also, the Commission responded by issuing three separate opinions. The "majority" (in this case a lone ***14** commissioner) found that our mandate *also* allowed suit against Harris and modified the previous order. The second commissioner joined in the modification, but found that our opinion was not clear. The dissenting commissioner read our mandate to hold that Harris was protected by the exclusive-remedy provision. The issue now before our court is not whether the Commission followed our mandate, but more precisely—what our mandate required.

While a lower court (or, in this case, the Commission) is bound by the mandate rule, our court is bound by the law-of-the-case doctrine. As such, in order to resolve the appeal currently before us, we must first consider if we are so bound. Matters once decided upon appeal become law of the case and govern the court of appeals upon a subsequent appeal. ****418** *Glover v. Glover,* 15 Ark. App. 79, 81, 689 S.W.2d 592, 594 (1985). However, the question is always open as to what matters were "decided on appeal." *Id.,* 689 S.W.2d at 594. In this case, based on the three commissioners' opinions and the parties' divergent motions and responses, it is evident that no clear mandate exists. In fact, the parties each "followed" our mandate to divergent (and mutually exclusive) ends. Based on the inherent lack of clarity in our prior decision, neither the mandate rule nor law of the case should prohibit us from reexamining our prior opinion.

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The only means by which Harris may be sued in tort in this case is by use of the dual-persona doctrine. Everyone agrees that Harris is protected by the exclusive-remedy provision of the workers'-compensation law as an employer in his role as owner of Arkansas Steel Erectors. His role (or persona) as owner of Erin, Inc., the owner of the crane, is at issue. The dual-persona doctrine makes an employer vulnerable to suit in tort if he possesses a second ***15** persona completely independent of his status as employer. *Hill v. Patterson,* 313 Ark. 322, 855 S.W.2d 297 (1993). The Arkansas Supreme Court officially recognized and adopted the dual-persona doctrine in *Thomas by City National Bank of Fort Smith v. Valmac Industries, Inc.,* 306 Ark. 228, 812 S.W.2d 673 (1991).

Subsequent to *Thomas,* the Arkansas General Assembly passed Act 796 of 1993, which completely revised our state's workers' compensation law. The current version of our law states that "[t]he rights and remedies of the employee ... shall be exclusive of all other rights and remedies of the employee[.]" Ark.Code Ann. § 11–9–105(a) (Repl.2002). Moreover, the Act provides that "[n]o role, capacity, or persona of any employer, principal, officer, director or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter[.]" Ark.Code Ann. § 11–9–105(a). In sum, the Act is now the sole and exclusive source of an employee's rights and remedies "regardless of the multiple roles, capacities, or personas the employer may be deemed to have." Ark.Code Ann. § 11–9–105(a). To make it even clearer, our general assembly legislatively overruled *Thomas* by passing a law stating that "this section is to preserve the exclusive[-]remedy doctrine and specifically annul any case law inconsistent herewith, including but not necessarily limited to ... *Thomas v. Valmac Industries,* 306 Ark. 228, 812 S.W.2d 673 (1991)." Ark.Code Ann. § 11–9–107(e) (Repl.2002).

The law in Arkansas is clear. Our mandate should offer corresponding clarity. Once Harris was deemed to be "an employer" based on his ownership of Arkansas Steel Erectors, ***16** he came under the protection of the exclusive-remedy doctrine regardless of any other persona or role he maintained. Whether this is a majority view, minority view, good law, bad law or even constitutional (none of which is raised or argued), we are bound by it. I would therefore reverse the decision of the Workers' Compensation Commission.

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All Citations

2011 Ark. App. 243, 383 S.W.3d 409

Footnotes

1 His first suit, filed August 8, 2003, was against the Nabholz Construction Corp.

2 On January 28, 2010, the supreme court denied Erin's petition for review.

3 The mandate rule has been described as a "sub-species of the venerable 'law of the case' doctrine, a staple of our common law as old as the Republic[.]" *Turner,* 91 Ark. App. at 298, 210 S.W.3d at 133 (quoting *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coops., Inc.,* 896 F.Supp. 912, 914 (E.D.Ark.1995)). The law-of-the-case doctrine provides that the decision of an appellate court establishes the law of the case for the trial court upon remand and for the appellate court itself upon subsequent review and is conclusive of every question of law and fact previously decided in the former appeal, and also of those that could have been raised and decided in the first appeal, but were not presented. *Id.* (citing *Linder v. Linder,* 348 Ark. 322, 72 S.W.3d 841 (2002); *Clemmons v. Office of Child Support Enforcement,* 345 Ark. 330, 47 S.W.3d 227 (2001)).

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CLERK OF THE COURT

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Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DISTRICT COURT
CLARK COUNTY, NEVADA

000531

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BENKELY-SCOTT, daughter and heir of the decedent GIL BEN-KELY; GWENDOLYN WARD, as personal representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD, deceased; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited liability company; SCOTT GRAGSON WORLD CLASS DRIVING, an unknown entity; SLOAN VENTURES 90, LLC, a Nevada limited liability company, ROBERT BARNARD; MOTORSPORT SERVICES INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C
Dept. No.: XXVII

MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD; AFFIDAVIT OF FELICE J. FIORE, JR.; DECLARATION OF REGINA ZERNAY

HEARING REQUESTED

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limited liability company; AARON FESSLER; the ESTATE OF CRAIG SHERWOOD; AUTOMOBILI LAMBORGHINI AMERICAN, LLC a foreign limited liability company; FELICE J. FIORE, JR.; DOES I-X, inclusive; and ROE CORPORATIONS IX, inclusive,

Defendants

GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, Individually, and surviving spouse of CRAIG SHERWOOD, deceased GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased,

Crossclaim Plaintiffs,

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the ESTATE; DOES I-X, inclusive,

Crossclaim Defendants

ESTATE OF BEN-KELY by ANTONELLA BEN KELY, duly appointed representative of the Estate and widow and heir of decedent GIL BEN-KELY; SHON BEN KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and here of decedent GIL BEN-KELY,

Crossclaim Plaintiffs

ESTATE OF CRAIG SHERWOOD; DOES I-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Crossclaim Defendants.

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MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD

Defendant FELICE J. FIORE, JR. ("Fiore" or "defendant"), by and through his counsel of record, Alan W. Westbrook, Esq. of Perry & Westbrook; Paul L. Tetreault, Esq. and Regina S. Zernay, Esq. of Agajanian, McFall, Weiss, Tetreault & Crist LLP; Brent D. Anderson, Esq. and James D. Murdock, Esq. of Taylor Anderson, LLP submits the following MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR.

This motion is brought against plaintiffs ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD, a minor, only. A separate motion for summary judgment/partial summary judgment on behalf of Mr. Fiore is filed against plaintiffs ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, ANTONELLA BEN-KELY individually, SHON BEN-KELY, and NATHALIE BEN-KELY-SCOTT.

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This motion is based on the following memorandum of points and authorities, the affidavit and declaration and their attached exhibits filed concurrently herewith, and on all papers, files, and arguments that may properly be presented at or before the hearing on this matter.

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DATED: May 14, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook
Alan W. Westbrook, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: May 14, 2021

AGAJANIAN, McFALL, WEISS, TETREAULT & CRIST LLP

/s/ Paul L. Tetreault
Paul L. Tetreault, Esq.
Regina S. Zernay, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: May 14, 2021

TAYLOR ANDERSON, LLP

/s/ James D. Murdock
Brent D. Anderson, Esq.
James D. Murdock, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

AFFIDAVIT OF FELICE J. FIORE, JR.

STATE OF CONNECTICUT)
)
COUNTY OF FAIRFIELD)

Felice J. Fiore, Jr., being duly sworn upon his oath, hereby deposes and says:

1. I am over 18 years of age and have personal knowledge of the facts stated in this affidavit. If called as a witness I would testify under oath that each of the facts stated herein are true.

2. This affidavit is presented in support of the motions for summary judgment, or, in the alternative partial summary judgment, brought on my behalf against plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood; and against plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott; and on behalf of SpeedVegas, LLC, against plaintiffs Estate of Craig Sherwood, Gwendolyn Ward, and Zane Sherwood in the consolidated case of *Estate of Ben-Kely et al. vs. SpeedVegas, LLC* (hereinafter "SpeedVegas") et al., Case No. A-17-757614-C.

3. I am a named defendant in this consolidated action, having been sued by the Estate of Craig Sherwood and decedent Craig Sherwood's heirs, and by the Estate of Gil Ben-Kely and his heirs.

4. I am informed and believe that Gil Ben-Kely ("Mr. Ben-Kely") was employed by SpeedVegas as a driving instructor/coach prior to and on the date of February 12, 2017. *See, e.g.,* Ben-Kely Plaintiffs' Fifth Amended Complaint ("5AC") at 2:22-27; 14:12-13; and Sherwood Complaint, 9:10-11.

5. I am informed and believe that on February 12, 2017, Craig Sherwood ("Sherwood"), a customer of SpeedVegas, was driving a Lamborghini Aventador at SpeedVegas, with Ben-Kely seated next to him. *See, e.g.,* 5AC at 2:17-26. During the driving session, the Lamborghini crashed and both Sherwood and Ben-Kely were killed ("Incident"). *See, e.g.,* 5AC at 4:14-16; 5:8-9.

6. I was a member (shareholder) of the SpeedVegas LLC at the time of the Incident.

7. I was also a member of SpeedVegas's Board of Directors at the time of the Incident and I received compensation for my services as a member of SpeedVegas's Board of Directors.

8. I owned the subject Lamborghini Aventador and leased it to SpeedVegas in my capacity as a member of the SpeedVegas LLC. I was authorized by SpeedVegas to do so in this capacity.

9. I have never waived the protection from individual liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument.

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10. I was not, at the time I leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case. *See also* Deposition ("Depo") of Mr. Fiore, 59:20-25; Ex. 1.

11. Mmy occupation up to the time of the Incident was a financial advisor and investment manager.

12. I have never been a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case. *See also id.*

13. Customers of SpeedVegas paid by the lap to drive a vehicle in SpeedVegas' fleet, including the subject Lamborghini Aventador, on SpeedVegas' track. They were accompanied by a SpeedVegas employee serving as a "coach" and could not remove the vehicle from the premises.

14. I did not receive notice of a defect in the subject Lamborghini Aventador prior to February 12, 2017, and the deaths of Gil Ben-Kely and Craig Sherwood. I am informed and believe that the recall notice issued by the National Highway and Traffic Safety Administration (NHTSA) was not issued until after the date of this accident. Attached as Exhibit 2 is a true and correct copy of the recall notice from Lamborghini, dated February 28, 2017, and its envelope. I did not first receive notice of the NHTSA recall until on or after March 9, 2017, as indicated in the postmark of the envelope for the notice. *See* Depo of Mr. Fiore, 102:4-15; Ex. 1.

15. I swear or affirm under penalty of perjury pursuant to the laws of the State of Nevada that the foregoing is correct.

Further affiant sayeth not.

Executed on May 6th, 2021.

Felice J. Fiore, Jr.

Subscribed and sworn to before me
This 6th day of May, 2021.

DEIRDRE NEALON
My Commission Expires
NOTARY PUBLIC
12-31-2022
CONNECTICUT

Notary Public in and for said
County and State: FAIRFIELD COUNTY, CONNECTICUT

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DECLARATION OF REGINA ZERNAY

I, Regina Zernay, declare, as follows:

1. I am an attorney duly licensed to practice law in the State of California and admitted by Motion to practice in the above-referenced matter. I am an attorney at the law firm of Agajanian, McFall, Weiss, Tetreault & Crist, LLP, attorneys of record for defendant, FELICE J. FIORE, JR. ("Fiore" or "defendant"). I have personal knowledge of the facts set forth herein and if called upon, I could and would competently testify thereto.

2. Attached hereto as Exhibit "1" is a true and correct copy of relevant portions from the transcript of the Deposition of Felice Fiore, Jr.

3. Attached hereto as Exhibit "3" is a true and correct copy of relevant portions from the transcript of the Deposition of Robert Butler, Ph.D.

4. Attached hereto as Exhibit "4" is a true and correct copy of relevant portions from the transcript of the Deposition of Martyn Thake.

5. Attached hereto as Exhibit "5" is a true and correct copy of relevant portions from the transcript of the Deposition of Robert Banta.

6. Attached hereto as Exhibit "6" is a true and correct copy of relevant portions from the transcript of the Deposition of Cam Cope.

7. Attached hereto as Exhibit "7" is a true and correct copy of relevant portions from the transcript of the Deposition of Mark Arndt.

8. Attached hereto as Exhibit "8" is a true and correct copy of relevant portions from the transcript of the Deposition of Jack Ridenour.

9. Attached as Exhibit "9" is a true and correct copy of the case *Ortiz v. HPM Corp.* 234 Cal. App. 3d 178 (1991).

10. Attached as Exhibit "10" is a true and correct copy of the case *Lancaster v. W.A. Hartzell & Assoc.*, 54 Or. App. 886, 637 P.2d 150 (1982).

11. Attached as Exhibit "11" is a true and correct copy of the case *McGraw v. Furon Co.*, 812 So. 2d 273 (2001).

12. Attached as Exhibit "12" is a true and correct copy of the case *Lane v. Int'l Paper* 545 So. 2d 484

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(FL 1989).

13. Attached as Exhibit "13" is a true and correct copy of the case *Siemen v. Alden,* 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975).

14. Attached as Exhibit "14" is a true and correct copy of the case *Crist v. K-Mart Corp.,*653 N.E.2d 140 (1995).

15. Attached as Exhibit "15" is a true and correct copy of the case *Lucas v. Dorsey Corp.,* 609 N.E.2d 1191 (IN 1993).

16. Attached as Exhibit "16" is a true and correct copy of the case *Griffin Industries v. Jones,* 975 S.W.2d 100 (KY 1998).

17. Attached as Exhibit "17" is a true and correct copy of the case *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 507 N.E.2d 728 (1987).

18. Attached as Exhibit "18" is a true and correct copy of the case *Engel v. Corrigan Co.,* 148 S.W.3d 28 (MO 2004).

19. Attached as Exhibit "19" is a true and correct copy of the case *Scordino v. Hopeman Brothers,* 662 So. 2d 640 (MS 1995).

20. Attached as Exhibit "20" is a true and correct copy of the case *Brescia v. Great Road Realty Trust,* 117 N.H. 154 (1977).

21. Attached as Exhibit "21" is a true and correct copy of the case *Hauerstock v. Barclay Street Realty,* 168 A.D.3d 519, 92 N.Y.S.3d 220 (2019).

22. Attached as Exhibit "22" is a true and correct copy of the case *Abbott v. U.S.I. Clearing Corp.,* 17 Ohio App. 3d 75, 477 N.E.2d 638 (1984).

23. Attached as Exhibit "23" is a true and correct copy of the case *McKenna v. Art Pearl Works, Inc.,* 225 Pa. Super. 362, 310 A.2d 677 (1973).

24. Attached as Exhibit "24" is a true and correct copy of the case *Peterson v. Safway Steel Scaffolds Co.,* 400 N.W.2d 909 (SD 1987).

25. Attached as Exhibit "25" is a true and correct copy of the case *New Texas Auto Auction Services v. Gomez De Hernandez,* 249 S.W.3d 400 (TX 2007).

26. Attached as Exhibit "26" is a true and correct copy of the statute, 6 Del.C. § 18-303.

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. EXECUTED this 14th day of May, 2021, at Los Angeles, California.

/s/ Regina Zernay
Regina Zernay, Declarant

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Ward/Sherwood Plaintiffs' Complaint contains five causes of action against Mr. Fiore: wrongful death, negligence, negligent entrustment, negligent products liability, and strict products liability. The uncontroverted evidence establishes, as a matter of law, that Mr. Fiore cannot be held liable under any of these theories.

A. CLAIMS OF NEGLIGENCE

Mr. Fiore owned the subject Lamborghini and leased it as his private automobile to SpeedVegas for use at that facility. Undisputed Material Fact ("UMF") No. 3. There is no evidence that the crash of the Lamborghini at the SpeedVegas driving experience track on February 12, 2017, was caused by a mechanical failure (UMF No. 7), modification to the vehicle (UMF No. 8) or improper maintenance (UMF No. 9).

Although notice of a recall of the Lamborghini to correct a problem with the fuel evaporative canister was announced, such notice was not sent to owners, and Mr. Fiore did not receive it, until after the date of this accident. UMF No. 10. Based upon these undisputed material facts, there is no basis for a cause of action sounding in negligence (including causes of action for negligence, negligent entrustment, negligent products liability and wrongful death) against Mr. Fiore.

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B. PRODUCTS LIABILITY

Mr. Fiore was not engaged in the business of leasing or selling automobiles to others and is therefore not a merchant who is liable in strict liability for product defects.

Mr. Fiore's occupation up to the time of this accident was a financial advisor and investment manager. *See* Affidavit of Mr. Fiore ("Fiore Affidavit") at ¶ 11. He was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in this case. UMF No. 5. In fact, Mr. Fiore, had never before leased a car that he owned to anyone else and had never engaged in the business of supplying goods of the kind (automobiles) involved in this case. UMF No. 6. Based upon these undisputed material facts, there is no basis for a cause of action for strict products liability against Mr. Fiore.

C. STATUTORY IMMUNITY

The Ward/Sherwood Complaint identifies Mr. Fiore as an owner (member) of the SpeedVegas LLC (UMF No. 1) and the owner of the subject Lamborghini Aventador that crashed while being driven at SpeedVegas by Craig Sherwood with driving coach Gil Ben-Kely in the passenger seat.

As an LLC member (owner), under Nevada Revised Statute ("NRS") 86.371, Mr. Fiore is protected from individual liability for SpeedVegas's debts or liabilities. Pursuant to NRS 86.381, Mr. Fiore is also not a proper party in these proceedings against SpeedVegas (causes of action for negligence, negligent entrustment, negligent products liability, products liability and wrongful death).

These facts, about which there is no genuine dispute, are material to the causes of action raised against Mr. Fiore. In their absence, the Ben-Kely Plaintiffs cannot prevail.

Defendant Felice Fiore, Jr. therefore moves for summary judgment in his favor, pursuant to Nevada Rules of Civil Procedure ("NRCP") Rule 56. Alternatively, if this court finds that any of plaintiffs' individual causes of action should survive summary judgment, defendant requests this court grant partial summary judgment as to those causes of action that are improper as to Mr. Fiore.

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II. STATEMENT OF RELEVANT FACTS

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SpeedVegas, LLC ("SpeedVegas"), operated a facility where members of the public could drive exotic and high performance automobiles on a high speed closed road course ("driving experiences"). They were accompanied by a "coach" sitting in the front passenger seat who would guide the customer through the experience in an effort to keep them and others on the track safe.

Gil Ben-Kely ("Ben-Kely") was employed by SpeedVegas as a driving instructor/coach. *See* Plaintiffs' Complaint at 9:10-11. On February 12, 2017, Craig Sherwood ("Sherwood"), a customer of SpeedVegas, was driving a Lamborghini Aventador at the facility, with Ben-Kely seated next to him. *See* Complaint, *Id.*. During the driving session, the Lamborghini crashed and Mr. Sherwood was killed ("Incident"). *See* Complaint at 12:7-8.

At the time of the Incident, defendant Felice J. Fiore, Jr. ("defendant" or "Fiore") was the owner of the subject Lamborghini. *See* Ex 1 – Deposition ("Depo") of Mr. Fiore, 58:15-20. Mr. Fiore was also a member (shareholder) of the SpeedVegas LLC (Ex 1 – Depo of Mr. Fiore, 58:10-14) and a paid member of its board of directors. *See* Fiore Affidavit at ¶ 7. Mr. Fiore was not and has never been in the business of

selling or leasing vehicles. Ex 1 – Depo of Mr. Fiore, 59:20-25.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Felice J. Fiore, Jr. was a member (shareholder) of the SpeedVegas LLC at the time of the Incident. Fiore Affidavit at ¶ 6; *see also* Sherwood Plaintiffs' Complaint, Aug. 17, 2018 ("Sherwood Complaint"), 15:26-27.

2. Felice J. Fiore, Jr. was a paid member of SpeedVegas's Board of Directors at the time of the Incident. Fiore Affidavit at ¶ 7.

3. Felice J. Fiore, Jr. owned the subject Lamborghini Aventador and leased it to SpeedVegas in his capacity as a member of the SpeedVegas LLC. Mr. Fiore was authorized by SpeedVegas to do so in this capacity. *Id.* at ¶ 8.

4. Felice J. Fiore, Jr. has never waived the protection from individual liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument. *Id.* at ¶ 9.

5. Felice J. Fiore, Jr. was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case. *Id.* at ¶ 9. Ex 1 – Depo of Mr. Fiore, 59:20-25.

6. Felice J. Fiore, Jr. has never been a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case. Fiore Affidavit at ¶ 12; Ex 1 – Depo of Mr. Fiore, 59:20-25.

7. There is no evidence that a mechanical failure in the subject Lamborghini Aventador caused or was a contributing factor in the February 12, 2017, crash that caused the deaths of Gil Ben-Kely and Craig Sherwood. Ex 3 – Depo of Robert Butler, Ph.D., 284:7-11; Ex 4 – Depo of Martyn Thake, 33:10-13; Ex 5 – Depo of Robert Banta, 195:11-13; Ex 6 – Depo of Cam Cope, 272:12-22; Ex 7 – Depo of Mark Arndt, 290:11-17.

8. There is no evidence that any modifications made to the subject Lamborghini Aventador caused or were a contributing factor in the February 12, 2017, crash that caused the deaths of Gil Ben-Kely and Craig Sherwood. Ex 3 – Depo of Robert Butler, Ph.D., 281:13-16; Ex 4 – Depo of Martyn Thake, 29:19-22; Ex 6 – Depo of Cam Cope, 274:7-10; Ex 8 – Depo of Jack Ridenour, 147:13-20.

9. There is no evidence that improper maintenance of the subject Lamborghini Aventador caused or was a contributing factor in the February 12, 2017, crash that caused the deaths of Gil Ben-Kely and Craig

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Sherwood. Ex 5 – Depo of Robert Banta, 45:14-16; 195:6-13. Ex 6 – Depo of Cam Cope, 272:12-22. Ex 8 – Depo of Jack Ridenour, 149:17-24.

10. Felice Fiore, Jr. did not receive notice of a defect in the subject Lamborghini Aventador prior to February 12, 2017, and the deaths of Gil Ben-Kely and Craig Sherwood. Fiore Affidavit at ¶ 14.

IV. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

Under NRCP 56, a party may move for summary judgment, "identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." NRCP 56. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* Summary judgment is appropriate "'when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.'" *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

On summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *See Palmieri v. Clark Cty.,* 131 Nev. 1028, 1038, 367 P.3d 442, 449 (Nev. App. 2015). However, to defeat summary judgment, "the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 603. A genuine issue of material fact "'is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (internal citations omitted). "When a motion is made and supported by evidence and affidavits, an adverse party may not rest on the mere allegations and denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Ferreira v. P.C.H. Inc.*, 105 Nev. 305, 306, 774 P.2d 1041, 1042 (1989). "Neither mere conjecture nor hope of proving the allegations of a pleading is sufficient to create a factual issue." *Howard Hughes Medical Institute v. Gavin*, 96 Nev. 905, 909, 621 P.2d 489, 491 (1980).

B. THERE IS NO EVIDENCE THAT MR. FIORE ACTED NEGLIGENTLY WITH REGARD TO HIS OWNERSHIP OF THE LAMBORGHINI

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Plaintiffs' second cause of action is for negligence against several defendants, including Mr. Fiore. They allege that Mr. Fiore and others

> 88. Defendants breached their duty of care by, *inter alia,* designing, constructing, and operating an unreasonably dangerous racetrack and vehicle; and failing to utilize, employ, and maintain adequate fire safety and other safety precautions and procedures.

Sherwood Complaint, 12:25-27.

Plaintiff's fifth cause of action is for negligent entrustment against Mr. Fiore. They allege that:

> 115. As an owner of the Roadster, Fiore would have received the NHTSA recall notice(s) for the Roadster.
>
> 116. Fiore, therefore, knew the Roadster was defectively designed and manufactured and that a gasoline fire in the vehicle was a foreseeable risk, further placing SPEEDVEGAS customers at risk of injury or death.

Sherwood Complaint, 16:7-11.

Plaintiffs' sixth cause of action is for negligent products liability against Mr. Fiore and others. They allege that:

> 123. Lamborghini, SPEEDVEGAS, and Fiore owed Plaintiffs and Craig a duty to exercise reasonable care in the design, testing, manufacture, assembly, sale, distribution, and servicing of the Roadster, including a duty to assure that the subject vehicle did not cause Craig, other users, bystanders, or the public unnecessary injury or death.

Sherwood Complaint, 17:3-6.

There is, however, no evidence to support any of these allegations. UMFs 7, 8, 9, 10.

The parties have designated their expert witnesses and their depositions have been taken. The Ward/Sherwood plaintiffs designated experts in this case who have given deposition testimony, including Cam Cope and Mark Arndt. Mr. Cope testified that when the Lamborghini was delivered to SpeedVegas by Mr. Fiore, Mr. Cope was unfamiliar with any problems with the car. Ex 6 – Depo of Mr. Cope, 272:12-22. He had no criticism regarding the operation of the car's brakes. *Id.*, 273:1-9. He had no opinions that

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any modifications to the car caused or contributed to the accident. *Id.*, 274:7-10.

Mr. Arndt testified that he did not have any opinions that there were any mechanical issues with the Lamborghini that was a factor in the driver (Mr. Sherwood) maintaining control of the vehicle before it impacted the wall. Ex 7 – Depo of Mr. Arndt, 290:11-17.

The Ben-Kely plaintiffs also designated Robert Butler, Ph.D., P.E.; Martyn C. Thake; and Robert D. Banta, among others, as liability and causation experts. Dr. Butler testified that he was not of the opinion that there was a mechanical defect or failure in the Lamborghini that resulted in the subject accident. Ex 3 – Depo of Dr. Butler, 284:7-11. It was also his opinion that the installation of an aftermarket wing on the back of the Lamborghini did not play a part in the accident. *Id.*, 281:13-16.

Mr. Thake testified that he did not have any opinions regarding post-production modifications that were made to the Lamborghini. Ex 4 – Depo of Mr. Thake, 29:19-22. He had no opinions regarding the mechanical condition of the Lamborghini at the time of the crash. *Id.,* 33:10-13. Mr. Banta testified that he had no opinions regarding Mr. Fiore's maintenance of the vehicle. Ex 5 – Depo of Mr. Banta, 195:6-10. Mr. Banta had no opinions that Mr. Fiore did anything wrong. *Id.*, 195:11-13. He was not critical of Mr. Fiore as the owner of the Lamborghini. *Id.*, 196:8-11.

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The fifth cause of action for negligent entrustment also alleges that defendants, including Mr. Fiore, received notice of a defect in the Lamborghini that exposed the vehicle's occupants to a foreseeable risk of fire. However, the recall notice issued by the National Highway and Traffic Safety Administration (NHTSA) was not issued until after the date of this accident and Mr. Fiore did not first receive notice of it until March 9, 2017, about four weeks after the accident. Fiore Affidavit at ¶ 14; Ex 1 – Depo of Mr. Fiore, 102:4-15.

Finally, no expert witness has formed the opinion that the object of the recall of this model Lamborghini caused the car to crash or catch fire after impact. Mr. Banta, the Ben-Kely plaintiffs' expert, testified that the recall condition did not cause the crash. Ex 5 – Depo of Mr. Banta, 40:2-5. He also testified that he does not hold the opinion that the recall condition caused the post-collision fire. *Id.*, 40:7-13.

Mr. Robert Butler, an expert retained by the Ward/Sherwood plaintiffs, testified that he did not have an opinion on whether the recall condition on the Lamborghini had any bearing on this case. Ex 3 –

Depo of Mr. Butler, 231:14-20. Mr. Cam Cope, another expert retained by the Ward/Sherwood plaintiffs, testified that in his opinion the recall had nothing to do with this crash and release of gasoline from the fuel tank. Ex 6 – Depo of Mr. Cope, 53:10-14.

No expert witness in this case has offered an opinion that Mr. Fiore did not properly maintain the car, made any modifications to it that caused or contributed to the accident, or that he in any way was responsible for the accident. The uncontroverted evidence is that Mr. Fiore did not receive notice of the recall campaign until after the accident, and that in any event, the condition that precipitated the recall had nothing to do with this accident. There is simply no evidence to support the plaintiffs' negligence based causes of action (first, second, fifth and sixth) against Mr. Fiore.

C. MR. FIORE WAS NOT A MERCHANT SELLER THAT SUBJECTS HIM TO STRICT PRODUCTS LIABILITY FOR DEFECTS

The Seventh Cause of Action in the Ward/Sherwood Complaint is for Products Liability which identifies Mr. Fiore as one of several defendants. The plaintiffs allege:

> 137. At all times herein mentioned, Lamborghini, SPEEDVEGAS, and Fiore designed, manufactured, assembled, analyzed, recommended, merchandised, advertised, promoted, distributed, supplied, leased, modified, serviced, loaned, and/or sold to distributors and retailers for sale, the Lamborghini Aventador Roadster at issue in this lawsuit.

Sherwood Complaint, 19:4-7.

They further allege:

> 140. The Roadster was unsafe for its intended use by reason of defects in its manufacture, design, testing, modification, servicing, components, and constituents, so that it would not safely serve its purpose, but would instead expose the users of said product to serious injuries because of the failure of Lamborghini, SPEEDVEGAS, and Fiore to properly guard and protect the users of the Roadster from the defective design and manufacturing of said product.

Sherwood Complaint, 19:13-17.

Mr. Fiore was the owner of the Lamborghini involved in this accident. UMF No. 3. He leased the

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car to SpeedVegas for its use as a car that could be driven by customers. As Mr. Fiore explained in his deposition, in about December of 2016 he lost his job and had to cut his expenses until he could regroup financially. The subject Lamborghini was an expensive asset but not easily sold at a fair price in the winter months. As a member of the Board of Directors for SpeedVegas he asked if there was interest in leasing the car to SpeedVegas in order to defray his expense. SpeedVegas agreed and a deal was negotiated. Ex 1 – Depo of Mr. Fiore, 62:5-64:15.

The doctrine of strict liability in tort for product defects has been long recognized as applying to manufacturers, distributors and sellers of goods that place such goods into the stream of commerce. But not every person or entity that at one time owned, transferred or sold a product is necessarily subject to strict products liability for defects.

In the Nevada Supreme Court case of *Elley v. Stephens,* 104 Nev. 413, 760 P.2d 768 (1988), purchasers of a prefabricated house sued the original owners and for injuries sustained when Mr. Elley fell from the deck of the house when a railing failed. There were several issues involved in the case, including the question of whether a prefabricated house qualified as a "product," but more important to the case before this court was whether the defendant who sold the house was subject to strict liability for alleged product defects.

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The Supreme Court noted that the defendant sellers had the house built in 1973 and that same year sold it to another couple, who later sold it to the plaintiff and his wife. *Elley,* 104 Nev. at 414. Questioning whether the seller defendants were subject to strict products liability for defects, the Court stated:

> [A] strict liability theory is not applicable to an occasional seller of a product, who does not, in the regular course of his business, sell such a product. See, e.g., Restatement (Second) of Torts § 402A (1965); Prosser and Keaton on Torts 705 (5th ed. 1984) ("Only a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind involved in the case is subject to strict liability, whether on warranty or in tort."); Bailey v. ITT Grinnell Corp., 536 F.Supp. 84, 87 (N.D.Ohio 1982) ("[S]trict tort liability is not an appropriate theory of liability for application to the occasional seller); Lemley v. J & B Tire Co., 426 F.Supp. 1376, 1377 (W.D.Penn.1977) ("The plaintiffs cannot prevail on their [strict

> liability cause of action] because the defendants ... are not sellers engaged in the business of selling such a product.").

Elley, 104 Nev. at 418.

The Court, noting that the seller defendants were not in the business of selling homes, stated the "The Stephenses are unquestionably occasional sellers, hardly qualifying as retailers or manufacturers of homes. Strict liability theory does not apply to such sellers." *Id.*

The *Elley* court cited the Restatement (Second) of Torts § 402A(1) which provides:

> 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 ... if
> (a) the seller is engaged in the business of selling such a product.... (Restatement (Second) of Torts § 402A(1) (1965).)

Comment (f) to § 402A notes:

> The rule stated in this section ... does not, however, apply to the occasional seller of ... products who is not engaged in that activity as part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars.... [H]e is not liable to a third person, or even to his buyer, in the absence of his negligence.

Id.

Nevada Jury Instruction 7.1 on Products Liability, citing *Elley v. Stephens* as a source/authority, states:

> In order to establish a claim of strict liability for a defective product, the plaintiff must prove the following elements by a preponderance of the evidence:
> 1. The defendant was either:
> a. a manufacturer of the product,
> b. a distributor of the product. or
> c. a seller *who can be regarded as a merchant engaged in the business of*

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supplying goods of the kind involved in the case;

2. The product was defective;

3. The defect existed when the product left the defendant's possession;

4. The product was used in a manner which was reasonably foreseeable by the defendant; and

5. The defect was a legal cause of the damage or injury to the plaintiff

Nevada Jury Instructions (2019 Edition), No. 7.1 (emphasis added).

A survey of all 50 states and the District of Columbia found that every jurisdiction that has examined the issue of what constitutes a "seller" for purposes of applying strict products liability either follows the Restatement (Second) of Torts or has adopted its own legislation that is virtually identical. *See* Ex 9 – *Ortiz v. HPM Corp.* 234 Cal. App. 3d 178 (1991); Ex 10 – *Lancaster v. W.A. Hartzell & Assoc.,* 54 Or. App. 886, 637 P.2d 150 (1982); Ex 11 – *McGraw v. Furon Co.*, 812 So. 2d 273 (2001); Ex 12 – *Lane v. Int'l Paper* 545 So. 2d 484 (FL 1989); Ex 13 – *Siemen v. Alden,* 34 Ill. App. 3d 961, 341 N.E.2d 713 (1975); Ex 14 – *Crist v. K-Mart Corp.,*653 N.E.2d 140 (1995); Ex 15 – *Lucas v. Dorsey Corp.,*609 N.E.2d 1191 (IN 1993); Ex 16 – *Griffin Industries v. Jones,* 975 S.W.2d 100 (KY 1998); Ex 17 – *Fernandes v. Union Bookbinding Co.*, 400 Mass. 27, 507 N.E.2d 728 (1987); Ex 18 – *Engel v. Corrigan Co.,* 148 S.W.3d 28 (MO 2004); Ex 19 – *Scordino v. Hopeman Brothers,* 662 So.2d 640 (MS 1995); Ex 20 – *Brescia v. Great Road Realty Trust,* 117 N.H. 154 (1977); Ex 21 – *Hauerstock v. Barclay Street Realty,* 168 A.D.3d 519, 92 N.Y.S.3d 220 (2019); Ex 22 – *Abbott v. U.S.I. Clearing Corp.,* 17 Ohio App. 3d 75, 477 N.E.2d 638 (1984); Ex 23 – *McKenna v. Art Pearl Works, Inc.,* 225 Pa. Super. 362, 310 A.2d 677 (1973); Ex 24 – *Peterson v. Safway Steel Scaffolds Co.,* 400 N.W.2d 909 (SD 1987); Ex 25 – *New Texas Auto Auction Services v. Gomez De Hernandez,* 249 S.W.3d 400 (TX 2007).

Mr. Fiore's occupation up to the time of this accident was a financial advisor and investment manager. Fiore Affidavit at ¶ 11. He was asked in his deposition in this case about his purchasing and selling of cars. When asked about how he leased the subject Lamborghini to SpeedVegas he testified that "[b]ut for the Lamborghini, I've never -- I never did a transaction like this, ever. I was just a typical retail buyer of cars." Ex 1 – Depo of Mr. Fiore, 59:20-25.

1. There is No Substantive Difference Between One Who

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Sells a Product and One Who Leases With Regard to Strict Products Liability

The Restatement (Second) and Restatement (Third) of Torts address the role of "sellers" in product liability actions. However, there is no legal difference between a casual seller of a good and one who leases. In *Brescia v. Great Road Realty Trust,* a construction company employee brought an action for on-the-job injuries he sustained as the result of the collapse of the boom of a truck crane owned and leased from the defendant. The court, using the same rule for the defendant lessor as applied to sellers, found that the crane owner "was not in the business of supplying cranes. And it cannot be held accountable in strict liability." Ex 20 – *Brescia*, 117 N.H. at 157. The court further stated:

> Professor Prosser has observed: 'As to strict liability, whether on warranty or in tort, no case has been found in any jurisdiction in which it has been imposed upon anyone who was not engaged in the business of supplying goods of the particular kind.' W. Prosser, Law of Torts s 100, at 664 (4th ed. 1971).

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2. A Sale By a Non-Merchant in a Commercial Setting is Not Treated Differently

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The status of the buyer or lessee of the goods does not change the rule that non-merchants in the goods are not strictly liable for product defects. In the present case the Lamborghini was leased by Mr. Fiore to SpeedVegas for commercial purposes. It was not the sale of a used automobile to a private individual for personal use. However, many of the cases previously cited involved the sale of machinery to commercial enterprises, and not individual, private, consumers, yet the same rule applied: casual sellers of goods by those not engaged in the business of supplying goods of the kind involved in the case are not subject to strict products liability treatment. Ex 13 – *Siemen*, 34 Ill. App. 3d at 963 (sale of a multi-rip saw to a sawmill in an action brought by injured employee of buyer); Ex 15 – *Lucas,* 609 N.E.2d at 1202 (sale of a digger derrick, applying Indiana statute that limits strict products liability to those "engaged in the business of selling such a product" in an action brought by injured employee of buyer); Ex 16 – *Griffin Industries,* 975 S.W.2d at 102 (sale of a cleaning screw conveyor system to a rendering plant in an action brought by injured employee of buyer); Ex 17 – *Fernandes,* 400 Mass. at 731-32 (sale of a die press in an action brought by injured employee of buyer); Ex 20 – *Brescia*, 117 N.H. at 157 (lease of a truck crane

brought by injured employee of buyer).

Mr. Fiore was not a merchant in the sale of automobiles. He was the private owner of the Lamborghini which he enjoyed for his personal use until such time that he could no longer afford it. He then, for the first time in his life, agreed to lease out his car. The nature of the transaction (lease vs. sale) and the status of the buyer (private consumer vs. commercial) makes no difference and no jurisdiction in the United States has been found that treats such transactions differently. Without exception found, a one-time or occasional seller of a good or product causing injury due to a defect is not subject to strict products liability. Mr. Fiore is unquestionably the "occasional seller[ ], hardly qualifying as retailer[ ] or manufacturer[ ] . . . . Strict liability theory does not apply to such sellers." *Elley,* 104 Nev. at 418. The plaintiffs' seventh cause of action for strict products liability cannot be applied to Mr. Fiore.

D. MR. FIORE IS NOT LIABLE FOR THE DEBTS, OBLIGATIONS OR LIABILITIES OF SPEEDVEGAS, LLC

Mr. Fiore is a member of SpeedVegas LLC. In Delaware, the state in which SpeedVegas, LLC was organized, limited liability company members and managers are not personally obligated for company debt, obligations, or liabilities. *See* Ex 26 – 6 Del.C. § 18-303(a).

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Likewise, members and managers of Nevada limited liability companies are not proper parties in proceedings against the company and are not personally liable for company debts or liabilities. Pursuant to NRS 86.381, "A member of a limited-liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company." NRS 86.371 provides: "Unless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company." This means that barring an exception, a lawsuit against the individual members and managers of a limited liability company, such as Mr. Fiore, is improper because, under Nevada law, they are not proper parties and are not individually liable for company debts or liabilities.

Chapter 86 of the NRS identifies the exceptions to these rules. NRS 86.361 states that a person acts as a limited-liability company without authority to do so is jointly and severally liable for all debts and liabilities of the company. NRS 86.371 recognizes an exception if it is written in the articles of

organization or an agreement signed by the member. NRS 86.376 also provides an exception if a person acts as the alter ego of company.

None of these exceptions apply here. Mr. Fiore leased the subject Lamborghini Aventador to SpeedVegas in his capacity as a member of the SpeedVegas LLC, and was authorized to do so. *See* Fiore Affidavit, ¶ 8. Mr. Fiore has never waived the protection from individual liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument. *Id.*, ¶ 9. Plaintiffs have not alleged that Mr. Fiore was acting as the alter ego of SpeedVegas and no facts have been produced showing this.

In summary, under NRS Chapter 86, Mr. Fiore is protected from individual liability as a member of SpeedVegas LLC and is not a proper party in these proceeding. No exceptions to these well-established rules are present in this matter and the causes of action for wrongful death, negligence, negligent entrustment, negligent products liability, and strict products liability should be summarily adjudicated in Mr. Fiore's favor and against the plaintiffs.

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V. CONCLUSION

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There are multiple pathways for the grant of summary judgment in favor of Mr. Fiore. His status as a member of the LLC affords him statutory protections recognized in both Delaware and Nevada. He is therefore not liable to plaintiffs for his own conduct related to SpeedVegas, nor the acts and omissions committed by SpeedVegas and its employees. Mr. Fiore is not alleged by plaintiffs to be the alter ego of SpeedVegas. Therefore, recognition of his protected status as a member of the LLC should result in the dismissal of all causes of action that have been asserted against him.

Irrespective of this defense, it has been shown that as a one-time leasor/seller of his personal automobile to SpeedVegas, he is not subject to strict products liability treatment, and that cause of action should be summarily adjudicated in his favor. Further, it has been shown that there is no evidence in support of the claims that he negligently maintained or modified the Lamborghini resulting in the crash and deaths of its occupants, that he had knowledge of a product recall before the accident, or that alleged defect that was the subject of the recall caused or contributed to the crash and deaths of the car's occupants. As such, the negligence based causes of action should be summarily dismissed in his favor.

