S139184

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM KEITH JOHNSON,

Plaintiff and Appellant,

vs.

AMERICAN STANDARD, INC.,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B179206

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT AMERICAN STANDARD, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Court Rules

Miscellaneous

S139184

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TO THE HONORABLE CHIEF JUSTICE:

Under rule 29.1(f) of the California Rules of Court, Chamber of Commerce of the United States of America, American Chemistry Council, American International Companies, ExxonMobil Corporation, The Farmers Insurance Group of Companies, and Honeywell International Inc. request permission to file the attached Amici Curiae Brief in support of respondent American Standard, Inc.

INTEREST OF AMICI CURIAE; HOW THE AMICI CURIAE BRIEF WILL ASSIST THE COURT

Chamber of Commerce of the United States of America is the nation's largest federation of business companies and associations, representing an underlying membership of more than 3,000,000 businesses and professional associations of every size and in every sector and geographic region of the country, including California. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $550 billion enterprise and a key element of the nation's economy. The business of chemistry in California alone generates a payroll of over $7.2 billion and directly employs over 81,000 workers, which represents 5.5 percent of the state's manufacturing workforce.

American International Companies are comprised of insurer-member companies of the American International Group, Inc. (AIG). Several of the American International Companies write commercial liability policies in California and nationwide.

ExxonMobil Corporation's principal business is energy, including the exploration for and production of crude oil and natural gas, the manufacture and transportation of petroleum products, and the sale of crude oil, natural gas, and petroleum products. ExxonMobil is a member of the Chamber of Commerce of the United States of America. ExxonMobil Chemical Company, a division of ExxonMobil Corporation, is a member of American

Chemistry Council.

The Farmers Insurance Group of Companies, based in Los Angeles, California, operates in 41 states and provides automobile, homeowners and commercial insurance to more than 15 million customers. The Farmers Insurance Group of Companies is the nation's third-largest writer of both private passenger automobile and homeowners insurance.[1/]

Honeywell International Inc. is a $30 billion diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials.

Although this case raises additional issues, this amici curiae brief focuses solely on the issue of the sophisticated user doctrine, paying particular attention to its treatment by jurisdictions across the country, as well as its outgrowth from the obvious and known danger doctrine and its relationship to the sophisticated purchaser doctrine. The sophisticated user doctrine is of particular interest to amici because the scope and application of amici's (or amici members' and insureds') duty to warn is frequently the subject of litigation. By focusing on a single issue and tracing its modern development, amici are able to offer the court a more detailed treatment of the issue than the parties' briefs, which necessarily must discuss all the issues presented. Therefore, this amici curiae brief should assist the court in deciding this case.

1/ The Farmers Insurance Group of Companies is a service mark used to collectively identify the entities in the Farmers family of companies. Farmers Group, Inc. is a provider of insurance management services and a holding company. Acting under the dba Farmers Underwriters Association, and with its wholly-owned subsidiaries Truck Underwriters Association and Fire Underwriters Association, Farmers Group, Inc. acts as the attorneys-in-fact for three reciprocals or interinsurance exchanges – Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange.

CONCLUSION

For the foregoing reasons, amici request that the Court permit the filing of the attached Amici Curiae Brief in support of respondent American Standard, Inc.

Dated: September 14, 2006 Respectfully submitted,

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AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT AMERICAN STANDARD, INC.

INTRODUCTION

"The duty to warn 'is perhaps the most widely-employed claim in modern products liability litigation.' . . . Indeed, the 'vast majority' of products liability cases involving toxic torts concern the adequacy of product warnings." (Cheney, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees* (1991) 85 Nw.U. L.Rev. 562, fns. omitted.)

The sophisticated user doctrine, adopted by each of the twenty-eight jurisdictions to consider it, eliminates the need to warn product users of hazards which they know or which, because of their training, experience or profession, they are presumed to know. Consistent with this nationwide trend, the Court of Appeal here determined that William Keith Johnson, a trained, certified HVAC technician, required no warning to be made aware of a hazard generally and long known in his profession: the risk that potentially hazardous gas could be released when heat is applied to a commercial air conditioning unit during a brazing repair.

As we explain, the sophisticated user doctrine is a natural outgrowth of the long established and even more widely accepted obvious danger rule. The obvious danger rule – a rule long ago adopted by the California Legislature and Courts of Appeal – provides that there is no duty to warn of risks that would be generally or commonly recognized by an ordinary user or consumer of a product. In a majority of jurisdictions, the obvious danger rule has been extended to eliminate the duty to warn a presumably knowledgeable and sophisticated user – particularly a trained and skilled professional like the plaintiff here – about hazards generally known in the profession. An even greater number of jurisdictions have extended the principles underlying the obvious danger rule further, to obviate the need to warn about risks that a product *purchaser* either already knew or could be charged with knowing, and which the purchaser in turn reasonably could be expected to pass on to the ultimate user.

This court should join the majority of states in expressly adopting the sophisticated user doctrine and thereby recognize that a product supplier has no duty to warn a sophisticated user of a product hazard which the user, given his knowledge and training, either already knows or can be charged with knowing.

LEGAL DISCUSSION

I.

CALIFORNIA AND THE OVERWHELMING MAJORITY OF JURISDICTIONS HAVE LONG HELD THAT A MANUFACTURER HAS NO DUTY TO WARN OF OBVIOUS DANGERS WHICH THE ORDINARY FORESEEABLE USER OF ITS PRODUCT CAN BE EXPECTED TO RECOGNIZE.

A. The policy underlying the obvious danger rule.

Under both strict products liability and negligence law, the existence of a duty to warn is an essential element of a failure-to-warn claim. (See *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, 362-363.) "The general rule in American products law is that defendants owe no duty to warn of risks that are obvious to normal, reasonable users and consumers. Warnings are required with respect to hidden risks, but obvious risks are better left to consumers themselves, or to product designers, to identify and minimize." (Henderson & Twerski, *Doctrinal Collapse in Products Liability: the Empty Shell of Failure to Warn* (1990) 65 N.Y.U. L.Rev. 265, 280, fns. omitted; see also Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings* (1987) 17 Seton Hall L.Rev. 526 ["A seller of a product has a common law duty to warn of the product's 'latent limitations' and propensities which are not open, obvious or known to the user"].) Thus, "[t]raditionally . . . the plaintiff bears the burden of proving, as part of his prima facie case, that the risk that materialized in harm is not obvious."

(Henderson & Twerski, *Doctrinal Collapse in Products Liability: the Empty Shell of Failure to Warn, supra*, 65 N.Y.U. L.Rev. at p. 282; see also Maehler, *Glittenberg v. Doughboy Recreational Industries: The "Open and Obvious Danger" Rule* (1993) 1993 Det.C. L.Rev. 1357, 1373-1374 ["Absent the existence of a duty, a products liability claim cannot succeed and summary disposition in defendant's favor is required. The obviousness of a danger negates the duty element. . . . thereby allowing courts, as a matter of law, to summarily dispose of purchaser-user claims" (fns. omitted)].)

The rationale underlying the obvious danger rule is that "[t]he obvious nature of the product's potential danger functions as an inherent warning that the risk is present. In other words, if the risk is obvious from the characteristics of the product, the product itself telegraphs the precise warning that plaintiff complain[s] is lacking." (3 American Law of Products Liability 3d (2004) Warnings Liability, § 32:57, pp. 139-143; see also 63A Am.Jur.2d (1997) Products Liability, § 1156, p. 316 [same]; 3 American Law of Products Liability 3d, *supra*, § 32:61, p. 152.)

Moreover, imposing a duty to warn about obvious risks would not advance the policy of preventing future harm because a plaintiff oblivious to an obvious danger "'would likely be equally oblivious to the warning.'" (Bowbeer & Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption* (1999) 65 Brook. L.Rev. 717, 731-737.) Nor would it encourage people to take reasonable care for their own safety; rather, it would "effectively cast[] manufacturers in the role of insurers of their products." (*Ibid.*) "Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former

are paid damages out of funds to which the latter are forced to contribute through higher product prices." (Rest.3d Torts Products Liability, § 2, com. a., p. 16)

By not requiring sellers or manufacturers to warn about obvious dangers, courts also avoid the "social cost of 'overwarning,' . . . in the diversion of limited user attention to warnings that are perceived as verbose, irrelevant false alarms . . . [¶] . . . [t]he [resulting] increased competition for user attention would come at the expense of those truly necessary warnings about hidden dangers that, if read and heeded, have the potential to motivate a change in the user's safety-related behavior." (Bowbeer & Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, *supra*, 65 Brook. L.Rev. at pp. 740-741; see also 3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:57, p. 144 ["Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about nonobvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally"]; Gershonowitz, *The Strict Liability Duty to Warn* (1987) 44 Wash. & Lee L. Rev. 71, 99 ["Most courts agree that if a danger is so well known that a warning would probably have no impact, there is no duty to warn"].)

B. The obvious danger rule nationwide.

"[T]he 'open and obvious danger' rule remains embedded in the common law of many states and has been adopted by statute in six states. Moreover, the rule has drawn further support from the Restatement . . . . [and] has been incorporated into the Model Uniform Product Liability Act." (Maehler, *Glittenberg v. Doughboy Recreational Industries: The "Open and Obvious Danger" Rule*, *supra*, 1993 Det. C. L.Rev. at pp.1359-1362, fns. omitted.)[2/] In short, the open and obvious danger doctrine is a well-established principle which precludes liability for failure to warn in most states. (See, e.g., *Reeves v. Cincinnati, Inc.* (1989) 176 Mich.App. 181, 190 [439 N.W.2d 326, 330] [worker whose hand was crushed by power press which spontaneously cycled could not recover for failure to warn because the press' manufacturer "was under no duty to place warnings on the press of this open and obvious danger"]; *Jamieson v. Woodward & Lothrop* (D.C.Cir. 1957) 247 F.2d 23, 28 ["Surely every adult knows that, if an elastic band, whether it be an office rubber band or a rubber rope exerciser, is stretched and one's hold on it slips, the elastic snaps back. There was no duty on the manufacturer to warn of that simple fact"]; *Sherrill v. Royal Industries, Inc.* (8th Cir. 1975) 526 F.2d 507, 513 [manufacturer of a grain auger had no duty to warn of obvious defects (applying Nebraska law)]; *Kuras v. International Harvester Co.* (1st Cir. 1987) 820 F.2d 15, 18 [holding that the danger posed by the moving blade of a lawnmower is an obvious one, and therefore the defendant owed no duty to warn (applying Rhode Island law)]; *Argubright v. Beech Aircraft Corp.* (5th

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2/ "Under the Restatement . . ., a product seller is not generally subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users." (3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:57, p. 144.)

Cir. 1989) 868 F.2d 764, 766, cert. denied (1989) 493 U.S. 934 [holding that there is no duty to warn of the obvious danger associated with an unlocked pilot seat (applying Texas law)].)[3/]

C. The obvious danger rule in California.

California likewise has long recognized that there is no duty to warn of open and obvious dangers. (See, e.g., Civ. Code, § 1714.45, subd. (a)(1) [manufacturer or seller not required to warn about a risk posed by common consumer products intended for personal consumption if "[t]he product is inherently unsafe and is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community"]; *Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 965-966 [prior owner of customized automobile had no duty to warn the car's purchaser that the car's seatbelts were missing, reasoning that "[t]he absence of seatbelts is an obvious defect"]; *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930, 933-934 ["Is the slingshot defective because it did not have a warning it was dangerous? . . . [T]he seller does not need to add a warning when 'the danger, or potentiality of danger is generally known and recognized.' . . . Ever since David slew Goliath young and old have known that slingshots can be dangerous and deadly"]; *Holmes v. J. C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 ["In the instant case, appellant alleged that he was injured while defendant Damon Walker was shooting at birds with a pellet gun powered by a CO2 cartridge sold by Penney's. It is inconceivable that Damon Walker was unaware that an errant shot could strike a bystander such as appellant. . . . A warning, in this case, against the potentiality for injury would therefore serve no useful purpose"];

3/ Cases from jurisdictions applying the obvious danger doctrine are collected in Appendix A to this brief.

Morris v. Toy Box (1962) 204 Cal.App.2d 468, 472 [rejecting manufacturer warning liability for injuries incurred by a child hit by a toy bow and arrow: "As in the case of a sling shot, the bow and arrow has been in use by young and old alike for thousands of years; its method of operation, therefore, is a matter so notorious to all that production of evidence thereto would be unnecessary" (fn. omitted)]; *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 772 ["Liability does not attach if the dangerous propensity is either obvious or known to the injured person at the time he uses the product"]; *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44, 54-55 [there may be no duty to warn as a matter of law about the burning time of a dynamite fuse where it is shown that users generally know all dynamite fuses are "usually manufactured to burn at the [same standard] rate"]; see also *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 866 ["[T]he fuel tanks and the filler spouts were patently exposed, and they were obviously designed to hold gasoline. The properties and propensities of that volatile liquid are a matter of common knowledge. Nor did [the purchaser] need to be advised of the necessity to cover and protect the exposed fuel tanks before operating the unit under circumstances which could subject them to damage"].)[4/]

4/ California courts have been reluctant to embrace the obvious danger rule in the context of design defect claims, however. (See, e.g., *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 473-474 [rejecting defendant manufacturer's argument that it had no duty to install safety devices to protect against the obvious danger of one of its bulldozers backing into someone on a construction site, reasoning that "[t]he danger to bystanders is not diminished because the purchaser of the vehicle is aware of its deficiencies of design" and, even if the obviousness of a peril were relevant to a design defect claim, it would not in itself preclude recovery]; *Luque v. McLean* (1972) 8 Cal.3d 136, 144 [rejecting application of the obvious danger rule and latent/patent danger distinction to strict liability design defect claims]; *Thompson v. Package Machinery Co.* (1971) 22 Cal.App.3d 188, 192 [similarly rejecting application of the obvious danger rule and latent/patent danger distinction in strict liability

(continued...)

D. The standard for determining the obviousness of a danger: an objective one.

"Whether a danger is obvious is determinable by reference to objective criteria, not the subjective beliefs of the user. Thus, the inquiry into the obviousness of a danger turns not on the actual knowledge of the user, but on whether the danger was sufficiently obvious to make it unreasonable to impose on the manufacturer a duty to warn. The focus is the typical user's perception and knowledge and whether the relevant condition or feature that creates the

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4/ (...continued)
design defect context]; *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, 542-543 [same].)

This is consistent with the approach taken by courts in other jurisdictions which have continued to apply the rule to failure to warn claims but have either declined to apply the obvious danger rule to design defect claims or determined that the obviousness of a danger is merely a factor to be considered in determining whether to impose design defect liability. (See Bowbeer et al., *Warning! Failure to Read This Article May be Hazardous to Your Failure to Warn Defense* (2000) 27 Wm. Mitchell L.Rev. 439, 448 ["the obvious danger rule . . . remains a potent defense in failure-to-warn claims"]; Maehler, *Glittenberg v. Doughboy Recreational Industries: The 'Open and Obvious Danger' Rule, supra*, 1993 Det.C. L.Rev. at pp. 1384, 1386 [noting that while a majority of jurisdictions still apply it to failure to warn claims, some refuse to apply it to design defect claims]; Rest.3d Torts Products Liability, § 2, com. (d), p. 20 & com. (j), p. 31 [acknowledging that there is no duty to warn "regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users" but, as to design defect claims "[t]he fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff"].)

As American Standard explained in its answer brief on the merits (see ABOM 64-66), although Johnson has nominally asserted a design defect claim, no true claim based on a manufacturing defect has been made in this case; only failure-to-warn claims have been asserted here.

danger associated with the use is fully apparent, widely known, commonly recognized and anticipated by the ordinary user or consumer." (63A Am.Jur.2d, *supra*, Products Liability, § 1158, pp. 317-318; see also 3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:59, pp. 148-149; see also Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, *supra*, 65 N.Y.U. L.Rev. at p. 283 ["Most courts agree that for purposes of whether the defendant owed a duty to warn of a particular risk, the standard for testing obviousness is objective. Thus, the issue for purposes of determining whether a breach of duty occurred is not whether the plaintiff actually recognized the risk, but whether a reasonable person in the plaintiff's position would have done so" (fn. omitted)].)

The standard adopted by many courts for determining whether a danger is open and obvious therefore is an objective one; that is, whether a product user in plaintiff's position ordinarily can be expected to be aware of the danger, without need for a warning.[5/] Likewise, the California legislature has

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5/ See, e.g., *Rypkema v. Time Mfg. Co.* (S.D.N.Y. 2003) 263 F.Supp.2d 687, 694 ("Manufacturers have no duties to warn of open and obvious dangers. [citations] The standard of determining whether the danger was open and obvious is objective, and irrespective of [plaintiff's] subjective knowledge of the danger"[applying New York law]); *Bowersfield v. Suzuki Motor Corp.* (E.D.Pa. 2000) 111 F.Supp.2d 612, 622 ("[w]hether a danger is open and obvious is an objective inquiry, not dependent upon the actual knowledge of the product's user or his actual awareness of the danger" [applying Pennsylvania law]); *Sauder v. Custom Fabrication, Inc. v. Boyd* (Tex. 1998) 967 S.W.2d 349, 349-350 ("The principal issue in this case is whether the obviousness of a risk is to be determined from the perspective of an average person or an average user of the product. The proper perspective is that of the average user. Because the risk in this case was obvious to an average user, the lower courts' judgments for the plaintiffs cannot be sustained"); *Cox v. Murray Ohio Mfg. Co.* (W.D.Okla. 1987) 732 F.Supp. 1555, 1560 (holding that because an ordinary user would recognize the exposed chain and sprockets of a mower as an obvious danger, there was no duty to warn); *Laaperi v. Sears, Roebuck & Co., Inc.* (1st Cir. 1986) 787 F.2d 726, 730, fn. 3 ("The (continued...)

explicitly, and California courts have implicitly, applied an objective standard in determining whether a risk was obvious. (Civ. Code, § 1714.45, subd. (a)(1) [manufacturer or seller not required to warn about a risk posed by common consumer products intended for personal consumption "if the product is inherently unsafe and is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community"]; *Brown v. Board of Trustees* (1919) 41 Cal.App. 100, 104 ["[T]he deceased, as readily as the defendants, *or any other person*, by the exercise of his facilities of sight and judgment, *in an ordinarily diligent manner*, could

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5/ (...continued)
Massachusetts courts have made clear, however, that warnings are to be construed with the "average user" or "reasonably prudent person" in mind" [applying Massachusetts law]); *Gray v. Manitowoc Co., Inc.* (5th Cir. 1985) 771 F.2d 866, 871 ("[B]oth the Restatement's theory of strict liability and Mississippi's theories of negligence and implied warranty require an objective appraisal of the obviousness of a product hazard [plaintiff] and his inexperienced co-worker's testimony concerning their subjective ignorance has little significance to this objective inquiry. In light of the overwhelming evidence indicating that the existence of a blind spot in the 4100W was common knowledge in the construction trade, we must conclude that the testimony of [plaintiff] and his inexperienced co-worker did not create a jury question as to the knowledge or expectations of the ordinary observer or consumer" [emphasis and citations omitted]); *Pigliavento v. Tyler Equipment Corp.* (1998) 248 A.D.2d 840, 842 [669 N.Y.S.2d 747] ("there is no duty to warn product users of obvious risks and dangers – that being those risks and dangers which could have been or should have been appreciated by the user or that can be recognized as a matter of common sense"); *Emerick v. U.S. Suzuki Motor Corp.* (3d Cir. 1984) 750 F.2d 19, 22 ("The question of obviousness is an objective one, with the focus being on the fictional 'ordinary consumer'" [applying Pennsylvania law]); *Memphis Bank & Trust Co. v. Water Services, Inc.* (Tenn. 1988) 758 S.W.2d 525, 528 ("in determining whether a product was defective or unreasonably dangerous because of inadequate warning, an objective standard must be utilized; that is, the knowledge and experience of an ordinary consumer of the product, rather than a particular plaintiff, must be considered").

have observed and known of the danger to life and limb attending employment in and about the unsupported walls of the burnt building, where, at the time of the accident, he was employed"]; *Krawitz v. Rusch*, *supra*, 209 Cal.App.3d at p. 966 [determining that the absence of seatbelts in a car was an obvious defect, and that "[t]he obviousness of missing seat belts applies regardless of the fact that [the driver of the car] was a teenager"]; cf. *Simmons v. Rhodes & Jamieson, Ltd.* (1956) 46 Cal.2d 190, 195 [applying objective "common knowledge" standard in analyzing plaintiff's res ipsa loquitur claim: court determined that the doctrine did not apply because the evidence did not exclude the plaintiff's conduct as the responsible cause for his burns; even though the plaintiff did not actually know this, "[i]t is a matter of common knowledge that water activates the lime in cement" and therefore by thinning the cement with which he was working with more water, plaintiff simultaneously allowed the cement to soak through his clothes more quickly and increased the risk that he would be more severely burned when he came into contact with it].)[6/]

6/ But see *Canifax v. Hercules Powder Co.*, *supra*, 237 Cal.App.2d at p. 55 (observing that it had not been shown that the dynamite fuse in question had the same burn rate as is generally known to users and sellers alike; moreover, "[i]t was not . . . shown that this ultimate consumer, [plaintiff], was aware of the fact that manufacturers do not customarily give warning of the burning time of [a] fuse").

II.

A MAJORITY OF JURISDICTIONS HAVE ALSO RECOGNIZED THAT A MANUFACTURER HAS NO DUTY IN NEGLIGENCE OR STRICT LIABILITY TO WARN A SOPHISTICATED USER OF A PRODUCT ABOUT DANGERS WHICH, GIVEN THE USER'S KNOWLEDGE AND TRAINING, THE PLAINTIFF KNOWS OR CAN BE PRESUMED TO KNOW.

A. The sophisticated user doctrine: an outgrowth of the obvious danger rule.

As the Court of Appeal in this case observed, the sophisticated user doctrine "is a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers." (Slip opn., p. 6; see also *Carrel v. National Cord & Braid Corp.* (2006) 447 Mass. 431, 440-441 [852 N.E.2d 100, 108-109] [sophisticated user doctrine, which "relieves a manufacturer of liability for failing to warn of a product's latent characteristics or dangers 'when the end user knows or reasonably should know of a product's dangers'" "is a corollary of the 'open and obvious' doctrine"].) Like the obvious danger rule from which it stems, the sophisticated user doctrine has been widely adopted. Thus far, twenty-eight states have recognized some form of the doctrine either by case law or statute. (See Appendix B (collecting cases).)

Under the "sophisticated user" doctrine, "a product supplier has no duty to warn of danger in using a product when the ultimate user . . . possesses special knowledge, sophistication, or expertise in relation to the product." (3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:68, pp.