Based on the foregoing, defendant Felice J. Fiore, Jr. asks this Court to grant summary judgment in

his favor and dismiss all of the causes of action raised against him in the Ward/Sherwood Plaintiffs' Complaint. In the alternative, should this court find that any of plaintiffs' individual causes of action survive summary judgment, defendant asks that partial summary judgment be granted as to those causes of action that are improper as to Mr. Fiore.

DATED: May 14, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook
Alan W. Westbrook, Esq.
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DATED: May 14, 2021

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DATED: May 14, 2021

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Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2021, I caused to be served a true and correct copy of **MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD; AFFIDAVIT OF FELICE J. FIORE, JR.; DECLARATION OF REGINA ZERNAY** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically served through the Court's Electronic Filing/Service system to all parties on the Court's Master Service List, listed below.

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By: /s/ Mary Davis
An Employee of Taylor Anderson, LLP

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EXHIBIT “1”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Videotaped Deposition Of:

PHIL FIORE

March 10, 2021

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envision
legal solutions
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD,	Case No.: A-17-757614-C
Plaintiffs,	Dept. No.: XXVII

VIDEOTAPED VIDEOCONFERENCE DEPOSITION

OF PHIL FIORE

WEDNESDAY, MARCH 10, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5221

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vs.)
)
SPEEDVEGAS, LLC, a foreign-)
limited liability company;)
VULCAN MOTOR CLUB, LLC dba)
WORLD CLASS DRIVING, a New)
Jersey limited liability)
company; SLOAN VENTURES 90,)
LLC, a Nevada limited)
liability company; MOTORSPORT)
SERVICES INTERNATIONAL, LLC,)
a North Carolina limited)
liability company; AARON)
FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI)
AMERICA, LLC, a foreign)
limited liability company;)
TOM MIZZONE, an individual)
SCOTT GRAGSON, an)
individual; PHIL FIORE aka)
FELICE FIORE, an individual;)
DOES I-X; and ROE ENTITIES)
I-X, inclusive,)
)
)
Defendants.)
_____)
)
AND ALL RELATED CLAIMS)
_____)

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VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF PHIL FIORE, held on Wednesday, March 10, 2021, at 8:01 a.m., before Monice K. Campbell, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

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gguelker@rlattorneys.com

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APPEARANCES:

For SpeedVegas, LLC, Tom Mizzone and Felice Fiore, Jr.:

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303.551.6661
banderson@talawfirm.com

Also Present:

NATHALIE BEN-KELY

KORTNEY DRAGOO, EXHIBIT TECH

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400-, thereabouts.

Q. Now, with regard to SpeedVegas, they actually had a board of directors, right?

A. Yeah. I mean, that got to be a very larger concern than World Class Driving or, certainly, Vulcan was, right? So Tom and Aaron certainly formalized what they were doing. And they brought on a whole array of different investors as well.

Q. When did you become a board of directors at SpeedVegas?

A. I guess when it became a real entity. Again, I'm not sure of the timing, but it was all happening at once.

Q. I want to talk about the purchase of the Lamborghini Aventador.

When did -- when did you first become involved or purchase that vehicle -- or lease it?

A. I became the owner of that vehicle on November 1st of 2015.

Q. And who did you -- who did you purchase it from?

A. I had a car broker, if you will, an exotic car broker that I dealt with. But he bought it from Chicago Lamborghini. I don't know the

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exact name, but it was a dealership out of Chicago.

Q. Was that the first exotic car that you had owned?

A. No.

Q. When was the first time that you purchased an exotic car?

A. It depends how you define "exotic." I've had Corvettes and Datsun 280Zs and those type of cars, right, but if you're talking about the level of Ferraris and those types of cars, a couple years prior to me owning a Lamborghini, I had purchased a Ferrari.

Q. And what happened with regard to that Ferrari?

A. What I did at the time, I actually owned -- I don't consider this an exotic car, although an expensive car -- I had owned the Ferrari and a Rolls Royce. And what I had done was trade those cars for the Lamborghini, essentially.

Q. Of the cars that you owned, not including the Lamborghini, did you ever lease those cars to any other person or entity?

A. No. But for the Lamborghini, I've never -- I never did a transaction like this, ever. I was just a typical retail buyer of cars.

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for sure.

A. Maybe a year and a quarter.

Q. All right. So you owned it for a year and a quarter.

And tell me how it came about that you were going to lease it to SpeedVegas?

A. Well, I'm a finance guy, right? And what happens when you're dealt with something that changes your life financially pretty dramatically, you've got to take inventory of the things that are somewhat inconsequential in your financial life, right?

And so when I was let go out of UBS, I literally went from a place of pretty decent income to a place of zero. It wasn't as if I got a severance or anything like that, right?

And so I took inventory of the various clubs that I belonged to and other things like that. Once I eliminated all the frivolous clubs and all the stuff that I had been a member of, you know, golf clubs, those types of things, I looked at -- mind you, we're talking about December now, right? December/January, right?

I'm looking in my garage, and I see this amazing, beautiful piece of art, but it's a huge

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asset, and it's a huge expense to me. And so I called my car broker guy at the time and asked him if we think we can get out of it, you know, at a reasonable price. He said, "You're going to get killed. Let's wait until the spring and try it," which obviously makes sense. You don't sell Lamborghinis in the middle of winter. I get that.

And Aaron and I hopped on a call, and he said he would love to have the Lamborghini at the racetrack.

Q. So your broker's not the one that found Aaron. You know Aaron and you know SpeedVegas. And so did you make a call to Aaron?

A. Well, Aaron and I were talking all the time, right? But, yeah, we spoke specifically about, you know, can the racetrack use a Lamborghini Aventador? It didn't have one at the time. The racetrack up the road -- I'm sorry -- it's not up the road. It's at the racetrack, at Las Vegas racetrack.

I think both of those, Exotic Racing, and I forget the name of the other one, but there's another racetrack type of business up there in the parking lot. I think they both had several -- oh,

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Dream Racing -- they both had Aventadors as part of their arsenal.

Q. So it was your understanding Aaron was interested in purchasing, or at least leasing, I guess, is fair to say, the Lamborghini Aventador, right?

A. Yeah. He thought that would be great for the racetrack as a marquee car.

Q. So is that the deal that you entered into, was a lease agreement with him?

A. I guess. I'm not sure what the exact deal was. I know we have paperwork relative to it, but, essentially, what was promised is a certain minimum a month, and then profit sharing anything over that on what the car produced.

Q. Minimum a month, meaning a minimum payment as well as profits that would come back to you based upon the usage by customers; is that fair to say?

A. That's fair.

Q. All right. I'm going to show you, Mr. Fiore, an exhibit. We're going to call it "Exhibit Number 1."

A. Okay.

Q. Let me see if I can share my screen

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did it ever have a salvage title, to your knowledge?

A. Not to my knowledge.

Q. And then, are you aware that a recall was issued by the National Highway Traffic Safety Administration regarding the EVAP system on the Lamborghini?

A. Am I aware of that now?

Q. Yes.

A. Yes, I am aware of that now.

Q. When did you first become aware of that recall?

A. I was sent that recall at the beginning of March. I think the exact stamp on that was March 9th of 2017.

Q. Okay.

MS. ANDREEVSKI: Those are all the questions that I have. Thank you.

THE VIDEOGRAPHER: Anybody have any further questions?

MR. TRAINA: I don't think so. Not from me.

MS. VARGAS: I don't have any other questions for Mr. Fiore.

MR. ANDERSON: Brent Anderson. No

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Monice K. Campbell, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, PHIL FIORE, commencing on Wednesday, March 10, 2021, at 8:01 a.m.;

That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel or any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action; that a request ([X] has not) been made to review the transcript.

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IN WITNESS THEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 22nd day of March, 2021.

Monice K. Campbell, CCR No. 312

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EXHIBIT “2”

Herndon, February 28, 2017

FELICE G FIORE
[redacted]

IMPORTANT SAFETY RECALL – Recall No. 17V-073 EVAP system

Your Lamborghini Aventador with the VIN ZHWUR1ZD3FLA03687

Automobili
Lamborghini America LLC

Dear FELICE G FIORE

This notice is sent to you in accordance with the National Traffic and Motor Vehicle Safety Act. Automobili Lamborghini S.p.A. has decided that a defect, which relates to motor vehicle safety, exists in certain Model Year 2012-2017 Aventador Coupè and Roadster vehicles. Our records indicate that you are the owner of a vehicle in this recall.

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Why are we contacting you?

We are pleased to inform you that we have the necessary parts to complete this recall. Please contact your authorized Lamborghini Dealer immediately to schedule an appointment to have this important free repair performed as soon as possible. You can locate your nearest Lamborghini Dealer at https://www.lamborghini.com/en-en/ownership/dealer-locator.

What is the issue?

Under certain circumstances, fuel vapors can interact with hot gases and increase the risk of a fire. This condition is dependent on various factors, including overfilling the fuel tank combined with certain handling conditions that allow mistreated fuel vapors to combine with hot gasses, increasing the risk of a fire.

In case of fuel tank heavily overfilled and in particular handling conditions liquid fuel could reach the carbon canister and the purge valves, causing fuel vapors not treated properly. With not properly treated fuel vapor, particular maneuvers, as example engine over revving at idle, could imply contact between fuel vapor and hot gasses; especially if combined with a not approved aftermarket exhaust system, this could lead to risk of fire.

For safety reasons it is therefore necessary to upgrade these vehicles. If you are not the only driver of this vehicle, please advise all other drivers and passengers of this important information.

2200 Ferdinand Porsche Drive
Herndon, VA 20171
USA
Telephone +1-866-681 6276
Fax +1-248-754-6599

Your vehicle is affected

What will Lamborghini do?

We will upgrade the EVAP system "Free of Charge". The repair could take up to 8 hours depending on your car configuration. Please contact your dealer and make arrangements to leave the car for up to 3 business days. We apologize for any inconvenience this recall may cause.

Please bring this letter and your Service Booklet with you when you visit the dealer, so that we can make all necessary entries.

We recommend that, until your car is fixed, that you avoid severe handling maneuvers or over-revving the engine at idle, and ensure that you do not over-fill your fuel tank. If, however, you notice a strong fuel smell, please contact your Lamborghini dealer to have your vehicle towed.

What if you are not the current owner of this vehicle?

You can update your vehicle ownership or contact information by filling out the enclosed document (Appendix A) and sending it to Lamborghini by following the detailed instructions present on it.

If you are a vehicle lessor, Federal Regulations require you to forward this notice to your lessee within ten days.

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What if you have questions or experience problems?

Should you need additional assistance, you may contact Lamborghini Customer Care via Email at CustomerCareAmerica@lamborghini.com or by calling 1-866-681-6276 from 9 AM to 5 PM Eastern Time, Monday through Friday.

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If your Lamborghini Dealer is unable to remedy the defect within a reasonable period of time, you may notify the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Ave., S.E., Washington, DC 20590, call the toll-free Vehicle Safety Hotline at 1-888-327-4236 (TTY: 1-800-424-9153), or go to http://www.safercar.gov.

We sincerely apologize for any inconvenience this recall may cause; however, be assured that Lamborghini is concerned about your safety.

Yours faithfully,

Alessandro Farmeschi
Chief Operating Officer
Automobili Lamborghini America LLC

Rene Sueltzner
Head of After Sales
Automobili Lamborghini America LLC

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Automobili Lamborghini America, LLC
2200 Ferdinand Porsche Drive
Herndon, VA 20171

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IMPORTANT SAFETY RECALL NOTICE

IMPORTANT SAFETY RECALL INFORMATION

U.S. Department of Transportation

Issued in Accordance With Federal Law

NHTSA

06752-121799

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EXHIBIT “3”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY, et al.

vs

SPEED VEGAS, LLC, et al.

Deposition Of:

ROBERT J. BUTLER, PH.D., P.E.

March 05, 2021

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702-805-4800
scheduling@envision.legal

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD,	Case No.: A-17-757614-C
Plaintiffs,	Dept. No.: XXVII

VIDEOCONFERENCE DEPOSITION OF

ROBERT J. BUTLER, Ph.D., P.E.

FRIDAY, MARCH 5, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5228

vs.)
)
SPEEDVEGAS, LLC, a foreign-limited liability company; VULCAN MOTOR CLUB, LLC dba WORLD CLASS DRIVING, a New Jersey limited liability company; SLOAN VENTURES 90, LLC, a Nevada limited liability company; MOTORSPORT SERVICES INTERNATIONAL, LLC, a North Carolina limited liability company; AARON FESSLER, an individual; the ESTATE OF CRAIG SHERWOOD and AUTOMOBILI LAMBORGHINI AMERICA, LLC, a foreign limited liability company; TOM MIZZONE, an individual SCOTT GRAGSON, an individual; PHIL FIORE aka FELICE FIORE, an individual; DOES I-X; and ROE ENTITIES I-X, inclusive,
)
)
Defendants.
)
)
AND ALL RELATED CLAIMS
)

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VIDEOCONFERENCE DEPOSITION OF ROBERT J. BUTLER, Ph.D., P.E., held on Friday, March 5, 2021, at 9:00 a.m., before Monice K. Campbell, Certified Court Reporter, in and for the State of Nevada.

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Also Present:

NATHALIE BEN-KELY

KORTNEY DRAGOO, EXHIBIT TECH

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Q. Did you review the Nevada OSHA report for this matter?

A. Yes.

Q. Did you note anything inaccurate about that report?

A. I don't remember.

Q. Did you rely on anything in that report?

A. I don't know about relying. I summarized their findings and noted the recall documents that were -- because that's primarily where the recall documents came from. That's what I remember about the OSHA file.

Q. This is the Lamborghini fuel system recall?

A. Yes.

Q. Do you have any opinion as to whether or not that recall had any bearing whatsoever on this case?

A. No. I don't have an opinion.

Q. Do you have an opinion as to how much fuel was in the Aventador's tank at the time of the crash?

A. I just have an observation of what -- some witnesses said it was half full.

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Q. Have you been to any other experienced track that had a similar instructor or coach brake system and tested that vehicle?

A. No. I've not seen any -- I think this is the only vehicle I've worked on that had the alternate brake.

Q. Okay. This vehicle had a -- I don't know if you know this, but I'll represent to you, in case you don't, that this vehicle, this Aventador, had a non-factory rear wing.

Were you aware of that?

A. Yes. I wrote that in the first report.

Q. Do you have any opinions as to whether or not the application or the installation of that rear wing played a part in this accident?

A. I don't believe it did.

Q. I'm just about done.

In your first report, Doctor, you make reference on page 4 -- let me see. Let me go to the exhibits here.

Is that Exhibit 3? I forget which one it is now.

EXHIBIT TECH: Yes, Counsel, it is Exhibit 3.

MR. TETREAULT: Okay. Thank you.

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stating the hypotheses I can't rule out.

Q. Are you going to ascribe some fault to Lamborghini?

A. I don't -- I don't give fault at all. I don't use the word "fault" -- certainly not in trial, nor in a report.

Q. You don't have any opinion that -- that there was a mechanical defect or a failure, mechanical failure of some type that resulted in this accident?

A. I don't have that opinion, no.

Q. Same thing with regards to SpeedVegas. Do you expect to be providing an opinion at trial that this accident was caused or contributed to based upon something that SpeedVegas did or did not do?

A. No. When you were saying "the accident," I'm thinking the accident sequence and it occurring.

You know, clearly, in my work regarding, you know, what failed and pushed into the fuel tank, that's -- I don't think any of the experts are disagreeing that that fuel tank breached. I think some of the experts are arguing over welds and so forth, but I won't be in that battle.

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Monice K. Campbell, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, ROBERT J. BUTLER, Ph.D., P.E., commencing on Friday, March 5, 2021, at 9:00 a.m.;

That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel or any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action; that a request ([X] has) been made to review the transcript.

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IN WITNESS THEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 11th day of March, 2021.

Monice K. Campbell, CCR No. 312

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EXHIBIT “4”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Deposition Of:

MARTYN THAKE

April 07, 2021

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envision
legal solutions

702-805-4800
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY; GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, Plaintiffs,	Case No. A-17-757614-C Dept. No. XXVII

REMOTE VIDEOTAPED ZOOM DEPOSITION OF: MARTYN THAKE

APRIL 7, 2021

9:09 A.M.

Reporter: Vickie Larsen, CCR/RMR
Utah License No. 109887-7801
Nevada License No. 966
Notary Public in and for the State of Utah

vs.)
)
SPEEDVEGAS, LLC, a foreign-)
limited liability company;)
VULCAN MOTOR CLUB, LLC, dba)
WORLD CLASS DRIVING, a New)
Jersey limited liability)
company; SLOAN VENTURES 90,)
LLC, a Nevada limited)
liability company; MOTORSPORT)
SERVICES INTERNATIONAL, LLC,)
a North Carolina limited)
liability company; AARON)
FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI)
AMERICA, LLC, a foreign)
limited liability company;)
TOM MIZZONE, an individual;)
SCOTT CRAGSON, an individual;)
PHIL FIORE aka FELICE FIORE,)
an individual; DOES I-X; and)
ROE ENTITIES I-X, inclusive,)
)
)
Defendants.)
)
)
AND ALL RELATED CLAIMS)
)

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APPEARANCES (All parties present remotely)

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Kmaxwell@rlattorneys.com

Also Present:

Shon Ben-Kely
Nathalie Ben-Kely-Scott
Kortney Dragoo, exhibit tech

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for the vehicle?

A. I have seen YouTube videos of -- of the cars catching fire, and it is my understanding from these YouTube videos that it's got something to do with the exhaust system and the fuel system and how the exhaust system was routed.

But I am not an engineer and I would not even consider making that a statement in fact, it's just what I've heard and what I've read and what I've seen.

Q. In this case are you going to be offering any opinions as an expert regarding the design of the 2015 Aventador involved in this accident?

A. No.

Q. In this case are you going to be offering any opinions regarding the manufacturer of the 2015 Aventador involved in this accident?

A. No.

Q. Are you going to be offering any opinions regarding modifications made to the Aventador in this case that were post-production modification?

A. No.

Q. Are you aware of any modifications to this car?

A. I understand the brake system was

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qualified to offer any accident reconstruction opinions in this case; is that right?

A. That's correct.

Q. As you sit here, you don't know the braking capacity of the Aventador; is that right?

A. Correct.

Q. You don't know the cornering capability of the Aventador; is that correct?

A. Correct.

Q. You have no opinions regarding the mechanical condition of the car at the time of the crash, meaning no negative opinions about that; is that correct?

A. That is correct.

Q. Do you know what ChassisSim is?

A. Say again.

Q. Are you familiar with a program -- program called ChassisSim?

A. I am not.

Q. What is an escape line?

A. An escape line?

Q. Are you familiar with that term?

A. I'm not.

Q. Again, some of these questions probably seem silly, but I just -- I'm helping narrow the case.

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Reporter's Certificate

State of Nevada)
County of Clark)

I, Vickie Larsen, Certified Shorthand Reporter and Registered Merit Reporter, in the State of Nevada, do hereby certify:

THAT the foregoing proceedings were taken before me at the time and place set forth herein; that the witness was duly sworn to tell the truth, the whole truth, and nothing but the truth; and that the proceedings were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

THAT the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of April, 2021.

Vickie Larsen, CCR/RMR
Utah License No. 109887-7801
Nevada License No. 966

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EXHIBIT “5”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Deposition Of:

ROBERT D. BANTA

March 25, 2021

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envision
legal solutions

702-805-4800
scheduling@envision.legal

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative widow and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, Plaintiffs,	Case No.: A-17-757614-C Dept. No.: XXVII

VIDEOCONFERENCE DEPOSITION OF ROBERT D. BANTA

March 25, 2021

REPORTED BY: KELLY REXROAT, CCR NO. 977

JOB NO. 5239

000597

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vs.)
)
SPEEDVEGAS, LLC, a foreign-limited)
liability company; VULCAN MOTOR)
CLUB, LLC d/b/a WORLD CLASS)
DRIVING, a New Jersey limited)
liability company; SLOAN VENTURES)
90, LLC, a Nevada limited liability)
company; MOTORSPORT SERVICES)
INTERNATIONAL, LLC, a North)
Carolina limited liability company;)
AARON FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI AMERICA,)
LLC, a foreign limited liability)
company; TOM MIZZONE, an)
individual; SCOTT GRAGSON, an)
individual; PHIL FIORE a/k/a FELICE)
FIORE, an individual; DOES I-X; and)
ROE ENTITIES I-X, inclusive,)
)
Defendants.)
)
AND ALL RELATED CLAIMS)
)

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VIDEOCONFERENCE DEPOSITION OF ROBERT D. BANTA on March 25, 2021, at 8:14 a.m., before Kelly Rexroat, Certified Court Reporter, in and for the State of Nevada.

REMOTE APPEARANCES

For the Plaintiff, The Estate of Gil Ben-Kely:

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For the Plaintiff, The Estate of Craig Sherwood:

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REMOTE APPEARANCES (Continued)

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For the Defendant Automobili Lamborghini America, LLC:

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For the Defendant Automobili Lamborghini America, LLC:

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For the Defendant/Cross-Claimant SpeedVegas, LLC, Tom Mizzone and Felice Fiore, Jr.:

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REMOTE APPEARANCES (Continued)

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Also present: Nathalie Ben-Kely
Shon Ben-Kely

Exhibit Technician: Jared Marez

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BY MR. HOSTETLER:
Q. Is it your opinion that the recall condition did not cause the crash?
MR. KRAMETBAUER: Same objection.
A. Yes, the fuel leak did not cause the crash.
BY MR. HOSTETLER:
Q. Is it your opinion, Mr. Banta, that the condition described in recall 17V-073 caused the post-collision fire?
A. I cannot determine that. I don't know.
Q. You have no opinion on that?
A. No, I have no opinion. I don't have sufficient information to draw that conclusion. What I'm saying is that the condition existed -- the fuel leak condition existed in this car prior to the crash and Lamborghini knew it and Lamborghini was effecting a recall for it, and it was an active fuel leak. It wasn't like it was a fuel leak that's just slowly dripping. This thing was transferring fuel from the tank to the ORVR system and out the vent into that space where the EVAP system is located.
Q. Let me go through a couple things and then we'll dive into your report, Mr. Banta. Did you find any evidence in your review of this file of driver incapacitation?

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A. I know Mark Arndt. I have not talked to him.
Q. Or Cam Cope?
A. No.
Q. You know Mr. Cope, don't you?
A. Oh, yes.
Q. Do you have any opinions about racetrack design with respect to SpeedVegas in any way, shape, or form?
A. I do not, no.
Q. And do you have any opinions about racetrack operation or safety?
A. No.
Q. Do you have any opinions about whether this 2015 Lamborghini Aventador was properly maintained?
A. No, I have not undertaken a study on that.
Q. Are you aware of any modifications to this 2015 Lamborghini Aventador?
A. I'm aware of what other experts said in their reports, but I haven't undertaken a study of that subject.
Q. What is your awareness from any source about the modifications to this vehicle?
A. I think I learned through the reports that there was a claim that this vehicle may have had

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Q. A gentleman by the name of Felice Fiore, and I'll represent to you he owned the vehicle -- he bought it about a year before the crash and he was leasing it to the SpeedVegas track, okay?

A. Yeah.

Q. And what I want to find out from you is, first, I take it you have no criticisms of Mr. Fiore's maintenance of the subject vehicle; is that correct?

A. Or lack of maintenance, yes. I don't know.

Q. Essentially you're not going to say he did anything wrong; is that correct?

A. That's correct.

Q. In fact, isn't it true, he did not receive a recall notice before the subject accident; is that true?

MR. KRAMETBAUER: Object to the form of the question.

A. I believe that to be correct.

BY MR. MURDOCK:

Q. So let me ask you --

MR. KRAMETBAUER: Sorry, guys.

BY MR. MURDOCK:

Q. Let me ask you in a different way. Do you have any information that Mr. Fiore was aware of a

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recall or a potential recall of this vehicle anytime before February 12, 2017?

A. No, I do not.

MR. KRAMETBAUER: Object to form. Sorry. I didn't mean to cut you off. Object to the form of the question. Keep going, J.D.

BY MR. MURDOCK:

Q. Do you have any criticisms of Mr. Fiore's conduct while he was an owner of the vehicle up until the date of the crash?

A. I do not, no.

Q. Do you have any criticisms of the fact that Mr. Fiore leased the vehicle to SpeedVegas?

A. No.

Q. You were asked a number of questions about the part 573 safety recall report, and I want to ask you, step back a little bit and walk me through how this process works. If a company submits a 573 safety recall report, what is the impetus for that? Why would a company do that?

A. Because the Code of Federal Regulations, 49 CFR 573 contains all of the instructions to auto manufacturers and NHTSA and some aftermarket equipment manufacturers about how to handle the recall process, and the investigation process

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Kelly Rexroat, a Certified Court Reporter licensed by the State of Nevada, do hereby certify: That I reported the deposition of ROBERT D. BANTA on March 25, 2021, at 8:14 a.m.

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes via computer-aided transcription into written form, and that the typewritten transcript is a complete, true, and accurate transcription of said shorthand notes; that review of the transcript was requested.

I further certify that I am not a relative, employee, or independent contractor of counsel or of any of the parties involved in the proceeding; nor a person financially interested in the proceeding; nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS HEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 8th day of April 2021.

Kelly R. Rexroat

KELLY REXROAT, CCR NO. 977

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EXHIBIT “6”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Deposition Of:

CAM COPE, B.S., CFII, CFEI, CVFR, CLI

March 17, 2021

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envision
legal solutions

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scheduling@envision.legal

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, Plaintiffs,	Case No.: A-17-757614-C Dept. No.: XXVII

VIDEOCONFERENCE DEPOSITION OF

CAM COPE, B.S., CFII, CFEI, CVFR, CLI

WEDNESDAY, MARCH 17, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5237

vs.)
)
SPEEDVEGAS, LLC, a foreign-)
limited liability company;)
VULCAN MOTOR CLUB, LLC dba)
WORLD CLASS DRIVING, a New)
Jersey limited liability)
company; SLOAN VENTURES 90,)
LLC, a Nevada limited)
liability company; MOTORSPORT)
SERVICES INTERNATIONAL, LLC,)
a North Carolina limited)
liability company; AARON)
FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI)
AMERICA, LLC, a foreign)
limited liability company;)
TOM MIZZONE, an individual)
SCOTT GRAGSON, an)
individual; PHIL FIORE aka)
FELICE FIORE, an individual;)
DOES I-X; and ROE ENTITIES)
I-X, inclusive,)
)
)
Defendants.)
_____)
)
AND ALL RELATED CLAIMS)
_____)

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VIDEOCONFERENCE DEPOSITION OF CAM COPE, BS, CFII, CFEI, CVFR, CLI, held on Wednesday, March 17, 2021, at 8:00 a.m., before Monice K. Campbell, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

For the Plaintiff, The Estate of Gil Ben-Kely:

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APPEARANCES:

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303.551.6661
jmurdock@talawfirm.com

Also Present:

SHON BEN-KELY

KORTNEY DRAGOO, EXHIBIT TECH

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A. It's a fire safety issue on the recall, yes.
Q. And do you have any information whether the conditions that needed to be present for the recall condition were present in the subject vehicle?
A. At the time of the crash?
Q. Yes, sir.
A. I don't think so.
Q. Is it your opinion that this recall had nothing to do with the crash?
A. I don't think the recall had anything to do with this crash and the release of gasoline from the fuel tank.
Q. Do you have any criticism of the manufacturer issuing a safety recall as they did in this case -- not in this case, but with this vehicle?
A. No, sir.
Q. As part of your analysis, Mr. Cope, did you form an opinion as to how much fuel was in the vehicle at the time of the crash?
A. We did an analysis of what the vehicle was designed to hold, and we received information from the racetrack that indicated that the fuel

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(Recess had.)

THE COURT REPORTER: We're back on the record at 3:54 p.m.

EXAMINATION

BY MR. MURDOCK:

Q. Mr. Cope, I do have some follow-up questions for you. I'll do my best not to cover any ground that has already been covered by Frank, but I do want to follow up on some questions.

So, first, is it my understanding that when the car was first transferred to SpeedVegas that there were no mechanical conditions with the vehicle that you believe had a -- caused or contributed to this accident; is that fair to say?

MR. SAMSON: Objection to form. Misstates testimony.

MS. ANDREEVSKI: Object to the form. Join.

THE WITNESS: I'm not familiar with any problems when it was delivered to SpeedVegas.

BY MR. MURDOCK:

Q. And you had mentioned -- I think it's actually in Exhibit 3 -- actually, I guess it's

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Exhibit 4, your report. You talk about that there is nothing with the brakes you felt caused or contributed to cause this accident; is that correct?

A. I don't think there's anything with the brakes that caused the accident.

Q. No criticism of them, in other words, right?

A. Correct.

Q. Including the pedal for the -- for Mr. Ben-Kely to operate? I know you had a criticism about the use of the wire, but at the end of the day, is that a causative factor in the accident, in your opinion?

A. No. I think Mr. Sherwood was braking the full time and that the brakes were performing and they're leaving marks on the roadway for 565 feet.

Q. Do you have any opinions about any -- strike that.

Do you know who owned the vehicle and who leased it to SpeedVegas?

A. I think it's listed in the one of the reports where the data indicates that it was purchased by somebody -- I think one of the other experts has got that information. But it was

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purchased by somebody. I don't know who it was. I don't remember. But it's been -- that information is available.

Q. If I represent to you that it was Phil Fiore, does that sound familiar?

A. Yes, sir.

Q. And do you have any opinions as to whether any modifications he made to the car caused or contributed to cause this accident?

A. No, not to my knowledge.

Q. One of the aspects he changed out is he made the steering wheel a carbon fiber steering wheel. He also changed some shifters in the vehicle.

You have no criticism of those modifications; is that correct?

A. No, sir.

Q. Meaning correct, no criticisms, right?

A. No, sir, no criticisms.

Q. You were asked a series of questions about the PC-Crash data results, the PC -- that you ran, the computer program?

A. Yes.

Q. A couple of overarching questions about that.

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Monice K. Campbell, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, CAM COPE, BS, CFII, CFEI, CVFR, CLI, commencing on Wednesday, March 17, 2021, at 8:00 A.M.;

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That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel or any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action; that a request

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([X] has) been made to review the transcript.

IN WITNESS THEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 23rd day of March, 2021.

Monice K. Campbell, CCR No. 312

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EXHIBIT “7”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Deposition Of:

MARK W. ARNDT

March 22, 2021

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, Plaintiffs,	Case No.: A-17-757614-C Dept. No.: XXVII

VIDEOCONFERENCE DEPOSITION OF

MARK W. ARNDT

MONDAY, MARCH 22, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5231

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vs.)
)
SPEEDVEGAS, LLC, a foreign-)
limited liability company;)
VULCAN MOTOR CLUB, LLC dba)
WORLD CLASS DRIVING, a New)
Jersey limited liability)
company; SLOAN VENTURES 90,)
LLC, a Nevada limited)
liability company; MOTORSPORT)
SERVICES INTERNATIONAL, LLC,)
a North Carolina limited)
liability company; AARON)
FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI)
AMERICA, LLC, a foreign)
limited liability company;)
TOM MIZZONE, an individual)
SCOTT GRAGSON, an)
individual; PHIL FIORE aka)
FELICE FIORE, an individual;)
DOES I-X; and ROE ENTITIES)
I-X, inclusive,)
)
)
Defendants.)
_____)
)
AND ALL RELATED CLAIMS)
_____)

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VIDEOCONFERENCE DEPOSITION OF MARK W. ARNDT, held on Monday, March 22, 2021, at 9:10 a.m., before Monice K. Campbell, Certified Court Reporter, in and for the State of Nevada.

APPEARANCES:

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For the Defendant Automobili Lamborghini America, LLC:

MUSICK, PEELER & GARRETT LLP
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For the Defendant Automobili Lamborghini America, LLC:

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For the Estate of Gil Ben-Kely:

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APPEARANCES:

For SpeedVegas, LLC, Tom Mizzone, and Felice Fiore, Jr.:

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Denver, Colorado 80202
303.551.6661
jmurdock@talawfirm.com

Also Present:

SHON BEN-KELY

JARED MAREZ, EXHIBIT TECH

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A. Well, then ask it.

I don't recall it, but I understand where your -- what you're asking about.

Q. Okay. Did you observe anything or take any -- reach any conclusions about whether there were any mechanical defects with the car that caused it to lose -- that was a factor in it being -- lost control at the time of the impact -- strike that. Let me ask it differently.

Based on your evaluation in this case, do you have any opinions that there were mechanical issues with the Lamborghini that was a factor in Mr. Sherwood not being able to maintain control of the vehicle as it came down the straightaway before it impacted the wall?

A. I don't have an opinion.

Q. Do you have any opinions that there were any conditions with the track -- the topography of the track, the surface material, the visual markers -- that was a cause or a contributing factor to Mr. Sherwood's operation of the car and leading up to the impact?

MR. SAMSON: Objection to the form. Asked and answered.

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Monice K. Campbell, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, Mark W. Arndt, commencing on Monday, March 22, 2021, at 9:10 a.m.;

That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel or any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action; that a request ([X] has not) been made to review the transcript.

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IN WITNESS THEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 1st day of April, 2021.

Monice K. Campbell, CCR No. 312

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EXHIBIT “8”

In the Matter Of:

A-17-757614-C

ESTATE OF BEN-KELY

vs

SPEED VEGAS, LLC, et al.

Videotaped Deposition Of:

JACK RIDENOUR, P.E.

April 02, 2021

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envision
legal solutions

702-805-4800
scheduling@envision.legal

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, as the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of Decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and heir of the Decedent GIL BEN-KELY, GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD,	Case No.: A-17-757614-C
Plaintiffs,	Dept. No.: XXVII

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VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF

JACK RIDENOUR, P.E.

FRIDAY, APRIL 2, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5222

vs.)
)
SPEEDVEGAS, LLC, a foreign-)
limited liability company;)
VULCAN MOTOR CLUB, LLC dba)
WORLD CLASS DRIVING, a New)
Jersey limited liability)
company; SLOAN VENTURES 90,)
LLC, a Nevada limited)
liability company; MOTORSPORT)
SERVICES INTERNATIONAL, LLC,)
a North Carolina limited)
liability company; AARON)
FESSLER, an individual; the)
ESTATE OF CRAIG SHERWOOD and)
AUTOMOBILI LAMBORGHINI)
AMERICA, LLC, a foreign)
limited liability company;)
TOM MIZZONE, an individual)
SCOTT GRAGSON, an)
individual; PHIL FIORE aka)
FELICE FIORE, an individual;)
DOES I-X; and ROE ENTITIES)
I-X, inclusive,)
)
)
Defendants.)
_____)
)
AND ALL RELATED CLAIMS)
_____)

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VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF JACK RIDENOUR, P.E., held via videoconference, on Friday, April 2, 2021, at 8:35 a.m., before Monice K. Campbell, Certified Court Reporter, in and for the State of Nevada.

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there any evidence, or are you aware of any evidence, of any mechanical problems with the Lamborghini that caused or contributed to cause the vehicle to lose control and impact the wall?

MR. SAMSON: Objection to the form.

THE WITNESS: No. I found no evidence of a vehicle malfunction -- a vehicle performance issue. It appears to be totally driver error causing the vehicle not to slow down to an appropriate speed at the end of the Speedway, end of the straightaway.

BY MR. MURDOCK:

Q. So you'd also agree, then, that none of the modifications, either post-manufacturing or aftermarket modifications, to the vehicle were a factor in causing the car to lose control or causing the car to have the initial impact.

Is that also correct?

MR. SAMSON: Objection.

THE WITNESS: That is correct. And also that the recall had no effect in this crash, either. I agree with Mr. Arndt on that. There is no indication that this recall was relevant or contributed or was a factor in this collision cause and/or the subsequent fire.

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The fire department applied almost 1,500 gallons of water in this incident to put out the fire. One fire engine was not sufficient with its water supply. There's no reason to believe that a SpeedVegas fire response on-site, shy of two engines -- complete, you know, big fire department fire engines -- would have had any effect.

Q. How about with respect to the maintenance of the vehicle, do you have any opinions as to whether -- well, strike that.

You testified before that there's no mechanical issues you identified in the vehicle that you believe were a factor in the accident.

Is that -- did I understand your testimony correctly?

A. Yes, that is correct.

Q. So I take it, then, you also agree that -- you have no criticism -- strike that.

Do you believe that SpeedVegas' maintenance of the vehicle was appropriate prior to and on the day of the accident?

A. I don't think there's anything that SpeedVegas did in maintenance that influenced this accident. It wasn't a factor.

Q. You were asked some questions about

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Monice K. Campbell, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of the witness, JACK RIDENOUR, P.E., commencing on Friday, April 2, 2021, at 8:35 a.m.;

That prior to being examined, the witness was, by me, duly sworn to testify to the truth. That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of said shorthand notes.

I further certify that I am not a relative or employee of an attorney or counsel or any of the parties, nor a relative or employee of an attorney or counsel involved in said action, nor a person financially interested in the action; that a request ([X] has) been made to review the transcript.

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IN WITNESS THEREOF, I have hereunto set my hand in my office in the County of Clark, State of Nevada, this 19th day of April, 2021.

Monice K. Campbell, CCR No. 312

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EXHIBIT “9”

234 Cal.App.3d 178, 285 Cal.Rptr. 728, Prod.Liab.Rep. (CCH) P 13,084

ALBERTO ORTIZ et al., Plaintiffs and Appellants,

v.

HPM CORPORATION et al., Defendants and Respondents.

No. B045104.
Court of Appeal, Second District, Division 4, California.
Sept. 20, 1991.

[Opinion certified for partial publication.*]

SUMMARY

A husband and wife brought an action for damages arising from injuries suffered by the husband when, in the course of his work, he became trapped in a plastic injection molding machine. The husband and wife were both employed at the same location, and the wife found the husband pressed between the cylinder and a stationary part of the molding machine, with the machine still running. He sustained serious injuries. Defendants were the manufacturer of the machine, the first owner of the machine, a used-machinery dealer that purchased the machine from the first owner, and plaintiffs' employer (the ultimate purchaser of the machine). The trial court granted nonsuits as to the wife's cause of action for negligent infliction of emotional distress and both plaintiffs' causes of action for strict products liability and negligence against the first owner of the machine. The jury returned a verdict finding negligence on the part of the manufacturer, but assessing comparative fault of 90 percent to the husband and 10 percent to the manufacturer. A different jury found damages in the amount of $1.5 million. (Superior Court of Los Angeles County, No. C 502847, Aurelio Munoz, Judge.)

The Court of Appeal reversed the judgment of nonsuit against the wife. For reasons stated in the unpublished portion of the opinion, the court also reversed the judgment of nonsuit in favor of the first owner of the machine on plaintiffs' cause of action for negligence, and struck the workers' compensation credit against the verdict in the amount of $52,000. In all other respects, the court affirmed the judgment. The court held that the rule that a bystander plaintiff, in order to recover for negligent infliction of emotional distress, must contemporaneously perceive the injury-producing event was not intended to deny recovery to a plaintiff who personally observes an ***179** injury-producing event in progress. Even if the wife could not "perceive" the full extent of the damage to her husband resulting from oxygen deprivation, she was clearly aware that his body was limp, that blood was running down his arm, and that he did not respond when spoken to. The court further held that, since the first owner of the machine had simply made a one-time sale of the machines to the used-machinery dealer when it closed its own operation, it was merely an occasional seller not subject to strict products liability. (Opinion by Epstein, J., with Woods (A. M.), P. J., and Cooper, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Negligence § 14--Elements of Actionable Negligence--Injury Without Impact; Emotional Distress--Bystander Liability--Observation of Injury-producing Event in Progress.
In an action by a husband and wife arising from injuries suffered by the husband when he became trapped in a plastic injection molding machine, the trial court erred in granting a nonsuit on the wife's cause of action for negligent infliction of emotional

000641

distress. The husband and wife were both employed at the same location, and the wife found the husband pressed between the cylinder and a stationary part of the molding machine, with the machine still running. The rule that a bystander plaintiff, in order to recover for negligent infliction of emotional distress, must contemporaneously perceive the injury-producing event was not intended to deny recovery to a plaintiff who personally observes an injury-producing event in progress. Instead, the rule excludes those plaintiffs who come upon the scene after the event. Even if the wife could not "perceive" the full extent of the damage to her husband resulting from oxygen deprivation, she was clearly aware that his body was limp, that blood was running down his arm, and that he did not respond when spoken to.

(2)
Dismissal and Nonsuit § 41--Nonsuit--Standard of Review.
Nonsuit may be granted only when there is no evidence to support a verdict in the plaintiff's favor. On appeal from a judgment of nonsuit, the reviewing court accepts the plaintiff's evidence, indulges in every favorable inference that can be drawn on behalf of the plaintiff, and disregards conflicting evidence. ***180**

(3)
Products Liability § 32--Strict Liability in Tort--Purpose of Doctrine.
A manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. The purpose of strict liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

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(4)
Products Liability § 38--Strict Liability in Tort--Persons Liable-- Manufacturers and Sellers.
Under the stream of commerce approach followed in this state in product liability cases, strict liability in tort is applied not only to manufacturers but to the various links in the commercial marketing chain, including retailers, wholesale-retail distributors, personal property lessors and bailors, and licensors of personalty. Although it is not necessary that the seller be engaged solely in the business of selling such products, strict liability is not applied to isolated transactions.

000642

[See **Cal.Jur.3d,** Products Liability, § 27.]

(5)
Products Liability § 38--Strict Liability in Tort--Persons Liable-- Manufacturers and Sellers--Previous Owner of Machine Causing Injury.
In an action by a husband and wife arising from injuries suffered by the husband when, in the course of his work, he became trapped in a plastic injection molding machine, the trial court properly granted a nonsuit as to plaintiffs' strict liability cause of action against a former owner of the machine, where the evidence established that the former owner was not in the business of selling such machines. It had made a one-time sale of the machines to a used-machinery dealer (plaintiffs' employer ultimately purchased it) when it closed its own operation, and thus it was merely an occasional seller not subject to strict products liability. Although the former owner had made some modifications in the machine while it owned it, these alterations fells far short of the virtual redesign and reconstruction that would supporting treating the owner as a manufacturer.

[When is person "engaged in the business" for purposes of doctrine of strict tort liability, note, 99 **A.L.R.3d** 671. See also 6 **Witkin,** Summary of Cal. Law (9th ed. 1988) Torts, § 1299.] ***181**

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000643

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EPSTEIN, J.

Alberto and Maria Lugo Ortiz appeal from the judgment entered in their action seeking damages for injuries suffered when Mr. Ortiz became trapped in a plastic injection molding machine. Mrs. Ortiz asserts error in the court's granting of a nonsuit on her cause of action for negligent infliction of emotional distress, and claims this error was caused in part by the bifurcation of the trial. Mr. Ortiz challenges the jury's determination that he was 90 percent at fault, asserting that the bifurcation of the trial and improper evidentiary rulings caused this result. Both appellants contend that the trial court erroneously granted a nonsuit in favor of the former owner of the machine, Celanese Corporation. Finally, Mr. Ortiz claims the court should not have granted a credit to defendant HPM Corporation for the workers' compensation benefits paid to Mr. Ortiz by his employer.

In the published portion of this opinion, we conclude that there was sufficient evidence that Mrs. Ortiz personally observed the injury-producing event for that factual determination to have been presented to the jury. We therefore reverse the order granting a nonsuit on her cause of action for negligent infliction of emotional distress. We also conclude that the trial court correctly granted a motion of nonsuit in favor of Celanese on the cause of action for strict liability. In the unpublished portion of the opinion, we find no abuse of discretion in the court's decision to bifurcate the trial, and we conclude that the court properly granted a nonsuit in favor of Celanese on the causes of action for breach of warranty, but find error in the granting of a nonsuit on the cause of action for negligence. We further conclude that HPM should not have received a credit for the workers' compensation benefits paid to Mr. Ortiz.

Factual and Procedural Summary

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Alberto Ortiz and Maria Lugo Ortiz, husband and wife, both worked for Colonial Engineering. Mr. Ortiz was a foreman in the production department, ***182** responsible for production and for keeping the plastic injection molding machines running. Mrs. Ortiz was a machine operator.

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On November 6, 1983, Mr. and Mrs. Ortiz took a morning meal break together at work. Mr. Ortiz then returned to work. Mrs. Ortiz followed about five minutes later. She noticed that machine No. 11 had stopped working, and went to machine No. 12, where Mr. Ortiz was working, to tell him to fix it. Mrs. Ortiz approached machine No. 12, told Mr. Ortiz that machine No. 11 was not running, and started to walk away. When he did not answer her, Mrs. Ortiz went back to machine No. 12 to see what was going on. She bent down to the machine and saw that Mr. Ortiz was inside the mold area of machine No. 12, pressed between the cylinder and a stationary part of the machine; the machine was still running. Blood was dripping down his arm and his body was limp. Mrs. Ortiz yelled hysterically and summoned help. John Matlock, a maintenance mechanic, freed Mr. Ortiz from the machine and administered cardiopulmonary resuscitation to him. Mr. Ortiz sustained serious injuries in this accident.

Mr. Ortiz brought this action seeking damages for personal injury based on theories of negligence, breach of express and implied warranty and strict liability. Mrs. Ortiz sued for negligent infliction of emotional distress. Named defendants included HPM Corporation, the manufacturer of the machine; Celanese Plastics Company, a division of Celanese Corporation, the original purchaser and user of the machine; KM Industrial Machinery Company, a dealer in used machinery which had purchased the machine from Celanese Corporation; and Colonial Engineering, Mr. Ortiz's employer and the ultimate purchaser of the machine.

Colonial Engineering settled with the plaintiffs and was dismissed from the action prior to the start of trial. On motion of Celanese Corporation, joined by HPM and KM Industrial, and over appellants' objection, the trial was bifurcated. Liability was to be tried first, with the damages phase to follow, if necessary. At the conclusion of plaintiffs' case, the court granted motions for nonsuit brought by Celanese Corporation and KM Industrial. The Supreme Court decision in *Thing v. La Chusa* (1989) 48 Cal.3d 644 [257 Cal.Rptr. 865, 771 P.2d 814], was filed during the trial, establishing strict requirements for bystander recovery on the theory of negligent infliction of emotional distress. Based on its reading of that decision, the trial court granted HPM's motion for nonsuit as to Mrs. Ortiz.

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The jury returned a verdict on the first phase of the trial, finding negligence on the part of HPM Corporation, but assessing comparative fault of 90 percent to plaintiff Mr. Ortiz and 10 percent to HPM Corporation. The issue of damages was tried to a different jury, resulting in a finding of damages in ***183** the amount of $1.5 million. Judgment was entered against HPM for $150,000, less $69,500 in credits for prior settlements, including $52,000 in workers' compensation benefits. Mr. and Mrs. Ortiz appeal.

Discussion

I *Nonsuit as to Maria Lugo Ortiz*

(1a) Maria Lugo Ortiz asserts error in the court's granting of nonsuit against her on her claim for negligent infliction of emotional distress. She argues that there was circumstantial evidence from which a jury could have determined that she observed the injury-producing event while it was occurring, and so satisfied the requirements of *Thing v. La Chusa, supra,* 48 Cal.3d 644. We conclude that her claim has merit.

(2) "Nonsuit may be granted only when there is no evidence to support a verdict in plaintiff's favor. [Citation.] On appeal from a judgment of nonsuit, we accept plaintiff's evidence, indulge in every favorable inference that can be drawn on behalf of plaintiff, and disregard conflicting evidence. [Citation.]" (*Harris v. Smith* (1984) 157 Cal.App.3d 100, 104 [203 Cal.Rptr. 541].)

(1b) The right of a "bystander" to recover damages for negligent infliction of emotional distress was first recognized in *Dillon v. Legg* (1968) 68 Cal.2d 728 [69 Cal.Rptr. 72, 441 P.2d 912]. *Dillon* held that as in other negligence cases, liability exists only where defendant owes a duty to the plaintiff. (*Id.* at p. 740.) "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis." (*Id.* at p. 740.) The court declined to define that obligation, choosing instead to provide guidelines to aid courts in determining reasonable foreseeability of the harm in each case. (*Ibid.*) Courts were instructed to "take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." (*Id.* at pp. 740-741.) ***184**

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The case-by-case application of the *Dillon* guidelines produced widely inconsistent rulings in the lower courts, and finally, in *Thing v. La Chusa, supra,* the Supreme Court sought to resolve the uncertainties which had long troubled courts and litigants as to the right of a "bystander" to recover for emotional distress caused by knowledge of an injury to a third person. After tracing the evolution of this theory of recovery, the court concluded that "a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances." (48 Cal.3d at pp. 667- 668, fns. omitted.)

The court explained the basis for the requirement of contemporaneous observation, the factor at issue in this case: "The impact of personally observing the injury-producing event in most, although concededly not all, cases distinguishes the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury. Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recover for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences." (48 Cal.3d at p. 666.)

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The evidence at trial was that Mrs. Ortiz discovered her husband trapped in the plastic injection molding machine. The air cylinder was pressing across his chest, pinning him against the stationary platen of the machine. His head was caught in a downward position just on the other side of the cylinder. The machine was still running at that time; its pressure system was on, and it was exerting pressure on Mr. Ortiz, particularly across his chest. Mr. Ortiz was in that condition, being pressed by the machine, when Mrs. Ortiz saw him. Mrs. Ortiz was the individual who summoned help.

In order to free Mr. Ortiz from the machine, maintenance mechanic John Matlock went to the back of the machine and shifted the cylinder so the machine could be opened manually. Mr. Ortiz was released from the machine and his body fell onto the chute.

While Mr. Ortiz was trapped in the machine, his skin was extremely discolored and he did not appear to be breathing at all. His body was limp and blood was flowing from his left arm. This evidence supports the ***185** inference that Mr. Ortiz was being deprived of oxygen during the time his wife saw him pressed in the machine.

This case is clearly distinguishable from the situation in *Thing,* where the mother was told by her daughter that her son had been hit by a car. Mrs. Thing rushed to the scene, where she saw her son, bloody and unconscious. She did not contemporaneously observe the injury-producing event. She learned about it from another person. By the time she arrived, the event was over and only the consequences were observable. (48 Cal.3d at p. 669.)

In a footnote in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159 [216 Cal.Rptr. 661, 703 P.2d 1], quoted with approval in *Thing,* the court explained why contemporaneous observation of an accident merits different treatment: "[A] distinction between distress caused by personal observation of the injury and by hearing of the tragedy from another is justified because compensation should be limited to abnormal life experiences which cause emotional distress. While receiving news that a loved one has been injured or has died may cause emotional distress, it is the type of experience for which in a general way one is prepared, an experience which is common. By contrast few persons are forced to witness the death or injury of a loved one or to suddenly come upon the scene without warning in situations where tortious conduct is involved. In the present case, for example, while it is common to visit a loved one in a hospital and to be distressed by the loved one's pain and suffering, it is highly uncommon to witness the apparent neglect of the patient's immediate medical needs by medical personnel." (*Id.* at p. 165, fn. 6.)

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In this case, as in *Ochoa,* the injury-producing event continued for a period of time, and the plaintiff personally observed the event while it still was occurring. We do not believe that the bright line drawn in *Thing v. La Chusa* was intended to deny recovery to a plaintiff who personally observes an injury-producing event in progress. The limitation, instead, excludes those plaintiffs who come upon the scene *after* the event, and whose observation is solely of the consequences of the occurrence. (See, e.g., *Hathaway v. Superior Court* (1980) 112 Cal.App.3d 728 [169 Cal.Rptr. 435], where recovery was denied to parents who came upon their child one minute after he received an electrical charge, since they observed only the dreadful consequences of the accident, not the accident itself; and *Parsons v. Superior Court* (1978) 81 Cal.App.3d 506 [146 Cal.Rptr. 495, 5 A.L.R.4th 826], where recovery was denied to a mother and father who, while driving in the same direction as their daughters, came upon the wreckage of their daughters' car "before the dust had settled" and found their mangled bodies, already dead or dying.) ***186**

Respondent HPM argues that if oxygen deprivation is the permanent injury suffered by Mr. Ortiz, it could not be perceived and therefore does not meet the requirement of *Thing* that the witnesses to the injury-causing event must be aware that it is causing injury to the victim. (*Thing v. La Chusa, supra,* 48 Cal.3d at p. 668.) In *Golstein v. Superior Court* (1990) 223 Cal.App.3d 1415 [273 Cal.Rptr. 270], upon which respondent relies, the victim's parents did not witness the injury-causing event, an excessive radiation dosage during cancer treatment, and also were unaware at the time that it was causing injury. The court interpreted *Thing v. La Chusa* as requiring that "plaintiffs experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury." (*Golstein v. Superior Court, supra,* 223 Cal.App.3d at p. 1427.) Since the fatal dosage of radiation was not a visible injury at the time of its occurrence, and since the parents were unaware of its injurious nature at the time it occurred, the court held that the parents could not proceed on a bystander theory for negligent infliction of emotional distress.

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Unlike the parents in *Golstein,* Mrs. Ortiz saw the occurrence which caused her husband injury, and she was fully aware that he was being injured. Even if she could not "perceive" the full extent of the damage resulting from oxygen deprivation, she was clearly aware that his body was limp, that blood was running down his arm, and that he did not respond when she spoke to him.

This evidence would have justified a jury in finding that the injury-producing event was still occurring at the time Mrs. Ortiz discovered Mr. Ortiz trapped in the machine, and that she was then aware that it was causing injury to him, so as to meet the contemporaneous observation requirement for a claim of negligent infliction of emotional distress. The trial court therefore erred in granting a nonsuit on Mrs. Ortiz's cause of action for negligent infliction of emotional distress.

II *Bifurcation of Trial**

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III *Nonsuit as to Celanese*

Appellants assert that the court erred in granting a nonsuit in favor of Celanese as to the claims for strict products liability, breach of express and implied warranty, and negligence. We consider these claims in that order.

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(3) It is settled in California that "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62 [27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049].) "The purpose of strict liability is to 'insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.' [Citations.]" (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 251 [259 Cal.Rptr. 311].) (4) Under the stream of commerce approach followed in California, "strict liability in tort has been applied not only to manufacturers but to the various links in the commercial marketing chain" including retailers, wholesale-retail distributors, personal property lessors and bailors, and licensors of personalty. (*Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 459 [213 Cal.Rptr. 213, 698 P.2d 116].)

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As explained in the Restatement Second of Torts, the rule of strict liability "applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. ... [¶] The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. ... This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like." (Rest.2d Torts, § 402A, com. f.)

While our Supreme Court has diverged from the Restatement Second of Torts as to some aspects of strict liability, it has expressed agreement with comment f of section 402A, by holding that strict liability does not apply to isolated transactions, but rather to sellers "found to be in the business of manufacturing or retailing." (*Price v. Shell Oil Co.* (1970) 2 Cal.3d 245, 254 [85 Cal.Rptr. 178, 466 P.2d 722].) ***188**

(5) Celanese established at trial that it was not "in the business of selling" plastic injection molding machines. It successfully asserted that its one-time sale of the machines when it closed its Santa Ana operation rendered it merely an "occasional seller," not subject to strict products liability. Support for this position is found in *Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890]. In that case, Paper Mate Manufacturing Company purchased a plastic injection molding press from a manufacturer and used it in its operations. Paper Mate later sold the press to Olympic Plastics Company. Olympic's employee, Balido, was injured by the press and sued her employer, the manufacturer, and the intermediate owner, Paper Mate. The court upheld the granting of a nonsuit in favor of Paper Mate on the strict liability claim: "On strict liability, there was

nothing to suggest that Paper Mate was a conduit for the production or distribution of [the manufacturer's] presses. Paper Mate was no more than a one-time 'occasional seller' who does not become subject to strict liability for manufacturing or design defects." (*Id.* at pp. 639-640; disapproved on other grounds in *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121 [104 Cal.Rptr. 433, 501 P.2d 1153], as explained in *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 476 [128 Cal.Rptr. 545].)

A similar conclusion, that an intermediate owner of equipment was not "in the business of selling equipment" for purposes of strict liability, was reached in *Daniels v. McKay Machine Co.* (7th Cir. 1979) 607 F.2d 771. In that case, the evidence established that Dow Chemical Company installed a piece of equipment known as a hot shear in its manufacturing plant, and modified it three times during a sixteen-year period of use. Dow leased and later sold its plant and equipment, including the hot shear machine, to another corporation, Conalco. One of Conalco's employees was injured while using the hot shear machine. On appeal, the court affirmed summary judgment in favor of Dow on the employee's cause of action for strict products liability. The evidence established that Dow was not in the business of manufacturing or selling hot shears, and that the sale of the hot shear line "was a one-time isolated sale of manufacturing equipment which had been installed on Dow's premises, which sale was included in the sale of Dow's entire manufacturing facility at said location." Since Dow was not "in the business of selling" the equipment, its one-time, isolated lease or sale of the equipment did not subject it to strict liability. (*Id.* at pp. 775- 776; see also *Bruce v. Martin-Marietta Corp.* (10th Cir. 1976) 544 F.2d 442, 448-449.)

Santiago v. E.W. Bliss Div. (1985) 201 N.J.Super. 205 [492 A.2d 1089, 1097-1099] contains a thorough treatment of the question of when an intermediate seller of used equipment is "in the business of selling" for purposes of strict liability. The court held that "the disposal of a product such ***189** as, in this case, a punch press, by a consumer after 23 years of use, does not constitute the consumer as being in the 'business of selling' as a manufacturer, seller, distributor, retailer or supplier subject to strict liability pursuant to *Restatement, supra,* § 402A(1). Rather, such a seller of a second-hand product is merely an 'occasional seller' of an isolated sale of discarded equipment and not engaged in the activity of selling the product as part of its business." (*Id.* at p. 1100.)

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In this case, too, the evidence showed that the intermediate seller, Celanese, used the plastic injection molding machines in its own operation for several years, and then engaged in a one-time sale of this used equipment at the time it shut down its southern California operating facility. There was no evidence demonstrating that Celanese was "in the business of selling" plastic injection molding machines.

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Appellants argue, however, that Celanese made extensive modifications to the machines and should therefore be considered a remanufacturer subject to strict liability. A seller of used goods who makes extensive modifications to a product prior to sale has been considered "tantamount to a manufacturer" subject to strict liability. (*Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 838 [115 Cal.Rptr. 685].) *Green* involved an extreme situation, where the intermediate owner rebuilt and completely changed a crane, and ultimately sold it with a warranty that it was in "like new" condition. The trial court's detailed findings as to the owner's total refabrication of the crane, unchallenged on that appeal, justified its decision to consider that particular owner as a manufacturer.

The evidence at trial in this case was that when it purchased the machine from HPM, Celanese specified certain modifications to the original design and specified that it be capable of utilizing particular dies; that it modified the front safety gate guarding the mold area, moving it outward from the center of the machine, thereby increasing the unguarded area surrounding the machine; that it further modified the safety gate so that the distance from the floor to the bottom of the gate was three inches greater than the original distance; and that it changed the rear safety gate as well. Celanese made these modifications in order to accommodate its particular large dies. This evidence falls far short of the virtual redesign and reconstruction of the crane in *Green* which supported treating the intermediate owner as a manufacturer.

More relevant are the cases considering whether an employer should be subjected to strict liability under the dual capacity doctrine when an employee is injured on a machine created by the employer for use in its own ***190** plant.[2] For example, in *Shook v. Jacuzzi* (1976) 59 Cal.App.3d 978 [129 Cal.Rptr. 496], two employees were injured while operating a machine used by the employer in its manufacture of wheels. Both received workers' compensation benefits, but also sought to recover in a

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civil action for strict liability, alleging that the machine was defectively designed and manufactured by the employer and a third party. The court held that the employer was not liable on a products theory, since it had created the machine exclusively for its own use in its own plant and premises, and did not sell the machine or place it in the stream of commerce. "Rather, it was but an occasional or casual manufacturer, and thus not subject to strict liability [citations]. Its design and construction of this machine was but auxiliary to its principal manufacturing operation." (*Id.* at p. 981.)

In *Douglas v. E. & J. Gallo Winery* (1977) 69 Cal.App.3d 103 [137 Cal.Rptr. 797], the court held the employer subject to strict liability on a dual capacity theory where the product which caused the employee's injury was one the employer also manufactured and sold to the public. The holding was expressly limited "to a defendant who engages in manufacturing for sale to the general public. A single or occasional disconnected act does not constitute engaging in such manufacturing. ... The proper standard for determining whether a defendant is engaged in manufacturing so as to make applicable the manufacturers' liability imposed hereunder is the exercise of judgment on a case by case basis to decide if the manufacturing by the particular defendant is such as to justify the conclusion that it is part and parcel of an activity which occupies the effort, attention and time of the defendant for the purpose of possible profit on a continuing basis." (*Id.* at p. 113.)

Indulging every favorable inference on behalf of appellants, as we are required to do in light of the nonsuit posture of the case (*Harris v. Smith, supra,* 157 Cal.App.3d 100, 104), we find no substantial evidence that Celanese was engaged "in the business of" manufacturing plastic injection machines or the dies used with them.[3] At best, the evidence showed that Celanese was an occasional or casual manufacturer, and as such was not subject to strict liability. (See ***191** *Shook v. Jacuzzi, supra,* 59 Cal.App.3d 978, 981.) The nonsuit was properly granted as to the strict liability cause of action against Celanese.

III B-IV[*]

. . . . . .

Disposition

The judgment of nonsuit against Mrs. Ortiz is reversed, the judgment of nonsuit in favor of Celanese on the cause of action for negligence is reversed, and the credit against the verdict in the amount of $52,000 is stricken from the judgment. In all other respects, the judgment is affirmed. Appellants are to recover their costs on appeal.

Woods (A. M.), P. J., and Cooper, J.,[†] concurred.
Respondents' petition for review by the Supreme Court was denied December 12, 1991. ***192**

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III B and C, and IV.

* Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council.

* See footnote, *ante,* page 178.

2 The Supreme Court has recognized the need for consistency between application of general products liability law and application of the dual capacity doctrine against an employer: "By interpreting the workers' compensation law in harmony with product liability doctrine, a manufacturer will not escape liability to its employees for defective products where there would be liability to any other injured person." (*Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268, 278 [179 Cal.Rptr. 30, 637 P.2d 266].)

3 Even if appellants had been able to establish that Celanese made the dies, such manufacture for its own use in its own plant would not have placed it "in the business of" manufacturing for sale to the public. (See *Williams v. State Compensation Ins. Fund* (1975) 50 Cal.App.3d 116, 120 [123 Cal.Rptr. 812].)

* See footnote, *ante,* page 178.

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† Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council.

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EXHIBIT “10”

54 Or.App. 886
Court of Appeals of Oregon.

Joann LANCASTER, Plaintiff-Appellant,
v.
W. A. HARTZELL & ASSOCIATES, INC., and Huggy Bear's Cupboards, Inc., both Oregon corporations, Defendants-Respondents.
W. A. HARTZELL & ASSOCIATES, INC., and Huggy Bear's Cupboards, Inc., both Oregon corporations, Third Party Plaintiffs-Respondents,
v.
RELIANCE UNIVERSAL, INC., an Oregon Corporation, Third Party Defendant-Respondent.

No. A7709-13079; CA 17049.
|
Argued and Submitted July 22, 1981.
|
Decided Nov. 23, 1981.
|
Reconsideration Denied Jan. 14, 1982.

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Synopsis

Purchaser filed action for personal injuries against seller and manufacturer of wood stain seeking damages for injuries arising out of her use of wood stain she obtained from seller. The Circuit Court, Multnomah County, John C. Beatty, Jr., J., entered judgment in favor of defendant, and purchaser appealed. The Court of Appeals, Van Hoomissen, J., held that: (1) trial court did not err in instructing jury to effect that defendant would not be strictly liable if it had not sold stain in ordinary course of business, and (2) court sufficiently covered defendants' duty when it instructed jury that warning information had to be visible, noticeable, and in clear and legible English.

Affirmed.

Attorneys and Law Firms

***887** ****151** Dana Taylor, Portland, argued the cause for appellant. With him on the briefs was Howard R. Hedrick, Portland.

Mildred J. Carmack, Portland, argued the cause for respondent W. A. Hartzell & Associates, Inc. With her on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Opinion

****152** VAN HOOMISSEN, Justice.

Plaintiff filed this action for personal injuries against defendants Reliance Universal, Inc. (Reliance), Huggy Bear's Cupboards, Inc. (Huggy Bear), and W. A. Hartzell & Associates, Inc. (Hartzell), arising out of her use of a wood stain she obtained from Hartzell. The stain, manufactured by Reliance, was sold to Huggy Bear, which in turn sold it to Hartzell. Plaintiff sought to impose liability on all three defendants on theories of strict liability and negligence. The trial court directed a verdict in favor of Reliance, and plaintiff has not assigned that ruling as error. A judgment subsequently was entered in favor of the other two

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defendants pursuant to a special verdict which found that neither defendant had sold the stain in the ordinary course of business and that neither defendant had been negligent. Plaintiff appeals. We affirm.

The issues are: (1) did defendants Huggy Bear and Hartzell plead and prove that they had not sold the stain in the ordinary course of business; (2) assuming the provisions of the Oregon's Hazardous Substances Act applied, did the trial court properly instruct the jury on defendants' obligations under that Act; and (3) did the trial court err in failing to instruct that statutory negligence constituted negligence in and of itself when the jury was instructed that statutory negligence consists of a violation of the applicable statute?

Huggy Bear manufactured prefinished wood cabinets which were sold exclusively by Hartzell. Hartzell sold kitchen and bathroom cabinets wholesale and dealt through building contractors. Neither defendant sold cabinets or wood stain to the general public.

Plaintiff originally contacted Hartzell's employee Davis. When plaintiff met Davis at Hartzell's place of business, stain was not discussed; plaintiff only wanted to purchase cabinets. Plaintiff handed Davis her business card and told him she was in business with Engler, a building contractor. Plaintiff said she and Engler had some joint building ventures and that she desired to obtain wholesale prices for cabinets. Davis confirmed that Engler was a building contractor, and the cabinets ordered by plaintiff were invoiced to Engler.

***890** Plaintiff subsequently inquired of Hartzell about obtaining a small quantity of wood stain to match the stain on the cabinets. Hartzell obtained some stain from Huggy Bear and invoiced it to Engler. The stain was an industrial product, not available to the general public. Huggy Bear used that particular stain because it was highly volatile and fast drying, features characteristic of an industrial stain.

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When plaintiff arrived at Hartzell's to pick up the stain, she was taken to Huggy Bear's place of business and a gallon of stain was delivered to her there by a Huggy Bear employee. Plaintiff objected to the size of the container. Although she testified the label was unreadable, she did not ask for any instructions or information about the stain. The accident occurred when plaintiff later reached into an ashtray to extinguish a smouldering cigarette while wearing gloves that were wet with the stain. The gloves ignited, and she sustained injuries.

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Plaintiff first assigns as error the court's instruction that the principles of strict liability do not apply to isolated or incidental sales of goods.[1] Plaintiff contends that while a non-merchant defendant may raise the isolated sale defense by general denial, a merchant defendant must affirmatively plead the defense. We see no compelling reason to adopt such a rule.[2] ****153** Our law does not distinguish between sales by merchants and sales by non-merchants. Harris v. Northwest Natural Gas Company, 284 Or. 571, 576, 588 P.2d 18 (1978); Heaton v. Ford Motor Co., 248 Or. 467, 470, 435 P.2d 806 (1967). Rather, it focuses ***891** on whether the seller is engaged "in the business of selling such a product * * *."[3]

Although Oregon courts have not directly confronted the issue of what constitutes a sale outside the usual course of business, a number of other courts have. Generally, it has been held that even if a merchant sells a product, if he is not engaged in the business of selling that particular product in the normal course of business, strict liability may not be imposed. See, e.g., Siemen v. Alden, 34 Ill.App.3d 961, 963, 341 N.E.2d 713, 715 (1975). In Goetz v. Avildsen Tool & Machines, Inc., 82 Ill.App.3d 1054, 38 Ill.Dec. 324, 330, 403 N.E.2d 555, 561 (1980), the court, in affirming the finding that plaintiff had failed to state a cause of action in strict liability, explained:

> " * * * Count I fails to allege activity on the part of (defendant) indicating that (defendant) was involved in the business of manufacturing and selling the drill hopper machine. The allegation of such activity is necessary to establish (defendant's) second function as a manufacturer held to strict liability standards. A manufacturer must be in the business of selling the allegedly defective product to be held strictly liable in tort."

See also Gilbert v. Stone City Const. Co., 357 N.E.2d 738, 742 (Ind.App.1977).

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Plaintiff asserts that decisions such as Goetz do not represent the rule in Oregon and cites as support Fulbright v. Klamath Gas Co., 271 Or. 449, 533 P.2d 316 (1975). In Fulbright, defendants loaned a potato vine burner to plaintiff's employer as a means of promoting a sale of propane gas. The vine burner exploded, causing serious injury to plaintiff. The Supreme Court held defendants could be held strictly liable for plaintiff's injury. Fulbright, however, is inapposite to the present situation. Fulbright was decided primarily on two bases. First, the court analogized the mutually beneficial bailment of the vine burners to bailment for hire cases in which courts had applied strict ***892** liability principles. 271 Or. at 455-59. Second, the court reasoned that "the sale of the propane gas (could not) be logically separated from the loan of the vine burner in which the gas was to be used." 271 Or. at 459, 533 P.2d 316. Significantly, the Fulbright court limited the decision to its facts. 271 Or. at 459, 533 P.2d 316.

The case at issue is not analogous to bailment for hire cases, and the sale of the wood stain did not constitute an integral part of the sale of the cabinets. We conclude that the court did not err in instructing the jury on the issue.

Plaintiff also assigns as error the trial court's instruction on the application of the Oregon Hazardous Substances Act, ORS 453.005 et seq. Plaintiff contends the court instructed the jury the Act applies only when the substance may cause substantial personal injury as a result of any foreseeable use of the product. The trial court's instruction, however, did not contain the restrictive term only nor did it state that plaintiff was required to show she had sustained a substantial injury. Rather, in its instruction the court correctly used a portion of the statutory language defining "hazardous substance." ORS 453.005(7)(a). The court instructed:

> "Oregon law provides that containers of a hazardous substance which may ****154** cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, be properly labeled."

ORS 453.005(7)(a) defines a hazardous substance as:

> "Any substance which is toxic, * * * inflammable, combustible, * * * if such substance or mixtures of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use * * *." (Emphasis added.)

The court properly used the relevant language of the statute.

Plaintiff also complains that the trial court failed to advise the jury that the Hazardous Substances Act is a ***893** "home consumer law." Plaintiff did not request an instruction in those terms. Thus, the trial court did not err.[4]

Plaintiff argues that the trial court erred in omitting the following language from its instruction: " * * * (T)he label shall be of such construction and finish as to withstand reasonably foreseeable spillage through foreseeable use." The quoted language comes from OAR 333-16-005(4), which defines the words "prominently" and "conspicuously" for purposes of the Hazardous Substances Act. The court, however, did include in its instructions the most important portion of that definition: " 'Prominently' and 'conspicuously' means that under customary conditions of purchase, storage and use, the required information shall be visible, noticeable, and in clear and legible English. * * * "

No party contends that the label became illegible because of spillage after plaintiff obtained and used the stain container. The only theory upon which the jury could have found that defendants were negligent in failing to label the stain would have been that defendant Hartzell should have replaced the label before the sale, because the evidence indicates the label was unreadable at the time of sale. We find that the court sufficiently covered defendants' duty when it instructed the jury that the warning information had to be "visible, noticeable, and in clear and legible English."

The last issue we must address is whether the trial court erred when it refused to instruct the jury that a violation of a statute "constitutes negligence in and of itself." The Supreme Court resolved that issue in Carter v. Mote, 285 Or. 275, 590 P.2d 1214 (1979). As in Carter, the trial court here included the first sentence, but omitted the second sentence, of Uniform Jury Instruction No. 10.03. The Supreme Court's comments in Carter are instructive:

" * * * (W)e find that the court during its charge to the jury gave the first sentence of Uniform Jury Instruction No. 10.03 but omitted the second sentence. * * *

***894** "Plaintiff contends that the failure to give the second sentence constitutes reversible error. We disagree. First, we would note that the Uniform Jury Instructions do not have the force and effect of statute. There is no statutory requirement, that is to say, that such instructions be given in the form set forth in the book. We agree with plaintiff that the giving of the second sentence would make the instruction much clearer to the jury, but it does not follow that the failure to give the second sentence constitutes reversible error. The first sentence, which the court did give, does inform the jury that in addition to common-law negligence which the court had just defined for the jury there is a species of negligence called 'statutory negligence' and that that term refers to as violation of a statute regulating the driving of a motor vehicle and the duty of a pedestrian on the highway. The court did give to the jury the wording of the applicable statutes quoted in the first ****155** part of this opinion. The jury had before it, therefore, the applicable statutes together with the court's charge that there is a form of negligence known as 'statutory negligence' which consists of a violation of one of the pertinent statutes. * * * " 285 Or. at 291-92, 590 P.2d 1214. (Footnote omitted.)

Plaintiff attempts to distinguish Carter by arguing that it involved a statute defining a crosswalk and a statute on yielding the right of way to a pedestrian. Plaintiff contends that those statutes are more readily understood by the general public than administrative rules made pursuant to the Hazardous Substances Act. We disagree. The jurors here were instructed on defendants' duties under the Act. As in Carter, the jury had before it the applicable statutes, together with the court's charge that there is a form of negligence known as "statutory negligence." We think that constituted a sufficient basis for the jury to decide the issue of statutory negligence.[5]

Affirmed.

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All Citations

54 Or.App. 886, 637 P.2d 150

Footnotes

1 The errors claimed by plaintiff in her first, third, fourth, fifth, sixth, and ninth assignments of error could not have prejudiced the plaintiff, because the jury did not reach those issues relating to whether the wood stain was a defective product or to defenses based on plaintiff's conduct. These assigned errors were rendered moot when the jury determined that neither defendant was a seller engaged in the business of selling wood stain. A dispositive special finding by the jury makes harmless any error in instructing on issues which the jury did not have to consider. Payne v. McDonald, 270 Or. 576, 578-79, 528 P.2d 552 (1974).

2 Under Oregon pleading rules, evidence which controverts facts necessary to be proved by plaintiff may be shown under a general denial. Deering v. Alexander, 281 Or. 607, 613, 576 P.2d 8 (1978). Under Restatement (Second) of Torts s 402A, plaintiff had to prove that defendants were engaged in the business of selling wood stain. See n.3 infra. Defendants' general denial put that question in issue.

3 Restatement (Second) of Torts, s 402A(1)(a). Strictly speaking, s 402A does not control this case, because it was tried prior to its codification in ORS 30.920. We recognize, however, that the principles embodied in s 402A have been followed in Oregon since the Supreme Court decided Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967). Thus, in deciding whether the principles of strict liability apply to the isolated sale of goods, we look to s 402A(1)(a) and Comment f.

4 To warrant reversal, the trial court's ruling must be not only erroneous, but prejudicial. Scanlon v. Hartman, 282 Or. 505, 511, 579 P.2d 851 (1978). Because we find in favor of defendants on the issue of whether the court properly instructed the jury on defendants' duty under the Hazardous Substances Act, it is unnecessary to decide whether that Act applies to the present facts.

5 We note, however, that possible confusion can be avoided if a trial court uses the entire Uniform Jury Instruction No. 10.03.

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EXHIBIT “11”

812 So.2d 273
Supreme Court of Alabama.

Bruce McGRAW and Dellia McGraw
v.
The FURON COMPANY.

1991997.
|
May 18, 2001.
|
Rehearing Denied Aug. 31, 2001.

Synopsis
Worker in used-rubber plant, who was severely injured when his right hand and arm were drawn into a processing machine, brought products liability action against manufacturer, previous owner of the machine, and other defendants. The Circuit Court, Jefferson County, No. CV-95-3557, William A. Jackson, J., entered summary judgment in favor of previous owner. Following his settlement with other defendants, worker appealed from this summary judgment. The Supreme Court, Woodall, J., held that: (1) previous owner was only an occasional seller, and, thus, could not be liable under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) for injury to worker; (2) previous owner's contractual duty to provide adequate safety features for the machine was limited to the machine's use in its own system, and did not extend to a worker; and (3) previous owner was not liable for negligently failing to warn foreseeable users of the dangerous nature of the machine.

Affirmed.

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Attorneys and Law Firms

***274** C. Ellis Brazeal III and Tracy H. Beauchamp of Walston, Wells, Anderson & Bains, L.L.P., Birmingham, for appellants.

C. Jeffery Ash of Porterfield, Harper & Mills, P.A., Birmingham, for appellee.

Opinion

WOODALL, Justice.

The plaintiffs appeal from a summary judgment for the defendant, Furon Company ("Furon"). We affirm.

On March 16, 1995, Bruce McGraw was employed by Diamond Rubber Products Company ("Diamond") to operate various machines involved in the processing of used rubber at its Birmingham plant. One of the machines processed batches of rubber removed from a rubber mill, and was referred to as a batch-off machine. While McGraw was placing rubber onto the conveyor belt of the batch-off machine, his right hand and arm were drawn into the machine, resulting in severe injuries and, ultimately, the surgical amputation of his right hand.

On May 18, 1995, McGraw filed this action against the manufacturer of the batch-off machine and several other defendants.[1] On March 14, 1997, McGraw amended the complaint to add Furon and several additional defendants. Furon filed a motion for summary judgment on May 8, 1998, and a supplemental motion for summary ***275** judgment on March 2, 1999. On May 10, 1999, the trial court granted a summary judgment for Furon in a non-final order. The summary judgment became final on June

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7, 2000, when the remaining defendants were dismissed with prejudice pursuant to settlement agreements. McGraw appealed from the summary judgment for Furon.

I.

The batch-off machine was manufactured by the Akron Standard Division of Eagle Picher, Inc., and was sold to Reeves Rubber Company ("Reeves") in 1978. Reeves installed and used the machine at its plant in San Clemente, California. Reeves merged with Furon, and Furon acknowledges that it assumed Reeves' liabilities. Furon closed the San Clemente plant, and the machine was moved to Furon's plant in Tulsa, Oklahoma.

The machine was never used at the Tulsa plant. Instead, it was placed in an outdoor scrap yard, along with other discarded equipment. In 1992, Gene Fulbright of Furon told R.J. Wheeler, who was also in the rubber business in Tulsa, that the discarded equipment could be taken by anyone who wanted to haul it away from the plant. Wheeler mentioned the batch-off machine to Mike Dyer, a used rubber equipment broker in Akron, Ohio, who had previously mentioned to Wheeler that he was looking for such a machine. Dyer wanted the machine, and Wheeler arranged to have it loaded onto a truck to be shipped to Dyer, along with other equipment that Wheeler was trading in from his own plant.

According to Wheeler, the batch-off machine was in "sad" condition, *i.e.,* it needed a lot of work, when it was shipped to Dyer. The machine was dirty and rusty and, according to Wheeler, "everything was hanging off of it."

Dyer unloaded the batch-off machine in Akron, made no repairs to it, and then shipped it to Diamond, McGraw's employer, to which Dyer had sold the machine and other equipment. Diamond connected the machine to the electrical service and began to use it, making no changes to the machine prior to McGraw's accident.

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II.

McGraw contends that the batch-off machine was defective, *i.e.,* unreasonably dangerous, because it was not adequately guarded and because a safety cable had been removed from it. His claims against Furon are based upon three theories: 1) the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"); 2) negligent failure to provide adequate safety features for the machine; and 3) negligent failure to warn foreseeable users of the dangerous nature of the machine. We will address each claim separately.

III.

McGraw's first claim is that Furon is liable under the AEMLD. "[T]he term 'manufacturer,' as it is used in regard to this cause of action, is applicable to every seller engaged in the business of selling products. *Caudle v. Patridge,* 566 So.2d 244 (Ala.1990)." *Huprich v. Bitto,* 667 So.2d 685, 687 (Ala.1995). " 'That requirement excludes isolated or occasional sellers' from liability. [*Baugh v. Bradford,* 529 So.2d 996, 999 (Ala.1988)]." *Rhodes v. Tractor & Equip. Co.,* 677 So.2d 194, 195 (Ala.1995).

Furon made a prima facie showing in support of its motion for summary judgment that it has never been in the business of selling batch-off machines or similar products. Therefore, the burden shifted to McGraw to present "substantial evidence" creating a genuine issue of material ***276** fact. *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794 (Ala.1989); § 12–21–12(d), Ala.Code 1975. Evidence is "substantial" if it is "of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact to be proved." *West v. Founders Life Assur. Co. of Florida,* 547 So.2d 870, 871 (Ala.1989). McGraw has not offered substantial evidence that Furon is engaged in the business of selling batch-off machines or similar products.

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Furon is involved in the processing of used rubber, and its plants contain various types of equipment, including batch-off machines. On an unspecified number of occasions, Furon has sold or otherwise disposed of used rubber machines which it no longer needed. While McGraw argues that this is substantial evidence that Furon is engaged in the business of selling used rubber machines, we disagree. The evidence, reviewed in a light most favorable to McGraw, indicates that Furon is, at most, only an occasional seller. Therefore, Furon cannot be liable under the AEMLD.

IV.

McGraw contends that Furon is liable to him for its negligent failure to provide adequate safety features for the machine. This contention is grounded upon the testimony of John Bordos, a design draftsman for the manufacturer, whose affidavit was offered by McGraw in opposition to Furon's motion for summary judgment. In the affidavit, Bordos stated, in pertinent part:

> "4. Because the machine was going to be used in *Reeves' existing system,* it was understood and agreed that Reeves would be responsible for the installation and safe guarding of the machine.... Reeves was in the best position to properly safe guard the machine because the machine was being installed by Reeves and *adapted by Reeves to its existing system.*"

(Clerk's Record, at 510.) (Emphasis supplied.)

While Reeves voluntarily assumed a contractual duty to provide adequate safety features for the machine, that duty was limited to the machine's use in its system. The duty did not extend to McGraw, who was injured after the batch-off machine was removed from that system and placed in an outdoor scrap yard.

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McGraw relies upon *Fuller v. Tractor & Equipment Co.,* 545 So.2d 757 (Ala.1989). In *Fuller,* the defendant contracted with Fuller's employer to install air conditioning on a front-end loader sold by the defendant to Fuller's employer. This Court held that the contract created a non-delegable duty on the part of the seller/defendant to ensure that the air conditioning was installed in a reasonable manner. That case is distinguishable from the case *sub judice.* Unlike the defendant in *Fuller,* Furon had no contractual relationship with McGraw's employer. Also, perhaps more importantly, Furon assumed a duty only to ensure that the machine was installed safely in its system, and did not assume a duty to ensure that it was installed safely in the system of another company with which it had no contact and of which it had no knowledge.

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V.

McGraw's final claim is that Furon negligently failed to warn foreseeable users of the dangerous nature of the batch-off machine. McGraw acknowledges that a duty to warn requires "a finding that Furon knew, or should have known, about the dangerous nature of the machine." Appellant's Brief, at 19. While it is undisputed that no one had been injured on the machine during the years that it was used at the Reeves plant, McGraw argues that a "letter from the manufacturer informing ***277** Furon that it was responsible for safety devices clearly put it on notice that the machine was defective." *Id.* That argument has no merit.

The subject of the December 13, 1978, letter from the manufacturer was electrical approval prints. The letter stated in pertinent part: "Stopping entire system including any special safety considerations are your responsibility." This letter was received prior to Reeves' installation of the batch-off machine into its existing system, and provides no evidence that Reeves or Furon knew or should have known of any dangerous condition of the machine.