166-167.) "The sophisticated user may be presumed to know of product-related dangers because of the user's familiarity or extensive experience with the product. In such a case, the duty to warn may be negated even if the user lacked actual knowledge of the danger, based on the determination that a user with such experience should have known of the danger." (*Id.* § 32:68, p. 168, fn. omitted.) As with the obvious danger rule, courts apply an objective standard in determining whether someone in plaintiff's position should be charged with knowledge of a particular risk under the sophisticated user doctrine.[7/] (See, e.g., *East Penn Mfg. Co. v. Pineda* (D.C. 1990) 578 A.2d 1113, 1120 & fn. 7 ["An experienced professional, employed for the very purpose of handling the dangerous instrumentality in question, is more likely than an ordinary consumer to have the requisite knowledge of the specific risks. The test is whether the user, by virtue of his profession and experience, knew or should have known of the latent danger" (fn. omitted); "This concept has also been extended to charge professionals with constructive knowledge of risks for purposes of imposing tort liability on them"]; *Duane v. Oklahoma Gas & Elec. Co.* (Okla. 1992) 833 P.2d 284, 286, 287 ["The duty to warn of any dangerous character of [defendants'] product arises only if [defendants] had no reason to expect those who use the product to discover the condition and realize the danger involved"; "Where the danger or potentiality of danger is known or should be known to the user, the duty to warn does not attach"]; *Id.* at p. 287 ["The scope of the duty upon Shell and Chevron does not depend upon whether Trayer did not in fact know of the dangerous properties, but whether he *should*

7/ In his reply brief, plaintiff appears to agree that the proper standard for assessing the scope of the duty to warn is an objective one: "Respondent is indeed correct that the duty to warn any particular plaintiff is based on the manufacturer's duty to provide warnings to an objective group of intended or foreseeable users of the product of which this plaintiff is a member." (ARB 20.)

have known"]; *Westchester Fire Ins. Co. v. American Wood Fibers, Inc.* (Mar. 21, 2006, No. 2:03-CV-178-TS) 2006 WL 752584, at p. *15 [nonpub. opn.] ["Knowledge may be actual or constructive, and exists where the user knew or should have known of the dangers of a product. [Citation.] Actual or constructive knowledge may be found where . . . information of the product's dangers is available in the public domain"]; *Powell Duffryn Terminals v. Calgon Carbon Corp.* (S.D.Ga. 1998) 4 F.Supp.2d 1198, 1203 ["'Ordinarily, there is no duty to give warning to the members of a profession against generally known risks. "There need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession." "When determining whether a danger is generally known, courts 'should use an objective point of view, as opposed to subjective, since the user's perceptions are irrelevant'"]; see also Kan. Stat. Ann. § 60-3305 (2005) [no duty to warn about risks already known to the plaintiff or risks "which a reasonable user or consumer of the product, with the training, expertise, experience, education and any special knowledge" of the plaintiff "should or was required" to know]; *Humble Sand & Gravel, Inc. v. Gomez* (Tex. 2004) 146 S.W.3d 170, 183 ["A supplier has no duty to warn of risks involved in a product's use that are commonly known to foreseeable users, even if some users are not aware of them. 'Commonly' does not mean universally. . . . 'the inquiry whether a recognition of risk "is within the ordinary knowledge common to the community" is an objective standard'"(fns. omitted)].)

B. The sophisticated user doctrine and the trained professional.

The sophisticated user doctrine is applied with particular force to plaintiffs like Johnson, who are trained professionals. "[U]nder traditional failure to warn doctrine, if more than one category of users and consumers is foreseeably likely to use or consume the product, then the duty owed to the particular plaintiff will be judged by the category of users or consumers in which the plaintiff falls. If the plaintiff is an expert, no duty to warn may be owed him even if such duties are owed to non-expert users or consumers." (Henderson & Twerski, *Doctrinal Collapse in Products Liability: the Empty Shell of Failure to Warn*, *supra*, 65 N.Y.U. L.Rev. at p. 283, fn. omitted.) Thus, "[t]he effect on the duty to warn arising from the sophistication or special knowledge of the user is especially significant when the user is a professional who should be aware of the characteristics of the product. An experienced professional, employed for the very purpose of handling the . . . [product] in question, is more likely than an ordinary consumer to have the requisite knowledge of the specific risks." (3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:70, pp. 170-171, fn. omitted; see also 72 C.J.S. (2006) Products Liability, § 27 ["sophisticated user defense . . . provides that there is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product"].[8/] Implicit in this analysis is a policy judgment

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8/ See *Peppin v. W.H. Brady Co.* (Minn.Ct.App. 1985) 372 N.W.2d 369, 375 (manufacturer of wire markers used in press had no duty to warn press manufacturer that its aluminum wire markers would conduct electricity; "'a manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user'"); *Martinez v. Dixie Carriers, Inc.* (5th Cir. 1976) 529 F.2d 457, 463-467 (applying Texas law); *Littlehale v. E. I. du Pont de Nemours & Co.* (S.D.N.Y. 1996) 268 F.Supp. 791, 798-800;

(continued...)

that a professional, when faced with a risk commonly encountered in his profession, will be in the best position to determine how to respond to these risks and adjust his behavior accordingly. (Cf. *Priebe v. Nelson* (Aug. 28, 2006, S126412) ___ Cal.4th ___ [06 D.A.R. 11418, 11424] [explaining one of the policy rationales for the "veterinarian's rule," under which a dog owner is generally exempt from liability when the dog bites or injures a veterinarian or veterinarian's assistant, or those in similarly stated professions, during treatment: such professionals "are in the best position, *and usually the only position*, to take the necessary safety precautions and protective measures to avoid being bitten or otherwise injured by a dog left in their care and control"].)

Thus, in assessing whether a warning is required, many courts look to the general or common knowledge that may be attributed to members of the

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8/ (...continued)
Bryant v. Hercules Incorporated (W.D.Ky. 1970) 325 F.Supp. 241, 246-247; *Thibodaux v. McWane Cast Iron Pipe Co.* (5th Cir. 1967) 381 F.2d 491, 495; *Antcliff v. State Employees Credit Union* (1982) 414 Mich. 624, 639-640 [327 N.W.2d 814, 821]; *Kerber v. American Machine & Foundry Company* (8th Cir. 1969) 411 F.2d 419, 421-422; *Strong v. E. I. DuPont de Nemours Co., Inc.* (8th Cir. 1981) 667 F.2d 682, 687; *Peitzmeier v. Hennessy Industries, Inc.* (8th Cir. 1996) 97 F.3d 293, 299-300; *Hutchins v. Silicone Specialties, Inc.* (Okla. 1993) 881 P.2d 64, 67; *Smith v. Louisville Ladder Co.* (5th Cir. 2001) 237 F.3d 515, 521-523; *Mallery v. International Harvester Co.* (3d Cir. 1997) 690 So.2d 765, 768; see also *Krutsch v. Walter H. Collin GmBh* (Minn.Ct.App. 1993) 495 N.W.2d 208, 212 ("'[A] manufacturer's duty to warn in strict liability cases extends to all reasonably foreseeable users.' [Citation.] However, 'a manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user'"); *Donald v. Shinn Fu Co. of America, Inc.* (Sept. 4, 2002, No. 99-CV-6397 (ARR)) 2002 WL 32068351, at p. *8 [nonpub. opn.] ("New York courts have consistently found the [sophisticated user] exception to apply when plaintiffs are experienced professionals asserting a claim relating to a tool of their profession"); *Lockett v. General Electric Company* (E.D.Pa. 1974) 376 F.Supp. 1201, 1209, 1212; *Mackowick v. Westinghouse Elec. Corp.* (1990) 525 Pa. 52, 57-59 [575 A.2d 100, 103-104]; *Haase v. Badger Mining Corp.* (Wis.Ct.App. 2003) 266 Wis.2d 970, 983-986 [669 N.W.2d 737].

plaintiff's profession. (See 3 American Law of Products Liability 3d, *supra*, Warnings Liability, § 32:70, p. 172; *Thibodaux v. McWane Cast Iron Pipe Co.*, *supra*, 381 F.2d at p. 495 [consulting engineers chargeable with knowledge of corrosion characteristics of cast iron pipe which allowed gas to escape]; *Strong v. E. I. DuPont de Nemours Co., Inc.*, *supra*, 667 F.2d at p. 687 [no duty to warn of hazards because plaintiff and his employer, Nebraska Natural Gas Co. "[k]new or should have known of the pull-out hazard [in natural gas lines]"; moreover, "the Nebraska Natural Gas Company was under a high duty of care with respect to the safety of its gas lines. Given this high duty of care, a manufacturer such as [defendant] could have assumed that [the company] was aware of the pull-out problem. Indeed, [a court previously] found that the danger was 'well known throughout the industry'" (applying Minnesota law)]; *Mayberry v. Akron Rubber Machinery Corp.* (N.D.Okla. 1979) 483 F.Supp. 407, 413 ["There is ordinarily no duty to give a warning to members of a profession against dangers generally known to members of that profession. . . . [¶]. . .[¶] A duty to warn exists only when those to whom the warning is to be communicated can reasonably be assumed to be ignorant of the dangers to which the warning relates. If it is unreasonable to assume they are ignorant of those facts, there is no duty to warn. [Citation.] In other words, where the danger or potentiality of danger is known or should be known to the user, the duty [to warn] does not attach" (applying Oklahoma law)]; *Collins v. Ridge Tool Co.* (7th Cir. 1975) 520 F.2d 591, 596 [no duty to warn plumber injured when front of his jacket caught in pipe-cutting machine; "a manufacturer's duty to impart information as to the safe use of its product, whether it be by warnings or instructions, is significantly minimized where the user is a member of a particular trade or profession with regard to a danger that is generally known to that trade or profession" (applying Wisconsin law)]; see also *Mays v. Ciba-Geigy Corp.* (1983) 233 Kan. 38, 58 [661 P.2d 348, 363] [""""Where the product

is vended to a particular group or profession, the manufacturer is not required to warn against risks generally known to such group or profession"'" (emphasis omitted)]; *Mackowick v. Westinghouse Elec. Corp.* (1990) 525 Pa. 52, 57 [575 A.2d 100, 103] ["'A seller or manufacturer should be able to presume mastery of basic operations by experts or skilled professionals in an industry, and should not owe a duty to warn or instruct such persons on how to perform basic operations in their industry'"]; *House v. Armour of America, Inc.* (Utah 1996) 929 P.2d 340, 345 ["defendants need not show that [plaintiff's decedent] actually knew about the danger but that the 'community' [of police officers to which] Lt. House belongs 'generally knows' about the danger"]; *Bartkewich v. Billinger* (1968) 432 Pa. 351, 356 [247 A.2d 603, 606] ["[W]e hardly believe it is anymore necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth"].)

Courts have found members of numerous professions to have special knowledge of hazards sufficient to preclude the duty to warn, including: electricians, electronics technicians, experienced and trained beauticians, professional carpenters, plumbers, painters, crewmembers of a barge with tanks used for chemical products, a forklift operator, a mechanic, and a certified and trained HVAC technician like the plaintiff in this case.[9/]

9/ *Rosebrock v. General Electric Co.* (1923) 236 N.Y. 227, 237-238, 241 [140 N.E. 571, 574, 575] (electrician); *Bigness v. Powell Electronics, Inc.* (N.Y.App.Div. 1994) 209 A.D.2d 984, 985 [619 N.Y.S.2d 905, 906] (electronics technician); *McDaniel v. Williams* (N.Y.App.Div. 1965) 23 A.D.2d 729 [257 N.Y.S.2d 702] (beauticians); *Borowicz v. Chicago Mastic Company* (7th Cir. 1966) 367 F.2d 751, 757-758 (carpenter); *Ducote v. Liberty Mut. Ins. Co.* (La.Ct.App. 1984) 451 So.2d 1211, 1213, 1215 (carpenter); *Collins v. Ridge Tool Company, supra*, 520 F.2d at p. 596 (plumber); *Antcliff v. State Employees Credit Union, supra*, 327 N.W.2d at p. 821 (painter); (continued...)

Plaintiff argues that the sophisticated user doctrine should not be applied in California because to do so would preclude some plaintiffs from recovering against a product manufacturer or seller for injuries they suffered. (See ARB 17.) But the fact that a sophisticated or knowledgeable professional may not be able to recover damages against a product manufacturer is not reason enough to reject the doctrine. "An injury caused by a product is not, in itself, sufficient grounds for imposing liability on the product manufacturer." (Cheney, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees*, *supra*, 85 Nw.U. L.Rev. at p. 565.) As this court has long recognized, "[S]trict liability never has been, and is not now, absolute liability." (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733, emphasis omitted.) Where, as here, the plaintiff is a member of a class of professionals trained in both the risks and methods of handling the type of equipment which allegedly caused his harm, the lack of a warning about those risks does not render the equipment defective.