McGraw argues that *Rutley v. Country Skillet Poultry Co.,* 549 So.2d 82 (Ala.1989), supports his contention that a duty to warn arose under the facts of this case. However, our holding in *Rutley* was limited to the plaintiffs' failure to state a non-AEMLD failure-to-warn claim in their amended complaint. Since a negligentfailure-to-warn claim had not been stated, this Court did not address the merits of such a claim under the facts of that case. However, unlike this case, the plaintiff in *Rutley* presented

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evidence of numerous prior injuries on the relevant machine and the defendant's actual knowledge of dangerous conditions presented by such machine.

VI.

The trial court did not err in granting Furon's summary-judgment motion. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

MOORE, C.J., and HOUSTON, LYONS, and JOHNSTONE, JJ., concur.

All Citations

812 So.2d 273, Prod.Liab.Rep. (CCH) P 161,001

Footnotes

1 Dellia McGraw, Bruce McGraw's wife, makes a claim for loss of consortium. Her derivative claim presents no separate issue on appeal.

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EXHIBIT “12”

545 So.2d 484
District Court of Appeal of Florida,
First District.

Brenda Gail LANE, Appellant,
v.
INTERNATIONAL PAPER COMPANY, Appellee.

No. 88–1863.
|
June 22, 1989.
|
Rehearing Denied July 20, 1989.

Synopsis

Paper mill employee brought suit against manufacturer of belt conveyor seeking damages for injuries sustained to her arm and shoulder when her arm became caught between the conveyor belt and tail pulley. The Circuit Court, Bay County, Don T. Sirmons, J., granted summary judgment in favor of manufacturer, and employee appealed. The District Court of Appeal, Thompson, J., held that manufacturer, which designed and constructed belt conveyor for its own use, could not be held liable under any products liability theory for reason that manufacturer was not in the business of manufacturing and selling belt conveyors.

Affirmed.

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Attorneys and Law Firms

***485** Steve Pajcic of Pajcic & Pajcic, P.A., Jacksonville, for appellant.

John M. Fite and Marcia Davis, of Barron, Redding, Hughes, Fite, Bassett & Fenson, P.A., Panama City, for appellee.

Opinion

THOMPSON, Judge.

This is an appeal of an order granting appellee's motion for summary judgment in a products liability case. We affirm.

On December 6, 1985, Lane was employed as a utility worker at the Southwest Forest Industries (SFI) paper mill. On that day she was attempting to clear paper scraps from a belt conveyor when her right arm was caught between the conveyor belt and tail pulley. As a result of the accident, she suffered permanent injuries to her arm and shoulder.

The belt conveyor was designed and constructed by International Paper Company's (IPC) in-house engineers and mechanics in 1964. It is located in the basement of the mill and is used to convey scrap paper and debris (broke) to a pulp machine which reprocesses it into paper. The broke conveyor has not been substantially altered or modified since it became operational in 1964. In 1979 the entire mill, including the broke conveyor, was sold to SFI.

On July 6, 1987 Lane filed a products liability complaint against IPC seeking damages for her injuries. The two count complaint sought recovery based on the theories of strict liability and negligence. Subsequently IPC moved for summary judgment on the ground that the action was barred by the 12 year Statute of Repose and on the ground that it owed no duty to use reasonable

care in designing and assembling the conveyor because it was not in the business of and gained no profits from distributing or selling broke conveyors through the stream of commerce.

July 12, 1988 the trial court granted final summary judgment as to both counts. The court held that the Statute of Repose did not apply because IPC manufactured the conveyor for its own use in 1964, and thus it did not constitute a delivery of a completed product. With respect to the complaint, the court held that although IPC manufactured the broke conveyor, Lane could not recover because IPC was not in the business of manufacturing and selling broke conveyors.

At the time the broke conveyor was designed and constructed IPC was in the business of producing, distributing and selling paper. The broke conveyor was constructed for use in its business of producing paper. It was not in the business of manufacturing, distributing, or selling broke conveyors. The only time the broke conveyor was sold prior to the accident was ***486** when the entire paper mill, including the broke conveyor, was sold to SFI in 1979. On any theory of products liability, whether it be for negligent design or manufacture of the product, for breach of implied warranty, or strict liability, in order for the manufacturer to be liable the injured party must show that the manufacturer is in the business of and gains profits from the distribution and sale of the product through the stream of commerce. The one time sale of the entire paper mill, of which the broke conveyor is only a small part, does not render IPC liable under any products liability theory. *Johnson v. Supro Corporation,* 498 So.2d 528 (Fla. 3d DCA 1986).

AFFIRMED.

SMITH, C.J., and MINER, J., concur.

All Citations

545 So.2d 484, 14 Fla. L. Weekly 1528, Prod.Liab.Rep. (CCH) P 12,181

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EXHIBIT “13”

34 Ill.App.3d 961
Appellate Court of Illinois, Second District, Second Division.

Roland SIEMEN, Plaintiff-Appellant,
v.
Verna R. ALDEN, Executor of the Estate of Lloyd G. Alden, Deceased, and L. G. Alden Machine Co., Defendants, Edwin Korleski, d/b/a Rock River Sawmill & Rock River Sawmills, Inc., a corp., Defendants-Appellees.

No. 74—103.
|
Dec. 23, 1975.

Synopsis

Buyer of multiripsaw sued seller to recover for injuries sustained as result of alleged defect. The Circuit Court, Winnebago County, Albert S. O.'Sullivan, J., rendered summary judgment for seller, and buyer appealed. The Appellate Court, Thomas J. Moran, J., held that buyer was not entitled to recovery under theory of strict liability; that sale of saw was 'isolated sale' and relieved seller from warranty of merchantability; and that buyer was not 'relying on seller's skill' in purchasing saw, and thus no implied warranty existed that saw would be fit for purpose buyer intended.

Affirmed.

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Attorneys and Law Firms

****714** ***962** Winston & Strawn, Edward J. Wendrow, R. Lawrence Storms and Stephen C. Bruner, Chicago, Miller & Hickey, Francis E. Hickey, Rockford, for plaintiff-appellant.

Williams, McCarthy, Kinley, Rudy & Picha, Edward R. Telling, III, Rockford, for defendants.

Opinion

THOMAS J. MORAN, Justice.

Plaintiff sued defendants to recover for injuries he sustained while operating an automated multi-rip saw. The three-count complaint sought recovery on theories of strict tort liability for sale of a defective product, breach of warranties, and negligence. Plaintiff proceeds on this appeal against defendant Korleski only. He appeals the order of the trial court granting defendant's motion for summary judgment on count one, alleging strict tort liability, and count two, alleging breach of warranties.

Plaintiff had owned and operated a sawmill since 1961. In 1968, he decided to purchase a multi-rip saw to increase his production of decking pallets. Upon the suggestion of a customer, plaintiff contacted Lloyd G. Alden, manufacturer of the saw in question. Alden informed plaintiff that a new saw could not be delivered in less than six months and suggested that plaintiff contact defendant Korleski, who owned two of the Alden saws. Plaintiff contacted defendant, who advised him that he indeed had two saws: the one he was currently using, and an older one purchased in 1962 which had not been used since 1965. Thereafter the parties met on two occasions at defendant's sawmill to discuss plaintiff's possible purchase of the older saw. At the first meeting, defendant demonstrated the newer saw, which operated in the same manner as the one plaintiff was considering purchasing. Plaintiff's son accompanied him to the second meeting, at which time plaintiff was first shown the saw in question. It was sitting,

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partially dismantled, in a corner and was covered with boards and sawdust. Defendant informed plaintiff that it was in operating condition and that plaintiff would have to supply and install saw blades, motor, shiv, belts, pulleys, and a sawdust removal apparatus in order to use it. Thereafter, the parties agreed on a purchase price of $2900.

Plaintiff's injury, which precipitated the instant suit, occurred in 1970 when a cant of wood exploded while being fed through the saw in question.

***963** On appeal, plaintiff contends that summary judgment in favor of defendant should be reversed because (1) defendant had a sufficient relationship to the saw which injured plaintiff to subject him to strict liability for sale of the defective product, and (2) under the Uniform Commercial Code, Sections 2—314 and 2—315 (Ill.Rev.Stat.1971, ch. 26, ss 2—314, 2—315), the defendant is liable for implied warranties.

In Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E.2d 182 (1965), the Illinois Supreme Court adopted the provisions of section 402A of the Restatement (Second) of Torts (1965), which states:

'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

****715** (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.'

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The plain language of the rule limits the application to a seller engaged in the business of selling the product which proved defective. This limitation is buttressed by the comment accompanying the rule in that the occasional seller is explicitly excluded. (Restatement (Second) of Torts, Comment I at 350. See 55 Ill.B.J. 906 (1967).) Plaintiff contends that because the sale of the saw occurred within the scope and conduct of defendant's business, and because defendant modified the machine to suit his own purposes, thereby creating the condition which led to plaintiff's injury, defendant had a relationship to the saw sufficient to subject him to strict liability. Plaintiff's argument fails to overcome the clear requirement of the rule that the seller be engaged in the business of selling the particular product. In the instant case, defendant asserted and plaintiff has not denied that defendant's only sale of a saw or sawmill equipment was to plaintiff. It is therefore apparent that the sale is an isolated transaction and does not come within the provisions of 402A. Balido v. Improved Machinery, Inc., 29 Cal.App.3d 633, 640, 105 Cal.Rptr. 890, 895 (1972).

***964** Plaintiff claims that under sections 2—314 and 2—315 of the Uniform Commercial Code (Ill.Rev.Stat.1971, ch. 26, ss 2—314, 2—315) a genuine issue of material fact exists as to defendant's liability arising from his saw-related knowledge and skill, and plaintiff's ultimate reliance upon this knowledge in purchasing the saw. Section 2—314 states in pertinent part:

'Unless excluded or modified * * * a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.'

Section 2—104(1) of the Uniform Commercial Code (Ill.Rev.Stat.1971, ch. 26, s 2—104(1),) defines a merchant as:

'(A) person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.'

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Defendant argues in his reply brief that plaintiff falls within the terms of section 2—104(1) and is therefore a merchant for purposes of section 2—314 by virtue of his 'holding himself out as having knowledge or skill.' This test, however, is not the standard for determining who is a merchant within the meaning of section 2—314. The Committee Notes to section 2—104 (S.H.A.1971, ch. 26, s 2—104, Committee Notes, 2, page 97) and to section 2—314 (S.H.A.1971, ch. 26, s 2—314, Committee Comments, 3, page 232) make it clear that the definition of merchant within 2—314 is a narrow one and that the warranty of merchantability is applicable only to a person who, in a professional status, sells the particular kind of goods giving rise to the warranty.
'A person making an isolated sale of goods is not a 'merchant' within the meaning of the scope of this section (2—314) and, thus, no warranty of merchantability would apply.' S.H.A.1971, ch. 26, s 2—314, Committee Comments, 3, page 232.

The record is clear that defendant is engaged in the sawmill business. The sale in the instant case was an isolated transaction and therefore did not come within the terms of section 2—314. ****716** Balido v. Improved Machinery, 29 Cal.App.3d 633, 640, 105 Cal.Rptr. 890, 895 (1972).

Plaintiff also claims that section 2—315 of the Uniform Commercial Code (Ill.Rev.Stat.1971, ch. 26, s 2—315) is applicable to the transaction in the instant case. The provision reads:
'Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and ***965** that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.'

This section imposes two requirements: first, that the seller know of the particular purpose for which the goods are required, and second, that the buyer rely on seller's skill or judgment in selecting the product. Here, the first requirement is met in that it is undisputed that defendant knew plaintiff's purpose for buying the saw: the making of pallets. As to the second requirement, plaintiff asserts that the following facts create a genuine issue of material fact as to plaintiff's reliance on seller's expertise: plaintiff neither owned nor had experience with a multi-rip saw whereas defendant had been operating one for about six years; Alden referred other customers to defendant for demonstrations of the saw; and defendant explained safety requirements for operating the saw and made recommendations on operating procedures. Impliedly, according to plaintiff, defendant had expertise due to his experience with the saw, and Alden considered defendant to have that expertise by its referral of other customers to defendant for demonstrations.

Defendant, on the other hand, asserts that there was no genuine issue of material fact indicating that plaintiff relied on defendant's skill or judgment in purchasing the saw, and supports this assertion with the following facts: plaintiff made his original inquiry to purchase an Alden-brand saw upon the advice and suggestion of a customer; after learning of the six-month delivery delay, plaintiff contacted defendant regarding the used Alden saw rather than investigating the purchase of a different brand; plaintiff's statement in his deposition, 'in my search for a gang-rip saw I was directed to Ed Korleski,' indicates that he had decided to purchase such a saw prior to any contact with defendant; and plaintiff brought his son to view the saw to see 'whether he thought (the saw) was what (they) needed,' suggesting that plaintiff relied on his son's judgment, not the defendant's.

It is not the facts that are in dispute, but the conclusion or inference to be drawn from them, I.e., do plaintiff's facts raise a question of his reliance on defendant's judgment in selecting the saw sufficient to submit the issue to the jury for determination. We find plaintiff's facts insufficient to raise a question of material fact as to his reliance upon defendant's skill and knowledge; no facts indicated that plaintiff relied on defendant's expertise in making his decision to purchase the saw. Rather, the uncontraverted facts establish that plaintiff had decided to purchase an Alden saw prior to his initial contact with defendant. We ***966** hold therefore that the trial court properly granted defendant's motion for summary judgment.

Judgment affirmed.

RECHENMACHER, P.J., and DIXON, J., concur.

All Citations

34 Ill.App.3d 961, 341 N.E.2d 713, 18 UCC Rep.Serv. 884

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EXHIBIT “14”

653 N.E.2d 140
Court of Appeals of Indiana.

Elmer CRIST and Patsy Crist, Appellants–Plaintiffs,

v.

K–MART CORPORATION, Appellee–Defendant.

No. 09A02–9412–CV–742.
|
July 24, 1995.
|
Rehearing Denied Sept. 12, 1995.

Synopsis

Truck driver who was injured while unloading shipment of boxes from distribution center for department store chain which were being delivered to individual store when box on which he was standing collapsed brought action against department store asserting claims based on negligence and Indiana Product Liability Act, and department store moved for summary judgment. The Cass Circuit Court, Donald E.C. Leicht, J., granted motion, and driver appealed. The Court of Appeals, Kirsch, J., held that: (1) department store was not "seller" of boxes used for shipment of goods to its individual stores for purposes of Products Liability Act, and (2) department store had no control over trailer which was owned by trucking company and owed no duty to driver to exercise reasonable care to assure safety in trailer.

Affirmed.

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Attorneys and Law Firms

***141** Robert Leirer Justice, Logansport, for appellant.

Lynne D. Lidke, Robert L. Browning, Scopelitis, Garvin, Light & Hanson, Indianapolis, for appellee.

OPINION

KIRSCH, Judge.

Elmer and Patsy Crist brought product liability and negligence claims against K–Mart Corporation for injuries Elmer suffered while delivering K–Mart merchandise. The trial court granted summary judgment to K–Mart on the product liability claims, and entered judgment for K–Mart following a bench trial on the negligence claims. The Crists appeal, raising the following issues:

I. Whether Crist was a user or consumer within the meaning of Indiana's Product Liability Act.

II. Whether K–Mart owed Crist a duty to protect him from harm.

We affirm.

FACTS AND PROCEDURAL HISTORY

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Elmer Crist is a truck driver who was employed by Hi–Way Dispatch, Inc. Hi–Way is an independent trucking company hired by K–Mart to transport K–Mart's merchandise from its distribution centers to its ***142** retail stores. Crist was assigned to transport K–Mart merchandise in a Hi–Way tractor-trailer from a distribution center in Ohio to various retail stores in West Virginia and Virginia. K–Mart's employees loaded the trailer at the distribution center and sealed it prior to transferring it to Crist for transportation to the retail stores. K–Mart employees would then break the seal when Crist arrived at a retail store. Once the seal was broken, Crist would unload the trailer. Hi–Way paid Crist additional compensation for the unloading.

On April 23, 1991, Crist was injured while unloading K–Mart's merchandise at one of the retail stores. Crist was standing on a box inside the trailer, attempting to reach another box located at the top of a stack, when the box upon which Crist was standing collapsed. Crist fell to the floor of the trailer and sustained injury.

The trial court granted K–Mart partial summary judgment on the Crist's product liability claims, finding that Crist was not a "user or consumer" as that term is defined in Indiana's Product Liability Act (the Act), and that K–Mart was entitled to judgment as a matter of law. Following a bench trial on the negligence claims, the court entered judgment in K–Mart's favor with specific findings of fact and conclusions of law.

DISCUSSION AND DECISION

I. PRODUCT LIABILITY

Crist argues that the trial court erred by determining that he was not a user or consumer of the box. The Act defines "user or consumer" as:

> "[A] purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."

IC 33–1–1.5–2 (1988 Ed.). The trial court determined that this definition, as interpreted in *Thiele v. Faygo Beverage, Inc.* (1986), Ind.App., 489 N.E.2d 562, *trans. denied,* warranted a summary judgment in K–Mart's favor.

When reviewing a decision on a summary judgment motion, this court applies the same standard as the trial court. *Selleck v. Westfield Ins. Co.* (1993), Ind.App., 617 N.E.2d 968, 970, *trans. denied.* Summary judgment shall be granted if the designated evidentiary matter demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Ind.Trial Rule 56(C); *Indiana Dep't of Pub. Welfare v. Murphy* (1993), Ind.App., 608 N.E.2d 1000, 1002. All facts and reasonable inferences must be construed against the moving party. *Sizemore v. Arnold* (1995), Ind.App., 647 N.E.2d 697, 699. We will affirm a summary judgment ruling on any legal theory which is consistent with the designated evidence in the record. *Wickey v. Sparks* (1994), Ind.App., 642 N.E.2d 262, 265, *trans. denied.*

In *Thiele,* the plaintiff, a Kroger employee, was injured while handling a case of Faygo soda pop. As Thiele was lifting the case, a piece of glass flew up and struck his eye. Thiele sued Faygo on a product liability theory, alleging that the design of the soda pop case, a cardboard box open on the top with plastic wrapped around it, was defective because it created a "trampoline effect" which caused the glass to fly off the plastic into Thiele's eye.

In affirming the entry of summary judgment in Faygo's favor, this court held that Thiele was not a "user or consumer" within the meaning of the Act. We determined that as a " 'middle man' employee at the distribution level of his employer's business who handled Faygo's product as it flowed through the stream of commerce toward the retail purchaser[,]" *id.,* 489 N.E.2d at 585, Thiele was not within the class of plaintiffs intended to be protected by the Act. *Id.* at 588. Rather, "[i]t appears the legislature intended 'user or consumer' to characterize those who might foreseeably be harmed by a product *at or after* the point of its retail sale or equivalent transaction with a member of the consuming public." *Id.* at 586 (emphasis in original; footnote omitted).

Ultimately, we determined that "our legislature has required a ***143** 'sale' to a 'first consuming entity' before the protection afforded by the Act is triggered[.]" *Id.* at 588.

Crist suggests that we revisit the analysis developed in *Thiele.* Indeed, as K–Mart conceded in oral argument, the principles espoused in *Thiele* are overly broad. Even the author of *Thiele,* Judge Miller, recognized the difficulty inherent in the result reached in that case when he discussed the amendment adding bystanders to the Act,[1] stating:

> "We note that the rationale behind extending the protection of strict liability theory to bystanders seems equally applicable to the employees of those entities in the distributive chain preceding the sale of a product to the 'first consuming entity.' Such an employee and such bystander are both foreseeably subject to harm caused by a defective product; neither is able to protect himself from such harm by choosing to deal with only reputably safe products. Thus, it would seem that a person in Robert Thiele's position in the chain of distribution of a product from manufacturer to consuming entity is as deserving of the protection of our Product Liability Act as any bystander."
> *Id.* While we believe that the same logical inconsistency continues to exist, we need not resolve it here because there is an alternative basis for affirming the summary judgment in favor of K–Mart. *See Wickey,* 642 N.E.2d at 265 (summary judgment ruling may be affirmed on any legal theory which is consistent with the designated evidence in the record).

The alternative basis is that K–Mart was not a seller of the boxes. K–Mart asserts that, if anything, it is an "occasional seller" of the boxes and is not engaged in the business of selling the boxes as the Act requires.[2] The Act defines a seller as "a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor." IC 33–1–1.5–2 (1988 Ed.). In *Lucas v. Dorsey Corp.* (1993), Ind.App., 609 N.E.2d 1191, *trans. denied,* we considered the question of who qualifies as a seller within the meaning of the Act. As stated in *Lucas:*

> "The Products Liability Statute applies to a seller of a defective product provided the seller is 'engaged in the business of selling such a product.' *See* IND.CODE § 33–1–1.5–3(a)(1). However, the occasional seller who is not engaged in that activity as part of his business is not liable in products liability. *Perfection Paint [& Color Co.] v. Konduris* [1970], 147 Ind.App. 106, 117, 258 N.E.2d 681, 686."
> *Id.,* 609 N.E.2d at 1202.

In support of its summary judgment motion, K–Mart designated the affidavit of its transportation manager, Joseph Lody. Mr. Lody averred that the trailer Crist was transporting was loaded at the distribution center with boxes containing K–Mart products. He stated that "The *boxes* were not for sale, either on a wholesale or retail basis; rather, it was the *products* within the boxes that were to be sold." *Record* at 35 (emphasis in original). Further, Mr. Lody stated that K–Mart was not in the business of selling the boxes; instead, it was in the business of selling the products contained in those boxes.

Mr. Lody's affidavit was sufficient to satisfy K–Mart's burden, as the moving party, of demonstrating "the absence of any genuine issue of fact as to a determinative issue[.]" *Jarboe v. Landmark Community Newspapers of Indiana, Inc.* (1994), Ind., 644 N.E.2d 118, 123. *See also Green v. Whiteco Industr., Inc.* (7th Cir.1994), 17 F.3d 199 (affidavit stating defendant was not a manufacturer, retailer or wholesaler of sound systems, but was in the business of outdoor ***144** advertising and ownership of hotels, restaurants, and entertainment centers, was sufficient in summary judgment proceedings to establish the absence of any credible evidence that defendant was a seller under Indiana's Product Liability Act). In other words, K–Mart established the absence of any genuine issue of fact as to whether it was a seller of the boxes.

It was then Crist's burden, as the non-moving party, to come forward with contrary evidence. *Jarboe*, 644 N.E.2d at 123. Crist failed in this burden. He asserted that a genuine issue of material fact existed as to whether K–Mart was a seller of the boxes because it would sell certain products in the original box, such as a case containing several cans of motor oil. K–Mart would also gratuitously provide boxes upon its customers' request for their use in transporting goods they had purchased. These types of sporadic and isolated dealings do not constitute the type of regular business activity necessary to classify K–Mart as a seller of boxes. *See Keen v. Dominick's Finer Foods, Inc.* (1977), 49 Ill.App.3d 480, 7 Ill.Dec. 341, 364 N.E.2d 502 (grocery store who

gratuitously provided shopping carts to its customers was not engaged in the business of selling shopping carts). *See generally* Donald M. Zupanec, Annotation, *When is Person 'Engaged in the Business' for Purposes of Doctrine of Strict Tort Liability,* 99 A.L.R.3d 671 (1980).

Crist also contends that K–Mart is a seller because it manufactured the boxes. Crist claims K–Mart's manufacturing activities consisted of assembling the boxes from flat, preformed cardboard provided by suppliers and placing K–Mart's name on the boxes. These boxes are known as "re-pack" boxes because various items of K–Mart merchandise are re-packed into these larger boxes for transportation to the retail stores. K–Mart merchandise was also transported in "case pack" boxes, so named because they contain K–Mart brand merchandise such as motor oil or detergent. Crist did not save the box from which he fell and did not present evidence at any stage of the trial court proceedings to establish whether the box was a re-pack box or a case pack box. Furthermore, Crist asserted in oral argument that the nature of the defect in the box, whether arising from design or manufacture, is immaterial because "It was K–Mart's box."[3]

For the first time in his reply brief, Crist asserts that K–Mart is a seller because it bailed the boxes to Crist. New arguments made in a reply brief are inappropriate and will not be considered on appeal. *Osmulski v. Becze* (1994), Ind.App., 638 N.E.2d 828, 836 n. 9.

Even if K–Mart is classified as a seller it still is not subject to liability under the Act. The Act provides that "[i]f an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter." IC 33–1–1.5–2.5(c) (1988 Ed.). The box's purpose was for the storage of retail merchandise and for ease in handling the merchandise as it made its way through the stream of commerce. The purpose of the box was not to serve as Crist's ladder during unloading. Such use was not reasonably expectable; K–Mart cannot be liable.

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II. NEGLIGENCE

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The Crists' negligence claims were tried to the bench. In rendering judgment for K–Mart, the court entered findings of fact and conclusions of law at K–Mart's request. When a party makes such a request, "the reviewing court cannot affirm the judgment on any legal basis; rather, this court must determine whether the trial court's findings are sufficient to support the judgment." *McDonald v. McDonald* (1994), Ind.App., 631 N.E.2d 522, 523. When reviewing the trial court's judgment, we employ a two-tiered standard: first, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Head v. Commissioner, Indiana Dep't of Envtl. Management* (1993), Ind.App., 626 N.E.2d 518, 524, *trans. denied.* ***145** "[T]he court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." T.R. 52(A). A judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions of law entered on the findings. *Head,* 626 N.E.2d at 524. Findings of fact are clearly erroneous "when the record lacks any evidence or reasonable inferences from the evidence to support them." *Id.*

One of Crist's theories for recovery is premises liability, i.e., K–Mart, as a "landowner," owed him, as an invitee, a duty to provide reasonably safe premises. The parties do not make an issue of whether the trailer constitutes a "premise" for purposes of determining any potential liability on K–Mart's part, *see Duffy v. Ben Dee, Inc.,* (1995), Ind.App., 651 N.E.2d 320 (premises liability principles not applicable to injuries occurring on bulldozer); nor do they dispute Crist's invitee status while working in the trailer. *See Burrell v. Meads* (1991), Ind., 569 N.E.2d 637, 639 ("the entrant's status on the land determines the duty that the landowner (or occupier) owes to him."); *Louisville Cement Co. v. Mumaw* (1983), Ind.App., 448 N.E.2d 1219, 1221 (employees of an independent contractor are invitees). Rather, the parties' dispute centers around the nature and extent of K–Mart's control over the trailer and its contents.

The issue of control is important in this context because:

> "In premises liability cases, we must determine who controlled the property upon which the injury occurred, because 'the thread through the law imposing liability upon occupancy of premises is control.' *Great Atlantic & Pacific Tea Co. v. Wilson* (1980), Ind.App., 408 N.E.2d 144, 150. The reasons the law imposes liability on the person who controls the property is [sic] self-evident: only the party who controls the land can remedy the hazardous conditions which exist upon it and only the party who controls the land has the right to prevent others from coming onto it. Thus, the party in control of the land has the exclusive ability to prevent injury from occurring."

City of Bloomington v. Kuruzovich (1987), Ind.App., 517 N.E.2d 408, 411, *trans. denied.*

In most premises liability cases, the owner and the possessor of the property are the same person or entity, so that there is no question as to who is responsible for the safe maintenance of the premises. *See* Joseph A. Page, *The Law of Premises Liability* 3 (2d ed.1988). Here, however, Hi–Way, not K–Mart, owned the trailer. Thus, the dispositive question is whether K–Mart exercised sufficient control over the trailer so as to be deemed the possessor. If K–Mart had control over the trailer, then it owes a duty to its invitees to exercise reasonable care for their protection while they are on the premises. *Burrell,* 569 N.E.2d at 639. If K–Mart had no control over the trailer, it owed Crist no duty.

In determining whether an entity is a possessor of land in the premises liability context, our supreme court has adopted the following definition:

> "A possessor of land is
>
> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of [the] land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

Risk v. Schilling (1991), Ind., 569 N.E.2d 646, 647 (quoting *Restatement (Second) of Torts* § 328E (1965)). Based upon this definition, one commentator has described possession as "a question of fact involving occupation and intent to control the particular area where the injury occurred." Page, *supra* (footnote omitted).

The trial court made the following findings regarding K–Mart's control over the trailer: Hi–Way owned the trailer; Crist was exclusively responsible for unloading the trailer; and none of K–Mart's employees assisted, supervised or controlled Crist in the unloading process. The trial court then concluded ***146** that K–Mart relinquished control over the interior of the trailer and its contents to Crist no later than when K–Mart employees broke the seal at the retail stores and turned the contents over for unloading.

The evidence supporting the trial court's findings regarding K–Mart's control over the trailer is Crist's testimony that Hi–Way owned the trailer. Crist also testified to his understanding that K–Mart employees were not permitted to enter the trailer, and, in fact, they did not enter the trailer on the day Crist's fall occurred. Crist explained that he was a Hi–Way employee, and that as such, he was exclusively responsible for unloading the trailer.

We find that this evidence supports the trial court's findings on the issue of control. We further find that the trial court's findings support its ultimate conclusion that K–Mart had no control over the trailer, and, thus, owed no duty to Crist. Accordingly, the trial court's judgment is not clearly erroneous.[4]

Crist also contends the trial court erroneously failed to apportion fault as required by Indiana's Comparative Fault Act. The Comparative Fault Act defines fault as "any act or omission that is negligent, willful, wanton, or reckless...." IC 34–4–33–2(a) (1988 Ed.). In the present case, K–Mart's "fault" is alleged to be negligence. Accordingly, Crist must prove: 1) a duty owed to him by K–Mart; 2) K–Mart's breach of that duty; and 3) injury to him proximately caused by K–Mart's breach. *See Wickey v.*

Sparks, 642 N.E.2d at 265. Absent a duty, however, there can be no breach, and, thus, no basis for recovery under a negligence theory. *Id.* If there is no negligence, there is no fault, and apportionment is not possible.

Crist appears to advance an additional theory, claiming that K–Mart was negligent in the manner in which it loaded the boxes onto the trailer at the distribution center. This contention was argued as a part of Crist's premises liability theory at trial, and was resolved by the trial court on the duty issue. Although Crist asserted at oral argument that the contention was a separate theory of liability, a party may not present an argument for the first time on appeal. *Williams v. City of Indianapolis* (1990), Ind.App., 558 N.E.2d 884, 887, *trans. denied.* Furthermore, there is nothing in the trial record to establish that K–Mart was negligent in this manner.

Affirmed.

FRIEDLANDER and BAKER, JJ., concur.

All Citations

653 N.E.2d 140, Prod.Liab.Rep. (CCH) P 14,290

Footnotes

1 Thiele was injured prior to a 1983 amendment to the Act which added bystanders to the class of users or consumers entitled to recover under the Act. 489 N.E.2d at 588. While Crist is subject to the amended definition, he was not a bystander. Thus, the amendment to the Act does not alter our analysis.

2 Crist claims it is impermissible for us to consider K–Mart's theory that it is not a seller because K–Mart originally pursued this theory but was unsuccessful in the trial court. We are not precluded from considering K–Mart's status as a seller because we may affirm a summary judgment on any theory supported by the evidence designated to the trial court. *Wickey,* 642 N.E.2d at 265.

3 In addition to classifying the defendant as a seller, a product liability claim must also establish the existence of a defective product. *See* IC 33–1–1.5–3 (1988 Ed.); *Stump v. Indiana Equipment Co.* (1992), Ind.App., 601 N.E.2d 398, 401, *trans. denied.* The parties did not designate any evidence to the trial court addressing the defect issue.

4 Crist also asserts that a duty arose out of an alleged lease arrangement between K–Mart and Hi–Way. Crist's argument is without evidentiary foundation and is otherwise unpersuasive.

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EXHIBIT “15”

609 N.E.2d 1191
Court of Appeals of Indiana,
First District.

Raymond L. LUCAS, Jr. and Theresa A. Lucas, Appellants–Plaintiffs,
v.
The DORSEY CORPORATION and Dorsey Trailers,
Inc., Delphi Body Works (Inc.), Appellees–Defendants,
Daro Ltd., and Gary W. Wilson and Darlene Wilson d/b/a Midwest Hydraulic, Defendants.

No. 72A01–9112–CV–405.
|
March 10, 1993.
|
Transfer Denied May 27, 1993.

Synopsis
Worker who was injured when auger from utility truck fell on top of him brought products liability suit against successor to manufacturer of digger derrick and installer. Summary judgment was granted in favor of defendants by the Scott Circuit Court, James Kloepfer, J., and worker appealed. The Court of Appeals, Ratliff, Senior Judge, held that: (1) failure of worker to update discovery responses did not require trial court to strike affidavit of worker's expert witness; (2) worker failed to show that installer breached any duty of care with regard to design, manufacture, assembly, or installation of derrick; (3) genuine issues of fact existed, precluding summary judgment in favor of installer on worker's negligent failure to warn in strict liability claims; and (4) genuine issues of fact existed, precluding summary judgment on worker's negligence and products liability claims against successor.

Affirmed in part, reversed in part, and remanded.

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Attorneys and Law Firms

***1194** David W. Stone, IV, Stone Law Offices & Legal Research, Anderson, David W. Paugh, Montgomery, Elsner & Pardieck, Seymour, for appellants-plaintiffs.

James D. Witchger, Rocap, Witchger & Threlkeld, Indianapolis, for appellee-defendant Delphi Body Works, Inc.

Cory Brundage, Bette J. Dodd, Ice Miller Donadio & Ryan, Indianapolis, for appellees-defendants The Dorsey Corp. and Dorsey Trailers, Inc.

RATLIFF, Senior Judge.

STATEMENT OF THE CASE

Raymond L. Lucas, Jr. and Theresa A. Lucas (collectively "Lucas") appeal from summary judgment entered in favor of The Dorsey Corporation and Dorsey Trailers, Inc. ("Dorsey") and Delphi Body Works (Inc.) ("Delphi") in an action for personal injury damages suffered as the result of a large auger falling upon Raymond. We affirm in part, reverse in part, and remand.

ISSUES

We restate the issues on appeal as follows:

1. Did the trial court abuse its discretion in failing to strike the affidavit of Lucas's expert witness, when Lucas failed to comply promptly with Ind.Trial Rule 26's duty to update discovery responses?

2. Did the trial court err in granting Delphi's motion for summary judgment concluding that there was no material issue of fact regarding Lucas's negligence or product liability claims?

3. Did the trial court err in granting Dorsey's motion for summary judgment and concluding that as a matter of law Dorsey neither owed Lucas a duty nor was a "seller" within the purview of Indiana's Products Liability Statute?[1]

FACTS

Indiana Bell solicited bids for the purchase of utility trucks equipped with digger derricks. Delphi's bid was ultimately successful. On January 11, 1979, Delphi ordered five (5) derricks manufactured by the Holan Division. The Holan derricks were to be placed on the utility trucks ordered by Indiana Bell. Daro Ltd. acquired the Holan Division from Ohio Brass Company. Daro, however, went into bankruptcy and Dorsey purchased the assets of the Holan Division in a sale which was approved by the bankruptcy court on July 12, 1979. Subsequently, Delphi received an invoice for the Holan derricks directing that payment be sent to Dorsey. Delphi received ***1195** the Holan derricks on September 28, 1979. The Holan derricks were installed on the utility trucks Indiana Bell ordered.

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Lucas was employed as a lineman with Indiana Bell. A lineman's duties include the installation of utility poles. To install a utility pole a lineman first digs the hole. After the hole is dug with the auger, which is located on the derrick unit, a cable is attached to the auger's neck. The operator of the derrick then rotates the auger which winds the cable around its neck and pulls the auger up to the boom. The boom contains two safety latches, a primary and secondary latch, to secure the auger once it is wound up against the cradle of the boom. The latches either can be opened automatically as the auger is raised into position or they can be opened manually. After the auger is in the boom cradle, the boom is lowered and a safety pin is inserted to secure the auger should the latches malfunction.

On July 17, 1984, Lucas and his partner were dispatched to an area outside Fairland, Indiana to repair a broken utility pole. They determined that further assistance was required and two more trucks were dispatched. A bucket truck was used to secure the telephone cables and the boom on Lucas's truck was used to remove the broken pole. The driver of the other utility truck, Cindy Page, used the Holan derrick to clean out the hole so a new pole could be installed. After the hole was dug out, Lucas was in the process of inserting a safety pin to complete securing the auger when the cable broke and the auger fell, striking him. Page was running the engine at about ⅓ of its speed when the cable broke. The Holan derrick was equipped with a dump valve as a safety feature which was to divert hydraulic fluid when the switch was activated by contact with the auger that was being raised. However, the dump valve has a slower reaction time when the engine is run at a higher rate of speed than when it is run at idle speed.

On November 26, 1985, Lucas filed a complaint, which was later amended. On January 14, 1991, Delphi filed its motion for summary judgment in which Dorsey joined. The trial court granted Dorsey's motion for summary judgment on September 23, 1991. On the same day the court set an additional hearing on Delphi's motion. On November 7, 1991, Delphi's summary judgment was also granted. Lucas filed a motion to correct error which was denied. Lucas now appeals. Dorsey and Delphi cross-appeal.

DISCUSSION AND DECISION

Issue One

Dorsey and Delphi contend the trial court abused its discretion in failing to strike the affidavit of Lucas's expert witness, John M. Howard, when Lucas failed to comply promptly with the duty to update discovery responses imposed by T.R. 26. Prior to dealing specifically with the facts relating to this issue, we make some general observations concerning appellate review of a trial court's rulings on discovery issues. A trial court has broad discretion in ruling on issues of discovery and we will interfere only where an abuse of discretion is apparent. *Keesling v. Baker & Daniels* (1991), Ind.App., 571 N.E.2d 562, 566–68, *trans. denied.* To obtain reversal of a trial court's discovery order, the moving party must show prejudice. *Coster v. Coster* (1983), Ind.App., 452 N.E.2d 397, 400. Review of an exercise of judicial discretion must be made in view of the facts and the circumstances of the case. *Fulton v. Van Slyke* (1983), Ind.App., 447 N.E.2d 628, 636, *trans. denied.* With these general principles in mind, we turn to a consideration of the underlying facts and circumstances relevant to this issue.

Lucas filed his initial complaint in September of 1985. In early 1986, Delphi attempted to obtain the name, address, opinions, and conclusions of any expert witnesses. On April 4, 1986, Lucas responded in interrogatory answers that he had no expert as of that time. Record at 1525. On May 1, 1986, Lucas hired Howard, a human factors expert, as a "consultant." Record at 1692. As early as September 12, 1986, Lucas's answers to Delphi's interrogatories identified John Howard as an expert. However, Lucas did not supply the ***1196** substance of Howard's expert opinion in these answers because Howard's evaluation of the vehicle was alleged to be continuing.

On March 8, 1990, Dorsey served three additional interrogatories on Lucas. One interrogatory specifically asked for Howard's expert opinion. From April to August of 1990, Lucas sought and obtained six enlargements of time to respond. Lucas finally provided Dorsey and Delphi with Howard's expert opinion in an affidavit twelve days prior to the consolidated hearing on the defendants' motions for summary judgment, held July 23, 1991.

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We indeed are appalled by the delay in responding to the legitimate discovery requests of Delphi and Dorsey. Lucas's only explanation for his recalcitrance is that, although Howard was employed by him in early 1986, he had not received Howard's conclusions. Lucas's answers to Delphi's interrogatories disclose that Howard examined the vehicle as early as 1986. Lucas's counsel explained that the nearly five year delay in providing Delphi and Dorsey with Howard's expert opinion was a result of counsel's own inability to get his expert "up to date" and himself "up to speed" in this case until after a motion for summary judgment had been filed. This is hardly the degree of diligence which the Trial Rules envision.

Discovery under our trial rules is designed to be self-executing with little, if any, supervision by the trial court. *Chrysler Corp. v. Reeves* (1980), Ind.App., 404 N.E.2d 1147, 1151, *trans. denied.* Delphi and Dorsey served Lucas with three sets of interrogatories regarding Lucas's expert witness before Lucas provided Delphi and Dorsey with Howard's opinions and conclusions. Neither repetitive interrogatories nor motions to compel are required where the trial rules impose an affirmative duty to supplement a discovery request and to provide the substance of an expert's testimony. Ind.Trial Rule 26(E)(1)(b); *State v. Kuespert* (1980) Ind.App., 411 N.E.2d 435, 437.

The duty seasonably to supplement a discovery response is absolute and is not predicated on a court order. *Lewis v. Darce Towing Co.* (W.D.La.1982), 94 F.R.D. 262, 266. It is a breach of a litigant's duty seasonably to supplement if the litigant postpones supplementing its response by not obtaining from its experts the information which is to be supplied in answer to interrogatories. *Ferrara v. Balistreri & DiMaio, Inc.* (D.Mass.1985), 105 F.R.D. 147, 150 (construing Fed.R.Civ.P. 26(e), which is virtually identical to Ind.Trial Rule 26(E)).

Given the foregoing pronouncements and considering what we view to be a serious lack of diligence on the part of Lucas's counsel, we nevertheless do not find reversible error. We note that rather than request a continuance to review the affidavit, Dorsey and Delphi moved to strike the affidavit. *See Marathon Petroleum Co. v. Colonial Motel Properties, Inc.* (1990),

Ind.App., 550 N.E.2d 778, 781; *see also City of Evansville v. Rieber* (1979), 179 Ind.App. 256, 261, 385 N.E.2d 217, 221–22 (failing to move for continuance waived objection that unlisted witness should not be allowed to testify). Moreover, no date for the conclusion of discovery had been set. Under these circumstances the trial court did not abuse its discretion when it denied Dorsey and Delphi's motion to strike the affidavit.

Although absence of a discovery deadline does not relieve a party of the duty of seasonably supplementing discovery responses,[2] such is a relevant factor in our appellate review particularly as it bears upon the question of abuse of discretion. Likewise, although there was no burden upon Dorsey and Delphi to seek court ordered compliance with Lucas's discovery duties, the fact they did not also is relevant to our decision.

Delphi's reliance on *Brown v. Terre Haute Regional Hospital* (1989), Ind.App., 537 N.E.2d 54, and ***1197** *Beird v. Figg & Muller Engineers, Inc.* (1987), Ind.App., 516 N.E.2d 1114, is misplaced. These cases concluded that there were no abuses of discretion in the trial courts' grants of motions to strike; this is far different from finding the trial court abused its discretion. *Brown,* 537 N.E.2d at 58; *Beird,* 516 N.E.2d at 1120–23. The mere fact that the trial court might not have abused its discretion if it had granted the motion to strike the affidavit does not necessarily mean that the denial of such a motion constitutes an abuse of discretion. *See Fulton,* 447 N.E.2d at 636 (fact that trial court would not have abused its discretion in granting Ind.Trial Rule 60(B) motion does not mean that denial of motion was abuse of discretion).

Further, neither Dorsey nor Delphi has articulated any specific prejudice resulting from the trial court's denial of their motion to strike Howard's affidavit because of the delay in providing it. General statements of prejudice because they were hampered in their ability to cross-examine or rebut Howard's theories, Dorsey's brief at 44, or in deposing other witnesses, Delphi's brief at 11, without more, are insufficient to establish a clear abuse of discretion by the trial court.

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In sum, while we do not condone the disregard for the rules of discovery exhibited by counsel for Lucas and by the apparent lack of diligence manifested in this case, we cannot say the trial court abused its discretion. When reviewing a trial court's ruling on a discovery matter, we reverse only for an abuse of discretion. *Hudgins v. McAtee* (1992) Ind.App., 596 N.E.2d 286, 289. Due to the fact-sensitive nature of such issues, discovery rulings are cloaked with a strong presumption of correctness on appeal. *Vibrometic Co. v. Xpert Automatic Systems Corp.* (1989) Ind.App., 540 N.E.2d 659, 661.

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Dorsey argues that the affidavit is inadmissible pursuant to Ind.Trial Rule 56(E). T.R. 56(E) provides that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testified to the matters therein." An expert's testimony is admissible if the expert has some special knowledge which would assist the trier of fact. *Cox v. American Aggregates, Corp.* (1991), Ind.App., 580 N.E.2d 679, 686, *trans. denied.* A trial court has broad discretion in determining an expert's qualifications and admitting opinion evidence. *Id.*

Here, Dorsey and Delphi do not contest Howard's qualifications as a human factors expert; rather, they focus on his opinion. In the affidavit Howard stated that after reviewing various affidavits, Indiana Bell's accident report, various documents, the operation manual, and viewing the auger and its control panel, it was his opinion that the users were not adequately instructed on safety procedures; were not adequately warned of the dangers of stowing the auger at greater than idle speed; and, the control panel for the auger did not have proper instructions on safe use or warnings. Record at 1692–95. Howard also expressed an opinion that the secondary latch and the hydraulic shutoff valve were not properly designed. *Id.* at 1695. Howard opined that these factors were a contributing cause of the accident. *Id.* Howard's testimony would be admissible in evidence; hence, the trial court did not abuse its discretion in denying the motion to strike the affidavit. *See Cox,* 580 N.E.2d at 686. Howard's use of the phrases "defective and dangerous" and "contributing causes," *see* Record at 1692 and 1695, does not necessitate the striking of the affidavit. Dorsey is also erroneous in its assertion that Howard's use of the word "fail safe design," *see* Record at 1695, attempts to make the defendants insurers of the product. Howard merely asserted his opinion of the design of the latch system from a human factors stand point. Dorsey and Delphi show no error.

Issue Two

When reviewing the propriety of a ruling on a motion for summary judgment, this court applies the same standard applicable to the trial court. *Houin v. Burger* (1992), Ind.App., 590 N.E.2d 593, 596, *trans. denied.* We must consider the pleadings and evidence sanctioned by Ind.Trial Rule 56(C) ***1198** without determining weight or credibility. *Id.* Only if such evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law should summary judgment be granted. *Id.* The movant bears the burden of proving the propriety of summary judgment, and all facts and inferences to be drawn therefrom are viewed favorably to the non-movant. *Id.* Summary judgment will be affirmed on appeal if it is sustainable on any theory or basis found in the evidentiary matter designated to the trial court. T.R. 56(C).

Lucas contends that the trial court erred in entering summary judgment in favor of Delphi. More specifically, Lucas argues that there are material issues of fact as to whether Delphi was negligent in the design, manufacturing, assembly, or installation of the derrick. A negligence action is rarely appropriate for summary judgment. *Jump v. Bank of Versailles* (1992), Ind.App., 586 N.E.2d 873, 875. In order to prevail in a negligence action, the plaintiff must establish that the defendant breached a duty owed to him which proximately caused the injury. *Rubin v. Johnson* (1990), Ind.App., 550 N.E.2d 324, 328–329, *trans. denied; Ogden Estate v. Decatur County Hospital* (1987), Ind.App., 509 N.E.2d 901, 902, *trans. denied.*

A duty of care exists when one party assumes such a duty, either gratuitously or voluntarily. *Plan–Tec, Inc. v. Wiggins* (1983), Ind.App., 443 N.E.2d 1212, 1219. The assumption of a duty creates a special relationship between the parties and a corresponding duty to act as a reasonably prudent person. *Id.* With regard to design, manufacture, assembly, or installation of the derrick, Delphi breached no duty of care. Delphi did not design and was not the manufacturer of the derrick. Although Delphi did install the derrick on to the utility truck and it is unclear whether Delphi assembled the derrick in any way, there were no inferences presented to draw a conclusion that installation or any possible assembly by Delphi was performed improperly.

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Lucas also contends that the trial court erred in granting summary judgment in favor of Delphi on his claims of negligent failure to warn and strict liability for selling an inherently dangerous product. Lucas's claim for negligence rests upon inadequate operating instructions and warnings of the dangers of stowing the auger. To succeed Lucas must establish 1) that Delphi supplied to Indiana Bell for use by its employee, a product with a concealed danger; 2) Delphi knew or had reason to know of the danger; 3) Delphi failed to adequately warn of the danger; and, 4) the failure to warn was a proximate cause of Lucas's injuries. *See Jarrell v. Monsanto Co.* (1988), Ind.App., 528 N.E.2d 1158, 1161, *trans. denied.* Delphi's task was to show the uncontroverted nonexistence of at least one of these elements. Delphi has failed.

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It is undisputed that Delphi supplied Indiana Bell with the derrick-equipped utility truck. Hence, we must determine if there was a concealed danger. Although Lucas stated that it was common knowledge that it was dangerous to step underneath the boom when the auger was being stowed, Lucas stated in his deposition that on the day of the incident the safety latch had closed and the auger had stopped turning when he reached for the safety pin which had been set on the back of the utility truck. Record at 1953, 1955, and 1958. Further, Lucas was not aware of any complaints regarding the safety latch. Record at 1927. Cindy Page stated in a report after the incident that Lucas reached for the safety pin "after the auger had reached the safety catch." Record at 2250. Page, however, stated in her deposition that she could not say for certain that the safety latch had closed and she opined that the dump valve, which stops the auger from spinning, was not working because if it had the cable would not have broken. Record at 2208 and 2239. The facts present permissible contrary inferences not amenable to summary judgment. A reasonable trier of fact might find either that Lucas should have perceived the danger or that as to him the danger was concealed. *See Jarrell,* 528 N.E.2d at 1162. There are also facts from which the trier of fact could infer that Delphi knew or should have ***1199** known of any danger. Lucas presented sufficient evidence to create a question as to whether Delphi had a duty to warn of danger.

If Delphi is found to have a duty to warn, it then must be determined if Delphi fulfilled its duty by adequately warning of the danger. The adequacy of warnings is usually a question for the trier of fact and therefore, inappropriate for summary judgment. *Id.* As we have previously stated:

" 'The warning should be of such intensity to cause a reasonable man to exercise for his own safety caution commensurate with the potential danger.' We must therefore consider the adequacy of the factual context, the adequacy of the manner in which that context is expressed, and the adequacy of the method of conveying these expressed facts."

Id. at 1162–63 (quoting *Ortho Pharmaceutical Corp. v. Chapman* (1979), 180 Ind.App. 33, 388 N.E.2d 541, *trans. denied*).

Here, the operating manual instructed on the proper method for stowing the auger. Record at 163. The directions included language which stated "*NOTE:* While stowing auger operate engine at *Idle Speed Only* !!!" Record at 163. Page testified that she was instructed on how to properly stow an auger while attending a two week course provided by Indiana Bell. Record at 2224–26. Page also testified that she learned by watching others that the operating speed of the auger when stowing should be slow; however, she did not know why. Record at 2167–68. Lucas's expert witness, Howard, filed an affidavit wherein he opined: the operating manual did not adequately instruct users in the proper and safe procedure for auger stow; the operating manual was not available on the vehicle; Lucas and Page never received any written instruction on how to operate the derrick; Lucas and Page did not know a manual existed; the manual did not adequately warn users of the dangers of stowing the auger at greater than idle speed, or in a non reverse direction; the procedure in the manual for stowing the auger does not indicate why it is important to operate the engine at idle speed only; the manual was void of language indicating potential injury; the control panel for the derrick should have been permanently labeled advising the user of the manual and the importance of reading it; the control panel for the auger should have had a warning to stow only at idle speed and the danger of failing to adhere to the warning; the control panel of the auger [derrick] should have a warning advising the user to stow the auger only by winding the auger in the reverse direction; the control panel for the auger [derrick], the rear of the utility truck, and the area in the vicinity of the safety latch should have a warning instructing persons not to go near the auger until both the primary and the secondary latches have been closed and secured. Record at 1692–95. Because a genuine issue of material fact exists as to the adequacy of the warnings and instructions, the trial court erred in granting summary judgment thereon.

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The final element of Lucas's negligence claim is proximate cause. A fundamental element of proximate cause "is that the injury or consequence of the wrongful act be of a class reasonably foreseeable at the time of the act." *Ortho,* 180 Ind.App. at 54, 388 N.E.2d at 555. The defendant's act need not be the sole proximate cause; many causes may influence a result. *Id.* Rather, the question is whether the wrongful act is one of the proximate causes rather than a remote cause. *Id.* Proximate cause is generally a question for the trier of fact. *Id.*

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Delphi argues that Howard's affidavit is insufficient to create a material question of fact as to whether any failure to properly instruct or warn of possible dangers was the proximate cause of Lucas's injuries. Delphi specifically points to language in the affidavit which states that in Howard's professional opinion as a human factors expert, "that the defects noted above [i.e., failure to adequately instruct and warn on the proper method for stowing the auger] were contributing causes of this accident and Mr. Lucas's injuries." Record at 1695. Howard's use of the words "contributing cause," rather than "proximate cause" is ***1200** not dispositive. Howard is an expert witness and it would be overly burdensome to require him to be cognizant of proper legal terminology. *Cf. Noblesville Casting Division of TRW v. Prince* (1982), Ind., 438 N.E.2d 722, 725–29 (expert medical witness not required to use exact words for his testimony to be admissible or to have probative value). Failure by Howard to use the proper legal term does not negate the proximate cause element of Lucas's claim.

Delphi further contends that the element of proximate cause[3] was negated by evidence that misuse and alteration caused the accident, rather than any negligence on its part. Delphi points to Page's deposition testimony that Indiana Bell employees would hit the latch with a hammer to support its contentions. Record at 2165, 2192, and 2226. Page, however, did not know over what period of time this happened. *See* Record at 2226. Further, Lucas stated that the latch was closed when he reached for the safety pin on the day he was struck by the auger. Record at 1955 and 1958. Gary Wilson, hired by Indiana Bell to repair its equipment, testified the secondary latch and the auger were bent. Record at 814–19. Although we agree with Delphi that a jury could infer that that alteration or repairs to the auger were the cause of the incident, it also could infer that a failure of the dump valve, that the auger was wound at greater than idle speed, or inadequate instructions and warnings were proximate causes. Ultimately we cannot say as a matter of law which of the various factors proximately caused Lucas's injuries. *See,*

e.g., Capasso v. Minster Machine Co. (3d Cir.1972), 532 F.2d 952, 954–55 (question of whether inadequate device installed by buyer was proximate cause is question for jury); *Finnegan v. Havir Manufacturing Corp.* (1972), 60 N.J. 413, 425, 290 A.2d 286, 292 (where punch press manufactured and sold in 1949 with no safety devices other than guard over flywheel, and which, as originally manufactured, was operated by foot pedal but which subsequently was modified by installation of electrical foot pedal device, it was question of fact as to whether substitution of foot pedal was such substantial change under Restatement, Torts Second § 402, as to relieve manufacturer of strict liability; also, question of fact whether alteration was intervening cause under negligence). We conclude that the trial court erred when it granted Delphi summary judgment upon Lucas's negligence claim. Similar considerations militate the same conclusion on Lucas's products liability claim.

Products liability actions in Indiana are governed by IND.CODE § 33–1–1.5–1 *et seq.* A supplier who places into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer is subject to liability for physical harm caused by that product if the user or consumer is within the class of people that the seller reasonably foresees and the product reaches the user without substantial change in its condition. *Jarrell,* 528 N.E.2d at 1165–66; *Ortho,* 180 Ind.App. at 37–38, 388 N.E.2d at 545. Under IND.CODE § 33–1–1.5–2.5, a product is defective if the seller fails to: "(1) properly package or label the product to give reasonable warnings of danger about the product; or (2) [g]ive reasonable complete instructions on proper use of the product when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the consumer." Delphi contends that it negated the essential element of proximate cause as to Lucas's products liability claim. As we have previously determined there are genuine issues of material fact regarding this element, the trial court thus also erred in granting summary judgment on this claim.

Issue Three

Dorsey contends that it owed no duty to Lucas and therefore the trial court correctly entered summary judgment in its favor. Lucas urges that there is a genuine issue of material fact as to whether Dorsey assumed a duty to provide adequate ***1201** warnings and instructions regarding the derrick's use. We agree with Lucas that the designated evidence is sufficient to present a jury question as to whether Dorsey assumed a duty. A duty of care arises when a party voluntarily or gratuitously assumes such a duty. *Phillips v. United Engineers* (1986), Ind.App., 500 N.E.2d 1265, 1269. The assumption of a duty creates a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person. *Id.* Whether a party has assumed a duty and the extent, if any, of such duty, are questions for the trier of fact. *Id.*

Here, the derrick was purchased by Delphi from Daro Corporation pursuant to a January 17, 1979 purchase order. The derrick was subsequently placed into production and manufactured by Daro sometime after January 1979. Daro went bankrupt and on July 14, 1979, Dorsey purchased the assets of the Holan Division of Daro which had manufactured the derrick. On August 18, 1979 the derrick in question was shipped to Delphi. In total, Dorsey shipped nine (9) derricks which had originally been ordered through Daro. Dorsey subsequently discontinued the derrick product line. Delphi received an invoice for the derricks it had ordered, dated September 25, 1979, directing payment be made to Dorsey. Delphi received the derrick at issue on September 28, 1979. Each page of the operating and instruction manual that accompanied the derricks bore Dorsey's name and address as did the warranties for all five of the derricks shipped to Delphi. *See* Record at 624, 632–722, and 1352–56. Dorsey's name also appears within the text of the manual. For example, the third page of the manual states: "Dorsey trailers, Holan Division will not accept responsibility for alterations or modifications to this equipment except through the expressed written consent of the Holan Engineering department." Record at 634. In Section IV of the manual the name Ohio Brass Company is struck out and Dorsey Trailers printed above it. Record at 658. From this evidence a jury could infer that Dorsey by sending out instruction manuals and warranties with its name and address appearing on each page assumed a duty of care to adequately warn and instruct users on the safe use of the derrick, more specifically stowing the auger.

As to Lucas's claim of negligent design or manufacturing, Dorsey argues that it neither designed nor manufactured the derrick, and therefore it had no duty to Lucas. A vendor that holds itself out as a manufacturer of a product and labels the product as such is held to the same standard of care in design, manufacture, and sale of the product as if it were in fact the manufacturer. *See Dudley Sports Company v. Schmitt* (1972) 151 Ind.App. 217, 224, 279 N.E.2d 266, 273, *trans. denied.* Arguably, a trier of fact could find that Dorsey by placing its name on the operating manual and warranty held itself out as the manufacturer

of the derrick. The fact that Dorsey and its predecessor, Daro, had an agreement whereby Dorsey was not to assume Daro's liabilities is not dispositive. *See Cyr v. B. Offen & Company Inc.* (1st Cir.1974), 501 F.2d 1145, 1152–54 (purchase agreement exonerating purchaser not determinative of third party rights); *cf. Vernon Fire & Casualty Insurance Co. v. Graham* (1975), 166 Ind.App. 509, 512, 336 N.E.2d 829, 832 (exculpatory provision in contract ineffective to exonerate persons from liability to one not party to agreement).

The evidence is sufficient to present a jury question as to whether Dorsey had a duty to Lucas. Further, Dorsey's contention that Lucas knew of the dangers of stowing the auger misses the mark, as it was Page, not Lucas, operating the derrick. Although Page stated that she knew that the derrick was to be stowed at slow speed, *see* Record at 2168, this does not necessarily equate with stowing the derrick at idle speed or that she "knew" of the dangers of failing to do so. Additionally, Lucas stated that the safety latch had closed at the time he reached for the safety pin. *See* Record at 1955 and 1958. Therefore, we reverse the trial court's grant of summary judgment as to both the claims of negligent warning and instruction, and negligent design.

***1202** Dorsey also contends that the trial court correctly granted summary judgment in its favor on Lucas's strict liability claim because it was not a "seller" of the derrick. The Products Liability Statute applies to a seller of a defective product provided the seller is "engaged in the business of selling such a product." *See* IND.CODE § 33–1–1.5–3(a)(1). However, the occasional seller who is not engaged in that activity as part of his business is not liable in products liability. *Perfection Paint v. Konduris* (1971), 147 Ind.App. 106, 117, 258 N.E.2d 681, 686. Thus, for example, the statute does not apply to a homemaker who sells a jar of jam or a person who sells his used car to his neighbor. Restatement Second of Torts § 402A, comment (f); *but cf. Hartman v. Opelika Machine & Welding Co.* (1982), Fla.App., 414 So.2d 1105, 1106–07, *petition denied,* 426 So.2d 27 (manufacturer of spin buggy used in textile manufacturing by employee who fell when handle broke engaged in business of selling product although buggy made to employer's specifications and sold only to single purchaser).

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Viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, as we must, the evidence presented demonstrates the existence of a genuine issue of material fact as to whether Dorsey was in fact engaged in the business of selling derricks. Dorsey points out that four of the derricks were returned, it scrapped the returned derricks rather than resell them, and that it discontinued the derrick product line upon purchasing Daro's assets, to support its contention that it was not a seller within the meaning of Indiana's Products Liability Statute. Nevertheless, we cannot say as a matter of law that the sale of only nine (9) derricks, four (4) of which were returned, as a matter of law negates a finding that Dorsey was a seller. Dorsey's reliance on *Sukljian v. Charles Ross and Son Co.* (1986), 69 N.Y.2d 89, 503 N.E.2d 1358, 511 N.Y.S.2d 821, as controlling is misplaced, as it is factually distinguishable. In *Sukljian,* a corporation sold a single machine that it had previously used in its own production for eleven (11) years, as surplus property. *Id.* at 95–97, 503 N.E.2d at 1361–62, 511 N.Y.S.2d at 823–25. The evidence, here, does present a jury question as to whether Dorsey was a "seller" within the purview of the Products Liability Statute. Therefore, we reverse the trial court's grant of summary judgment in favor of Dorsey as to Lucas's claim sounding in strict liability.

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We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion, noting that this determination in no way portends a positive outcome for Lucas at trial; rather, we merely hold that issues of material fact exist which preclude summary judgment. *See Jones v. Berlove* (1986), Ind.App., 490 N.E.2d 393, 395 (mere improbability of recovery at trial does not justify summary judgment against plaintiff).

Affirmed in part, reversed in part, and remanded.

BAKER and NAJAM, JJ., concur.

All Citations

609 N.E.2d 1191, Prod.Liab.Rep. (CCH) P 13,578

Footnotes

1 IND.CODE § 33–1–1.5–1 *et seq.*

2 See the recent decision of our supreme court in *McCullough v. Archbold Ladder Co.* (1993), Ind., 605 N.E.2d 175, 180, regarding the duty to update and supplement discovery responses.

3 Delphi argues that misuse and alteration negate the "breaching" element of Lucas's negligence claim; however, we conclude that misuse and alteration are applicable instead to the question of whether Delphi's, negligence, if any, was the proximate case of Lucas's injuries.

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EXHIBIT “16”

975 S.W.2d 100
Supreme Court of Kentucky.

GRIFFIN INDUSTRIES, INC., Appellant,
v.
James JONES, Appellee,
and
James JONES, Cross–Appellant,
v.
GRIFFIN INDUSTRIES, INC., Cross–Appellee.

Nos. 96–SC–685–DG, 97–SC–182–DG.
|
Sept. 3, 1998.

Synopsis

Sanitary worker who was injured while cleaning screw conveyor system in course of his employment brought products liability claim against company in business of rendering animal waste that had manufactured and sold conveyor system to worker's employer. The Campbell Circuit Court, Leonard L. Kopowski, J., directed verdict for company on strict liability claim, and jury entered judgment for company on negligence claim. Worker appealed. The Court of Appeals, reversed directed verdict for company on strict liability claim. Company sought discretionary review. The Supreme Court, Wintersheimer, J., held that company was "occasional seller" and was not strictly liable.

Affirmed in part and reversed in part.

Stephens, C.J., concurred in result only.

Lambert, J., filed opinion concurring in part and dissenting in part.

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Attorneys and Law Firms

***101** Kevin L. Murphy, Covington, for appellant/cross-appellee.

Michael J. O'Hara, David B. Sloan, Covington, for appellee/cross-appellant.

Garis L. Pruitt, Catlesttsburg, for amicus curiae The Kentucky Academy of Trial Attorney.

Opinion

WINTERSHEIMER, Justice.

This is a significant products liability case presenting a novel strict liability issue involving comment (f) to section 402A of the Restatement (Second) of Torts. Griffin Industries sought discretionary review from an opinion of a Court of Appeals' panel which rendered a 21–page published opinion affirming in part and reversing in part and remanding for retrial part of the complaint filed by plaintiff/respondent James Jones. A separate concurring opinion in the Court of Appeals also specifically asked this Court to consider the matter.

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Jones suffered serious leg injuries on October 10, 1990 while cleaning a screw conveyor system in the course of his employment as a sanitary worker for Kahns. Jones had failed to disengage or lock out the system which was activated by a coworker in another room. The screw conveyor system had been manufactured and sold to its customer, Kahns, by Griffin, which renders inedible animal by-product for resale and use in other commodities. Although Griffin had previously designed and installed such screw conveyor systems for internal use, it sold the three conveyor system in question at slightly more than cost to its regular customer, Kahns. There was a seven day jury trial involving the negligence claim by Jones against Griffin. The major issue on appeal is the propriety of a directed verdict in favor of Griffin on the strict liability aspect of the case. The jury, by an 11 to 1 vote, absolved Griffin of negligence. The case against Kahns was settled before trial. Griffin had obtained a summary judgment on the breach of warranty claim and a directed verdict on strict liability.

Jones raised numerous issues on appeal to the Court of Appeals, which affirmed in part but reversed and remanded as to the directed verdict for Griffin on the strict liability claim. The motion for review by Griffin agrees with the appellate panel's decision on the question of first impression in Kentucky adopting the occasional seller exception to strict liability under section 402A, differing regarding the application of that new law to this fact pattern.

The panel decided that the trial judge had erroneously directed a verdict for Griffin on strict liability. The Court of Appeals concluded that Jones could get to the jury with his proof of Griffin's internal screw conveyor endeavors plus its profit from the sale of the system installed for Kahns. Griffin argues vigorously that the panel thereby erroneously applied the occasional seller exception it had adopted.

Griffin argues that the Court of Appeals erred in reversing the order of the trial judge directing a verdict in favor of Griffin on the claim by Jones of strict liability. Griffin also contends that the Court of Appeals erred in concluding that the contents of an investigative report of the accident as compiled by Kahns were improperly admitted into evidence. Griffin also asserts that the Court of Appeals erred in concluding that the testimony of witnesses Robert Perry and Richard Young was improperly allowed.

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Jones argues that the Court of Appeals holding that the trial judge erred in dismissing his products liability claim against Griffin should be affirmed. He also maintains that the Court of Appeals correctly found that the trial judge erred in admitting into evidence the contents of the investigative report of the Jones accident as conducted by Kahns because it failed to comply with KRE 803(6). He also contends that the Court of Appeals correctly held that the lay opinion testimony of Kahns and KWS representatives should have been excluded under KRE 701.

Jones also argues that the trial court erred in permitting Griffin to introduce evidence that OSHA did not cite either Griffin or ***102** Kahns for violation of any OSHA regulations with respect to the screw conveyors in question. He also claims that the Court of Appeals incorrectly held that the improperly admitted testimony of Perry and Young was harmless error. Finally, he argues that the trial judge erred when he allowed evidence of the negligence of Jones' employer to be introduced into evidence and included Kahns, as a settling plaintiff, in the apportionment instruction.

The principle issue in this case is the application of the occasional seller exception to strict liability under section 402A of the Restatement (Second) of Torts.

In 1996 the Court of Appeals ruled that it was error for the trial judge to direct a verdict on the issues of strict liability and remanded for a trial on the merits. The panel also ruled on several different evidentiary issues which had the effect of letting the verdict for Griffin on the issue of negligence stand. This court granted the motion of Griffin for discretionary review and the cross motion of Jones for similar review.

The Court of Appeals erred in reversing the order of the trial judge directing a verdict in favor of Griffin on the claim by Jones for strict liability in tort.

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Kentucky adopted section 402A of the Restatement (Second) of Torts in *Dealers Transport Co., Inc. v. Battery Distributing Co., Inc.,* Ky., 402 S.W.2d 441 (1965). In *Dealers supra,* the court held that privity is not a prerequisite to the maintenance of an action for breach of an implied warranty in products liability actions. Since that time there have been numerous cases recognizing that theory of recovery in product liability cases.

The trial judge correctly determined that Griffin was an occasional seller under comment (f) to section 402A of the Restatement (Second) of Torts and thus properly entered a directed verdict against the strict liability claim of Jones.

The responsibility for liability under section 402A is in the sale of a defective product by one who is engaged in the business of selling. Here, there is no question from an examination of the evidence presented at trial that Griffin was not engaged in the business of selling screw conveyors. The uncontradicted testimony was that Griffin is in the business of rendering animal waste. The evidence indicated that Griffin, through an internal division, assembled screw conveyors for its own use. The division was not a separate corporation and existed only to accommodate the operating needs of Griffin. One who employs a product for internal use does not incur the liability of a manufacturer. *See American States Ins. Co. v. Lanier Business Products,* 707 F.Supp. 494 (M.D.Ala.1989).

In this case, other than the sale to Kahns, Griffin had never sold a screw auger to an outside entity. Consequently, the sale of the system to Kahns was an isolated transaction that was within the occasional seller exception to section 402A; it does not come within the doctrine of strict liability.

Not every seller is subject to strict liability. The general considerations presented to justify the imposition of strict liability on manufacturers and sellers in the normal course of business are not applicable here because this corporation is not engaged in the sale of the allegedly defective product as a regular part of its business. *See Sukljian v. Ross and Son Co.,* 69 N.Y.2d 89, 97, 511 N.Y.S.2d 821, 503 N.E.2d 1358 (1986). The liability imposed by section 402A relates to the sale of a defective product by one engaged in the business of selling. "It is axiomatic that one basic requirement for the application of the rule of strict liability under section 402A is that the defendant must be engaged in the business of selling the chattel." *Walker v. Skyclimber, Inc.,* 571 F.Supp. 1176 (D.Vi.1983); *Burke Enterprises, Inc. v. Mitchell,* Ky., 700 S.W.2d 789 (1985). The liability imposed by section 402A is special liability limited to manufacturers and distributors engaged in the business of selling the product in question. *See also Mini Mart, Inc. v. Direct Sales Tire Co.,* 876 F.2d 63 (8th Cir.1989); *Marte v. W.O. Hickok Manuf. Co., Inc.,* 159 A.D.2d 316, 552 N.Y.S.2d 300 (1990); *McKenna v. Art Pearl Works, Inc.,* 225 Pa.Super. 362, 310 A.2d 677 (1973); *Welch v. Dura–Wound Inc.,* 894 F.Supp. 76 (N.D.N.Y.1995).

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***103** The otherwise valuable rule of strict liability does not apply to the occasional seller of an allegedly defective product. When a product is sold only on an occasion or incident to the business of the seller, the transaction does not come within the purview of the doctrine of strict liability. *See Bailey v. ITT Grinnell Corp.,* 536 F.Supp. 84 (N.D.Ohio 1982)

The evidence in this case indicated that Griffin, through its internal operations, assembled screw conveyors for its internal use. The law is clear that when one uses a product for internal use only, manufacturer liability does not apply. *American States Ins., Co.,* 707 F.Supp. at 498. *See also Goetz v. Avildsen Tool and Machines, Inc.,* 82 Ill.App.3d 1054, 38 Ill.Dec. 324, 403 N.E.2d 555, 562 (1980); *Holifield v. Pitts Swabbing Co.,* 533 So.2d 1112 (Miss.1988). The sale by Griffin of the screw conveyor system to Kahns was an isolated transaction that comes within the occasional seller exception to section 402A.

Griffin did not solicit the sale in question and received no significant revenue from the sale. The system was sold to Kahns for $16,870, slightly over cost. There was no evidence presented that Griffin advertised or otherwise marketed this or any other screw conveyor system. "[T]he fact of mass marketing, or at least some marketing, is an essential element of a claim of strict products liability." *Snyder v. ISC Alloys, Ltd.,* 772 F.Supp. 244, 252 (W.D.Pa.1991).

We reverse that part of the decision by the Court of Appeals which reversed the order of the trial judge directing a verdict in favor of Griffin on the claim of strict liability in tort by Jones because Griffin was not a seller within the definition of section 402A.

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We conclude that the evidentiary rulings by the trial judge with regard to the admission of testimony of Perry and Young in relation to the accident investigation report and the safety devices were in error, however, such error was harmless and nonprejudicial.

We affirm that part of the decision of the Court of Appeals which permitted the introduction of OSHA testimony and regulations and the admission of testimony by Perry and Young as harmless error. The trial judge did not err when he allowed evidence of the negligence of Jones employer to be introduced in the apportionment instructions.

The decision of the Court of Appeals is affirmed in part and reversed in part.

COOPER, GRAVES, JOHNSTONE and STUMBO, JJ., concur.

STEPHENS, C.J., concurs in result only.

LAMBERT, J., files a separate opinion concurring in part and dissenting in part.

LAMBERT, Justice, concurring and dissenting.
I concur with that portion of the majority opinion which addresses the occasional seller rule in Section 402A of the Restatement (Second) of Torts, comment (f). Nevertheless, I would reverse for a new trial on the negligence claim against Griffin Industries on the view that apportionment of libility was erroneous by allowing an instruction against Kahns.

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The majority opinion approves allowing the jury to apportion liability against Kahns. Appellee was employed by Kahns. As such, Kahns was protected from civil liability by the exclusive remedy provision of the Workers' Compensation Act, KRS 342.690. Of course, as appellee's employer at the time of his injuries, Kahns was required to pay Workers' Compensation benefits. In circumstances where an employee is injured by the negligence of a third party, but where the employer is required to pay Workers' Compensation benefits, the employer is entitled to recover such sums from the party at fault. To facilitate such recovery, KRS 342.700 authorizes an employer to intervene in civil litigation brought by the employee against a negligent third party, and, if the third party's negligence is established, recover such sums as have been paid in Workers' Compensation benefits.

The majority has reasoned that the employer's intervention into the civil action for recovery of Workers' Compensation benefits it had paid, and the settlement of the claim between the employer and the third party ***104** (Griffin Industries) constitute the active assertion of a claim and authorizes apportionment of liability against the employer. With this I must disagree. After this Court's departure from the rule in *Nix v. Jordan,* Ky.App., 532 S.W.2d 762 (1975), whereby a plaintiff was entitled to sue whatever negligent party the plaintiff desired to sue, leaving to the defendant the responsibility to seek indemnity or contribution from others who might be liable for some or all of the injuries sustained, we adopted the view that apportionment was proper against whomever the plaintiff had actively asserted a claim. Thus, if a plaintiff settled with a party prior to commencement of litigation and thereafter sued one or more other parties, at trial, apportionment was proper against those defendants who remained as well as those who had settled. This was the rule in *Floyd v. Carlisle Construction Company,* Ky., 758 S.W.2d 430 (1988). The key to application of such theory was allowing apportionment against all parties who were or might be legally liable to plaintiff.

In the case at bar, Kahns was not and could not be liable to plaintiff by virtue of the exclusive remedy provision of the Workers' Compensation Act. Plaintiff had no right to bring litigation against his employer. His only claim against his employer was for Workers' Compensation benefits. The employer entered this litigation not to obtain indemnity or contribution from plaintiff, but from Griffin Industries, the manufacturer of the device which injured plaintiff. The fact that Griffin “bought its peace by paying Kahns” should not entitle Griffin to an apportionment instruction whereby Kahns can be adjudged liable for any part of plaintiff's injuries. The effect of allowing an apportionment against Kahns was to permit Griffin to present and argue irrelevant

evidence as to Kahns' negligence. Griffin was allowed to make its case against an empty chair. This fact quite probably explains the 11–1 jury verdict against Jones on his negligence claim against Griffin.

All Citations

975 S.W.2d 100, Prod.Liab.Rep. (CCH) P 15,399

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EXHIBIT “17”

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400 Mass. 27
Supreme Judicial Court of Massachusetts,
Middlesex.

Jose M. FERNANDES et al.[1]
v.
UNION BOOKBINDING COMPANY, INC. et al.;[2]Ionics, Incorporated, third-party defendant.

Argued Feb. 3, 1987.
|
Decided May 14, 1987.

Synopsis
Employee of buyer of die press brought suit against seller and redesigner and refurbisher of press for crushed hands employee received while operating press. Employee's wife and children asserted claims for loss of consortium and loss of parental society, and amended complaint to state negligence claims against employer. The Superior Court, Middlesex County, Joseph S. Mitchell, Jr., J., entered judgment on jury verdict in plaintiff's favor except as to negligence claim and consortium and society claims in breach of warranty action. On appeal and cross appeal, the Supreme Judicial Court, Lynch, J., held that: (1) implied warranties may arise from sale of new or used goods; (2) seller did not breach any implied warranty of fitness for particular purpose; and (3) spouse and minor children could base loss of consortium and society claims upon alleged breach of implied warranty.

Affirmed in part and reversed in part.

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Attorneys and Aat Fire s

ad8 aa7d9 Lewis C. Eisenberg, Quincy, for Union Bookbinding Co., Inc.

Edward J. Krug, Boston, for Ionics, Inc.

Leonard Glazer, Boston, for plaintiffs.

Frederick T. Golder, Boston, for Embossing Corp. of America & another.

Before **ad7** WILKINS, LIACOS, ABRAMS, NOLAN and LYNCH, JJ.

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LYNCH, Justice.

The plaintiff, Jose M. Fernandes, commenced this action to recover for personal injuries which he sustained on June 6, 1980, when a die press he was operating crushed both his hands, necessitating amputation. Maria Fernandes, his wife, claims loss of **aa730** consortium and his three minor children claim loss of parental society.[3]

ad9 The plaintiffs collectively brought suit against Union Bookbinding Company, Inc. (Union), the seller of the press to Fernandes's employer, Ionics, Incorporated (Ionics), alleging negligence and breaches of implied warranties of merchantability and fitness for a particular purpose. In addition, the consortium-society plaintiffs amended the complaint to state claims against Ionics based on negligence only. The plaintiffs also brought suit against Embossing Machine Service Co., Inc., and Embossing

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Corporation of America (Embossing),[4] alleging negligence and breaches of implied warranties of merchantability and fitness for a particular purpose. Embossing was the redesigner and refurbisher of the press which injured Fernandes and was the seller of the press to Union in 1978. The defendants brought various claims against each other for contribution or indemnification.

In December, 1984, the case was tried before a jury. At the close of the evidence, the judge denied Union's motion for a directed verdict on the issue of warranty of fitness for a particular purpose and granted it on the issue of warranty of merchantability. The judge instructed the jury that there could be no recovery for loss of consortium and parental society predicated upon a breach of warranty. The judge also instructed the jury that Union could be found liable for negligence only for patent, but not latent, defects in the press Union sold. The judge denied Ionics's and Embossing's motions for directed verdicts. Additionally, the judge ruled as a matter of law that there was no comparative negligence.

The jury returned a special verdict against Union on Fernandes's claim of breach of warranty and for Union on the negligence claim. Ionics was found liable to the consortium-society plaintiffs for negligence. Embossing was found to have been negligent and in breach of its warranty of merchantability. Judgments on the jury's verdicts were entered.

a30 Motions by Union, Ionics, and Embossing for judgments notwithstanding the verdict were denied by the judge. Ionics also moved on its cross-claims against Union and Embossing. The court denied the motion with respect to Union and allowed the motion with respect to Ionics's cross-claim against Embossing.

All defendants filed timely notices of appeal. The plaintiffs cross-appealed from the judge's instructions denying negligence liability for latent design defects, and consortium-society claims in the breach of warranty action. We affirm in part and reverse in part.

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We summarize the facts. On the day of the accident, Fernandes was operating a Sheridan 350–ton press, which was used by Ionics to cut out polyethylene components termed "spacer plys" for use in equipment it manufactured to desalinate water. Fernandes had to press two control buttons to activate the movement of a platen which would press up against a stationary platen and cut out a spacer ply. At the end of a single cycle, the press would come to a complete stop with the platens in a full open position. At that point Fernandes would reach in with his hands and pull out the spacer ply. Immediately prior to the accident, the platens had returned to the open position and Fernandes reached in to remove the finished spacer ply. While he was doing so, the press repeated its cycle, and crushed Fernandes's hands between the two platens. Fernandes suffered severe injuries to both hands which resulted in bilateral amputation.

Prior to the purchase of the press Ionics had contracted with Union to produce spacer plys for at least twenty-eight years. **aa731** Ionics utilized the services of Union as the sole source for cutting the spacer plys and Union cut spacer plys only for Ionics. To meet the demands of Ionics, Union subcontracted work to Embossing. John McNulty, the principal of Embossing, had considerable experience with Sheridan presses and had redesigned the press for Embossing in 1976. However, the press remained at Embossing and was operated on Union's behalf by Embossing.

a31 As the demand for its desalinization equipment increased, Ionics became concerned about being totally dependent on one supplier for spacer plys and decided to acquire an in-house spacer ply cutting capability. As a result, Ionics and Union entered into a written contract to purchase a press for cutting spacers. Union was to determine which press it would supply to Ionics, ultimately recommending the Sheridan press. The contract required that Union "insure that the press is in good working order" and demonstrate satisfactory spacer ply cutting ability. It was Ionics's understanding that the $60,000 purchase price was for "the press, the technology, and the training, and the installation of the Sheridan on our premises."

McNulty installed the press at Ionics and operated it for the Ionics personnel who were present. A Union representative was also present.

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Prior to purchasing the press, Ionics sent two employees to look at the press. One employee examined the press to determine whether it was capable of cutting certain types of production pieces. Another Ionics employee saw that the machine was in good working order. Ionics's vice president for operations testified that these employees had only "some" mechanical background and emphasized that he wanted them to go to "view" the press. Ionics also hired a consulting engineer shortly after installation of the press to evaluate its safety.

On the morning of the accident, Bradford H. Schofield, the plaintiffs' expert at trial, was called to Ionics to determine the cause of the accident. Schofield found that the thermal overload switch had been tripped. He determined that this was due to a failure of the air pressure which resulted in the clutch remaining in gear because there was insufficient pressure to push it out of gear. As a result of the failure of the clutch to disengage, the press repeated, thereby causing the accident. He testified that the cause of the accident was the failure of air pressure which resulted in the clutch remaining in gear and that the use of the same energy source (air pressure) both to activate and deactivate the clutch was an unsafe and hazardous design.[5]

a3d It was also the opinion of another of the plaintiffs' technical experts, Dr. Igor Paul, that the malfunction and the accident were a direct result of improper, inadequate, and defective design of the press controls, in particular, in failing to provide a "fail-safe" pneumatic control system with a backup clutch disengaging mechanism. Dr. Paul expressed the opinion that the press was "inherently hazardous" although the hazard was hidden. It was also Dr. Paul's opinion that the malfunction and the accident were a direct result of "failing to provide point of operation guarding which would mechanically disconnect and stop the machine, if an operator's hands were in the point of operation before the cycle would complete."

1. *Union's liability in negligence for latent defects.*

The judge instructed the jury that as the seller of used goods in an isolated transaction, Union could only be liable in negligence for patent, as opposed to latent, defects. The plaintiffs contend that Union mischaracterizes its role in the transaction; that Union was "no mere conduit in the **aa73d** channels of trade from manufacturer to ultimate user," and that, as a result, Union's responsibility in selling the press included responsibility for latent defects. We do not view Union's liability as extending to latent defects. There was no error.

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As a seller of the press manufactured by another, Union would not be liable in an action for negligence unless it knew or had reason to know of the dangerous condition that caused the accident. Restatement (Second) of Torts § 402 (1965). Without question, Union qualifies as a sophisticated maker of the spacers which it manufactured for Ionics. However, it is equally clear that Union is not a regular seller of presses which would warrant the level of liability which attaches to merchants. There was no evidence to warrant a finding that Union knew or should have known of the dangerous condition of the press. The evidence at trial indicated that over a fifteen to twenty-year **a33** period, Union only sold two pieces of used equipment (none of which were die cutting or embossing presses). Union never had possession of the press in question. The Sheridan press was never on Union's premises nor was it operated regularly by any Union employee. The evidence also revealed that repairs to the Sheridan press, as well as Union's two other presses, were performed by Embossing.