9/ (...continued)
Martinez v. Dixie Carriers, Inc., *supra*, 529 F.2d at pp. 463-467 (barge crew members [applying Texas law]); *Bavuso v. Caterpillar Indus., Inc.* (1990) 408 Mass. 694, 699-702 [563 N.E.2d 198, 201-202] (forklift operator); *Baltus v. Weaver Div. of Kidde & Co.* (1990) 199 Ill.App.3d 821, 833 [557 N.E.2d 580, 588] (mechanic); *Broadie v. General Motors Corp.* (1995) 216 A.D.2d 507, 507-508 [628 N.Y.S.2d 403, 404] (mechanic); *Eyster v. Borg-Warner Corporation* (1974) 131 Ga.App. 702, 704, 706 [206 S.E.2d 668, 670, 671] ["As the specific danger of the aluminum-copper connection was one commonly known to those in the trade, there was no duty on the manufacturer to warn of this hazard"; "[T]he danger of an aluminum-copper connection was common knowledge to those generally engaged in the installation of heating and air conditioning units. Accordingly, the manufacturer was not required to warn against this widely known risk"].

C. The sophisticated user doctrine as applied to negligent and strict liability failure to warn claims.

No distinction should be made between strict liability and negligent failure to warn claims in terms of analyzing the scope of the duty to warn or the application of the sophisticated user doctrine. (See OBOM 23-27; ARB 7-9.)

First, jurisdictions adopting the sophisticated user doctrine have applied it to failure to warn claims whether they were founded on negligence or strict liability. (See *ante*, pp. 13-20 & fns. 9-10; Appendix B, *post*.) This is because both types of failure to warn claims predicate liability on the existence of a duty to warn by the manufacturer or seller of a product; the sophisticated user doctrine defines the scope of that duty. (See Bowbeer et al., *Warning! Failure to Read This Article May be Hazardous to Your Failure to Warn Defense*, *supra*, 27 Wm. Mitchell L.Rev. at p. 441.)

Second, as most courts and commentators have recognized, there is little functional difference between the two theories. (See, e.g., Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis* (2002) 77 N.Y.U. L.Rev. 874 ["In defective design and warning cases, courts and commentators increasingly are questioning the substantive distinction between negligence and strict liability causes of action. In 1998, the Restatement (Third) of Torts: Products Liability adopted a risk/utility analysis of defective design and warning claims that reflects a strong trend among jurisdictions in two ways. First, it advocated using the risk/utility test regardless of whether plaintiffs label their claims as negligence or strict liability . . . . Second, the Restatement's risk/utility analysis draws from principles of reasonableness, making strict liability essentially subject to a negligence analysis"]; *id.* at p. 887 ["[T]he Restatement (Third)'s warning standard is intended for identical application in both negligence and strict liability cases.

The rule is stated functionally rather than in the rhetoric of traditional causes of action. . . . [P]laintiffs are free to choose to 'label' their warnings claims to the jury as either negligence or strict liability, even though the substantive approach is identical. [¶] . . .[¶] . . . [T]he Restatement (Third)'s approach to warning defects accurately reflects the standard used by most jurisdictions and has generated relatively little controversy" (fns. omitted)]; see also *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1140-1146 (conc. & dis. opn. of Turner, J.) [recommending that any distinction between strict liability and negligent failure to warn, at least in the drug manufacturer context, "be abrogated"].)

As one commentator has explained: "In practice," "the strict liability analysis [is] a 'functional equivalent' of the negligence standard, because both theories focus on whether the product poses an unreasonable risk of injury to users and on whether the warning was adequate. The analysis required under both theories involves essentially the same query: did the manufacturer exercise due care in warning users of potential dangers associated with the intended and reasonably foreseeable uses of the product?" (Cheney, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees*, *supra*, 85 Nw.U. L.Rev. at pp. 568-569, fns. omitted; see also Laughery, *Warnings in the Workplace: Expanding the Learned Intermediary Rule to Include Employers in the Context of the Product Manufacturer/Employee Relationship* (2005) 46 S.Tex. L.Rev. 627, 654 ["The majority of courts do not draw a distinction between failure to warn claims sounding in negligence as opposed to strict liability. Although many courts acknowledge that separate causes of action exist, the vast majority of courts apply a 'reasonableness' test in the adjudication of both causes of action. Such a test is inherently negligence-based"(fns. omitted)]; Bowbeer et al., *Warning! Failure to Read This Article*

May be Hazardous to Your Failure to Warn Defense, *supra*, 27 Wm. Mitchell L.Rev. at pp. 441-443 [noting debate among courts and commentators about whether "there is any meaningful difference between strict liability failure-to-warn and negligent failure-to-warn causes of action" and concluding that "the reasonableness of the defendant's failure-to-warn is always material, whether the action is tagged as one in negligence or strict liability"]; *East Penn Mfg. Co. v. Pineda* (D.C. 1990) 578 A.2d 1113, 1118-1119 [noting that "[t]he duty of the manufacturer or seller . . . is the same under both theories: essentially one of ordinary care" and that "[u]nder either theory, the threshold question to be decided is whether the manufacturer or seller owed the user any duty to warn"].)

Plaintiff asserts, however, that the sophisticated user doctrine should not apply to strict liability failure to warn claims in this state because strict liability in California is fundamentally different from negligence and to apply an objective sophisticated user standard would therefore improperly interject negligence principles into strict liability law. (See OBOM 28, ARB 8.) Not so. Strict liability in California "has incorporated some well-settled rules from the law of negligence [such as assumption of the risk and comparative fault] and has survived judicial challenges asserting that such incorporation violates the fundamental principles of the doctrine." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002; see also *id.* at p. 1001 ["the claim that a particular component 'rings of' or 'sounds in' negligence has not precluded its acceptance in the context of strict liability" in this state].) Indeed, "'warning defect' theory is 'rooted in negligence' to a greater extent than are manufacturing - or design-defect theories because 'while a manufacturing or design defect *can be* evaluated without reference to the conduct of the manufacturer, the giving of a warning can not." (*Id.* at p. 1002.) A manufacturer may only be held strictly liable for failing to adequately warn

about a risk that was "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available"; it need not warn about unknowable risks. (*Ibid.*) Likewise, whether a plaintiff's claim sounds in negligence or strict liability, a manufacturer should not be required to warn about a risk that is already known, or presumably known, by a sophisticated user of its product.

III.

THE SOPHISTICATED PURCHASER DOCTRINE FURTHER EXTENDS THE PRINCIPLES APPLIED IN THE OBVIOUS DANGER AND SOPHISTICATED USER CONTEXTS TO ELIMINATE THE NEED TO WARN WHERE THE PURCHASER OR INTERMEDIARY EITHER HAS OR IS CHARGED WITH KNOWLEDGE OF THE PRODUCT'S HAZARDS AND CAN BE EXPECTED TO PASS THIS KNOWLEDGE ON TO THE USER.

Plaintiff contends that the sophisticated user doctrine should not be adopted by this Court because to do so would run contrary to California's interpretation of the related sophisticated purchaser doctrine. (OBOM 32-34; ARB 9-11.) According to plaintiff, the manufacturer of a product should not be excused from giving a product warning to a sophisticated user because under the related sophisticated purchaser doctrine a manufacturer is always required to give an adequate product warning. (See *ibid.*) Plaintiff's theory is based on a number of false premises.

The sophisticated purchaser doctrine provides that, where a product is sold to a sophisticated or knowledgeable purchaser, the manufacturer or

distributor has no duty to directly warn the ultimate product users (such as the purchaser's employees) of any hazards posed by the product where it is reasonable to rely upon the purchaser to communicate the necessary warnings (because the purchaser either has or can be expected to have independent knowledge of the hazards, or was informed of them by the manufacturer). (See *ante*, pp. 26-31.)

Although this court has adopted the failure to warn approach of the Restatement Second from which the modern sophisticated purchaser doctrine is derived (see *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64-65; *Macias v. State of California* (1995) 10 Cal.4th 844, 862 (dis. opn. of Mosk, J.) [noting that "[i]n evaluating the scope of a manufacturer's common law duty to warn, numerous courts – including this court – have turned to the factors set forth in section 388 of the Restatement Second of Torts"]), California has not yet expressly adopted or defined the contours of the sophisticated purchaser doctrine.[10/]

Nonetheless, some courts in California have expressed support for the sophisticated purchaser doctrine. (See, e.g., *Fierro*, *supra*, 127 Cal.App.3d at p. 866 [in addition to recognizing the obvious danger rule, the court also notes that "there was nothing about the [manufacturer's] unit which required any warning to [the purchaser]. A sophisticated organization like [the purchaser] does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition"]; see also *In re Related Asbestos Cases* (N.D.Cal. 1982) 543 F.Supp. 1142, 1151 [noting as far back as 1982 that the sophisticated purchaser defense was "taking hold in California"].)

10/ This Court has been invited to address the viability, scope and application of the sophisticated purchaser doctrine on at least two occasions in the last decade. (See *Patterson v. E. I. DuPont de Nemours & Co., et al.*, Case No. S077927 (1999); *Laico v. Amoco Corp.*, Case. No. S103525 (2002).)

And one California Court of Appeal, citing the Restatement, has approved the doctrine, holding that where a product is sold to a sophisticated and knowledgeable purchaser, the manufacturer or distributor has no duty to directly warn the ultimate product users (such as the purchaser's employees) of any hazards posed by the product so long as it is reasonable to rely upon the purchaser to communicate the necessary warnings. (*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178 [manufacturer of ski-binding had no duty to warn plaintiff skier directly of the danger posed by pairing its bindings with certain types of boots; the manufacturer "had a reasonable basis to believe [its dealers] would pass along [its] product warning and was justified in relying upon [the dealer] to perform its independent duty to warn as required by law"].)[11/]

Nationwide, the sophisticated purchaser defense has gained particularly wide acceptance: over 30 states have adopted the defense. (See *In re Asbestos Litigation* (*Mergenthaler*) (Del.Super. 1986) 542 A.2d 1205, 1210-1211 ["some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions"]; *Kennedy v. Mobay Corp.* (1990) 84 Md.App. 397, 408 [579 A.2d 1191, 1197] ["The legal premise underlying [the sophisticated purchaser] defense, and indeed the defense itself, seems to have gained fairly wide acceptance"], affd. (1992) 325 Md. 385 [601 A.2d 123].) While the exact formulation of the defense varies from state to state, it does not necessarily depend on an adequate warning being given by the manufacturer. Under either

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11/ The ski-binding purchaser in *Persons* happened to gain its knowledge of hazards from the manufacturer; there is no indication that the *Persons* court would not have similarly applied the sophisticated purchaser doctrine where the purchaser has independent knowledge of a product's hazards, irrespective of the adequacy of the warning provided by the manufacturer. (But see *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21 [interpreting *Persons* to require an adequate warning to the intermediary].)

the minority or the majority view of the sophisticated purchaser doctrine, there is no duty to warn a purchaser who is already knowledgeable about a product hazard and can be expected to pass on that knowledge to the product user.