The plaintiffs argue that, as a result of Union's experience with presses, including the fact that it knew the Sheridan press it sold to Ionics had fewer safety features than the one it kept for itself, Union had reason to know the press it sold to Ionics was likely to be dangerous unless it had appropriate safety features. We disagree. The Sheridan press had been operated for Union for fourteen months before it was sold to Ionics and there was nothing to indicate to Union the presence of the dangerous condition that caused the accident. Given Union's limited experience, we think the judge's instruction, which conformed with the Restatement (Second) of Torts § 402, was a correct statement of the law.

2. *Breach of warranty for a particular purpose against Union.*

Under G.L. c. 106, § 2–315 (1984 ed.), an implied warranty of fitness for a particular purpose arises when, at the time of the contract, the seller "has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." The determination whether this warranty arises ordinarily

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is a question of fact. G.L. c. 106, § 2–315, comment 1, at 521 (Law.Coop.1984). The jury found that Union was liable to Jose Fernandes for breach of warranty of fitness for a particular purpose.

a. *Used goods.* We note at the outset the question whether G.L. c. 106, § 2–315, applies to used as well as new goods. Although the Uniform Commercial Code itself is silent as to the issue, there is an implicit recognition of the application of implied warranties to the sale of used goods. See, e.g., G.L. c. 106, § 2–314, comment 3, at 466 (Law Coop.1984) ("[a] contract for the sale of second-hand goods ... **a34** involves only such obligation as is appropriate to such goods for that is their contract description.... [A nonmerchant's] knowledge of any defects not apparent on inspection would, however, without need for express agreement in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed"). See also *International Petroleum Servs., Inc. v. S & N Well Serv., Inc.,* 230 Kan. 452, 639 P.2d 29, 33–34 (1982); 3 R.A. Anderson, Uniform Commercial Code § 2–314:188 (1983) ("[t]he provisions of the Code relating to warranties applies to all goods, without any distinction as to whether the goods are new or used goods"); Special Project, Article Two Warranties in Commercial Transactions, 64 Cornell L.Rev. 30, 83–85 (1979). In *Ferragamo v. Massachusetts Bay Transp. Auth.,* 395 Mass. 581, 481 N.E.2d 477 (1985), we recognized, without discussion, that the sale of used trolley cars was within the implied warranty of merchantability under art. 2 of the UCC. We conclude that **aa733** the implied warranties recognized in G.L. c. 106, § 2–314 and § 2–315, may arise from the sale of new or used goods.

b. *Reliance.* Under § 2–315, the test for determining the existence of a warranty of fitness for a particular purpose requires proof that (1) the seller had reason to know of the particular purpose for which the buyer requires the goods; (2) the seller had reason to know of the buyer's reliance on the seller's skill or judgment in selecting or furnishing suitable goods; and (3) the buyer's reliance in fact. See J.J. White & R.S. Summers, Uniform Commercial Code 358 (2d ed. 1980). The seller's reason to know and the buyer's actual reliance are often merged into a single "reliance" element, although both are distinct elements to the existence of the warranty. See G.L. c. 106, § 2–315, comment 1, at 521 (Law.Coop.1984); Special Project, 64 Cornell L.Rev. *supra* at 89.

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There is ample evidence in the record to support a conclusion that Ionics did in fact rely on Union's judgment to furnish a suitable press to Ionics and that Union knew of Ionics's reliance on its judgment. Union knew that Ionics wanted to be "set up" in the business of making spacers. Union's president testified **a35** that whenever Union was asked to meet with Ionics "the theme was usually the same," namely, that Ionics wanted to get into the business of cutting spacer plys. Union argues that there can be no justifiable reliance on the part of Ionics since Ionics possessed its own skill and judgment in the operation of presses and that Ionics knew Union relied on Embossing for the maintenance and technical expertise on its presses. However, the evidence was that Ionics had no in-house capability for cutting its own spacer plys and that for at least twenty-eight years Union was Ionics's sole source of spacer plys. In addition, Ionics contracted with Union to obtain both the technology and the equipment for cutting spacers. Viewed as a whole, the evidence clearly permits the jury's conclusion that Ionics justifiably relied on Union's judgment to select a suitable press for the production of spacer plys and that Union knew of Ionics's reliance.

c. *Reason to know.* A closer question is raised with respect to the requirement that Union had reason to know of the particular purpose for which Ionics required the goods. The evidence clearly supported a finding that Union knew Ionics purchased the press for the purpose of producing spacer plys. However, Union argues that there was no evidence to demonstrate that the Sheridan press was to be used for a particular purpose and that Ionics intended to use the press for its common ordinary purpose, that of a die press.

Comment 2 to § 2–315, explains that the implied warranty of fitness for a particular purpose "envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." G.L. c. 106, § 2–315, comment 2, at 521 (Law.Coop.1984). Under this standard we noted in *Hannon v. Original Gunite Aquatech Pools, Inc.,* 385 Mass. 813, 821, 434 N.Ed.2d 611 (1982), that, where there was no evidence that the buyer was going to use the pool in question for any purpose other than for what a pool is normally used, no particular purpose existed as required for liability under § 2–315. See **a36** *Regina Grape Prods. Co. v. Supreme Wine Co.,* 357 Mass. 631, 634, 260 N.E.2d 219 (1970). Other jurisdictions have likewise refused to attach liability under § 2–315 in the absence of a known particular purpose. See, e.g.,

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International Petroleum Servs., Inc. v. S & N Well Serv., Inc., supra. See also 3 J.J. White & R.S. Summers, *supra* at 357–358 n. 122 (criticizing cases applying § 2–315, "where the buyer's 'specific use' coincides with the 'general use' of the goods"); Note, Commercial Law—Implied Warranties Under the Uniform Commercial Code—The Implied Warranty of Fitness for a Particular Purpose, 10 Wake Forest L.Rev. 169 (1974).

We need not decide the close question whether the evidence would warrant a finding of knowledge of use for a particular **aa734** purpose because we conclude that no breach of this warranty was shown.

The press in question was purchased with the specific understanding that the press demonstrate satisfactory spacer ply cutting ability comparable in quality to cuts received by Ionics from Union. Clearly if the press failed to produce quality spacer plys, Union would not have met the terms of the implied warranty under § 2–315. Here, however, Fernandes's injuries were unrelated to the particular purpose § 2–315 was intended to ensure, the quality of spacer ply. It is true the defect here would fall under the terms of the implied warranty of merchantability. However, § 2–315 is "narrower, more specific, and more precise" than the implied warranty of merchantability. 3 J.J. White & R.S. Summers, Uniform Commercial Code, *supra* at 358. To hold otherwise would be to merge the distinction between the implied warranties of merchantability and fitness for a particular purpose. See generally Covington & Medved, The Implied Warranty of Fitness for a Particular Purpose: Some Persistent Problems, 9 Ga.L.Rev. 149 (1974).

Because the evidence would not support a claim of breach of the implied warranty of fitness for a particular purpose against Union, we need not consider further the claims of Ionics and the consortium-society plaintiffs against Union which are predicated on such a breach.

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3. *Claims against Embossing.*

a. *Comparative negligence.* At trial, Fernandes testified that he was unable to grease the press for a period of time before **a37** the accident. Embossing contends that the judge erred in ruling that there was no comparative negligence as a matter of law because there was testimony that the lack of greasing was causally connected to the accident. We agree.

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It is clear that the comparative negligence statute, G.L. c. 231, § 85 (1984 ed.), has no application to breach of warranty actions. *Correia v. Firestone Tire & Rubber Co.,* 388 Mass. 342, 354–355, 446 N.E.2d 1033 (1983). But to the extent that Fernandes's product liability claim sounds in negligence, his own negligence may serve to reduce or defeat that claim under comparative negligence principles applied through G.L. c. 231, § 85. In such case "the question of contributory negligence is rarely to be taken from the jury and decided as a matter of law." *Everett v. Bucky Warren, Inc.,* 376 Mass. 280, 289–290, 380 N.E.2d 653 (1978).

The plaintiffs claim that there was not a "scintilla of evidence" that the lack of greasing was causally connected to the accident. However, John McNulty, principal of Embossing and the redesigner of the press, testified that, based on his background, experience, and physical observation of the press after the accident, lack of lubrication over a period of time was the cause of the accident. On this record the question should have been submitted to the jury.

b. *Warranty of merchantability.* Embossing argues that the plaintiffs' implied warranty of merchantability claim under G.L. c. 106, § 2–314, must be rejected because there was no evidence that the press was in the same condition on the date of the injury as it was at the time of the sale. Embossing also seeks to negate its liability under § 2–314 by arguing that the plaintiffs failed to show that the design defect in the pneumatic control system was the proximate cause of Fernandes's injuries. Embossing further contends that Ionics's inspection of the press constituted an exclusion of the warranty under G.L. c. 106, § 2–316 (1984 ed.).

In order to invoke the implied warranty of merchantability under § 2–314, a plaintiff must demonstrate that the damages complained of were proximately caused by a defect or breach which existed at the time of the sale. *Walsh v. Atamian Motors, Inc.,* 10 Mass.App.Ct. 828, 829, 406 N.E.2d 733 (1980). See G.L. **a38** c. 106, § 2–314, comment 13, at 467–468 (Law.Coop.1984). The jury were instructed that in order to recover damages the plaintiffs must prove that the breach of warranty was the proximate cause of their injuries. The condition of the press at the time of **aa735** the accident vis-á-vis the time of the sale by Embossing

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was a factor to be considered by the jury in determining proximate cause. Here the plaintiffs' expert concluded that Fernandes's injuries were caused by design defects and not a failure to maintain the press in good condition.

We further note that Embossing performed the repairs and service to the press following its delivery and installation at Ionics up to the date of the accident. McNulty testified, that, upon completion of repairs and servicing, he tested the press and found it, each time, to be in good working order. The judge clearly instructed the jury that Embossing "would only be liable for defective and dangerous conditions which were present at the time they sold the product and parted with possession of it. Unless you find that the condition complained of was in existence at that time, the plaintiff is not entitled to recover from Embossing Corporation of America." Where there was evidence tending to show that the press was defectively designed, although otherwise in good physical condition at the time of the accident, the plaintiffs have satisfied their burden of proof and the verdict will not be disturbed.

Finally, Embossing argues that Ionics's inspection of the press excludes any implied warranties under § 2–316(3)(*b*). We disagree. At trial, the jury focused their attention on the issue by specifically requesting further instruction from the judge on the "consequences of a buyer's examination or failure to examine goods." In response, the judge read § 2–316(3)(*b*) to the jury and, pursuant to the jury's request, gave them a photocopy of the text of that section. Under that section examination prior to sale excludes implied warranties only in regard to defects which such an examination ought to have revealed. We think the evidence warrants the jury's verdict which implicitly recognized that Ionics's examination was not one which "ought in the circumstances to have revealed" the defects in the press under § 2–316(3)(*b*).

a39 c. *Consortium and society claims.* The consortium-society plaintiffs argue that recovery for consortium or society claims should be recognized in an action for breach of the implied warranty of merchantability, as in negligence actions. We agree. As we stated in *Wolfe v. Ford Motor Co.,* 386 Mass. 95, 100, 434 N.E.2d 1008 (1982), "we find no magic in the label 'warranty' but rather we look to the substantive quality of the claims against [the defendant] and find them to be essentially tort claims." Although *Wolfe* dealt with the issue of contribution under G.L. c. 231B, the rationale is equally applicable to consortium and society claims. See *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 414, 161 A.2d 69 (1960) (noting tort origins of warranty); W. Prosser & W. Keeton, Torts § 97 (5th ed. 1984).

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Under § 2–318, the spouse and minor children of an injured person are persons whom the seller might reasonably have expected to be affected by a product if such product caused injury to their spouse and parent. As a result, we conclude that the loss of consortium and society claims asserted by those plaintiffs may be based upon a breach of implied warranty action and that the judge's instruction to the contrary was error.

Accordingly, we affirm the judgment for Union on the negligence claims but reverse the judgment against Union on breach of warranty. We vacate the judgment against Embossing on the negligence claims and affirm the judgment against Embossing based upon breach of warranty of merchantability. Therefore, the jury verdict for plaintiff Jose Fernandes against Embossing for breach of the implied warranty of merchantability is to stand, and the verdict for Jose Fernandes against Embossing for negligence is set aside. The jury verdict for Jose Fernandes against Union is set aside. The jury verdict for the consortium and society plaintiffs against Embossing for negligence is set aside. Judgment is entered for the consortium and society plaintiffs on their breach of warranty claim against Embossing. We do not examine the correctness of the judgments **aa736** against Ionics based on negligence since they are not before us.

So ordered.

All Citations

400 Mass. 27, 507 N.E.2d 728, 55 USLW 2704, 5 UCC Rep.Serv.2d 959, Prod.Liab.Rep. (CCH) P 11,454

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Footnotes

1 Maria Fernandes, Joseph Fernandes, Grace Fernandes, and Anna Fernandes.

2 Embossing Machine Service Co., Inc., Embossing Corporation of America, and Ionics, Incorporated.

3 The claims of Maria Fernandes and her children are hereinafter referred to as the "consortium-society claims," and those plaintiffs are referred collectively as the "consortium-society plaintiffs."

4 The corporate distinction between Embossing Machine Service Co., Inc. and Embossing Corporation of America, and their individual roles in the facts giving rise to this action, are not germane to the issues raised on appeal. The two corporations are referred to collectively as "Embossing."

5 Schofield performed certain tests at the time of his inspection so as to confirm his findings and conclusions. He established that the "clutch ... worked very well" and "functioned properly" when he put sufficient compressed air into the system. Schofield testified that "there was no galling or scoring on the shaft on which the collar of the clutch rode. There was lubrication on the clutch. It could move very easily"; "[i]t was in very good condition." No parts were broken in the equipment Schofield examined.

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EXHIBIT “18”

148 S.W.3d 28
Missouri Court of Appeals,
Eastern District,
Division Four.

Nichole E. ENGEL, Individually and Representatively on Behalf of Trinity Engel, William Engel, III and Zachary Engel and William Engel, Sr. and Shirley Engel, Plaintiffs/Appellants,

v.

CORRIGAN COMPANY–MECHANICAL CONTRACTORS, INC., A DIVISION OF CORRIGAN BROTHERS, INC., and Terex Corporation, a Delaware Corporation, Defendants/Respondents.

No. ED 83241.
|
Aug. 10, 2004.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 6, 2004.
|
Application for Transfer Denied Nov. 23, 2004.

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Synopsis

Background: Family members of individual killed in accident caused by design defect in rented manlift brought wrongful-death action sounding in products liability against mechanical contracting company that sold manlift as surplus property. The Circuit Court, City of St. Louis, Steven R. Ohmer, J., granted summary judgment for company. Family members appealed.

The Court of Appeals, Lawrence G. Crahan, J., held that as a matter of first impression, company was not strictly liable to family members.

Affirmed.

Attorneys and Law Firms

***29** Stephen H. Ringkamp, Mark J. Becker, St. Louis, MO, for appellant.

Robbye Hill Toft, St. Louis, MO, for respondent.

Opinion

LAWRENCE G. CRAHAN, Judge.

Nichole Engel, individually and on the behalf of Trinity Engel, William Engel III and Zachary Engel and William and Shirley Engel, Sr. ("Plaintiffs") appeal the summary judgment entered in favor of Corrigan Company–Mechanical Contractors, Inc. ("Corrigan") in their wrongful death action based on section 537.760 RSMo[1] (strict liability). We affirm.

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In reviewing the entry of the summary judgment, we review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Finance Corp. v. Mid–America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). Inasmuch as the trial court's judgment is founded on the record submitted and the law, we need not defer to the trial court and our review is essentially *de novo. Id.*

There is no dispute about the material facts. In October, 1998, Plaintiffs' decedent, William Engel, Jr., was killed in an accident caused by a design defect in a manlift he rented from Imperial Manlift, Inc. ("Imperial"). Imperial purchased the manlift "as is" from Corrigan in 1994. Corrigan is a corporation primarily engaged in the business of mechanical contracting and had used the manlift in its business for about twelve years before disposing of it in a sale of 19 pieces of surplus construction equipment, including approximately 14 manlifts, to other businesses, including Imperial. The manlift at issue was manufactured by Marklift Industries, which was sold while in bankruptcy to Terex Corporation prior to the initiation of the underlying suit.

Plaintiffs argue in their sole point on appeal that the trial court erroneously applied section 402A of the Restatement (Second) of Torts instead of section 537.760. Plaintiffs contend that because of this misapplication of the law, the trial court improperly granted summary judgment for Corrigan on the basis of Corrigan not being a dealer in used goods. Plaintiffs ***30** correctly note that section 537.760 is the appropriate section of the Missouri Statutes for products liability claims. Plaintiffs point out that the lower court cited section 402A of the Restatement (Second) of Torts in its Order and Judgment granting Corrigan's motion for summary judgment. They contend that the plain language of section 537.760 allows a claim for strict products liability whether or not the defendant is a dealer in used goods. Finally, Plaintiffs note that courts must give effect to statutory language as written, citing *Spradlin v. City of Fulton,* 982 S.W.2d 255, 261 (Mo. banc 1998).

Essential elements of a strict products liability claim are (1) the defendant sold a product in the course of its business; (2) the product was then in a defective condition, unreasonably dangerous when put to a reasonably anticipated use; (3) the product was used in a manner reasonably anticipated; and (4) plaintiff was damaged as a direct result of the defective condition that existed when the product was sold. *Lay v. P & G Health Care, Inc.,* 37 S.W.3d 310, 325 (Mo.App.2000).

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Section 537.760 codified section 402A of the Restatement (Second) of Torts. *Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 65 (Mo. banc 1999); *Dorman v. Bridgestone/Firestone, Inc.,* 992 S.W.2d 231, 235 (Mo.App.1999). As such, the lower court's citation of the Restatement was not error.

Plaintiffs rely on *Bell v. Poplar Bluff Physicians Group, Inc.,* for the contention that incidental transfer of a product does not relieve an entity from strict products liability. *Bell v. Poplar Bluff Physicians Group, Inc.,* 879 S.W.2d 618, 619 (Mo.App.1994). This case is distinguishable however, because in *Bell* there was no question that the implant placed into petitioner's body was done so in the course of the business of respondent. *Id.* The issue was whether respondent was a "seller" within the meaning of section 402A of the Restatement (Second) of Torts. *Id.* In this case, the issue is whether Corrigan sold the manlift in the course of its business. This is apparently a question of first impression in Missouri.

Corrigan characterizes the issue to be whether a dealer in used goods may be held strictly liable under section 402A of the Restatement (Second) of Torts, or section 537.760 RSMo 2000. Corrigan, however, is not a dealer in used goods.[2] It is more properly viewed as an intermediate consumer who made an occasional or incidental sale of surplus property. Corrigan's business is mechanical contracting, not selling manlifts. It is not subject to section 537.760 because its sale of the manlift ***31** was incidental to and not in the course of its business.

In *Bruce v. Martin–Marietta Corp.,* 544 F.2d 442 (10th Cir.1976), the Tenth Circuit, applying Missouri Law, held that Ozark Airlines could not be held strictly liable for defects in an airplane it sold as surplus because it was not engaged in the business of selling airplanes. *Id.* at 448. Citing comment f to section 402A,[3] the court held that Ozark Airlines was an intermediate owner engaged in the business of providing scheduled commercial air transportation. *Id.* As such, its sale of surplus aircraft was merely

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incidental to its business. *Id.* at 448–49. *See also Counts v. MK–Ferguson Co., et al.,* 680 F.Supp. 1343, 1347 (E.D.Mo.1988), *aff'd* 862 F.2d 1338 (8th Cir.1988) (section 402A liability does not extend to occasional seller).

Other jurisdictions that have codified or adopted section 402A of the Restatement (Second) of Torts have routinely found that the isolated sale of a product by an occasional seller is not subject to the rule of strict liability. *See Lancaster v. W.A. Hartzell & Associates, Inc.,* 54 Or.App. 886, 637 P.2d 150 (1981) (holding that strict liability did not apply to the isolated sale of a gallon of wood stain by a merchant that sells cabinets); *Allen v. Nicole, Inc.,* 172 N.J.Super. 442, 412 A.2d 824 (Law Div.1980) (holding that amusement ride operator's disposal of less favored rides through sale did not rise to the level of being a business of selling); *Siemen v. Alden,* 34 Ill.App.3d 961, 341 N.E.2d 713 (1975) (holding that the one-time sale of an industrial saw by a sawmill was an isolated transaction that did not come within the provisions of section 402A).

The case of *Abbott v. U.S.I. Clearing Corp.,* 17 Ohio App.3d 75, 17 OBR 135, 477 N.E.2d 638 (1984), is instructive. In *Abbott,* Chrysler Corporation closed a plant and sold a seventy-five ton single gear press "as is." *Id.* at 639. The press later caused an injury. *Id.* at 640. The court found that Chrysler was not a seller engaged in the business of selling presses. *Id.* at 641. The court reasoned that the infrequent sale of plant machinery after one of its plants closed did not transform Chrysler into a seller of presses. *Id.* at 642. The court noted that the fact that Chrysler auctioned off a large number of presses and similar equipment does not establish that Chrysler was more than an occasional seller. *Id.*

In *Santiago v. E.W. Bliss Div., Gulf and W. Mfg. Comp.,* 201 N.J.Super. 205, 492 A.2d 1089 (App.Div.1984), Western Electric ***32** purchased a punch press and then sold it after twenty-three years of use. 492 A.2d at 1092. This press later injured Santiago. *Id.* The court held that the disposal of the press by a consumer who used the product for twenty-three years did not constitute the business of selling as a manufacturer, seller, distributor, retailer or supplier subject to strict liability. *Id.* at 1100. The court noted that there was considerable authority for the proposition that when a product is sold on an occasional basis, incidental to the business of the seller, the sale does not come within the scope of the doctrine of strict liability. *Id.* at 1097. The court reasoned that Western Electric was not a party in the chain of distribution of the press but rather a consumer who sold the press after it was no longer useful to the consumer. *Id.* at 1099. The benefits of the sale of the press were only incidental and collateral to Western Electric's business. *Id.*

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Missouri law is entirely consistent with this view. The mere assertion that Corrigan sold the manlift is not enough to show that it was sold in the course of Corrigan's business. In *Latham v. Wal–Mart Stores, Inc.,* 818 S.W.2d 673, 674 (Mo.App.1991) a parrot was special ordered by Wal–Mart to be purchased by an employee and the employee's husband later contracted a disease from the parrot. The uncontradicted assertion that Wal–Mart did not sell parrots to the general public in the ordinary course of its business was found to support the lower court's grant of summary judgment in favor of Wal–Mart. *Id.* at 676.

In this case, it is uncontradicted that Corrigan's sale of manlifts was an occasional sale and was incidental to its ordinary course of business. We hold that Corrigan is not strictly liable for injuries caused by the used manlift and is entitled to summary judgment as a matter of law. Judgment affirmed.

BOOKER T. SHAW, P.J., and PATRICIA L. COHEN, J., Concur.

All Citations

148 S.W.3d 28, Prod.Liab.Rep. (CCH) P 17,108

Footnotes

1 All statutory References are to RSMo 2000 unless otherwise noted.

2 Although it appears that no Missouri court has addressed the issue of whether dealers of used equipment are subject to section 537.760, the United States District Court for the Western District of Missouri has concluded they are not. *Harber v. Altec Indus., Inc.,* 812

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F.Supp. 954 (W.D.Mo.1993) *aff'd,* 5 F.3d 339 (8th Cir.1993). In a thoughtful and comprehensive analysis, Judge Stevens pointed out that while a dealer in used goods could be characterized as selling the product in the course of its business, imposition of such liability would be inconsistent with the policy considerations that led to the doctrine of strict liability in tort. Specifically, although imposition of liability would unquestionably further the goal of victim compensation, it would not accomplish the goals of spreading the risk, risk reduction through increased inspection or market pressure, satisfaction of consumer expectations or prevention of waste. 812 F.Supp. at 961–65. Because the instant case involves an occasional sale and not a sale by a dealer in used goods, we need not and do not decide that issue. We note, however, that the policy considerations discussed in *Harber* are even more attenuated in the case of an occasional sale by an intermediate consumer.

3 Comment f to section 402A of the Restatement (Second) of Torts states:

> *Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption ... The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business ... The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, section 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code section 2–314, to a seller who is a merchant. This section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

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EXHIBIT “19”

662 So.2d 640
Supreme Court of Mississippi.

Philip SCORDINO and Dwight Copeland, et al.

v.

HOPEMAN BROTHERS, INC.

No. 91–CA–01053–SCT.
|
Oct. 12, 1995.

Synopsis

Employees of shipbuilder who suffered from lung disease brought products liability action against subcontractor which had installed paneling containing asbestos in ships as joiner subcontractor. At trial, subcontractor moved for directed verdict, and the Circuit Court, Jackson County, Clinton Lockard, J., granted motion. Employees appealed, and the Supreme Court, Banks, J., held that: (1) subcontractor was not "seller" or "manufacturer" of paneling for purposes of strict liability provisions of Restatement (Second) of Torts, and (2) subcontractor was not negligent based on failure to warn of risks of exposure to asbestos.

Affirmed.

McRae, J., dissented and filed opinion in which Sullivan, J., joined.

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Attorneys and Law Firms

***641** Lowry M. Lomax, F. Gerald Maples, Maples & Lomax, Pascagoula, for Appellant.

Suzanne N. Saunders, Rebecca L. Wiggins, Saunders & Wiggins, Jackson, for Appellee.

Before HAWKINS, C.J., and PITTMAN and BANKS, JJ.

Opinion

BANKS, Justice, for the Court:

In this case, we are called upon to determine whether a joiner subcontractor, in the ***642** business of installing shipboard furniture, beds, box berthing, non-structural bulkheads, overheads, installation, etc., is strictly liable or negligent as a manufacturer or a seller under Section 402A of the Restatement Second of Torts for installing and supplying asbestos paneling as required under the subcontract. We conclude that the subcontractor in this case was not a manufacturer or a seller and therefore is not strictly liable, or liable under the theory of negligence, for failure to warn.

I.

In their complaint, the Plaintiffs, Appellants herein, former employees of Ingalls Shipyard Corporation, alleged that while employed at Ingalls, they were exposed to asbestos, a fibrous, incombustible, chemical-resistant mineral, in the form of Marinite and Micarta, a fire-resistant wall paneling supplied and installed by Hopeman Brothers, Inc. The Plaintiffs claimed that irreparable and progressive lung damage was caused due to being exposed to the dust generated by the installation of the paneling, and that during this exposure period, they had no reason to believe or otherwise had knowledge that the Marinite

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was dangerous when inhaled or otherwise ingested. The Plaintiffs alleged that Hopeman, among others, knew or should have known about the dangers of asbestos and failed to warn the Plaintiffs about said dangers by ignoring or actively and fraudulently concealing the danger. Thus, the Plaintiffs alleged that Hopeman was negligent and strictly liable for its conduct which resulted in the aforementioned injuries. In response, Hopeman claimed that because it was a installer and not a seller or manufacturer of asbestos, it was not liable for negligence or under strict liability.

At trial, following the testimony of witnesses for the Plaintiffs and Hopeman, Hopeman moved for a directed verdict which was granted by the trial court. The trial court reasoned that the Micarta and Marinite installed by Hopeman was not Hopeman's product. Rather, the trial court concluded, Hopeman was "a subcontractor of labor to assemble and install various materials," pursuant to the subcontract which contained exact specifications.

This appeal ensued with the Plaintiffs claiming that the directed verdict was against the overwhelming weight of the evidence with regards to strict liability and negligence.

II.

A. Strict Liability.

In *State Stove Manufacturing Co. v. Hodges,* 189 So.2d 113 (Miss.1966), *cert. denied* 386 U.S. 912, 87 S.Ct. 860, 17 L.Ed.2d 784 (1967), this Court adopted the doctrine of strict liability under Section 402A of the American Law Institute's Restatement of Torts (Second). Section 402A states:

> 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 condition in which it is sold
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller 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.

State Stove Manufacturing, 189 So.2d at 118, *citing* Restatement of Torts (Second) § 402A (1965). *See also Coca–Cola Bottling Co., Inc. of Vicksburg v. Reeves,* 486 So.2d 374, 378 (Miss.1986), *citing William Cooper and Nephews, Inc. v. Pevey,* 317 So.2d 406, 408 (Miss.1975); and *Early–Gary, Inc. v. Walters,* 294 So.2d 181, 186 (Miss.1974) ("... before recovery can be had under Section 402A, three elements must be established by proof:

(1) that the plaintiff was injured by the product, (2) that the injury resulted from a defect in the product which rendered it unreasonably ***643** dangerous, and (3) that the defect existed at the time it left the hands of the seller.").

The applicability of the strict liability doctrine depends upon, among other things, whether the defendant is a manufacturer or seller in the business of selling a defective product. *Harmon v. National Automotive Parts Ass'n,* 720 F.Supp. 79, 80 (N.D.Miss.1989) ("The statement of the rule makes it obvious that strict liability for injury caused by a defective product is not to be imposed on one who neither manufactures nor sells the products"); Restatement (Second) of Torts § 402A. Thus, resolution of this issue turns on the question of whether Hopeman is a manufacturer or a seller.

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The term "seller" is defined as a person who sells or contracts to sell goods. *Volkswagen of America, Inc. v. Novak,* 418 So.2d 801, 804 (Miss.1982), *citing* Miss.Code Ann. § 75–2–103(1)(d) (1972); 67 Am.Jur.2d *Sales* § 16 (1985). Comment f of Restatement (Second) Section 402A further defines a seller as any person engaged in the business of selling products for use or consumption. It is not necessary that the seller be engaged solely in the business of selling a specific product; however, the seller must not be an occasional seller of the product. Restatement (Second) Torts, § 402A, Comment f. The question here then is what is an occasional seller and whether Hopeman, as a subcontractor, falls within this category.

This Court has not addressed the issue of whether a subcontractor is an occasional seller and consequently not subject to the provisions of Restatement (Second) of Torts, Section 402A. However, the Plaintiffs insist that *State Stove Manufacturing Company v. Hodges,* 189 So.2d 113 (Miss.1966), if not controlling, may provide some guidance.

In *State Stove,* an action was brought by owners of a home destroyed in a fire due to the explosion of a water heater against the manufacturer of the heater and the contractors who constructed the home and supplied and installed the water heater. *State Stove Manufacturing Company v. Hodges,* 189 So.2d 113 (Miss.1966). The chancery court dismissed the suit with prejudice against the contractors and both the homeowners and the manufacturer appealed. *Id.* On appeal, this Court reversed. This Court found that the contractors were engaged in the business of selling and installing water heaters in homes constructed by them and were therefore strictly liable for its faulty installation. *Id.* at 123–124. Although it is urged that this case stands for the proposition that contractors are sellers, the fact is that the contractors in *State Stove,* who installed the water heater improperly, were also the owners of the hardware store from whence the water heater was purchased. That is, they were in the chain of delivery of the product in a different capacity than a mere contractor and that capacity was, inarguably, a seller.

The Plaintiffs also maintain that *Bounds v. Joslyn Manufacturing and Supply Company,* 660 F.Supp. 1063 (Miss.1986), a Mississippi District Court case, may shed some light on this issue. In this case, the plaintiff was an employee of an cable construction company that had entered into a contract with a cable company to construct twenty-seven miles of cable system in Meridian, Mississippi. *Bounds v. Joslyn Manufacturing and Supply Company,* 660 F.Supp. 1063 (S.D.Miss.1986). Pursuant to the contract, the cable company supplied all the cable poles and other necessary hardware for the construction of the cable system from the defendant retailer. *Id.* Included among the necessary hardware was a guy strap which had been manufactured by the defendant supply company. *Id.* When the plaintiff subsequently used the guy strap in the manner for which it was intended, the guy strap broke and this suit ensued. *Id.* The court addressed the question of whether supplying equipment under the terms of a contract made the supplier a seller of that equipment, and if so, did the act of supplying that equipment rise to the level of conducting the "business of selling" as required under Restatement (Second) of Torts § 402A. *Id.* at 1066. The court concluded:

> The Mississippi Supreme Court would, in all probability, take the position that an employee may sue one who contracts for services with his employer when, under the terms of the contract, he agrees to provide the necessary materials and supplies with ***644** which the employer's personnel must work. The employee needs to show for products liability purposes that the party that supplied the product to his employer furnishes materials in a contract arrangement on such a regular or consistent basis that the act of supplying products is a part of its business activity and not an occasional act.

Id. at 1068–1069. In reaching this conclusion, the court recognized that there is no Mississippi case which discusses whether a supplier of materials under the terms of a contract is engaged in the business of selling. In the absence of Mississippi case law, the court relied upon the following three federal cases: *Bosse v. Litton Unit Handling Systems, Inc.,* 646 F.2d 689 (1st Cir.1981); *Mitchell v. Shell Oil Company,* 579 F.Supp. 1326 (D.Mont.1984); *Walker v. Skyclimber, Inc.,* 571 F.Supp. 1176 (D.C.V.I.1983). None of these cases appear to support the District Court's conclusion. For example, in *Bosse,* the plaintiff's characterization of the general contractor as seller was never challenged, as it is in the instant case. Consequently, the issue of whether the defendant was a seller was not discussed. The holding of *Mitchell* primarily dealt with the dissimilar question of liability of an employer as seller to an employee. In any event, the *Mitchell* Court expressly rejected the proposition that an employer could be classified as a seller engaged in the business of selling work related equipment to his employees for purposes of strict liability. Likewise, in *Walker,* the court rejected a strict liability claim against an owner, which purchased a defective scaffolding device and transferred it to an independent contractor to do maintenance work at a refinery, because the owner was not "engaged in the business of selling" such devices.

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Other jurisdictions which have addressed this issue have determined that contractors and subcontractors are not within the scope of the term "seller" as it is used in Section 402A of the Restatement (Second) of Torts. For example, in *Monte Vista Development Corporation v. Willey Tile Company,* 226 Cal.App.3d 1681, 277 Cal.Rptr. 608 (1991), the California Court of Appeals held that a subcontractor who was in the business of installing commercial and residential ceramic tile was not strictly liable for supplying a defective soap dish since it was not in the business of selling soap dishes. In its analysis, the California appeals court stated that "[i]t is critical to identify the product which a plaintiff claims to be defective." *Id.,* 277 Cal.Rptr. at 610. Furthermore, the appeals court stated that the focus of its analysis was not on whether [the defendant] was a subcontractor, but whether the [the defendant] came within the chain of commerce as a supplier of the soap dish to the extent that it became strictly liable if the item was defective. *Id.* The appeals court concluded in this case that liability should not be extended under these circumstances. *Id.*

Another example is the Tennessee case, *Delta Refining Co. v. Procon, Inc.,* 552 S.W.2d 387 (Tenn.Ct.App.1976). In *Delta Refining Co.,* a fire occurred at an oil refinery due to a defective pump purchased and installed by a general contractor under a general construction contract with the oil refinery. *Delta Refining Co. v. Procon, Inc.,* 552 S.W.2d 387 (Tenn.Ct.App.1976). The oil refinery brought suit against the manufacturer of the pump and the contractor. *Id.* The circuit court granted a directed verdict in favor of the contractor, and the plaintiff appealed. *Id.* The Tennessee Court of Appeals affirmed the judgment. *Id.* The appeals court held that the contractor was not liable under the strict liability doctrine as a seller of the pump because the contractor was not in the business of selling such pumps, but had merely contracted with the oil refinery to purchase and install the pump which the codefendant was to build according to specifications furnished by the oil refinery. *Id.* at 388.

A third example is another Tennessee case, *Parker v. Warren,* 503 S.W.2d 938 (Tenn.Ct.App.1973). In this case, a husband and wife brought an action against a wrestling promoter and owner of a building in which the match was held for injuries sustained when a bleacher seat upon which the wife was sitting collapsed. *Parker v. Warren,* 503 S.W.2d 938 (Tenn.Ct.App.1973). The promoter filed a third-party complaint against the supplier of the lumber used in the bleachers and the carpenters who constructed ***645** the bleachers. *Id.* at 940. At trial, a verdict was entered in favor of the husband and wife against the promoter and in favor of the carpenters against the promoter. *Id.* The promoter appealed. *Id.* The Tennessee appeals court held that the carpenters were not sellers of the lumber and they were not engaged in the business of selling such a product. *Id.* at 945.

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A fourth and very recent illustration of how courts of other jurisdictions have addressed the issue of a contractors liability under Section 402A of the Restatement (Second) of Torts is *Maack v. Resource Design & Const., Inc.,* 875 P.2d 570 (Utah App.1994). In this case, the plaintiffs alleged that the exterior components of a residence—the stucco, membranes, and adhesives—built by the defendants were defective, and defendants were therefore strictly liable for damages under Section 402A of the Restatement (Second) of Torts. *Maack v. Resource Design & Const., Inc.,* 875 P.2d 570, 581 (Utah App.1994). This claim was rejected by the trial court on the basis that the defendants were not "sellers". *Id.* The Court of Appeals of Utah agreed. The court stated that

> [W]e find no reason to disturb the trial court's conclusion ... that [the Defendants] were not "sellers" or manufacturers of the component parts of the exterior of the house. The [Plaintiffs] claim, nonetheless that [the Defendants] were "sellers" of the component parts because the contract ... specified that [the Defendants] would be on a cost of work plus fee basis. However, this inclusion of the cost of materials seems to have been solely for the purpose of calculating a fee for the work done. The evidence is undisputed that [the Defendants] were construction contractors who simply utilized these component parts when constructing the residence—they were not in the business of selling stucco, adhesives, or membranes on wholesale or retail basis.

Id. The court did not cite any authority for this holding other than the Restatement.

The aforementioned cases stand for the proposition that a contractor/subcontractor is not a seller, within the scope of Section 402A of Restatement (Second) of Torts, and is therefore not liable for any component parts it may supply in compliance with the performance of a job or service. Other cases which follow this rule are: *Freitas v. Twin City Fisherman's Cooperative Association,* 452 S.W.2d 931 (Tx.App.Ct.1970); *The Trustees of Columbia University in the City of New York v. Gwathmey Siegel and Associates Architects,* 192 A.D.2d 151, 601 N.Y.S.2d 116 (1993); *Sapp v. Morton Buildings, Inc.,* 973 F.2d 539 (7th Cir. (Ind.) 1992).

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The facts of this case are: (1) that Hopeman is in the business of joiner subcontracting, i.e., building the interior outfitting of a ship which consisted of installing shipboard furniture, beds, box berthing, non-structural bulkheads, overheads, insulation etc.; (2) that the materials Hopeman purchased to fulfill a joiner subcontract were not purchased for resale; (3) that the services and materials Hopeman provided were specified in the contract with Ingalls and the vessel owners; and (4) that the total price of a job included both the services and materials that were provided. Based on this evidence, it is clear that Hopeman was not a seller in the business of selling Micarta and Marinite. Rather, as a subcontractor, Hopeman merely supplied the materials to complete the service for which it was hired pursuant to the contract between the parties. It follows that Hopeman is not strictly liable under the Restatement.

The Restatement does not define "manufacturer." However, since we conclude that Hopeman is not a seller, it necessarily follows that Hopeman is also not a manufacturer. A manufacturer, as implied by the Restatement (Second) of Torts § 395, Comment b, is a person or company "who regularly, and *in the course of their principal business, create, assemble and/or prepare goods for sale to the consuming public.*" *Olson v. Ulysses Irrigation Pipe Co., Inc.,* 649 F.Supp. 1511 (Dist.Kan.1986). In other words a manufacturer produces goods as a principal part of its business *and* sells them either directly or for resale to the consuming public. In the instant case, as previously indicated, Hopeman is a subcontractor in the business of joiner subcontracting and not in ***646** the business of producing Marinite–Micarta panels to be sold to the consuming public.

B. Negligence

The Plaintiffs contend that Hopeman was negligent in its failure to warn the Plaintiffs of the hazards of asbestos. The Plaintiffs argue that "any prudent company knew or should have known that asbestos was a dangerous substance when inhaled." Therefore, the Plaintiffs argue, Hopeman was under a duty to warn bystanders of the inherent risks involved in breathing the asbestos when it was sawed. The Plaintiffs also argue that at the very least, Hopeman aided and abetted the manufacturers of Marinite and Micarta in the commission of a tort action against the plaintiffs. Then, the Plaintiffs goes on to make much ado about Hopeman and Wayne Manufacturing as joint tortfeasors. *D.W. Jones v. Collier,* 372 So.2d 288 (Miss.1979). Specifically, the Plaintiffs claim that Hopeman and Wayne Manufacturing had superior knowledge with respect to the hazardous nature of the products manufactured by Wayne and sold by Hopeman. Therefore, the Plaintiffs argue, Hopeman and Wayne Manufacturing shared the duty to warn the Plaintiffs about those hazards. *Wilson v. Giordano Insurance Agency, Inc.,* 475 So.2d 414, 417 (Miss.1985); *D.W. Jones v. Collier,* 372 So.2d 288 (Miss.1979).

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Hopeman contends that there is no evidence which would allow a reasonable jury to find that it was negligent. Hopeman argues that it did not warn the Plaintiffs about the dangers of asbestos because it did not know of them until the 1960's. Hopeman asserts that when it became aware of the hazards of asbestos, immediate action was taken to eliminate the dust. Furthermore, Hopeman argues it had no reason to know of the dangers of asbestos since the dangers of inhaling asbestos dust would not have been apparent upon a reasonable inspection. Hopeman also contends that Wayne Manufacturing was dismissed as a party to this suit by the trial court, a point to which the Plaintiffs do not appeal. Hopeman further argues that the Plaintiffs have not only failed to raise on appeal any type of "joint tortfeasors" theory, but there was no such theory advanced below.

The Plaintiffs' contention is meritless. First, any reference to Wayne Manufacturing is disregarded by this Court. Wayne Manufacturing is not a party to this suit and the joint tortfeasor theory upon which the Plaintiffs claim recovery is being advanced for the first time on appeal. This Court has held that it will not consider theories of recovery advanced for the first time on appeal. *Crowe v. Smith,* 603 So.2d 301, 305 (Miss.1992); *Howard v. State,* 507 So.2d 58, 63 (Miss.1987).

Second, the Plaintiffs' argument assumes that Hopeman is the manufacturer or seller of the asbestos. As a manufacturer or seller, it is very true that Hopeman would have had a duty, as a matter of law, to warn of any known hazards. *Swan v. I.P., Inc.,* 613 So.2d 846 (Miss.1993). However, as previously indicated, we conclude that Hopeman is not a seller or a manufacturer.

The record indicates the following facts: (1) that Hopeman was regarded as a safety conscious company; (2) that Hopeman was unaware of the hazards of asbestos until the late 1960's; (3) that upon learning of the hazards of asbestos, Hopeman took extreme measures to eliminate the dust caused by the sawing of the Marinite and Micarta; (4) that Hopeman only dealt with

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what was considered the most reputable asbestos companies in the industry; (5) that there was no indication from within the industry as to the dangers of inhaling asbestos.

There is absolutely no evidence in the record which suggest that Hopeman knew of hazards inherent of inhaling the asbestos, prior to the late 1960's. When Hopeman did learn of the dangers, Hopeman took immediate action to eliminate the dust. Nor is there evidence to support a finding that Hopeman should have known about the hazards of inhaling asbestos. It does not appear that Hopeman was in the business of manufacturing or selling asbestos-containing products; nor is there any evidence in the record which suggests that there were any industry publications which warned of the dangers, prior to the late 1960's, which is when Hopeman took action.

***647 III.**

We hold that Hopeman was neither a manufacturer or seller of Marinite and Micarta panels and is, therefore, not strictly liable under Section 402A of the Restatement (Second) of Torts. Furthermore, we hold that there is no evidence to support a jury verdict that Hopeman was negligent in its failure to warn of the hazards of asbestos. Accordingly, we affirm the judgment of the circuit court.

AFFIRMED.

HAWKINS, C.J., DAN M. LEE and PRATHER, P.JJ., and PITTMAN, JAMES L. ROBERTS, Jr. and SMITH, JJ., concur.

McRAE, J., dissents with separate written opinion joined by SULLIVAN, J.

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McRAE, Justice, dissenting:
If Ingalls Shipyard Corporation is in the business of manufacturing ships, then Hopeman Brothers' activity was an integral part of the manufacturing process. The facts reveal that Hopeman Brothers was the party responsible for procuring and assembling the defective materials into the finished product. As an independent contractor involved in the process of building ships, Hopeman Brothers qualifies as a manufacturer under our law of strict liability.

By incorporating defective components into a finished product, a manufacturer is deemed a seller of the defective component as contemplated by § 402A of the Restatement (Second) of Torts. *See Coca Cola Bottling Co. v. Reeves,* 486 So.2d 374, 378 (Miss.1986) ("one who sells or distributes as his own a product manufactured by another is subject to liability the same as though he were its manufacturer"); *see also Ford Motor Co. v. Mathis,* 322 F.2d 267, 273 (5th Cir.1963) (holding assembler of finished product liable for incorporating defective materials); *Baughman v. General Motors Corp.,* 627 F.Supp. 871 (D.S.C.1985) (assembler who incorporates defective component into finished product and places finished product into stream of commerce is liable in tort if one is injured even if that manufacturer/assembler did not manufacture the component part). In *State Stove Mfg. Co. v. Hodges,* 189 So.2d 113 (Miss.1966), the contractor who constructed a mobile home and installed a water heater in it was held strictly liable in tort after the heater malfunctioned and destroyed the house. 189 So.2d at 123–24. This Court concluded that the contractor "sold" the product as contemplated by § 402A by installing the heater in the house during construction. *Id.* It follows that Hopeman Brothers should be liable for the unreasonably dangerous finished product in the present case since it was the party responsible for procuring and incorporating the Micarta wall covering into the construction of the ships.

To hold otherwise subjects two equally culpable corporations to different and unequal standards of care. The corporation directly responsible for the attachment of the defective materials is permitted to operate under the lower standard. Ingalls is required to prove a case of negligence against Hopeman Brothers before being entitled to any recourse while, at the same time, Ingalls will be subjected to strict liability claims even though it was not directly responsible for the portion of the manufacturing process

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which incorporated the defective materials. The production of unreasonably dangerous products would be better deterred if the independent contractor who purchased and incorporated the defective materials was held to the same strict liability standard.

The cases supporting the majority's position stand for the proposition that a seller must be in the business of selling the products in issue before he may be subjected to strict liability. The particular facts of this case clearly show that Hopeman Brothers was in the business of selling Micarta through its manufacturing role. It sold so much through its subcontracting installation business that the materials were obtained from a subsidiary corporation. The price of the materials was an integral part of the contract price with Ingalls. Hopeman Brothers admitted that there was only a minimal amount of labor required for assembling these materials into the finished product. Therefore, the bulk of its manufacturing activity consisted of supplying the interior of the ships with the asbestos product.

***648** The trial court erroneously granted the directed verdict to Hopeman Brothers since it qualified as a manufacturer and seller under § 402A of the Restatement (Second) of Torts. Even so, the directed verdict was erroneously granted since the plaintiff established a prima facie case of strict liability under the law of this state. The plaintiff is required to prove three elements in order to establish a prima facie case of strict liability: 1) the plaintiff was injured by the product, 2) the injury resulted from a product defect which rendered it unreasonably dangerous, and 3) the defect existed when the product left the manufacturer. *Early–Gary, Inc. v. Walters,* 294 So.2d 181, 186 (Miss.1974). The plaintiff has never been directed to put on proof that a defendant is in the business of selling certain products in order to establish a prima facie case. It was the defendant's burden to prove that he was not in the business of selling a certain product. Consequently, the trial court's failure to submit the case to the jury by granting a directed verdict was erroneous. This case should be reversed and remanded for a new trial on the merits. Accordingly, I dissent.

SULLIVAN, J., joins this opinion.

All Citations

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EXHIBIT “20”

117 N.H. 154
Supreme Court of New Hampshire.

Peter J. BRESCIA et al.

v.

GREAT ROAD REALTY TRUST.

No. 7555.
|
Feb. 28, 1977.
|
On Rehearing April 29, 1977.

Synopsis

Construction company employee brought action for on-the-job injuries he suffered as result of collapse of boom of a truck crane owned and leased from defendant. The plaitniff's wife sought damages for loss of her husband's consortium. The defendant moved to dismiss on ground that it shared statutory immunity from suit provided plaintiff's employer under Workmen's Compensation Act and that plaintiffs had not stated cause of action in either strict liability or implied warranty. The motions were denied and defendants' exceptions to denial of both motions were reserved and transferred by the Superior Court, Hillsborough County, Batchelder, J. The Supreme Court, Bois, J., held that: (1) since the defendant was not in business of supplying cranes and its role as lessor was due solely to shortage of funds of employer, defendant could not be held accountable in strict liability; (2) it could not be held on basis of implied warranty of merchantability; (3) under circumstances, it could not be held liable on basis of claim of warranty of fitness for a particular purpose, and (4) where defendant was not expected to do anything after it received the crane other than turn it over to employer, it was not negligent because of its failure to inspect crane, assemble it properly or make safe repairs.

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Exceptions sustained.

Attorneys and Law Firms

**1311 *155 Stein & Gormley, Nashua (Morris D. Stein, Nashua, orally), for plaintiffs.

Wyman, Bean & Stark, Manchester (Rodney L. Stark, Manchester, orally), for defendant.

Opinion

BOIS, Justice.

Peter Brescia was employed by Constructors, Incorporated, a construction company, when he suffered on-the-job injuries as the result of the collapse of the boom of a truck crane owned by and leased from the defendant Great Road Realty Trust. Plaintiff brought this suit seeking to recover damages on alternative theories of strict liability and implied warranty. Dianne L. Brescia is seeking damages for the loss of her husband's consortium.

The defendant moved to dismiss on the ground that the trust was not ‘some person other than the employer,’ and thus shared in the statutory immunity from suit provided Constructors under the workmen's compensation act. RSA 281:14 I.

The sole witness at the hearing held on the nature of the relationship between Constructors and the Trust was one Lawrence Moore who testified that he was president, treasurer and sole stockholder of Constructors, and that he was also sole stockholder, trustee, and beneficiary (with his wife) of Great Road Realty Trust. The Trust owned certain parcels of land which it rented

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to Constructors, and on some of which it had built sheds to house the ***156** construction company's equipment. The rental agreements were verbal, and repairs on the property were performed by Constructors. The Trust has never had any employees, and was formed solely as a tax-saving device pursuant to professional advice.

The crane in question was purchased by Mr. Moore on behalf of the trust simply because at the time Constructors was low on cash. Constructors already owned three cranes, and it added the fourth 'leased' crane (againt the rental agreement was verbal) to its fleet. The Trust never did anything after it received the crane other than turn it over to the construction company.

The superior court denied the motion to dismiss. The defendant also moved for dismissal on the grounds that plaintiffs had not stated a cause of action in either strict liability or implied warranty. This motion was also denied and defendant's exceptions to the denial of both motions have been reserved and transferred by the Trial Court (Batchelder, J.).

We find it unnecessary to comment upon the question of whether the Trust is 'some person other than the employer' for purposes of workmen's compensation law, since we agree that plaintiffs have not stated a cause of action either in strict liability or implied warranty.

Restatement (Second) of Torts, section 402-A (1965) provides for recovery in strict liability as follows:
'(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.'

****1312** We have spoken of strict liability as applying in actions agaist manufacturers and sellers. McLaughlin v. Sears, Roebuck, 111 N.H. 265, 281 A.2d 587 (1971); Buttrick v. Lessard, 110 N.H. 36, 260 A.2d 111 (1969). The applicability of the doctrine in an action between a lessee and lessor is not well established. Annot., Products Liability-Strict Liability in Tort 13 A.L.R.3d 1057, 1096-97 (1967). Restatement (Second) of Torts s 402-A, comment f at 350 ***157** (1965) indicates that the doctrine does not apply to the occasional seller not engaged in selling as a part of his business, nor to sales of the stock of merchants out of the usual course of business. Thus to the extent the doctrine is applicable to a lease arrangement, it would seem to be applicable only where the lease in question represents something more than business happenstance on the part of the lessor. See Cintrone Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965).

In the instant case, it is undisputed that the lease arrangement was a mere business arrangement. The defendant does not deal in cranes, and its role as lessor was due solely to the shortage of funds at Constructors. There is no evidence that the Trust has any dealings with the general public; rather the trust exists only to serve Constructors. Professor Prosser has observed: 'As to strict liability, whether on warranty or in tort, no case has been found in any jurisdiction in which it has been imposed upon anyone who was not engaged in the business of supplying goods of the particular kind.' W. Prosser, Law of Torts s 100, at 664 (4th ed. 1971). The defendant Trust was not in the business of supplying cranes, and it cannot be held accountable in strict liability.

We next consider plaintiffs' attempt to recover on an implied warranty theory. In this state, the statutory implied warranties of the Commercial Code are deemed to afford a complete remedy, and no common law cause of action in contract based on implied warranty is recognized. Stephan v. Sears Roebuck & Co., 110 N.H. 248, 250, 266 A.2d 855, 857 (1970). The Code provides two implied warranties: a warranty of general merchantability, applicable if the seller is a merchant with respect to goods of that kind (RSA 382-A:2-314); and a warranty of fitness for a particular purpose, applicable if the seller has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. RSA 382-A:2-315. These warranties are 'imposed by law on the basis of public policy. They arise by operation of law because of the relationship between the parties, the nature of the transaction, and the surrounding circumstances.' Elliott v. Lachance, 109 N.H. 481, 483-84, 256 A.2d 153, 155 (1969). In applying these warranties we must take into account commercial realities. See RSA 382-A:1-102.

***158** The application of the implied warranty doctrine to a lease arrangement is not settled in the cases. Annot., Application of Warranty Provisions of Uniform Commercial Code to Bailments, 48 A.L.R.3d 668 (1973); see Elliott v. Lachance, 109

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N.H. 481, 486, 256 A.2d 153, 157 (1969). We assume, arguendo, that under proper circumstances a lease arrangemet would be embraced by the Code warranties.

It is clear that plaintiffs, herein, cannot succeed on their warranty cause of action. The implied warranty of merchantability is applicable only if the seller is a merchant with respect to goods of that kind. RSA 382-A:2-104(1) defines a merchant as one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the goods involved. It is evident that here the defendant cannot be considered a merchant within the meaning of this definition. See J. White & R. Summers, Uniform Commercial Code s 9-6, at 289 (1972).

Any claim of warranty of fitness for a particular purpose must also fail. This warranty is applicable only if the seller has reason to know that the buyer is relying on the seller's skill or judgment. The defendant lessor here possessed no skill or judgment upon which the lessee relied; indeed the reality is that for commercial code purposes the lessor and lessee constituted a **1313 single entity in the person of Lawrence Moore. To speak of 'reliance' in these circumstances would be to indulge in an absurdity. See also RSA 382-A:2-318.

Plaintiffs cannot succeed in their claims of strict liability and/or implied warranty. The motion to dismiss should have been granted.

Exceptions sustained.

DOUGLAS, J., did not sit; the others concurred.

ON REHEARING

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The court was informed that plaintiff's action in the trial court included a claim based on negligence. No mention of a negligence count was included in either the reserved case or the briefs of the parties. Reference to such an allegation was not made at the time of oral argument and we thus had no occasion to discuss negligence in the earlier opinion.

*159 "One who leases a chattel as safe for immediate use is subject to liability . . . if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.' Restatement (Second) of Torts s 408 (1965). The duty imposed is operationally related to the real life circumstances of the lessor, and thus the inspection required varies with 'the length of time during which (the chattel) has been in the lessor's possession and use.' Id., comment a, at 367.

The undisputed facts in the instant case show that the lessor served merely as a source of funds for purchase of the crane. It did not purport, and was not expected, to do 'anything after it received the crane other than turn it over to the construction company. The lessor never had meaningful possession and use of the chattel, and clearly had no role to play with respect to its safety.

This is not a case where the lessor can be said to be negligent because of failure to inspect the crane, LaRocca v. Farrington, 301 N.Y. 247, 93 N.E.2d 829 (1950), or failure to assemble it properly, Wujnovich v. Equipment Corporation, 54 F.Supp. 465 (W.D.Pa.1944), or failure to make safe repairs, Scharf v. Gardner Cartage Co., 95 Ohio App. 153, 113 N.E.2d 717 (1953). The lessor here had no occasion for any of these breaches of duty.

It cannot be said that the lessor leased the chattel 'as safe for immediate use.' Plaintiffs' negligence claim must fail.

Former result affirmed; exceptions sustained.

All concurred.

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All Citations

117 N.H. 154, 373 A.2d 1310, 21 UCC Rep.Serv. 769

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EXHIBIT “21”

168 A.D.3d 519
Supreme Court, Appellate Division, First Department, New York.

Debra HAUERSTOCK, etc., et al., Plaintiffs–Appellants–Respondents,
v.
BARCLAY STREET REALTY LLC, et al., Defendants–Respondents–Appellants,
Saladino Furniture Inc., et al., Defendants–Respondents.

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ENTERED: JANUARY 17, 2019

Synopsis

Background: Appeal was taken from order of Supreme Court, New York County, Robert D. Kalish, J., which, among other things, denied summary judgment on negligence claims against property manager and owner arising out of antique columns covered in lead-based paint, and granted summary judgment in favor of seller of columns.

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Holdings: The Supreme Court, Appellate Division, held that:

local law addressing lead poisoning prevention and control did not impose on property owner and manager a duty to remediate the lead-based paint hazard;

property owner and manager failed to establish their entitlement to judgment as a matter of law on negligence claim and a claim under statute requiring multiple dwellings to be kept in good repair;

seller of antique columns covered in lead-based paint was not subject to strict products liability; and

seller of antique columns did not breach its duty to warn property manager and owner who purchased columns of known defects.

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Affirmed.

Attorneys and Law Firms

****222** Stadtmauer & Associates, New York (Marc A. Stadtmauer of counsel), for appellants-respondents.

Landman Corsi Ballaine & Ford P.C., New York (Joshua Deal of counsel), for respondents-appellants.

McGivney Kluger & Cook, P.C., New York (Anthony Nwaneri of counsel), for Saladino Furniture Inc., respondent.

Koster, Brady & Nagler, New York (Marc R. Wilner of counsel), for Saladino Group, Inc. and John Saladino, respondents.

Renwick, J.P., Manzanet–Daniels, Gische, Mazzarelli, Kahn, JJ.

Opinion

***519** Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about August 10, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Barclay Street Realty LLC (Barclay) and Glenwood Management Corp. (Glenwood)'s motion for summary judgment dismissing the complaint as against them and all cross claims asserted against them, except as to plaintiffs' causes of action for common-law negligence and for negligence based upon Multiple Dwelling Law § 78, and granted defendants Saladino Furniture Inc. (SFI), Saladino Group Inc. (SGI), and John Saladino (Saladino)'s separate motions for summary judgment dismissing the complaint as against them and all cross claims asserted against them, unanimously affirmed, without costs.

We agree with Supreme Court that Local Law No. 1 (2004) of City of New York (codified at Administrative Code of City of New York §§ 27–2056.1—27–2056.18) applies to elements, fixtures, and improvements of a multiple dwelling, and not to movable or removable decorative furnishings. Under this interpretation, we further agree that Local Law No. 1 does not impose on Barclay and Glenwood, which owned and managed the subject building, respectively, a duty to remediate the lead-based paint hazard posed by the decorative columns in the building's lobby—which were both movable and removable—prior to being notified by the Health Department that the columns, in fact, contained lead-based paint.

Supreme Court did, however, err in interpreting the scope of a property owner's duty under Multiple Dwelling Law § 78. "At common law[,] landlords had no duty to maintain leased premises, other than common areas, in good repair" (*Juarez v. Wavecrest Mgt. Team,* 88 N.Y.2d 628, 643, 649 N.Y.S.2d 115, 672 N.E.2d 135 [1996] [citation omitted]). Multiple Dwelling Law § 78 expanded this duty to include not only common areas of dwellings, but the *entire* dwelling, as well as the land upon which it is situated. It did not, however, impose liability upon a property owner for a dangerous or defective condition of which it had no actual or constructive notice.

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Nevertheless, Supreme Court correctly declined to dismiss plaintiffs' claims for common-law negligence and pursuant to Multiple Dwelling Law § 78 as against Barclay and Glenwood, ***520** since Barclay and Glenwood failed to establish prima facie that the antique columns which they purchased and placed in the building's lobby were in reasonably safe condition, and that they lacked actual and constructive notice that the columns contained lead-based ****223** paint (*see generally Chapman v. Silber,* 97 N.Y.2d 9, 734 N.Y.S.2d 541, 760 N.E.2d 329 [2001]).

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The court properly dismissed the action as against SFI, since the only evidence suggesting its involvement in the procurement of the subject columns was inadmissible hearsay, and as against Saladino, since there was no basis for imposing liability against him in his individual capacity (*see Peguero v. 601 Realty Corp.,* 58 A.D.3d 556, 559, 873 N.Y.S.2d 17 [1st Dept. 2009]; *Espinosa v. Rand,* 24 A.D.3d 102, 102, 806 N.Y.S.2d 186 [1st Dept. 2005]).

We also agree with Supreme Court that SGI was a casual seller of the subject columns, and therefore not subject to strict products liability (*see Stiles v. Batavia Atomic Horseshoes,* 81 N.Y.2d 950, 597 N.Y.S.2d 666, 613 N.E.2d 572 [1993]; *Sukljian v. Ross & Son Co.,* 69 N.Y.2d 89, 511 N.Y.S.2d 821, 503 N.E.2d 1358 [1986]). The record demonstrates that its sale of the subject columns to Barclay and Glenwood was an incidental part of its interior design services, and that SGI was not regularly engaged in the procurement or sale of such artifacts or antiques.

Since the record demonstrates that SGI did not know that the subject column contained lead-based paint at the time that it procured it for Barclay and Glenwood, SGI did not breach its duty, as a casual seller, to warn Barclay and Glenwood "of known defects that are not obvious or readily discernible" (*Sukljian,* 69 N.Y.2d at 97, 511 N.Y.S.2d 821, 503 N.E.2d 1358). In any event, the column's age and the fact that its paint was chipped and peeling were obvious.

Finally, plaintiffs' punitive damages claim was properly dismissed as against all defendants. The record contains no evidence that any of the defendants acted wilfully or maliciously—or, as plaintiffs suggest, recklessly—in placing the subject columns in the building's lobby. "This is not the 'singularly rare case' where the wrong complained of, having been actuated by an

improper state of mind or malice, or having resulted in public harm, justifies an exemplary award" (*APW, Inc. v. Marx Realty & Improvement Co.,* 291 A.D.2d 333, 334, 739 N.Y.S.2d 114 [1st Dept. 2002]).

We have considered the parties' remaining contentions and find them unavailing.

All Citations

168 A.D.3d 519, 92 N.Y.S.3d 220, 2019 N.Y. Slip Op. 00355

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EXHIBIT “22”

17 Ohio App.3d 75
Court of Appeals of Ohio, Sixth District, Fulton County.

ABBOTT et al., Appellants,

v.

U.S.I. CLEARING CORPORATION et al., Appellees.*

No. F–83–11.
|
April 20, 1984.

Synopsis
Action was brought against manufacturer of punch press and automobile manufacturer from which plaintiff's employer had bought the press, which spontaneously recycled and severed plaintiff's arm below the elbow. The Fulton County Court of Common Pleas rendered summary judgment for the manufacturers, and plaintiff appealed. The Court of Appeals, Handwork, J., held that: (1) given the numerous substantial alterations and modifications the automobile manufacturer could not be held liable on a negligence theory; (2) neither corporate size of the automobile manufacturer nor fact that it auctioned off a large number of subject presses established that it was other than an occasional seller, for purpose of strict products liability; and (3) given the substantial modifications made to the press following its original sale, including substantial change in the activation mechanism, the original manufacturer could not be held strictly liable.

Judgment affirmed.

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AAtre *Syllabus by the Court*

Aad 1. Strict liability in tort is not an appropriate theory of liability for application to the occasional seller. (2 Restatement of the Law 2d, Torts, Section 402A, Comment *f,* applied.)

2. The infrequent sale of plant machinery by a corporation at an auction after one of its plants has closed does not transform the corporation into a "seller engaged in the business of selling" such equipment or elevate it to the status of a corporate merchant doing business in that kind of product for purposes of strict liability under Section 402A(1)(a) of the Restatement of the Law 2d, Torts.

3. Standing alone, neither its corporate size nor the fact that the corporation sells a large number of plant machines at the auction suffices to establish that it is other than an "occasional seller."

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Harold M. Steinberg, Charles V. Contrada and Joan H. Rife, Holland, for appellants.

M. Donald Carmin, Glenn E. Wasielewski and John A. Pietrykowski, Toledo, for appellees.

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HANDWORK, Judge.

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This case is before the court on appeal from a judgment of the Fulton County Court of Common Pleas, which granted summary judgment in favor of co-defendants-appellees, U.S.I. Clearing Corporation and Chrysler Corporation (hereinafter U.S.I. and Chrysler).

In 1952, the corporate predecessor of U.S.I. manufactured a seventy-five-ton OBI, single gear press (serial number 52–197168). This press was built, tested and then sold to Chrysler in 1953, along with three similar presses. After its sale to Chrysler, and while in Chrysler's possession, the component parts of the press were extensively altered.

In 1980, Chrysler closed the plant where the particular press in question was being used. It thereafter held a public auction at which all the plant's equipment, including this press, was offered for sale. At the auction, the G.B. Manufacturing Co. (appellant's employer), purchased the press and other plant equipment. By the terms under which the auction was conducted, the press was sold "as is" and "where is." The contract of sale for this particular press contained the following clause:

"This press, or other item, is sold 'as is', 'where is' and the last owner makes no warranties, expressed or implied, common law or contractual, in connection with this sale."

The record indicates that, in acquiring the press, appellant's employer knew and fully understood the stated terms of the sale. The press itself bore **At** no standard warning labels regarding latent defects. **At 01** Once purchased, the press was disassembled at the Chrysler plant by someone appellant's employer had hired. This party then transported the press to the G.B. Manufacturing plant, and there reassembled it. G.B. Manufacturing also hired an electrician to "wire" the machine and "get it running," according to the depositions. Once the press had been reassembled and installed at the plant, its activation mechanism was altered. The press' activation mechanism consisted of two "palm buttons," which were made adjustable to move from eye-level to waist-level position, depending on how the press was being used. G.B. Manufacturing also installed a "point-of-operation" guard, which acted as a barrier for the user, completely encasing the working area around the press.

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During the initial period of use following its purchase, the press appeared to operate properly. Appellant, Brian E. Abbott, had been working at the G.B. plant for approximately six months before he was injured. He was apparently there when the press was first delivered. Appellant had operated the press approximately one hundred times before being injured, and his deposition indicates that he was satisfied that the machine worked properly. However, the record also reveals that appellant knew the press had a tendency to "repeat," that is, to continue rotating its stamper through another cycle without being activated by pressure on the "palm buttons."

On November 24, 1981, appellant was using the press. He had been stamping washers on the machine and, to facilitate his work, he placed a board across the two palm buttons, thereby needing only one hand to trigger a rotation of the stamper. While working, scrap metal became jammed in the press, and appellant attempted to remove it. At this point, in order to extract the jammed metal, appellant removed the "point-of-operation" barrier to get at the "die-area" of the press. As his arm reached into this area, the press spontaneously cycled (or "repeated"). Appellant's arm was severed below the elbow, the injury for which he now sues. It should be noted that the evidence also indicates that appellant knew he should have used an elongated device other than his arm to clear scrap metal from the press, having read similar warnings to this effect on other industrial machines he had worked with.

Appellant filed his complaint against Chrysler and U.S.I. on January 3, 1983. Chrysler thereafter filed a third-party complaint against G.B. Manufacturing. Eventually, in October 1983, Chrysler and U.S.I. filed motions for summary judgment. On December 14, 1983, the trial court granted both motions, and dismissed Chrysler's third-party complaint. This appeal followed.

In bringing this appeal, appellant presents three assignments of error for review, the first and second of which are:

"1. The trial court erred in failing to find that the issue of Chrysler's negligence in failing to warn constituted a material issue of fact.

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"2. The trial court erred in failing to find that the issue of whether Chrysler's massive sale of machines removed it from the category of 'an occasional seller' constituted a material issue of fact."

In support of his first assignment of error, appellant argues that the trial court incorrectly relied upon the Ohio Supreme Court's recent decision in *King v. K.R. Wilson Co.* (1983), 8 Ohio St.3d 9, 455 N.E.2d 1282, in finding that Chrysler was absolved of liability on a negligence theory because the press' activation mechanism had been substantially altered. Appellant attempts to distinguish the *King* case, contending that it dealt only with Aaa the liability of a defendant-*manufacturer* who had been sued on a theory of *strict liability* in tort. However, a careful reading of the *King* opinion indicates that the Supreme Court focused on the manufacturer's liability under a *negligence* theory for injuries caused by a die-cast trim press, the activation mechanism of which had undergone substantial modifications. The manufacturer's negligence was predicated on its "failure to warn" users of the potential AAt04 dangers of the trim press. The Supreme Court stated:

" * * * [A]s to the manufacturer's averred negligence in failing to warn of the dangers of the trim press, we are compelled to follow paragraph four of the syllabus in *Temple v. Wean United, Inc.* [(1977), 50 Ohio St.2d 317, 364 N.E.2d 267], *supra:*

" 'There is no duty to warn extending to the speculative anticipation of how manufactured components, not in and of themselves dangerous or defective, can become potentially dangerous dependent upon their integration into a unit designed and assembled by another.' " *King v. K.R. Wilson Co., supra,* 8 Ohio St.3d at 11, 455 N.E.2d 1282.

Given the numerous, substantial alterations and modifications that the press here underwent, including those made by appellant and his employer, we conclude that these facts place this case within the rule announced in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, and applied, on similar facts, in *King v. K.R. Wilson, supra,* at least as to the negligence issue regarding Chrysler (including an asserted "duty to warn"). Accordingly, the first assignment of error is not well-taken.

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In support of the second assignment of error, appellant argues that Chrysler's one-time "massive sale" of plant machinery at the auction gave rise to a disputed issue of material fact as to whether Chrysler was "an occasional seller" or "a seller engaged in the business of selling such a product [the press]" under 2 Restatement of the Law 2d (1965) 347–348, Torts, Section 402A. Section 402A has been adopted in Ohio in *Temple v. Wean United, supra.* See *id.* at 321–322, 364 N.E.2d 267. As stated in the first paragraph of the syllabus in the *Temple* case:

"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." (Emphasis added.)

Notwithstanding the issue of whether G.B. Manufacturing (and then, later, appellant himself) modified the press' activation mechanism to the extent that this alteration constituted an intervening, superseding cause of appellant's injuries, we conclude that Chrysler, on these facts, was not a "seller * * * engaged in the business of selling" presses. We agree with the observation in *Bailey v. ITT Grinnell Corp.* (N.D.Ohio 1982), 536 F.Supp. 84, 87:

" * * * [S]trict tort liability is not an appropriate theory of liability for application to the occasional seller."

The *Bailey* court cited Comment *f* to Section 402A, which states, in part:

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"*Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. * * *

"The rule does not, however, apply Aa5 to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. * * *

" * * * [I]n the case of the ordinary individual who makes the isolated sale, * * * [the historical reasons for the theory of strict liability are lacking] and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2–314, to a seller who Aat06 is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like." 2 Restatement of the Law 2d, Torts, at 350–351.

As is obvious to everyone, Chrysler is engaged in the business of selling automobiles and automotive parts, not presses or similar machines. The infrequent sale of plant machinery at an auction after one of its plants has closed should not magically transform Chrysler into a seller of presses or similar equipment or elevate it to the status of a corporate merchant doing business in that kind of product for purposes of strict liability under Section 402A(1)(a). Standing alone, neither its corporate size nor the fact that Chrysler auctioned-off a large number of these presses (a "massive sale," as appellant describes it) suffices to establish that Chrysler was other than an "occasional seller."

Moreover, since Chrysler sold the press here "as is" and "where is," with no attendant warranties, and since appellant's employer clearly knew about the terms and conditions of the sale, including the fact that the press might contain defects, we also conclude that the holding in *Thrash v. U-Drive-It Co.* (1953), 158 Ohio St. 465, 110 N.E.2d 419, is, by analogy, applicable to the facts *sub judice.*[1]

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Accordingly, appellant's second assignment of error is not well-taken.

Appellant's third assignment of error is:

"3. The trial court erred in failing to find that there were issues of material fact relative to plaintiff's claim of strict liability against U.S.I."

In support of this assignment of error, appellant contends that, as to his theories of design defect and strict liability in tort, factual issues existed regarding U.S.I.'s (the manufacturer's) failure to install a "point-of-operation" guard and its failure to warn subsequent users of the dangers inherent in modifying or altering the press.

With respect to appellant's "duty to warn" theory against U.S.I., we find that the same lacks merit due to the clear import of the holding in *Temple v. Wean United, supra,* as stated in the fourth paragraph of the syllabus. Appellant's design defect theory must, on these facts, similarly fail, inasmuch as the substantial alterations of the press by Chrysler, G.B. Manufacturing and appellant obviated any pre-existing "defects" in the press when it was sold. The facts indicate that, after its original sale in 1953, the press was virtually rebuilt and then modified to suit the particular needs of whomever happened to own it at any given time. The facts also Aae indicate that G.B. Manufacturing installed a "point-of-operation" barrier, ostensibly to protect the employee-user when working. Yet, the absence of this very "point-of-operation" device, when U.S.I. initially sold the press to Chrysler, is what appellant now asserts was the "design defect" he should have been permitted to prove at trial. We disagree. Quite clearly, a malfunctioning activation mechanism caused appellant's injury, a mechanism that had undergone a "substantial change in the condition in which it [was] sold," so as to preclude a claim of strict liability in tort against the manufacturer. See *Temple v. Wean United, supra* (paragraph 1[b], of the syllabus). Accordingly, appellant's third assignment of error is not well-taken.

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On consideration whereof, the judgment of the Fulton County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

CONNORS, P.J., and RESNICK, J., concur.

All Citations

17 Ohio App.3d 75, 477 N.E.2d 638, 17 O.B.R. 135

Footnotes

* A motion to certify the record to the Supreme Court of Ohio was overruled on September 12, 1984 (case No. 84–1023).

1 In the third paragraph of the syllabus in *Thrash,* the court held:
"Where the owner of a used motor vehicle sells the same 'as is' to a dealer in those articles for such disposition as the dealer may make of it, such owner may not ordinarily be held liable for injuries occasioned to one who purchases the vehicle from the dealer or for injuries to another, because of faults or imperfections in the vehicle which existed or occurred during the time it was in the possession of such owner."

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EXHIBIT “23”

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225 Pa.Super. 362
Superior Court of Pennsylvania.

Elizabeth M. McKENNA and Francis P. McKenna, Appellants,
v.
ART PEARL WORKS, INC. c/o Herman Golden, Registered Agent and
Bernard Dorfmann and Adelphia Button Company, Additional Defendant.

Sept. 19, 1973.

Synopsis

Employee of buyer of punch press and her husband filed suit in trespass and assumpsit against corporate seller and its agent to recover for injuries received while operating punch press. The Court of Common Pleas, Philadelphia County, June Term, 1971, No. 1436, Ned L. Hirsh, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Superior Court, No. 613 October Term, 1973, Hoffman J., held that corporate president who handled sale of punch press could not be held personally liable for employee's injuries and that complaint raised material issues of fact as to whether corporate seller was guilty of negligence, precluding summary judgment.

Reversed and remanded.

Attorneys and Law Firms

****678 *363** Elizabeth M. McKenna, Philadelphia, for appellants.

Saul D. Levit, Philadelphia, for appellees.

Before WRIGHT, President Judge, and WATKINS, JACOBS, HOFFMAN, SPAULDING, CERCONE, and SPAETH, JJ.

Opinion

HOFFMAN, Judge.

Appellants contend that the trial court erred in granting appellees' motion for summary judgment on the amended complaint.

The instant suit arose out of an accident occurring on December 10, 1969, in which the wife-appellant sustained injuries while operating a punch press in the course of her employment at the Adelphia Button Company. The punch press had been purchased from the Act Pearl Works, Inc., through its authorized agent ***364** Bernard Dorfmann. Appellants filed their Complaints in Trespass and Assumpsit against the appellees, Art Pearl Works, Inc., and Bernard Dorfmann individually. Appellees' motion for summary judgment as to appellants' second amended complaints, was granted on January 30, 1973, by the Honorable Ned L. Hirsh of the Court of Common Pleas of Philadelphia County, who based his decision on the deposition of the individual appellee, appellees' affidavit, and the pleadings. Appellants appeal to this Court questioning only those portions of ****679** the lower court's Order granting summary judgment in favor of the appellees on the second amended complaint in trespass.

A summary judgment may be sustained (only) 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Pa.R.C.P. 1035(b), 12 P.S.Appendix. 'The burden of demonstrating that no genuine issue of material facts exists is on the moving party and the record must be examined in the light most favorable to the nonmoving party. Schacter v. Albert, 212 Pa.Super. 58, 239 A.2d 841 (1968) . . . In passing upon a motion for summary judgment, the trial court's function is not to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. All doubts

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as to the existence of a genuine issue of material fact must be resolved against the moving party.' McFadden v. American Oil Co., 215 Pa.Super. 44, 48—49, 257 A.2d 283, 286 (1969).

The issue, therefore, is whether the appellants raised any genuine issues of material fact to negate the propriety of summary judgment on their amended complaint.

Plaintiffs' Complaint in Trespass sets forth with sufficient clarity and definiteness the identity of the ***365** parties, the circumstances of the sale of the punch press to wife-plaintiff's employer, and the injury on December 10, 1969. Plaintiffs' allegations state causes of action based on strict liability in tort and common law negligence.[1] In their Motion for Summary Judgment, defendants admit to the sale of the punch press and the resulting injury. They deny, however, that they are liable to the plaintiffs on a strict liability theory. We agree.[2] Defendants go further, however, and deny liability on any other tort theory. They deny corporate liability, saying that the corporation had ceased doing business in 1964 after a sale of its business assets. Likewise, individual liability is denied, as it is alleged that Bernard Dorfmann at all times acted as an authorized agent for the corporation.

We believe the lower court properly granted the Motion for Summary Judgment with respect to Bernard Dorfmann. Despite the fact that Mr. Dorfmann admitted that he was the president of Art Pearl Works, Inc., and that the corporation was a family business with the shares of stock divided among various family members, we are not persuaded that this is an appropriate case to pierce the corporate veil, as appellants would have us do.

***366** Under the law, there is no authority to look through the corporate appellee to the individual appellee. We have said that the 'equitable doctrine of piercing the corporate veil (should be employed) to prevent the perpetration of wrong; to prevent its use as a shield for illegal and wrongul conduct; or where its use, as a technical device, brings about injustice or an inequitable situation so that justice and public policy demand it be ignored. However, we have not done so where the rights of innocent parties are involved and the corporation is used for a legal purpose, as otherwise the entire theory of the corporate entity would be made useless.' Price Bar, ****680** Inc. Liquor License Case, 203 Pa.Super. 481, 484, 201 A.2d 221, 222 (1964).

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In the instant case, the evidence discloses that the corporate appellee, in an effort to terminate its business operations, sold all its corporate assets. There is absolutely no evidence or averment of fraud, criminal conduct, or other Ultra vires activity on the part of the corporate appellee in any of these transactions. Absent evidence that said corporation was being used for some illegal purpose, we cannot say that the mere fact that appellee sold a defective machine, which subsequently injures an employee of the buyer, would justify holding the selling agent personally liable. The fact that stock is closely held or even held by one stockholder should not, in itself, alter the proposition that the corporation is distinct from its shoreholders. Brown v. Gloeckner, 383 Pa. 318, 118 A.2d 449 (1955); Homestead Boro. v. Defense Plant Corp., 356 Pa. 500, 52 A.2d 581 (1947).

As for the liability of the corporate appellee, we take a different position. While it is true that s 402A liability may not be imposed in the instant case (see footnote 2), plaintiffs, in their Answer and Memorandum contra defendants' Motion for Summary Judgment, aver that defendants' denial of liability is conclusory, and that a cause of action based on common law negligence ***367** is sufficiently stated and proved to sustain their Complaint.

Plaintiffs allege in their Second Amended Complaint that defendants sold and supplied a defective punch press knowing or having reason to know of its unreasonably dangerous condition; reasonably foreseeing that an employee, such as the plaintiff, would use the product ignorant of its dangerous condition; in failing to warn or correct the dangerous condition; and, knowing or having reason to know that said product could not be made safe for use by the plaintiff.

Under the Restatement of Torts (2d) and our decisional law,[3] plaintiffs' complaint raises material issues ***368** of fact, which if read in a light most favorable to the plaintiffs, and if proven would form ****681** sufficient basis for recovery on principles of common law negligence. Having supplied an allegedly defective product to wife-plaintiff's employer, the corporate appellee, Art Pearl Works, Inc., is subject to liability for tortious conduct resulting in wife-plaintiff's injury. Appellants should be permitted to proceed with discovery and, if tenable, to trial.[4]

For the reasons stated above, we reverse the order of the lower court granting the Corporate appellee's motion for summary judgment on the Second Amended Complaint in Trespass, and remand for further proceedings. In all other respects, the order of the lower court is affirmed.

All Citations

225 Pa.Super. 362, 310 A.2d 677

Footnotes

1 Plaintiffs allege that defendants sold to the Adelphia Button Company a punch press in a defective condition. They set forth, inter alia, that defendants were negligent in that they failed to exercise reasonable care by 'selling the said press to her employer knowing or having reason to know that the press was or was likely to be dangerous when used by the plaintiff, a person for whose use it was supplied.'

2 In their Motion for Summary Judgment, defendants point out that Art Pearl Works, Inc. was a button manufacturer, as was the Adelphia Button Company. As such, defendant was not in the business of selling punch presses. Strict liability in tort under s 402A of the Restatement of Torts (2d) does not attach to a 'seller' unless it is in the business of selling said product.

3 Section 388 of the Restatement of Torts (2d), reads as follows:
's 388. Chattel Known to Be Dangerous for Intended Use.
One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.'
Section 389 provides:
's 389. Chattel Unlikely to Be Made Safe for Use.
One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has infomed the other for whose use the chattel is supplied of its dangerous character.'
Section 392 states:
's 392. One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should except to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.' See also, Fullard v. Urban Redevelopment Authority of Pittsburgh, 222 Pa.Super. 184, 293 A.2d 118 (1972).

4 The corporate appellee argues that it cannot be held liable to the appellants as it no longer exists as a corporate entity. Despite the production of a verification from the New Jersey Department of State indicating that it remains an active corporation, the appellee contends that its failure to pay corporate taxes for three consecutive years automatically voids its corporate standing. 18 N.J.S.A. s 7—122. We do not believe a corporation may escape liability to litigants or other creditors by automatic extinction, without either formal proceeding or legal notice. The mere sale of the corporate assets is not a dissolution of the corporation. Levin v. Pittsburgh United Corp., 330 Pa. 457, 199 A. 332 (1938).

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EXHIBIT “24”

400 N.W.2d 909
Supreme Court of South Dakota.

Garold PETERSON, Plaintiff and Appellant,
v.
SAFWAY STEEL SCAFFOLDS COMPANY of South Dakota and
Hi-Lo Powered Scaffolding, Inc., Defendants and Appellees.

No. 15340.
|
Feb. 18, 1987.