The Minority View: The Intermediate Purchaser's Knowledge. Approximately one-third of the jurisdictions that have adopted the sophisticated purchaser defense have taken a strict common law duty approach, which focuses exclusively on the intermediate purchaser's knowledge and absolves the seller of any duty to warn the ultimate product user so long as the purchaser is aware of the product's hazards. Under this formulation of the sophisticated purchaser doctrine, an adequate warning by the manufacturer is not necessary for the defense to apply, so long as the intermediary had independent knowledge of the product's hazards. The relevant inquiry under this formulation of the defense is simple: If the purchaser-employer had actual knowledge of the product's hazards, through either the supplier's warnings or independently-obtained information, the supplier has no duty to warn the purchaser's employees and judgment will be entered as a matter of law in the supplier's favor.[12/]

12/ See, e.g., *In re Asbestos Litigation* (*Mergenthaler*), *supra*, 542 A.2d at pp. 1211-1212 ("[w]hen the employer already knows or should be aware of the dangers which the warning would cover, there [is] no duty to warn on the part of the supplier," unless "the supplier knows or has reason to suspect that the requisite warning will fail to reach the employees, the users of the product" [applying Delaware law]); *Stiltjes v. Ridco Exterminating Co.* (1986) 178 Ga.App. 438, 441-442 [343 S.E.2d 715, 718-720], affd. on other grounds (1986) 256 Ga. 255 [347 S.E.2d 568] (supplier of pesticides to professional pesticide control operator entitled to summary judgment on failure to warn claim brought by tenant whose home the pesticide was applied in; supplier had no duty to warn since the pesticide operator was charged as a matter of law with knowledge of the dangers posed by use of the pesticide); *Cruz v. Texaco, Inc.* (D.C.Ill. 1984) 589 F.Supp. 777, 779-780 (seller of truck designed to transport heavy equipment had no duty to warn employee of truck company where employer was already aware of danger of driving the truck

(continued...)

The Majority View: Multi-factor Approach. The majority of states adopting the sophisticated purchaser doctrine opt for a multifactor approach

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12/ (...continued)
too fast, and employee operation of the truck involved specific, complex on-the-job training); *Mays v. Ciba-Geigy Corp.*, *supra*, 661 P.2d at pp. 364, 365 ("'no warning is required to be given by the manufacturer to a purchaser who is well aware of the inherent dangers of the product, [and] there is no duty on the part of the manufacturer to warn an employee of that purchaser'"); *McWaters v. Steel Service Co., Inc.* (6th Cir. 1979) 597 F.2d 79, 80 (*per curiam*) (upholding directed verdict in favor of steel rod manufacturer on strict liability failure to warn claim brought by employee of experienced bridge contractor, since the employer already knew the dangers posed by the rod and controlled the manner in which the rod would be used [applying Kentucky law]); *Davis v. Avondale Industries, Inc.* (5th Cir. 1992) 975 F.2d 169, 172, 174-175 (manufacturer has no duty to warn a sophisticated purchaser; defendant manufacturer was therefore entitled to a specific jury instruction that its duty to warn the plaintiff's employee "may be completely discharged by [the employer's] status as a sophisticated purchaser with a duty to warn its employees of the relevant hazard" [apply Louisiana law]); *Scallan v. Duriron Co., Inc.* (5th Cir. 1994) 11 F.3d 1249, 1252 (summary judgment for defendant manufacturer where plaintiff's employer ranked "'among the world leaders'" in chemical processing); *Jacobson v. Colorado Fuel & Iron Corp.* (9th Cir. 1969) 409 F.2d 1263, 1271-1272 (manufacturer of steel strand not required to warn that strand might snap during pre-stressing operation when victim's employer was already aware of the risk [applying Montana law]); *Marker v. Universal Oil Prods.* (10th Cir. 1957) 250 F.2d 603 (supplier of catalyst used in construction of petroleum refining vessel not required to warn victim's employer about danger of asphyxiation from carbon monoxide gas generated by the catalyst, since the employer already knew of the risk [applying Oklahoma law]); *Akin v. Ashland Chemical Co.* (10th Cir. 1998) 156 F.3d 1030, 1037 (summary judgment in favor of defendant chemical manufacturers on failure to warn claim brought by Air Force officers: "[w]e read Oklahoma case law to impose no duty to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. . . . This is tantamount to the familiar 'sophisticated purchaser defense' . . . [which is the] exception [that] absolves suppliers of the duty to warn purchasers who are already aware of or should be aware of the potential dangers").

embodied in the Restatement.[13/] Under this approach, a manufacturer has no duty to warn where it is objectively reasonable for the manufacturer to rely on the intermediary to convey necessary warnings to the product's ultimate users.

The Restatement Third of Torts (Products Liability) sets forth the most up-to-date formulation of the sophisticated purchaser doctrine[14/] and identifies

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13/ A number of states that pioneered the strict common law duty approach have also moved towards, and supplanted the common law approach with, the Restatement's multifactor approach. (See, e.g., *Frantz v. Brunswick Corp.* (S.D.Ala. 1994) 866 F.Supp. 527, 535 & fn. 55 [analyzing manufacturer's duty to warn end-user under the "reasonableness" factors of the Restatement, instead of the strict duty analysis employed by an earlier Alabama court]; *Carter v. E. I. DuPont de Nemours & Co. Inc.* (1995) 217 Ga.App. 139, 142-143 [456 S.E.2d 661, 663-664] [rejecting strict duty approach previously applied by Georgia courts in favor of Restatement multifactor approach]; *Miller v. G & W Elec. Co.* (D.Kan. 1990) 734 F.Supp. 450, 454 [indicating that, since Kansas courts implicitly adopted the Restatement in applying common law duty approach, the appropriate analysis is now the Restatement multifactor approach]; see also *Dole Food Co. v. North Carolina Foam Industries, Inc.* (1996) 188 Ariz. 298, 303, fn. 5 [935 P.2d 876, 881, fn. 5][rejecting strict duty analysis in favor of the Restatement approach in the first instance].)

14/ By defining all product liability claims and defenses functionally, rather than compartmentalizing them into traditional doctrinal categories like negligence or strict liability (Rest.3d Torts Products Liability, § 2, com. n, p. 34), the Restatement Third makes clear what a majority of jurisdictions have already recognized: doctrines like the sophisticated purchaser doctrine apply equally to both negligent and strict liability failure to warn claims. (See Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, *supra*, 77 N.Y.U. L.Rev. at p. 887 ["[T]he Restatement (Third)'s warning standard is intended for identical application in both negligence and strict liability cases. The rule is stated functionally rather than in the rhetoric of traditional causes of action. . . . [P]laintiffs are free to choose to 'label' their warnings claims to the jury as either negligence or strict liability, even though the substantive approach is identical. . . .[¶]. . . [T]he Restatement (Third)'s approach to warning defects accurately reflects the standard used by most jurisdictions and has generated relatively little controversy"].)

three factors to be considered in determining "whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings": "the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user." (Rest.3d Torts Products Liability, § 2, com. i, pp. 29-30; see also Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information* (1996) 46 Syracuse L.Rev. 1185, 1205-1207 [describing the Restatement's multifactor approach].) The required analysis is an objectively reasonable one that is not dependent upon evidence of actual, conscious reliance by the manufacturer on the intermediate purchaser. Nor is the test dependent upon what the intermediate purchaser in fact did with the product hazard information it possessed. (Cf. *Manning v. Ashland Oil Co.* (7th Cir. 1983) 721 F.2d 192, 196 ["We are not concerned with the reasonable inferences that may be drawn from the circumstances of the actual internal operation of [the employer's] business, but rather, whether Ashland acted reasonably in light of what [a supplier like Ashland reasonably could know] about the party to whom it sold the lacquer thinner"].) An adequate warning from the manufacturer is not a prerequisite for this multifactor version of the sophisticated purchaser defense to apply.[15/]

15/ See, e.g., *Goodbar v. Whitehead Bros.* (W.D.Va.1984) 591 F.Supp. 552, 561 ("when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated"; it then "becomes the employer's responsibility to guard against the known danger by either warning its employees or otherwise providing the necessary protection"); *Fisher v. Monsanto Co.* (W.D.Va. 1994) 863 F.Supp. 285, 288-289 (following *Goodbar* and granting summary judgment for defendant manufacturer on plaintiff-employee's negligent failure to warn claim; defendant could reasonably rely on employer, a sophisticated purchaser

(continued...)

In sum, and contrary to plaintiff's assertion, nothing about the sophisticated purchaser doctrine stands in the way of this court joining the majority of states in recognizing that a product supplier has no duty to warn a sophisticated user of a risk which the user, given his knowledge and training, either already knows or can be presumed to know.

15/ (...continued)
of defendant's products, to warn its employees because (1) the employer had considerable knowledge and expertise regarding the product, (2) defendant provided the product in bulk, so that any warnings placed by the manufacturer could not reach employees, and (3) the defendant was not in a position to constantly monitor the turnover in the employer's workforce); *Whitehead v. Dycho Co., Inc.* (Tenn. 1989) 775 S.W.2d 593, 600 (affirming summary judgment for bulk supplier of naphtha pursuant to the Restatement formulation of the sophisticated purchaser defense because the intermediary employer "was knowledgeable about the product in question and it was the only party in a position to issue an effective warning to the [p]laintiff. The [d]efendants had no reasonable access to plaintiff"); *Aetna Casualty & Surety Co. v. Ralph Wilson Plastics Co.* (1993) 202 Mich.App. 540, 546-548 [509 N.W.2d 520, 523-524] (affirming grant of summary judgment in favor of defendant manufacturer under sophisticated user doctrine; "[c]ommercial enterprises that use materials in bulk must be regarded as sophisticated users, as a matter of law" because "[t]hose with a legal obligation to be informed concerning the hazards of materials used in manufacturing processes must be relied upon, as sophisticated users, to fulfill their legal obligations"); *Jodway v. Kennametal, Inc.* (1994) 207 Mich.App. 622 [525 N.W.2d 883] (following *Aetna*); *Kennedy v. Mobay Corp., supra*, 579 A.2d at pp. 1200-1202 (jury properly allowed to consider sophisticated purchaser doctrine where: (1) defendants had no ability to give direct warnings to purchaser's employees and (2) purchaser was aware of the hazards posed by defendants' products.)

CONCLUSION

This court should formally adopt the sophisticated user doctrine and thereby make clear that there is no need to warn product users of hazards which they already know or which, because of their training, experience, or profession, they are presumed to know. Doing so would avoid the social cost of overwarning (including the diversion of limited user attention to unnecessary warnings) and enhance the effectiveness of the warnings that are placed on products by helping to ensure that warnings are given only where they are truly needed.

Accordingly, for the reasons expressed in this brief and in respondent's answer brief on the merits, the judgment should be affirmed.

Dated: September 14, 2006 Respectfully submitted,

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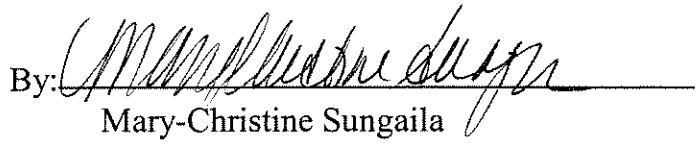
By: 
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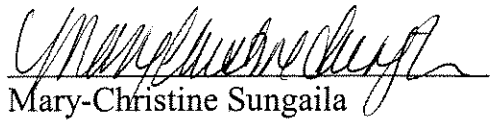
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief (including the text of Appendix A and B which follow) consists of 12,054 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

DATED: September 14, 2006



Mary-Christine Sungaila

APPENDIX A (Obvious Danger Cases & Statutes)	
STATE	**CASE / STATUTE**
Arizona	*Brown v. Sears & Roebuck Co.* (1983) 136 Ariz. 556, 562 [667 P.2d 750, 756] ("Surely every adult knows that if an electrical extension cord is cut or frayed a danger of electrical shock is created. We find that reasonable minds could not differ as to the obviousness of this danger. Because the danger was so obvious, . . . (defendant) had no duty to warn of the danger of electrical shock")
Arkansas	*Forrest City Mach. Works, Inc. v. Aderhold* (1981) 273 Ark. 33, 37 [616 S.W.2d 720, 723] ("[T]here is no duty on the part of a manufacturer to warn of a danger when the dangerous defect is open and obvious")
Florida	*Knox v. Delta Int'l Mach. Corp.* (Fla.Dist.Ct.App. 1989) 554 So.2d 6, 7 (no duty to warn of the obvious dangers associated with removing a detachable safety guard on a joinder machine)
Georgia	*Fluidmaster, Inc. v. Severinsen* (1999) 238 Ga.App. 755, 756 [520 S.E.2d 253, 255] ("[T]he duty-to-warn doctrine does not require a product manufacturer to warn of a product-connected danger which is obvious or generally known") *Powell Duffryn Terminals v. Calgon Carbon Corp.* (S.D.Ga. 1998) 4 F.Supp.2d 1198, 1203 (applying Georgia law) ("There is no duty to warn of an open and obvious danger of a product")
Idaho	*Puckett v. Oakfabco, Inc.* (1999) 132 Idaho 816, 824 [979 P.2d 1174, 1182]
Illinois	*Kokoyachuk v. Aeroquip Corp.* (1988) 172 Ill.App.3d 432, 439 [526 N.E.2d 607, 610-611] (no duty to warn of the obvious dangers associated with a refrigerated trailer)