Synopsis

Worker brought action against manufacturer and commercial lessor of scaffolding equipment which he was using at time of his injuries. The Circuit Court, Second Judicial Circuit, Minnehaha County, Gene Paul Kean, J., entered summary judgment in favor of manufacturer and lessor, and worker appealed. The Supreme Court, Wuest, C.J., held that evidence presented genuine issues of material fact, precluding summary judgment in favor of manufacturer and lessor.

Reversed and remanded.

Henderson, J., concurred specially and filed opinion.

Sabers, J., concurred in part and dissented in part and filed opinion.

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Attorneys and Law Firms

***910** Bradley G. Bonynge, Sioux Falls, for plaintiff and appellant.

Arlo D. Sommervold of Woods, Fuller, Shultz & Smith, P.C., Sioux Falls, for defendant and appellee Safway Steel Scaffolds Co. of South Dakota.

Danforth, Danforth & Johnson, Sioux Falls, for defendant and appellee Hi-Lo Powered Scaffolding, Inc.

Opinion

WUEST, Chief Justice.

This is an appeal from the trial court's grant of summary judgment against the plaintiff in a personal injury case. He appeals. We reverse.

***911** Appellant, Garold Peterson (Peterson), was an employee of Gage Brothers Concrete Products in Sioux Falls, South Dakota. On September 28, 1983 Peterson and a co-worker, Warren Kramer (Kramer), were washing and inspecting concrete panels on a Citibank building utilizing scaffolding equipment leased from Safway Steel Scaffolds Company (Safway) and manufactured by Hi-Lo Powered Scaffolding, Inc. (Hi-Lo), defendants and appellees.

The scaffold equipment and four roof hooks were on the job site when appellant and Kramer arrived the morning of the accident. The two men set up the equipment employing the roof hooks. Upon raising the stage upward, however, the men discovered that it was being drawn too close to the side of the building. Kramer, appellant's supervisor, discussed the problem with Fred

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Gage his supervisor and former safety director of Gage Brothers. Gage decided to go along with Kramer's suggestion to utilize parapet clamps instead of roof hooks since the parapet clamps suspended the cables further away from the side of the building.

Kramer had some prior experience with the parapet clamps and the scaffolding that was being used, but appellant had never worked on scaffolding and had no experience with the equipment. Therefore, Kramer instructed appellant how to rig the clamps so that while appellant moved the clamps on the roof Kramer could move the stage at ground level to begin work on another section of the building. However, Kramer in fact did not know how to properly use the parapet clamp, and both he and the appellant rigged the clamps to the top of the parapet wall in a backwards position. The end of the clamp that was designed to absorb the weight of the scaffolding faced inward instead of outward, and the end of the clamp that was supposed to face inward to receive a tieback cable or anchoring line was used to suspend the scaffolding. While Kramer had used the clamps in this manner on several other occasions, a tieback cable had always been attached to the clamps as required. On this occasion, a tieback was not used because there were no anchor points on the roof. Moreover, since the parapet wall was not tall enough or thick enough to properly accept the clamp, the workers improvised by placing blocks of wood against the wall and tightening the clamps against them.

Kramer rented the parapet clamps from Safway, but he was not given the safety, operating, maintenance and parts manual. Safway had allegedly given such a manual to a Gage Brothers employee previously when the other scaffolding equipment was rented and delivered to the job site. However, any manual that may have been given to the employee was apparently not left at the job site with the other equipment, but may have been given to Fred Gage.

As Kramer and the appellant raised the scaffolding for the third time, the appellant looked up and noticed that the clamp on his end was bending inwards. He shouted a warning to Kramer and reached for the motor to lower the scaffolding, but before he could do so the clamp came off the wall and the platform fell. Kramer and the appellant fell approximately five feet until they were caught by their safety lines. Appellant's arm was injured when it either became caught in the safety rope or was struck by a piece of equipment.

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Appellant brought suit against Safway under strict liability, negligence and warranty theories. Safway filed a third party complaint against Hi-Lo seeking indemnity for any recovery against it by the appellant and requesting a determination of the relative degrees of fault as between Safway and Hi-Lo. Appellant later joined Hi-Lo with Safway as a defendant by an amended complaint. Both defendants moved for summary judgment, which was granted.

Appellant states in his brief that while he raises only the strict liability issue against both defendants, he does not mean to imply that he waives an appeal of the warranty and negligence claims. However, having failed to raise any argument or authority in support of the warranty and negligence claims, we hold he has abandoned any appeal on those issues. " ***912** SDCL 15–26A–60(4) and (6) require that appellant's brief contain a concise statement of the legal issues, related argument and citation of authorities supporting the argument ... Appellant's failure to comply with SDCL 15–26A–60 is a waiver of all issues not raised, briefed and argued." *Graham v. State,* 328 N.W.2d 254 (S.D.1982). We review the strict liability issues.

South Dakota adopted the rule of strict liability in tort as expressed in RESTATEMENT (SECOND) TORTS § 402A (1965), in *Engberg v. Ford Motor Co.,* 87 S.D. 196, 205 N.W.2d 104 (1973). *See Zacher v. Budd,* 396 N.W.2d 122 (S.D.1986); *Hamaker v. Kenwel-Jackson Machine, Inc.,* 387 N.W.2d 515 (S.D.1986).

> 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 * * *.

*REST.*2d, *supra,* § 402A(1). Strict liability requires that the product be defective and unreasonably dangerous. *Zacher, supra.* "The rule in this section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesaler or retail dealer or distributor ..." *REST.*2d, *supra,* comment *f.*

Three broad classes of defects have emerged: manufacturing defects where individual products within a product line are improperly *constructed, design* defects involving the entire product line, and defect by *failure to properly warn* or instruct users

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of a product where such failure renders the product hazardous. 2 Frumer & Friedman, Products Liability § 3.03[4][f][i] (1986). The warning issue is important. The warnings contained on a product, as well as warnings that are missing, are just as important in strict liability as in negligence and warranty. This is because an otherwise properly manufactured and well-designed product may be found to be defective without an adequate warning. *Frumer, supra,* § 3.03[4][f][vi].

In strict liability the plaintiff need not prove scienter of the defendant, i.e., that defendant knew or should have known of the harmful character of the product without a warning. *Lancaster Silo & Block Co. v. Northern Propane Gas Co.,* 75 A.D.2d 55, 427 N.Y.S.2d 1009 (1980). Liability arises from selling any product in a defective condition unreasonably dangerous to the user or consumer. It is the unreasonableness of the condition of the product, not of the conduct of the defendant, that creates liability. *Jackson v. Coast Paint and Lacquer Co.,* 499 F.2d 809 (9th Cir.1974).

"In a products liability action based on negligence, the proof must show that the manufactuer or seller failed to exercise reasonable care to inform those expected to use the product of its condition or the facts which make it likely to be dangerous." *Jahnig v. Coisman,* 283 N.W.2d 557, 560 (S.D.1979); RESTATEMENT (SECOND) OF TORTS § 388 (1965). "Strict liability in products liability cases, on the otherhand, relieves the plaintiff of the burden of proving negligence by the manufacturer." *Jahnig, supra; Engberg v. Ford Motor Co.,* 87 S.D. 196, 205 N.W.2d 104 (1973); *REST.*2d, § 402A, Comment *a.* The issue under strict liability is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the reasonableness of the failure to warn judged by negligence standards. *Hamilton v. Hardy,* 37 Colo.App. 375, 549 P.2d 1099 (1976). "For purposes of the strict tort claims, but not for purposes of the negligence claim, knowledge of the potential risk is imputed to the manufacturer. The manufacturer cannot defend, as he could in a negligence case, on grounds that, at the time of production, he neither knew nor could have known of the risk." R. Dugan, Reflections on South Dakota's Trifucated Law of Products Liability, 28 S.D.L.Rev. 259 (1983); *See Beshada v. Johns-Manville Products Corp.,* 90 N.J. 191, 447 A.2d 539 (1981); *Freund v. Cellofilm Properties Inc.,* 87 N.J. 229, 432 A.2d 925, 929–31 (1981).

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***913** Whether a manufactuer knew or should have known of a particular risk involves technical issues which do not easily admit to evidentiary proof and which lie beyond the comprehension of most jurors. By placing the risk of ignorance upon the manufactuer, the rule advances the policy of enterprise liability underlying strict tort liability.

Dugan, supra; See, e.g., GRYC v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn.1980); *REST.*2d, § 402A, *supra,* Comment *c.*

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It provides the manufacturer with an incentive to conduct the research necessary to provide safer design and warnings, matters uniquely with in his control. Through insurance and increased product prices, this approach shifts the cost of unknowable and unpreventable risks from the injured party to the consuming public. On the other hand, in that risk-utility-cost considerations remain relevant for the manufacturers ultimate liability, the rule accords with the sentiment against insurer-like liability for manufacturers. Finally, the distinction overcomes the anomaly that, as applied without regard to the distinction, section 402A adds little or nothing to the manufacturer's negligence liability in the most common products cases.

Dugan, supra.

Hi-Lo argues that plaintiff misused its product and therefore it should not be strictly liable. Misuse may involve using a product for an unintended function or using the product for its intended purpose but in an improper manner. Simply because the product is misused does not necessarily bar a cause of action based on strict liability. " '[O]ne who manufactures or sells a product has a duty not only to warn of dangers inherent in a product's intended use but also to warn of dangers involved in a use which can be reasonably anticipated.' " This duty to warn applies in cases based on negligence and strict liability in tort. *Zacher, supra,* at 135 (quoting *Olson v. A.W. Chesterton Co.,* 256 N.W.2d 530 (N.D.1977)). However, a different test is applied under strict liability when the defendant manufacturer attempts to defend on the basis of a misuse of his product. Instead of imputing knowledge of all potential misuses of the product, when a misuse occurs it becomes a question of whether there was "reason to anticipate" or if it was "foreseeable". "Where a manufacturer or seller has reason to anticipate that danger may result from a particular use of his product, and he fails to give adequate warnings of such a danger, the product sold without such warning is in a defective condition within the strict liability doctrine." *Jahnig, supra;* RESTATEMENT (SECOND) OF TORTS, § 402A, Comment *h.* "A manufacturer may be held liable where the misuse by the customer was reasonably foreseeable.... Whether the use or misuse was reasonably foreseeable is ultimately a jury question." *Zacher, supra.*

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The issues of "unreasonably dangerous" under Section 402A and "foreseeable misuse" are an introduction of negligence concepts to strict liability theory. However, a manufacturer or seller is not an insurer, and so there is a standard by which the value in a product is compared with the level of dangerousness it may possess. There is also a standard to determine what types of misuse the consumer public would find to be foreseeable. These issues of reasonableness and foreseeability in strict liability are usually jury issues.

The manufacturer, Hi-Lo, defends the grant of summary judgment by citing SDCL 20–9–10, which provides:

> No manufacturer, assembler or seller of a product may be held liable for damages for personal injury, death or property damage sustained by reason of the doctrine of strict liability in tort based on a defect in a product, or failure to warn or protect against a danger or hazard in the use or misuse of such a product, or failure to properly instruct in the use of such product, where a proximate cause of the injury was an alteration or modification of such product made under all of the following circumstances:
>
> ***914** (1) The alteration or modification was made subsequent to the manufacture, assembly or sale of the product;
>
> (2) The alteration or modification altered or modified the purpose, use, function, design or manner of use of the product from that originally designed, tested or intended by the manufacturer, assembler or seller; and
>
> (3) It was not foreseeable by the manufacturer, assembler or seller of the product that the alteration or modification would be made, and, if made, that it would render the product unsafe.

The statute removes a manufacturer, assembler or seller from liability for defects where there is "an alteration or modification of such product". Appellees argue that there was a modification because the two workers not only failed to make use of tie back cables, but they also improvised with blocks of wood in securing the parapet clamps. While these actions may have had a definite impact on the effectiveness of the clamps, this was not a modification of the product itself. The statute covers situations where a consumer makes modifications of a product which defeat the safety which is engineered into that product. A consumer creates manufacturer immunity under SDCL 20–9–10 by changing the product from its original form, not by using it improperly. Even if we were to accept Hi-Lo's view, section (3) brings in foreseeability, which is a jury issue. For the reasons stated above, we hold the trial court erred in granting summary judgment to the manufacturer, Hi-Lo on the issue of strict liability.

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The rule stated in RESTATEMENT (SECOND) OF TORTS § 402A applies to anyone engaged in business of selling products for use or consumption. It applies to manufacturers, wholesalers, dealers or distributors but does not apply to the occasional seller, as where an automobile owner sells his car to his neighbor or to a dealer in used cars. RESTATEMENT 2d § 402A, Comment *if* ; Frumer, *supra,* § 3.03[4][b][i].

Many jurisdictions have applied strict liability in tort to commercial lessors. See the cases cited in *Miles v. General Tire & Rubber Co.,* 10 Ohio App.3d 186, 460 N.E.2d 1377 (1983), *Francioni v. Gibsonia Truck Corp.,* 472 Pa. 362, 372 A.2d 736 (1977), and 52 A.L.R.3d 121 (1973). "There is no logical reason to distinguish commercial lessors from manufacturers or sellers for the application of strict liability for dangerously defective goods." *Miles, supra.* Commercial lessors, like manufacturers and sellers, regularly introduce potentially dangerous products into the stream of commerce for profit and similarly are in a better position than lessees to insure against the risk of injuries from products in which they deal regularly. *Miles, supra; Santiago v. E.W. Bliss Div.,* 201 N.J.Super. 205, 492 A.2d 1089 (A.D.1985).

> The nature of a commercial transaction by which a product is placed in the stream of commerce is irrelevant to the policy considerations which justify strict liability. A lessor is subject to strict liability because his position in the "overall production and marketing enterprise" is no different from that as a seller.

Crowe v. Public Bldg. Com'n of Chicago, 74 Ill.2d 10, 23 Ill.Dec. 80, 383 N.E.2d 951, 953 (1978).

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Safway makes no claim it was not a seller, and as a matter of fact, Safway volunteers it should be considered a seller in order to avoid strict liability under SDCL 20–9–9, which states:

> No cause of action based on the doctrine of strict liability in tort may be asserted or maintained against any distributor, wholesaler, dealer or retail seller of a product which is alleged to contain or posses a latent defective condition unreasonably dangerous to the buyer, user, or consumer unless said distributor, wholesaler, dealer or retail seller is also the manufacturer or assembler of said product or the maker of a component part of the final product, or unless said dealer, wholesaler or retail seller knew, or, in ***915** the exercise of ordinary care, should have known of the defective condition of the final product. Nothing in this section shall be construed to limit any other cause of action from being brought against any seller of a product.

We interpret SDCL 20–9–9 that a seller may be strictly liable, but only if he knew or through "ordinary care" should have known of the defective condition of the product. In essence SDCL 20–9–9 says there may be strict liability, but as a matter of proof, knowledge of the defective condition will not be *imputed* to a nonmanufacturing middleman as would otherwise be the case under strict liability.

We hold Safway open to strict liability if it "knew, or in the exercise of reasonable care, should have known of the defective condition of the final product." This is a factual issue which must be resolved by the jury. There was evidence from an alleged expert that a warning should have been placed on the parapet clamps so a person using the clamps would not use them backwards or without a tie line. Since Safway was in possession of the clamps, it could be inferred they knew, or in the exercise of reasonable care, should have known the clamps were in a defective condition by not having the warning appear on the clamps. There are also jury questions as to proximate cause and misuse of the clamps.

The summary judgment is reversed and the case remanded for trial on the strict liability issue.

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MORGAN, J., and FOSHEIM, Retired Justice, concur.

HENDERSON, J., concurs specially.

SABERS, J., concurs in part and dissents in part.

MILLER, J., not having been a member of the Court at the time this action was submitted to the Court, did not participate.

HENDERSON, Justice (concurring specially).
This appellant has not presented either argument or authority in support of negligence claims. Therefore, he has not preserved his appellate record. We have held that an error not briefed or argued is deemed abandoned. *See Shaffer v. Honeywell, Inc.,* 249 N.W.2d 251 (S.D.1976).

In *Smith v. Smith,* 278 N.W.2d 155, 162 (S.D.1979), this author concurred specially and filed an opinion. In the same *Shaffer,* 249 N.W.2d 251, cited above, this Court affirmed its position taken in *Engberg,* 205 N.W.2d 104, which is cited in the majority opinion. Basically, as I pointed out in my special concurrence, strict liability was not created in this state by legislative fiat; rather it was the progeny of the judiciary. This case is going back to the trial court for trial on strict liability. There are numerous foreign authorities cited in the majority opinion and perhaps we could well stay at home.

Specifically, again referring to the *Smith* case, and referring to the said special concurrence, I should like to point out that the *Smith* case was the first time that this state ever addressed the question of the defenses available on a case brought under the strict liability. In said special concurrence, to which I allude again, I expressed that so far as my legal views were concerned:

> I would hold that in the State of South Dakota under a given set of facts that:
>
> (a) assumption of the risk; or

(b) misuse of the product

are available as defenses in strict liability cases.

Smith, 278 N.W.2d at 162 (Henderson, J., specially concurring). As regards the defenses of contributory negligence, comparative negligence, and contributory fault, I attempted to break these down as not being available in the defense of a strict liability case. In *Smith,* 278 N.W.2d at 162, this author noted:

I would further hold that in the State of South Dakota under a given set of facts that:

***916** (a) the classical negligence defenses are not available in the defense of a strict liability case. The judicially created tort of strict liability is not founded in negligence;

(b) inasmuch as the strict liability theory is not based on negligence, that contributory negligence cannot be interposed as a defense;

(c) although South Dakota has the comparative negligence doctrine, which is akin to the comparative fault theory now adopted by California and Alaska to reduce a plaintiff's recovery, this is not available as a defense in a strict liability action; and

(d) "contributory fault" is just another way of saying "contributory negligence" and should not be available as a defense to a case founded on strict liability.

I also tried to gather authorities on this subject and discuss the division of authority regarding defenses which are available in strict liability cases.

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Within the *Smith* special concurrence, at 163, which I still believe today, I expressed:

A manufacturer or distributor or retailer should not be at the mercy of a fool. So, lest it be considered that they are under a legal handicap by elimination of the classical negligence defenses, contributory negligence, comparative negligence or comparative fault defenses, these target defendants can plead and prove assumption of the risk or misuse of the product.

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SABERS, Justice (concurring in part and dissenting in part).

I concur in part and dissent in part.

I think this court is overreacting to SDCL 15–26A–60 which results in decisions that rely too heavily on waiver of a point or argument by failure to cite authorities.

For example, in this case appellant's brief relies on theories of negligence and breach of warranty as well as strict liability in tort. At page seven, appellant's brief states:

For purposes of simplicity the theory of strict liability in tort will be emphasized in this argument. Plaintiff does not wish to imply that the theories of negligence and breach of warranty are not equally applicable to his claim by reason of this emphasis.

In other words, appellant is really saying that the arguments and authorities apply to all three theories even though he's choosing not to restate them three separate times. In my opinion he shouldn't have to either, even if he didn't express this as well as he might have.

On remand, appellant should have an opportunity to prove all three theories of liability.

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All Citations

400 N.W.2d 909, 55 USLW 2524, Prod.Liab.Rep. (CCH) P 11,313

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EXHIBIT “25”

249 S.W.3d 400
Supreme Court of Texas.

NEW TEXAS AUTO AUCTION SERVICES, L.P. d/b/a Big H Auto Auction, Petitioner

v.

Graciela GOMEZ DE HERNANDEZ, et al, Respondents.

No. 06–0550.
|
Argued Oct. 17, 2007.
|
Decided March 28, 2008.

Synopsis

Background: Relatives of motorist killed in rollover accident brought products liability action against tire company, automobile manufacturer, auctioneer, and others. The 332nd District Court, Hidalgo County, Mario E. Ramirez, Jr., J., granted summary judgment to auctioneer and severed that claim. Relatives appealed. The Corpus Christi-Edinburg Court of Appeals, 193 S.W.3d 220, Rodriguez, J., reversed.

Holdings: On petition for review, the Supreme Court, Brister, J., held that:

auctioneer could not be held strictly liable for defect that allegedly caused fatal rollover accident, even though auctioneer held title to vehicle when it was sold at auction; and

auctioneer did not have a duty to replace tires on vehicle pursuant to a recall.

Judgment of Court of Appeals reversed.

Attorneys and Law Firms

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Phillip Dye Jr., Vinson & Elkins, L.L.P., Houston, Brendan K. McBride, Prichard Hawkins McFarland & Young, L.L.P., San Antonio, Michael W. Dunagan, Jameson & Dunagan, P.C., Dallas, Kathleen Cassidy Goodman, Boerne, TX, for Amicus Curiae.

Opinion

JUSTICE BRISTER delivered the opinion of the Court.

Auctioneers are usually neither buyers nor sellers, but agents for both.[1] ***402** While they are obviously engaged in sales, the only thing they sell for their own account is their services; the items they auction are generally sold for others. In this case, the court of appeals held an auto auctioneer could be liable in both strict liability and negligence for auctioning a defective car. But

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product-liability law requires those who *place* products in the stream of commerce to stand behind them; it does not require everyone who *facilitates* the stream to do the same. Accordingly, we reverse.

I. Background

The 1993 Ford Explorer at issue here was repossessed by a finance company, who consigned it for sale in Houston by Big H Auto Auction.[2] Big H sold the car at auction for $4,000 on October 12, 2000, receiving a fee of $145 from the seller and $90 from the buyer. When the buyer discovered a discrepancy in the car's odometer,[3] a quick arbitration was held and an arbitrator found Big H had made a clerical error, rescinded the sale, and ordered Big H to buy the car back. Big H took title to the car and sold it again at auction on October 17, 2000 for $3,100 to Houston Auto Auction, which auctioned the car a week later to Progresso Motors,[4] which sold it three days later to Jose Angel Hernandez Gonzalez in Progresso, Texas. About a year later, Gonzalez was killed in a rollover accident in Mexico.

Twelve plaintiffs (Gonzalez's wife, parents, children, and six others whose relationship to him is unclear)[5] filed suit in Hidalgo County against the car manufacturer (Ford Motor Co.), tire manufacturer (Bridgestone/Firestone Corp.), Progresso Motors, and the two auto auctioneers. The trial court granted summary judgment for Big H and severed that claim. The court of appeals reversed, finding Big H was not entitled to summary judgment on either the plaintiffs' strict liability or negligence claims.[6] We address each claim in turn.

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II. Strict Liability

Modern American product-liability law is derived primarily from section 402A of the Second Restatement of Torts,[7] "the most influential section of any Restatement of the Law on any topic,"[8] and perhaps in all of tort jurisprudence.[9] This Court adopted section 402A in 1967 in ***403** *McKisson v. Sales Affiliates,* holding those who sell defective products strictly liable for physical harm they cause to consumers.[10]

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From the beginning, section 402A did not apply to everyone. By its own terms, section 402A limits strict liability to those "engaged in the business of selling" a product:

> 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.[11]

Like many other short statements of legal doctrine, this one has been construed through the years to mean both more and less than what the plain words appear to say. For example, although section 402A appears to limit recovery to users or consumers of a defective product, we long ago extended it to innocent bystanders as well.[12] Similarly, section 402A explicitly applies only to those whose business is "selling" a product, but from the outset we have applied it more broadly. Thus, in *McKisson* itself we held strictly liable a distributor who handed out free samples, reasoning that the samples were distributed with "the expectation of profiting therefrom through future sales." Since then, we have applied strict liability to manufacturers,[13] distributors,[14] lessors,[15] bailors,[16] and dealers.[17]

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On the other hand, we have limited the scope of those "engaged in the business of selling" to those who actually placed a product in the stream of commerce.[18] "Imposition of strict liability demands more than an incidental role in the overall marketing program of the product."[19] An advertising agency that provides copy, a newspaper that distributes circulars, an internet provider that lists store locations, and a trucking business that makes deliveries all might be "engaged" in product sales, but they do not themselves sell the products. Since *McKisson,* we have applied strict liability only to businesses that are "in the same ***404** position as one who sells the product."[20]

The reason for this limitation arises from the justifications for strict liability itself, namely: (1) compensating injured consumers, (2) spreading potential losses, and (3) deterring future injuries.[21] Businesses that play only an incidental role in a product's placement are rarely in a position to deter future injuries by changing a product's design or warnings. If required to spread risks, they must do so across far more products than the one that was defective. And while many businesses may be able to pay compensation, consumers normally expect a product's manufacturer to be the one who stands behind it.

The Third Restatement of Torts adopted in 1998 recognized these developments in products law, expanding strict liability to those "engaged in the business of *selling* or otherwise *distributing* products,"[22] and defining those terms as a business that either "transfers ownership" or "provides the product."[23] In a comment, the Third Restatement specifically excluded auctioneers:

> Persons assisting or providing services to product distributors, while indirectly facilitating the commercial distribution of products, are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. *Sales personnel and commercial auctioneers are also outside the rules of this Restatement.*[24]

Nevertheless, the court of appeals held section 402A applied to auctioneers because Texas law "requires only that the defendant be responsible for introducing the product into the stream of commerce."[25] It is true we have sometimes referred to strictly liable defendants as "introducing" products into the stream of commerce[26] although more often we have referred to them as "placing" them in that current[27] as has the Legislature.[28] But ***405** both concepts were intended to describe producers, not mere announcers like an auctioneer or an emcee at a trade show who "introduces" a product to a crowd but has nothing to do with making it.[29]

The court of appeals also pointed to chapter 82 of the Civil Practices and Remedies Code to support its conclusion. But that chapter was not intended to replace section 402A or the common law except in limited circumstances.[30] Moreover, its broad definitions were drafted to provide indemnity for all retailers, even if they are not proper defendants in an underlying products claim.[31] To the extent chapter 82 addresses product claims generally, it reflects a legislative intent to restrict liability for defective products to those who manufacture them.[32]

The Plaintiffs' counsel concedes that auctioneers are generally not sellers under section 402A, but distinguished this case because Big H actually held title to the Explorer when it was finally sold at auction. But it was undisputed that Big H normally never took title to the cars it auctioned, and did so here only because an arbitrator ordered it to do so. Section 402A applies to those whose *business* is selling, not everyone who makes an occasional sale.[33]

Courts in other jurisdictions have consistently held that auctioneers are not subject to section 402A.[34] We agree, and ***406** hold that because Big H was not in the business of selling automobiles for its own account, it cannot be held strictly liable.

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III. Negligence

The plaintiffs alleged Big H was negligent in failing to replace the tires on this Explorer pursuant to a recall issued a few weeks before the auction took place. We agree with the trial court that Big H had no such duty on the facts here.

The existence of a legal duty is a question of law for the court.[35] In determining whether a duty should be recognized, we consider a number of factors including the risk of injury compared to the burden on the defendant and social utility of the conduct involved.[36] We have also considered whether one party has superior knowledge of the risk, or a right to control the actor whose conduct precipitated the harm.[37]

Unquestionably, ignoring a recall may run the risk of severe injury. But there are a huge number of recalls,[38] and the risks they involve varies widely.[39] Federal law generally places the duty on manufacturers of products to report potential defects, notify the public, and make necessary repairs.[40]

By contrast, imposing a duty on auto auctioneers to discover and repair defects would require them to go into a side business other than their own. The evidence establishes that Big H auctions about 1,000 vehicles each week, with many of them moving on and off the premises in a matter of hours. It does not inspect or repair vehicles unless a customer specifically requests and pays for such services. Many of the cars sold at its auctions need repairs, and some have to be towed on and off the auction block.

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Moreover, Big H does not sell to the public. Only licensed, bonded, commercial dealers are permitted to buy or sell vehicles at Big H's auctions. Accordingly, whatever access to recall information Big H may have, the dealers who buy at the auction, prepare the cars for display, and sell them to the public would have at least the same access. Moreover, Big H's knowledge is clearly inferior to that of the ***407** car and tire manufacturers the plaintiffs sued for these same defects, and there is no indication that Big H had any control over how those manufacturers made their products.

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Additionally, Big H made no warranties of its own at the auction, serving merely as a conduit for warranties made by sellers. The car here was sold under a red light, indicating the car was being sold "as is." Generally, those who buy a product "as is" accept the risk of potential defects, and thus cannot claim a seller's negligence caused their injuries.[41] Imposing a different duty here would effectively prohibit car dealers from selling cars "as is." And as one federal court has pointed out, imposing such a duty on auctioneers would seem to require imposing it on every person who ever sold a used car, as there is "no sensible or just stopping point."[42] We decline to impose so sweeping a duty.

The plaintiffs' summary judgment response included deposition testimony from a representative of Houston Auto Auction (the buyer from Big H) that had he possessed actual knowledge of the defect here (which he denied), he would have done "something to at least give notice to the buyer that there are Firestone tires, don't drive on them, or take them off." But Houston Auto Auction was more than a mere auctioneer; its business included buying and selling cars for its own account, and it made sales to the general public as well as dealers. Moreover, one's moral duty to warn of known dangers does not impose a legal duty to discover and remedy unknown dangers too.[43]

* * *

Accordingly, the court of appeals erred in concluding Big H owed the plaintiffs a duty under either section 402A or in negligence. We reverse the court of appeals' judgment and reinstate the trial court's take-nothing judgment for Big H.

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All Citations

249 S.W.3d 400, 51 Tex. Sup. Ct. J. 664

Footnotes

1 *Brock v. Jones,* 8 Tex. 78, 79–80 (1852) ("The auctioneer may be the agent of both parties.").

2 Big H Auto Auction is the assumed name of defendant New Texas Auto Auction Services, L.P.

3 The car's mileage was listed as 34,075 miles rather than the actual 84,075 miles.

4 Progresso Motors is the assumed name of defendant Eleazar Perez.

5 The plaintiffs listed the surviving spouse as Graciela Gomez De Hernandez, her children Jose Angel Hernandez Gomez and Elizabeth Hernandez Gomez, another child Arely Hernandez, and his parents Olvido and Juan Hernandez; the last three have settled and are not involved in this appeal. Listed as intervenors below are Guillermo Mujica Gutierrez, Marta Covarrubias Gutierrez, Juan Lorezo Gutierrez Hernandez, Victor Manuel Maldonado Castañon, Pedro Alfonso Castillo Cardenas, and Jacinto Loyde Frayde.

6 193 S.W.3d 220.

7 Restatement (Second) of Torts § 402A (1965).

8 David G. Owen, *The Puzzle of Comment J,* 55 Hastings L.J. 1377, 1377 n. 1 (2004) (noting that "section 402A had been cited in judicial opinions more often than any other section of any Restatement").

9 1 M. Stuart Madden, Products Liability § 6.1, at 190 (2d ed.1988) (calling section 402A "the most influential development ever experienced in tort jurisprudence").

10 416 S.W.2d 787, 789 (Tex.1967).

11 Restatement (Second) of Torts § 402A(1) (emphasis added).

12 *Darryl v. Ford Motor Co.,* 440 S.W.2d 630, 633 (Tex.1969) ("We hold that recovery under the strict liability doctrine is not limited to users and consumers.").

13 *McKisson,* 416 S.W.2d at 790 n. 3 ("Strict liability in tort lies against a distributor as well as a manufacturer.").

14 *Id.* ("Strict liability in tort lies against a distributor as well as a manufacturer.").

15 *Rourke v. Garza,* 530 S.W.2d 794, 800 (Tex.1975).

16 *See Armstrong Rubber Co. v. Urquidez,* 570 S.W.2d 374, 377 (Tex.1978) (distinguishing cases in which bailment for mutual benefit accompanied a sale of goods or services, and thus fell under section 402A).

17 *Henderson v. Ford Motor Co.,* 519 S.W.2d 87, 92 (Tex.1974) ("The car manufacturer and its dealer are liable for unreasonably dangerous products....").

18 *See, e.g., Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608, 616 (Tex.1996) (holding section 402A inapplicable to company that licensed design but did not manufacture tire that caused injury); *Armstrong Rubber,* 570 S.W.2d at 376 (holding section 402A inapplicable to tire sent to test track for testing).

19 *Firestone Steel,* 927 S.W.2d at 616.

20 *McKisson,* 416 S.W.2d at 792; *see FFE Transp. Servs., Inc. v. Fulgham,* 154 S.W.3d 84, 89 (Tex.2004) (holding section 402A inapplicable to trailers trucking company supplied for its drivers); *Firestone Steel,* 927 S.W.2d at 616 (holding section 402A inapplicable to tire designer that licensed concept royalty-free).

21 Restatement (Second) of Torts § 402A cmt. c (1965); W. Page Keeton et al., Prosser and Keeton on Torts § 98, at 692–93 (5th ed.1984); *see, e.g., Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 425 (Tex.1984) (noting that "failure to allocate accident costs in proportion to the parties' relative abilities to prevent or to reduce those costs is economically inefficient"); *Boatland of Houston, Inc. v. Bailey,* 609 S.W.2d 743, 750 (Tex.1980) ("One of the policy reasons for the doctrine of strict liability is that the manufacturer or supplier can spread the losses occasioned by the supplier's defective product"); *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.,* 572 S.W.2d 308, 312 (Tex.1978) ("Strict liability arose initially to compensate consumers for personal injuries caused by defective products...."); George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished,* 26 Rev. Litig. 799, 809–10 (2007); David Krump & Larry A. Maxwell, *Should Health Service Providers Be Strictly Liable for Product–Related Injuries? A Legal and Economic Analysis,* 36 Sw. L.J. 831, 848 (1982).

22 Restatement (Third) of Torts § 1 (1998).

23 *Id.* § 20.

24 *Id.* cmt. g (emphasis added).

25 193 S.W.3d 220, 225–26.

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26 *FFE Transp. Servs., Inc. v. Fulgham,* 154 S.W.3d 84, 88 (Tex.2004); *Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608, 616 (Tex.1996); *Rourke v. Garza,* 530 S.W.2d 794, 800 (Tex.1975).

27 *Torrington Co. v. Stutzman,* 46 S.W.3d 829, 844 (Tex.2000); *Am. Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 438 (Tex.1997); *Houston Lighting & Power Co. v. Reynolds,* 765 S.W.2d 784, 785 (Tex.1988); *Morgan v. Compugraphic Corp.,* 675 S.W.2d 729, 732 (Tex.1984); *Armstrong Rubber Co. v. Urquidez,* 570 S.W.2d 374, 376 (Tex.1978); *Gen. Motors Corp. v. Hopkins,* 548 S.W.2d 344, 352 (Tex.1977).

28 *See* Tex. Civ. Prac. & Rem.Code § 82.001(3).

29 *See Gaulding v. Celotex Corp.,* 772 S.W.2d 66, 68 (Tex.1989) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury."); *see also Firestone Steel,* 927 S.W.2d at 614 ("It is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce.").

30 *See, e.g.,* Tex. Civ. Prac. & Rem.Code § 82.005(e) ("This section is not declarative, by implication or otherwise, of the common law with respect to any product and shall not be construed to restrict the courts of this state in developing the common law with respect to any product which is not subject to this section.").

31 *See, e.g., Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 867 (Tex.1999) (holding defendant who did not sell product that injured plaintiff was nevertheless entitled to indemnity).

32 *See* Tex. Civ. Prac. & Rem.Code § 82.003(a) (providing that with certain exceptions, "[a] seller that did not manufacture a product is not liable for harm caused to the claimant by that product"). As this suit was filed in 2002, it is not governed by these provisions. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 23.02(c), 2003 Tex. Gen. Laws 899 ("An action filed before July 1, 2003, is governed by the law in effect immediately before the change in law made by [the above provisions], and that law is continued in effect for that purpose.").

33 Restatement (Second) of Torts § 402A cmt. f ("This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like."); *see also Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1219 (5th Cir.1985).

34 *Pelnar v. Rosen Sys., Inc.,* 964 F.Supp. 1277, 1281 (E.D.Wis.1997); *Antone v. Greater Ariz. Auto Auction,* 214 Ariz. 550, 155 P.3d 1074, 1079 (Ariz.Ct.App.2007); *Musser v. Vilsmeier Auction Co.,* 522 Pa. 367, 562 A.2d 279, 283 (1989); *Brejcha v. Wilson Mach., Inc.,* 160 Cal.App.3d 630, 206 Cal.Rptr. 688, 694 (1984); *Tauber–Arons Auctioneers Co. v. Superior Court,* 101 Cal.App.3d 268, 161 Cal.Rptr. 789, 798 (1980).

35 *Tri v. J.T.T.,* 162 S.W.3d 552, 563 (Tex.2005).

36 *Edward D. Jones & Co. v. Fletcher,* 975 S.W.2d 539, 544 (Tex.1998); *Greater Houston Transp. Co. v. Phillips,* 801 S.W.2d 523, 525 (Tex.1990).

37 *Graff v. Beard,* 858 S.W.2d 918, 920 (Tex.1993).

38 The National Highway Traffic Safety Administration reports that since 1966 more than 390 million cars, trucks, buses, recreational vehicles, motorcycles, and mopeds, as well as 46 million tires, 66 million pieces of motor-vehicle equipment, and 42 million child safety seats have been recalled. *See* Nat'L Highway Traffic Safety Admin., Motor Vehicle Safety Defects and Recalls: What Every Vehicle Owner Should Know I (2006), *available at* http://wwwodi.nhtsa.dot.gov/recalls/recallprocess.cfm.

39 *See id.* at 3 (listing safety-related defects including steering defects that may cause loss of control, fuel-system defects resulting in potential for fire, cooling-fan defects that could injure mechanics working on engines, and windshield-wiper defects).

40 *See, e.g.,* 15 U.S.C. § 2064(b)(2), (b)(3) (stating that if manufacturer becomes aware of substantial product hazard, it must immediately inform Consumer Product Safety Commission who may order the product repaired, replaced, or refunded); 40 C.F.R. § 159.184(a), (b) (recognizing manufacturer's duty to report incidents involving pesticide's toxic effects that may not be adequately reflected on its labels); 14 C.F.R. § 21.3 (imposing on aviation manufacturers an affirmative duty to report failures of parts it manufactures).

41 *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.,* 896 S.W.2d 156, 161 (Tex.1995).

42 *Pelnar v. Rosen Sys., Inc.,* 964 F.Supp. 1277, 1284 (E.D.Wis.1997).

43 *See Buchanan v. Rose,* 138 Tex. 390, 159 S.W.2d 109, 110 (1942) ("[A] mere bystander who did not create the dangerous situation is not required to become the good Samaritan and prevent injury to others. Under the last rule, a bystander may watch a blind man or a child walk over a precipice, and yet he is not required to give warning. He may stand on the bank of a stream and see a man drowning, and although he holds in his hand a rope that could be used to rescue the man, yet he is not required to give assistance. He may owe a moral duty to warn the blind man or to assist the drowning man, but being a mere bystander, and in nowise responsible for the dangerous situation, he owes no legal duty to render assistance.").

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EXHIBIT “26”

West's Delaware Code Annotated
Title 6. Commerce and Trade
Subtitle II. Other Laws Relating to Commerce and Trade
Chapter 18. Limited Liability Company Act
Subchapter III. Members

6 Del.C. § 18-303

§ 18-303. Liability to third parties

Currentness

(a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

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Credits
68 Laws 1992, ch. 434, § 1. Amended by 69 Laws 1994, ch. 260, § 22.

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Notes of Decisions (1)

6 Del.C. § 18-303, DE ST TI 6 § 18-303
Current through ch. 241 of the 150th General Assembly (2019-2020). Some statute sections may be more current, see credits for details. Revisions to 2020 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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DISTRICT COURT
CLARK COUNTY, NEVADA

000748

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the Estate and as the widow and heir of Decedent GIL BEN-KELY; SHON BEN-KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BENKELY-SCOTT, daughter and heir of the decedent GIL BEN-KELY; GWENDOLYN WARD, as personal representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, individually and as surviving spouse of CRAIG SHERWOOD, deceased; GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited liability company; SCOTT GRAGSON WORLD CLASS DRIVING, an unknown entity; SLOAN VENTURES 90, LLC, a Nevada limited liability company, ROBERT BARNARD; MOTORSPORT SERVICES INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C
Dept. No.: XXVII

MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT SPEEDVEGAS, LLC; AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD; DECLARATION OF REGINA ZERNAY

HEARING REQUESTED

000748

limited liability company; AARON FESSLER; the ESTATE OF CRAIG SHERWOOD; AUTOMOBILI LAMBORGHINI AMERICA, LLC a foreign limited liability company; FELICE J. FIORE, JR.; DOES I-X, inclusive; and ROE CORPORATIONS IX, inclusive,

Defendants

GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, Individually, and surviving spouse of CRAIG SHERWOOD, deceased GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased,

Crossclaim Plaintiffs,

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the ESTATE; DOES I-X, inclusive,

Crossclaim Defendants

ESTATE OF BEN-KELY by ANTONELLA BEN KELY, duly appointed representative of the Estate and widow and heir of decedent GIL BEN-KELY; SHON BEN KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and here of decedent GIL BEN-KELY,

Crossclaim Plaintiffs

ESTATE OF CRAIG SHERWOOD; DOES I-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Crossclaim Defendants.

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MOTION FOR SUMMARY JUDGMENT/PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT SPEEDVEGAS, LLC; AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD

Defendant SPEEDVEGAS, LLC; ("SpeedVegas" or "defendant"), by and through his counsel of record, Alan W. Westbrook, Esq. of Perry & Westbrook; Paul L. Tetreault, Esq. and Regina S. Zernay, Esq. of Agajanian, McFall, Weiss, Tetreault & Crist LLP; and Brent D. Anderson, Esq. and James D. Murdock, Esq. of Taylor Anderson, LLP submits the following MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT SPEEDVEGAS, LLC.

This motion is based on the following memorandum of points and authorities, the affidavit and declaration and their attached exhibits filed concurrently herewith, and on all papers, files, and arguments that may properly be presented at or before the hearing on this matter.

DATED: May 14, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook
Alan W. Westbrook, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: May 14, 2021

AGAJANIAN, McFALL, WEISS, TETREAULT & CRIST LLP

/s/ Paul L. Tetreault
Paul L. Tetreault, Esq.
Regina S. Zernay, Esq.
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DATED: May 14, 2021

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