APPENDIX A (Obvious Danger Cases & Statutes)	
STATE	**CASE / STATUTE**
Iowa	*Nichols v. Westfield Industries, Ltd.* (Iowa 1985) 380 N.W.2d 392, 400-401 (no duty to warn of the obvious dangers associated with a grain auger)
Kansas	Kan. Stat. Ann. § 60-3305 (2005) ("[A]ny duty on the part of the manufacturer . . . to warn . . . shall . . . not extend . . . [¶] . . . [¶]. . . to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product")
Louisiana	*Albert v. J. & L. Eng'g Co.* (La.Ct.App. 1968) 214 So.2d 212, 214-215 (a manufacturer of a sugar cane harvesting machine has no duty to warn of obvious dangers posed by the machine) La. Rev. Stat. Ann. § 9:2800.57 (2006) ("[a] manufacturer is not required to provide an adequate warning about his product when . . . [¶] . . . [t]he product is not dangerous to an extent beyond that which would be contemplated by the ordinary user . . .")
Maine	*Lorfano v. Dura Stone Steps, Inc.* (Me. 1990) 569 A.2d 195, 197 ("[A] manufacturer has no duty to warn of a danger that is obvious and apparent. We conclude that the dangers posed by the use of steps without a handrail are patently obvious and equally apparent to all. The Superior Court (therefore) correctly entered summary judgment as a matter of law")
Maryland	*Nicholson v. Yamaha Motor Co.* (1989) 80 Md.App. 695, 720-721 [566 A.2d 135, 148] (there is no negligence, in either design or failure to warn, for the obvious danger of riding a motorcycle without crash bars), cert. denied (Md. 1990) 569 A.2d 1242

APPENDIX A (Obvious Danger Cases & Statutes)	
STATE	**CASE / STATUTE**
Minnesota	*Mix v. MTD Prods. Inc.* (Minn.Ct.App. 1986) 393 N.W.2d 18, 19-20 (operational dangers of a riding lawnmower are obvious dangers not requiring a warning)
N. Carolina	*Simpson v. Hurst Performance, Inc.* (M.D.N.C. 1977) 437 F.Supp. 445, 447 (manufacturer of car gear shift not liable for failing to warn about the risk of injury to a person sitting on a bench type front seat without a seat belt when the danger was obvious)
New Jersey	N.J. Rev. Stat. § 2A: 58C-3(a) (2006) ("[M]anufacturer . . . shall not be liable if . . . [¶]. . . [t]he characteristics of the product are known to the ordinary consumer or user, and the harm was caused by . . . an inherent characteristic of the product and that would be recognized by the ordinary person . . .")
Ohio	*Taylor v. Yale & Town Mfg. Co.* (1987) 36 Ohio App.3d 62, 63-64 [520 N.E.2d 1375, 1377] (manufacturer has no duty to warn of the obvious danger of an industrial truck's propensity to spark) Ohio Rev. Code Ann. § 2307.76(B) (2006) ("A product is not defective due to lack of warning . . . as a result of the failure of its manufacturer to warn . . . about an open and obvious risk or a risk that is a matter of common knowledge")
Oklahoma	*Cox v. Murray Ohio Mfg. Co.* (W.D.Okla. 1987) 732 F.Supp. 1555, 1560-1561 (because an ordinary user would recognize the exposed chain and sprockets of a mower as an obvious danger, there was no duty to warn)

APPENDIX A (Obvious Danger Cases & Statutes)	
STATE	**CASE / STATUTE**
S. Carolina	*Anderson v. Green Bull, Inc.* (S.C.Ct.App. 1996) 322 S.C. 268, 271 [471 S.E.2d 708, 710-711] (no duty to warn because "[a]ny person of normal intelligence would know 'the risk posed by an aluminum ladder in close proximity to an energized high-voltage line") *Dema v. Shore Enterprises, Ltd.* (S.C.Ct.App. 1993) 312 S.C. 528, 530 [435 S.E.2d 875, 876] ("A product is not defective for failure to warn of the obvious")
Tennessee	*Pemberton v. American Distilled Spirits Co.* (Tenn. 1984) 664 S.W.2d 690, 692-693 (no duty to warn of the obvious danger associated with excessive consumption of alcohol) Tenn. Code Ann. § 29-28-105(d) (2006) ("A product is not unreasonably dangerous because of failure to adequately warn of a danger . . . that is apparent to the ordinary user")
Utah	*Shuput v. Heublein, Inc.* (10th Cir. 1975) 511 F.2d 1104, 1106 (applying Utah law)
Vermont	*Menard v. Newhall* (Vt. 1977) 373 A.2d 505, 507 (no duty to warn of the obvious danger that a BB gun, if fired, could injure an eye [applying Virginia law])
Virginia	*Austin v. Clark Equipment Co.* (4th Cir. 1995) 48 F.3d 833, 836
Washington	*Anderson v. Dreis & Krump Mfg. Corp.* (1987) 48 Wash.App. 432, 439 [739 P.2d 1177, 1182] ("warning's contents, combined with the obviousness of the press' dangerous characteristics, indicate that any reasonable operator would have recognized the consequences of placing one's hands in the point-of-operation area")

APPENDIX A (Obvious Danger Cases & Statutes)	
STATE	**CASE / STATUTE**
Wisconsin	*Estate of Schilling v. Blount, Inc.* (1989) 152 Wis.2d 608, 619-621 [449 N.W.2d 56, 60-61] (manufacturer of firearm bullets owes no duty to warn of the obvious dangers associated with their use)
Wyoming	*Parker v. Heasler Plumbing & Heating Co.* (Wyo. 1964) 388 P.2d 516, 519 ("a seller's duty to warn does not require that he warn a user of equipment of dangers of which the user is aware or of obvious dangers" and holding that a manufacturer of an incinerator owes no duty to warn, absent a latent defect unknown to the plaintiff)

APPENDIX B (Sophisticated User Cases & Statutes)	
STATE	**CASE / STATUTE**
Alabama	*Ex Parte Chevron Chemical Co.* (Ala. 1998) 720 So.2d 922, 924-926
Alaska	*Robles v. Shoreside Petroleum, Inc.* (Alaska 2001) 29 P.3d 838, 843
Arizona	*Southwest Pet Products, Inc. v. Koch Industries, Inc.* (D.Ariz. 2003) 273 F.Supp.2d 1041, 1061 (applying Arizona law)
Colorado	*Halter v. Waco Scaffolding & Equip. Co.* (Colo.Ct.App. 1990) 797 P.2d 790 (Colorado law)
Connecticut	*Sharp v. Wyatt, Inc.* (1993) 31 Conn.App. 824, 848-849 [627 A.2d 1347] Conn. Gen. Stat. Ann. § 52-572q (b)(2) (2006) (among factors to be considered in determining whether there is a duty to warn is "the ability of the product seller to anticipate . . . that the expected product user would be aware of the product risk, and the nature of the potential harm")
Dist. of Columbia	*East Penn. Mfg. Co. v. Pineda* (D.C. 1990) 578 A.2d 1113, 1120
Georgia	*Brown v. Apollo Industries, Inc.* (1991) 199 Ga.App. 260, 262 [404 S.E.2d 447, 449-450]
Hawaii	*Tabieros v. Clark Equip. Co.* (1997) 85 Hawaii 336, 365 [944 P.2d 1279, 1308]
Indiana	*Westchester Fire Ins. Co. v. American Wood Fibers, Inc.* (Mar. 21, 2006, No. 2:03-CV-178-TS) 2006 WL 752584, at p. *15 [nonpub. opn.]

APPENDIX B (Sophisticated User Cases & Statutes)	
STATE	**CASE / STATUTE**
Iowa	*Bergfeld v. Unimin Corp.* (8th Cir. 2003) 319 F.3d 350, 353 (applying Iowa law) *Vandelune v. 4B Elevator Components Unlimited* (1998) 148 F.3d 943, 946 (applying Iowa law) *West v. Broderick & Bascom Rope Co.* (1972) 197 N.W.2d 202, 210-211 (Iowa)
Kansas	Kan. Stat. Ann. § 60-3305 (2005) (no duty to warn about risks "which a reasonable user or consumer of the product, with the training, expertise, experience, education and any special knowledge the user or consumer did, should or was required to possess")

APPENDIX B (Sophisticated User Cases & Statutes)	
STATE	**CASE / STATUTE**
Louisiana	*American Mut. Liability Ins. Co. v. Firestone Tire and Rubber Co.* (5th Cir. 1986) 799 F.2d 993, 994 (applying Louisiana law) ("duty to warn is limited . . . where 'the purchaser or the user has certain knowledge or sophistication, professionally or otherwise, in regard to the product'") *Davis v. Avondale Industries, Inc.* (5th Cir. 1992) 975 F.2d 169, 172 (interpreting Louisiana statute to preclude any duty to warn a sophisticated user) *Gautreaux v. Tex-Steam Co.* (E.D.La. 1989) 723 F.Supp. 1181, 1182 (applying Lousiana law) *Hines v. Remington Arms Co., Inc.* (La.Ct.App. 1988) 522 So.2d 152, 156 (plaintiff, who was an experienced gun user and had previously used similar customized shotgun "was, in fact, what the courts have described as a sophisticated user who already knew or should have known of the dangers involved in handling a loaded target rifle with no safety device. [The gun manufacturer] was under no duty to warn him of a danger with which he was already familiar") *Mozeke v. International Paper Co.* (5th Cir. 1991) 933 F.2d 1293, 1297 (applying Louisiana law) La. Rev. Stat. Ann. § 9:2800.57(B)(2) (2006)
Maine	*Koken v. Black & Veatch Constr., Inc.* (1st Cir. 2005) 426 F.3d 39, 45 (determining that Maine Supreme Court would adopt sophisticated user doctrine "because the doctrine is simply a corollary of the open and obvious doctrine," which enjoys "widespread acceptance")

APPENDIX B (Sophisticated User Cases & Statutes)	
STATE	**CASE / STATUTE**
Maryland	*Emory v. McDonnell Douglas Corp.* (1998) 148 F.3d 347, 350 (open and obvious doctrine to be applied in light of expected user's expertise [applying Maryland law])
Massachusetts	*Carrel v. National Cord & Braid Corp.* (2006) 447 Mass. 431, 440-441 [852 N.E.2d 100, 108] (explicitly adopting sophisticated user doctrine for both negligent and strict liability failure to warn claims in Massachusetts)
Michigan	Mich. Comp. Laws § 600.2947(4) (2006) ("a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user") Mich. Comp. Laws § 600.2945(j) (2006) (defining "sophisticated user") Mich. Comp. Laws § 600.2948(2) (2006) ("[a] defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person whose injury or death the claim is based in a product liability action")
Minnesota	*Gray v. Badger Mining Corp.* (Minn. 2004) 676 N.W.2d 268, 276
Missouri	*Donahue v. Phillipps Petroleum Co.* (8th Cir. 1989) 866 F.2d 1008, 1012 (applying Missouri law)
Nebraska	*Jordan v. NUCOR Corp.* (8th Cir. 2002) 295 F.3d 828, 837 (applying Nebraska law)
New Jersey	*Wasko v. R.E.D.M. Corp.* (1986) 217 N.J.Super. 191, 198 [524 A.2d 1353, 1356-1357]

APPENDIX B (Sophisticated User Cases & Statutes)	
STATE	**CASE / STATUTE**
New Mexico	*Madrid v. Mine Safety Appliance Co.* (10th Cir. 1973) 486 F.2d 856, 859-860 (applying New Mexico law)
New York	*Rypkema v. Time Mfg. Co.* (S.D.N.Y. 2003) 263 F.Supp.2d 687, 694 (applying New York law)
Oklahoma	*Duane v. Oklahoma Gas & Elec. Co.* (Okla. 1992) 833 P.2d 284, 286-287
Pennsylvania	*Mackowick v. Westinghouse Electric Corp.* (Pa. 1990) 525 Pa. 52, 57 [575 A.2d 100, 103]
Tennessee	*Pittman v. Upjohn Co.* (Tenn. 1994) 890 S.W.2d 425, 430
Texas	*Humble Sand & Gravel, Inc. v. Gomez* (Tex. 2004) 146 S.W.3d 170, 183-184 *Koonce v. Quaker Safety Products & Mfg. Co.* (5th Cir. 1986) 798 F.2d 700, 716 (applying Texas law)
Utah	*House v. Armour of America, Inc.* (Utah 1996) 929 P.2d 340, 345
Wisconsin	*Mohr v. St. Paul Fire & Marine Ins. Co.* (Wis.Ct.App. 2003) 269 Wis.2d 302, 317-318 [674 N.W.2d 576, 584-585]

Cited Authorities Available Only From an Online Source

(provided pursuant to California Rules of Court, rule 977(c))

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,E.D. New York.
Hyron DONALD and Dawn Donald, Plaintiffs,
v.
SHINN FU CO. OF AMERICA, Ace Hardware Co. and MVP America, Inc. Defendants.
SHINN FU CO. OF AMERICA and MVP America, Inc. Third-Party Plaintiffs,
v.
MIDWOOD LUMBER CO., Third-Party Defendant.
No. 99-CV-6397 (ARR).

Sept. 4, 2002.

Mechanic, who was injured when fork lift collapsed on top of him, brought products liability action against manufacturer and retailers of fork lift jack. Upon defendants' motions for summary judgment, the District Court, Ross, J., held that: (1) genuine issue of material fact existed as to whether mechanic's failure to use a jack stand while using fork lift jack to elevate forklift was the proximate cause of his injuries; (2) mechanic was a knowledgeable user, and therefore, manufacturer of fork lift jack had no duty under New York law to warn him of the danger of a jack collapse; and (3) genuine issue of material fact existed as to whether mechanic's failure to use optional safety equipment while using fork lift jack to elevate forklift rendered the design defect in fork lift jack a nullity.

Motions granted in part and denied in part.

[1] Products Liability 313A ⇐ 71

313A Products Liability
313AII Actions
313Ak71 k. In General. Most Cited Cases

Sales 343 ⇐ 425

343 Sales
343VIII Remedies of Buyer
343VIII(D) Actions and Counterclaims for Breach of Warranty
343k425 k. Nature and Form of Remedy. Most Cited Cases
A finding that a products liability claim and a breach of implied warranty claim are distinct under New York law requires a showing that the "ordinary purpose" for which the product was sold and marketed is not the same as the purpose that provides the utility that outweighs the risk of injury.

A finding that a products liability claim and a breach of implied warranty claim are distinct under New York law requires a showing that the "ordinary purpose" for which the product was sold and marketed is not the same as the purpose that provides the utility that outweighs the risk of injury.

[2] Sales 343 ⇐ 262

343 Sales
343VI Warranties
343k259 Making and Requisites of Express Warranty
343k262 k. Reliance by Buyer on Statements. Most Cited Cases
So long as a plaintiff can show that the express warranty was part of the bargained-for agreement, plaintiff can succeed under New York law on an express warranty claim regardless of actual reliance on the particular terms of the warranty.

[3] Federal Civil Procedure 170A ⇐ 2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General. Most Cited Cases
Genuine issue of material fact existed as to whether mechanic's failure to use a jack stand while using fork lift jack to elevate forklift was the proximate cause of his injuries, which resulted when fork lift collapsed on top of him, precluding summary judgment in favor of manufacturer of fork lift jack on strict products liability claim.

[4] Products Liability 313A ⇐ 48

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak48 k. Particular Machines, Tools, and Appliances. Most Cited Cases

Mechanic, who was injured when forklift collapsed on top of him, was a knowledgeable user of forklift jacks, and therefore, manufacturer of fork lift jack had no duty under New York law to warn him of the danger of a jack collapse; in addition to his general knowledge of fork lift jacks and their intended uses, mechanic read and understood the instruction manual, which warned that failure to heed its instructions could result in severe physical injury.

[5] Federal Civil Procedure 170A ⇐ 2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General. Most Cited Cases
Genuine issue of material fact existed as to whether mechanic's failure to use optional safety equipment while using fork lift jack to elevate forklift rendered the design defect in fork lift jack a nullity, precluding summary judgment in favor of manufacturer of fork lift jack on strict products liability claim based on design defect.

[6] Products Liability 313A ⇐ 90

313A Products Liability
313AII Actions
313Ak87 Questions for Jury
313Ak90 k. Machinery, Tools, and Appliances in General. Most Cited Cases
Mechanic, who was injured when forklift collapsed on top of him, could not establish manufacturing defect in forklift jack based on New York's version of res ipsa loquitur since there was evidence that mechanic's failure to use a jack stand caused the accident.

[7] Products Liability 313A ⇐ 25

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak23 Persons Liable
313Ak25 k. Retailers. Most Cited Cases
Under New York law, retailer of goods which he does not manufacture and over which he has no control as to hidden or latent defects can be subjected to the remedy of strict products liability simply as a retailer of such goods.

[8] Products Liability 313A ⇐ 48

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak48 k. Particular Machines, Tools, and Appliances. Most Cited Cases
Retailers could not be held liable in negligence under New York law for mechanic's injuries, which allegedly were caused by defective fork lift jack where jack arrived at mechanic's employer's premises in a sealed carton.

[9] Federal Civil Procedure 170A ⇐ 2547.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2547.1 k. In General. Most Cited Cases
Plaintiff's failure to submit papers opposing a motion for summary judgment did not warrant granting summary judgment in favor of manufacturer and reailers on products liability claim where it was clear from the record that there was dispute as to how the accident happened. Local Rule 56.1.

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Mark Alan Taustine, Leahy & Johnson, P.C., New York, NY, for the Third-Party Defendant.

OPINION AND ORDER

ROSS, J.

***1** The court has jurisdiction over this diversity action pursuant to 28 U.S.C. § 1332. The motion currently before the court arises out of an accident that occurred on January 27, 1999, during which plaintiff, Hyron Donald, was severely injured while repairing a fork lift. Mr. Donald, a mechanic employed by Midwood Lumber Co. ("Midwood"), was underneath the fork lift, trying to install a new starter, when the lift unexpectedly descended upon

him, inflicting several serious injuries. By motion dated April 5, 2002, defendants, Shinn Fu Co. of America ("Shinn Fu"), MVP America, Inc. ("MVP"), and Ace Hardware Co. ("Ace") (collectively, "defendants"), move for summary judgment on plaintiffs' claims grounded in strict products liability and breach of warranty. MVP and Ace move for summary judgment on all claims. For the reasons stated below, defendants' motion is granted in part and denied in part.

FACTUAL BACKGROUND

In the instant action, plaintiffs allege that a fork lift jack, which Mr. Donald was using on the date of his accident, failed, resulting in a fork lift collapsing on top of him. Most of the facts known to the court at this time come from Mr. Donald's deposition testimony. Mr. Donald was brought up in a family of mechanics; even at a young age, he accumulated experience with automobile and heavy equipment repairs. Before immigrating to the United States from Grenada, Mr. Donald held a number of jobs as a mechanic, including, among others, positions with the Grenadian government and numerous private sector jobs working with heavy machinery in Grenada and Trinidad. After moving to the United States, Mr. Donald continued to work as a mechanic and gained experience repairing fork lifts. At several of these jobs, both in the Caribbean and in the United States, Mr. Donald attended seminars and other training sessions at which he received instruction in the proper use of fork lift jacks. By the time he began working at Midwood, Mr. Donald was a skilled mechanic, well-versed in the do's and don't's of fork lift repair.

Mr. Donald joined Midwood in January of 1999. Upon his arrival, he was asked by his boss, Barry Miltz, to set up the company's garage, which was to be used to maintain Midwood's fleet of trucks and fork lifts. *Id.* at 70. Mr. Donald asked Mr. Miltz to order several pieces of equipment Mr. Donald deemed necessary to do his job, including jacks and jack stands. *Id.* at 84. At the time, Mr. Donald believed that Mr. Miltz was ordering Lincoln-brand jacks, a type with which Mr. Donald was familiar. In fact, Mr. Donald asked specifically for Lincoln jacks, in part because they came with jack stands. *Id.* at 162. In spite of Mr. Donald's request, however, Mr. Miltz ordered an Omega-brand jack, manufactured by Shinn Fu, from MVP, a retailer of heavy equipment. The jack was actually purchased by Ace, with whom Midwood had a membership agreement, but it was shipped directly from MVP to Midwood.

***2** When the jack arrived on January 25, 1999, Mr. Donald was "shocked" to discover that the jack was not a Lincoln but an Omega Model 28045. *Id.* at 110. While Mr. Donald had extensive experience with Lincoln jacks, he had never worked with an Omega jack before. *Id.* at 41. Mr. Donald immediately doubted its quality, asking Mr. Miltz, "who ... ordered this cheap piece of shit jack?" *Id.* at 110. According to Mr. Donald, Mr. Miltz changed the order from the Lincoln to the Omega because the Omega was cheaper. *Id.* at 111. Also, while Mr. Donald asked that jack stands be ordered as well, Mr. Miltz had not done so, so the Omega jack arrived by itself. *Id.* at 114. Mr. Donald claims that Mr. Miltz "didn't think it was necessary to order them." *Id.* Mr. Miltz told Mr. Donald that Midwood was in the process of ordering jack stands, but in the meanwhile, to go ahead and use the jack without a stand. *Id.* at 315-16. Mr. Donald agreed to do so.

The Omega jack came with an instruction manual, which Mr. Donald claims to have read and understood. *Id.* at 141. The first paragraph in the manual concluded with the following warning: "Failure to comply with the information contained within could result in severe, even fatal injury and/ or property damage." Def. Exh. E at 2. The next paragraph, under the heading "Product Description," stated, "Omega Heavy duty fork lifts are designed for lifting, but not sustaining, loads ranging from up to 4 ton or 5 ton [sic]...." *Id.* On the next page, the manual's operating instructions urged users to "transfer the load immediately to appropriately rated jack stands." *Id.* at 3. A warning in bold typeface followed, repeating this injunction and warning that "failure to head these and all other warnings pertaining to this product can result in sudden loss of lifted load resulting in death, personal injury or property damage." *Id.* Further instructions and warnings were on a label affixed to the jack itself. The label echoed the instruction manual with the following: "transfer load immediately to appropriately rated jack stands," "transfer load to jack stands before working on, around or under load," and "failure to heed this warning may result in severe, even fatal injury and/

or property damage." Def. Exh. F.

On the morning of January 27, 1999, Mr. Miltz asked Mr. Donald to replace the starter in a fork lift. This repair required that the fork lift be jacked up so that Mr. Donald could access the starter from underneath the lift. Around 11:30 in the morning, Mr. Donald raised the fork lift with the Omega jack and removed the old starter. The whole process took about ten minutes and was accomplished without incident. Later in the day, he returned to put in a new starter. He again jacked up the fork lift and went underneath it. This time catastrophe struck. Mr. Donald claims that the fork lift started descending slowly upon him, but that the whole process "happened fast." Pl. Dep. at 186. According to Mr. Miltz, Mr. Donald told him that the jack "slipped out," Miltz Dep. at 57, suggesting that the collapse was sudden and swift. The fork lift trapped Mr. Donald under its four-ton weight, hurting Mr. Donald quite seriously. Ultimately, Mr. Donald's injuries, including a crushed jaw and a broken sternum, required a fifteen-day hospital stay.

***3** Plaintiffs allege that the fork lift collapsed because the jack was defective. They have solicited the opinion of Dr. Anthony Storace, P.E., a specialist in mechanical and safety engineering, to support their claim. In addition, they attach the report of Mr. Neal Growney, P.E., an expert hired by Midwood. In his first report, based on an examination of the jack and an interview with Mr. Donald, Dr. Storace alleged a design defect, concluding that the jack collapsed because of a leak in its hydraulic system that could have been countermanded by a simple safety mechanism. In a later supplement to this report, written after having read Mr. Donald's and Mr. Miltz's deposition transcripts, Dr. Storace offered a second explanation for the accident. FN1 Rather than collapsing slowly due to faulty hydraulics, the jack could have slipped out because (1) there was insufficient friction between the jack and the lift due to the design of the jack, and (2) the jack was on wheels. With regard to all these defects, Dr. Storace concluded that the jack had been defectively designed in a way that could have been easily remedied. Mr. Growney's report is consistent in large part with Dr. Storace's second theory.

FN1. Dr. Storace did not renounce his first theory in the supplement but rather presented both theories as possibilities.

Plaintiffs also allege that the warnings on the jack and in the manual were insufficient to alert Mr. Donald to the danger he faced by using the jack without a stand. In Dr. Storace's opinion, the warnings did not conform to the industry standard for product safety signs and labels. The label on the jack and the manual used the word "warning," indicating an only potentially hazardous situation, when they should have used the word "danger," giving notice of an imminently hazardous situation. Also, neither the label nor the manual contained a "pictogram"-a safety symbol above a signal word, adjacent to which the warning is spelled out in sufficient detail. Dr. Storace reiterated his opinion that the warnings were defective in his second report and claims that the defect caused Mr. Donald's injuries.

Mr. Donald has sued Shinn Fu, the manufacturer of the jack, MVP, the retailer of the jack, and Ace, the financier of the jack's purchase, alleging breach of express and implied warranty, strict products liability based on design defect, strict products liability based on failure to warn, strict products liability based on manufacturing defect, and negligence. Mrs. Donald adds a loss of consortium claim as a sixth cause of action. Shinn Fu, MVP, and Ace (collectively, "defendants") now move for summary judgment to dismiss plaintiffs' claims arising in strict liability and breach of warranty. MVP and Ace move for summary judgment on all claims.

DISCUSSION

1. Summary Judgment Generally

When a party moves for summary judgment, judgment "shall be rendered forthwith 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 judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists." *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir.1994). "On summary judgment the inferences to be drawn from the underlying facts ... must be

viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962), but the non-moving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In making the necessary showing, "[c]onclusory allegations [by the non-moving party] will not suffice to create a genuine issue." *Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir.1990). A "genuine" issue is one that could be decided in favor of the non-moving party based on the evidence by a reasonable jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The role of the court in deciding a motion for summary judgment is not to decide issues of fact, but only to determine whether or not they exist. *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir.1991).

2. Breach of Implied Warranty

***4** Defendants argue that the evolution of strict products liability doctrine in New York has rendered an action for breach of implied warranty redundant and therefore warrants dismissal of plaintiffs' claim. Defendants may be correct to argue that in the typical case a breach of warranty cause of action is superfluous when a plaintiff pleads a strict products liability claim. Generally speaking, "there is no need to recognize an action on implied warranty for personal injuries ... if the jurisdiction recognizes a tort action in strict products liability." *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 411, 488 N.Y.S.2d 132, 477 N.E.2d 434 (1985); *see also Ruggles et al. v. R.D. Werner Co., Inc.*, 203 A.D.2d 913, 914, 611 N.Y.S.2d 84 (4th Dep't 1994). "Strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 345, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969).

However, it is not true as a matter of law that all breach of implied warranty claims are mere doppelgangers of their more modern strict products liability cousins. *Denny et al. v. Ford Motor Co.*, 87 N.Y.2d 248, 256, 639 N.Y.S.2d 250, 662 N.E.2d 730 (1995) ("[T]he core element of 'defect' is subtly different in the two causes of action."). For strict products liability, the plaintiff must show that the product at issue is not reasonably safe. This requires a risk-utility balancing that takes into account, *inter alia,* the usefulness of the product, the cost of an alternative design, and the likelihood of the product causing injury. *Id.* at 257, 639 N.Y.S.2d 250, 662 N.E.2d 730. In contrast, a breach of implied warranty claim, like the claim at issue in the present case, involves an inquiry into whether or not the product is "fit for the ordinary purposes for which such goods are used." *Id.* at 258, 639 N.Y.S.2d 250, 662 N.E.2d 730. No balancing test is used. Thus,

> [i]n some cases, a rational factfinder could conclude that a design defect that is not actionable in tort may nevertheless support a viable contract claim [i.e., a breach of implied warranty claim]. That is, the factfinder could simultaneously conclude that a product's utility outweighs the risk of injury and that the product was not safe for the "ordinary purpose" for which it was marketed and sold.

Gonzalez et al. v. Morflo Indust., Inc. et al., 931 F.Supp. 159, 167 (E.D.N.Y.1996). Indeed, it could be said that a breach of implied warranty claim is the "stricter" form of liability, since recovery hinges only upon a showing that the product is not minimally safe for its intended purpose, without regard to the feasibility of an alternative design or any of the other considerations taken into account in the strict products liability calculus. *Denny, supra* at 259, 639 N.Y.S.2d 250, 662 N.E.2d 730.

[1] A finding that a products liability claim and a breach of implied warranty claim are distinct "requires a showing that the 'ordinary purpose' for which the product was sold and marketed is not the same as the purpose that provides the utility that outweighs the risk of injury." *Gonzalez, supra* at 167. Simply asserting that the two claims are redundant with no more detailed argument, defendants have not demonstrated in their submissions that plaintiff could not make this showing. Drawing all inferences from the record in plaintiffs' favor, plaintiffs could demonstrate, for example, that the jack's "ordinary purpose" as marketed is to hold in place fork lifts while repairs are made, while defendants could show that the utility of having a product that elevates (but doesn't hold in place) a fork lift outweighs the risk that it

could collapse while being jacked up. Because the record before the court does not warrant dismissal of plaintiffs' implied warranty claim, defendants' motion for summary judgment is denied at this time.

3. Breach of Express Warranty

***5** [2] Defendants claim that neither Mr. Donald nor Mr. Miltz relied on any express warranties when purchasing the jack, and therefore plaintiffs cannot seek damages based on a breach of express warranty claim. Defendants use oft-cited doctrine for their argument: "it is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on." *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.,* 29 A.D. 300, 302, 51 N.Y.S. 793 (1st Dep't 1898). However venerable this statement may be, it does not summarize contemporary New York law in its entirety on this subject. Reliance is a part of an express warranty claim, but only in the sense that a party to a contract must rely on the inclusion of an express warranty in order to make an agreement. So long as a plaintiff can show that the express warranty was part of the bargained-for agreement, plaintiff can succeed on an express warranty claim regardless of actual reliance on the particular terms of the warranty. *Ainger et al. v. Michigan General Corp.,* 476 F.Supp. 1209, 1226 (S.D.N.Y.1979); *see also CPC Int'l Inc. v. McKesson Corp. et al.,* 134 Misc.2d 834, 840, 513 N.Y.S.2d 319 (Sup.Ct., New York Co.1987). For example, if a supplier makes an express warranty as to a certain condition, and the purchaser independently investigates that condition, the purchaser does not rely on the supplier's express warranty. However, so long as the express warranty is included in the eventual contract, the purchaser can sue for a breach of that warranty.

Issues of reliance have no bearing on the instant motion, though, as a review of the record reveals no express warranties at all. Only in plaintiffs' complaint-and never in their response to defendants' motion-do plaintiffs even mention express warranties. Indeed, plaintiffs conclude their response to defendants' motion for summary judgment by claiming that they have "set out a prima facie case of products liability based on defective design, inadequate warnings, manufacturing design and breach of implied warranty of merchantability." Def. Memo. at 26. Absent is any mention of breach of express warranty. Since "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), defendants' motion for summary judgment on the breach of express warranty claim is granted.

4. Strict Products Liability

a. Strict Products Liability Generally

A strict products liability claim arises against a manufacturer, a retailer, or a commercial lessor of a product if (1) the product is defective, and (2) the defect caused plaintiff's injury. *Colon et al. v. Bic USA, Inc.,* 199 F.Supp.2d 53, 82 (S.D.N.Y.2001). The plaintiff must show that:
the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used ... for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

***6** *Codling v. Paglia,* 32 N.Y.2d 330, 342, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973). The defect can take one of three forms-a manufacturing defect, a design defect, or a failure to provide adequate warnings regarding the use of the product. *Voss et al. v. Black & Decker Manuf. Co.,* 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 450 N.E.2d 204 (1983).

b. Proximate Cause

[3] Defendants argue that Mr. Donald's failure to use a jack stand "broke the chain of causation" between any supposed defect in the jack and the fork lift's collapse. Def. Memo. at 15. Defendants' memorandum of law asserts this defense without citation to a single legal authority. However, since establishing causation is a *sine qua non* for any strict liability claim, and since plaintiffs address the issue at length in their response, the court first considers the merits of this argument before examining

defendants' arguments with regard to each of the jack's specific alleged defects.

To establish a prima facie case for any strict products liability claim, a plaintiff must show that the defect was the proximate cause of the injury. *Colon, supra* at 83 (stating that in a claim for a defective design, plaintiff must show that "the defective design was a substantial factor in causing plaintiff's injury."); *id.* at 84 (stating that a failure to warn claimant must show that the failure to warn "was the proximate cause of harm"); *id.* at 85 (stating that to prove a manufacturing flaw, the plaintiff must show that the defect "was the cause of plaintiff's injury"); *see also Voss, supra* at 107 (including a showing of proximate cause as an element that must be proved to sustain liability for a failure to warn); *Billsborrow v. Dow Chemical U.S.A.*, 177 A.D.2d 7, 16, 579 N.Y.S.2d 728 (2d Dep't 1992) (same, but for design defect). As with all alleged torts, if the act or omission-here the defective product-was not the proximate cause of plaintiff's injury, the defendant incurs no liability.

To satisfy the proximate cause requirement, a plaintiff must show that the product's defect was a "substantial factor" in causing his or her injury. *Voss, supra* at 109-110. This test explicitly rejects the notion that all accidents are monocausal and allows that several factors might lead to an accident. *Colon, supra* at 84 ("Because an accident may have 'more than one proximate cause,' the test is whether the defendant's defective or unreasonably dangerous design can be shown to be a 'substantial cause' of the injury."). Usually, whether or not a defect was indeed a substantial factor is a matter for the trier of fact to decide. *Voss, supra* at 109-110. Thus, in order to prevail at the summary judgment stage, the defendant must show that the plaintiff's conduct was the "sole proximate cause of [his or her] injuries." *Amatulli et al. v. Delhi Construction Corp. et al.*, 77 N.Y.2d 525, 534, 569 N.Y.S.2d 337, 571 N.E.2d 645 (1991). Not surprisingly, this showing is difficult on a motion for summary judgment. For example, in *Amatulli et al. v. Delhi Construction Corp.*, a defendant pool distributor, sued for installing a pool that concealed the water's depth, could not establish that the plaintiff's dive into the pool was the sole proximate cause of the accident even though the plaintiff was an experienced swimmer and aware of the pool's true depth.

*7 The instant case resembles *Amatulli*. Mr. Donald was an experienced mechanic, well acquainted with jacks and jack stands. Moreover, his own testimony suggests that he knew not to keep a fork lift aloft without a jack stand. However, plaintiffs have offered experts' reports claiming that defendants' actions were substantial factors. The court accordingly cannot find as a matter of law that Mr. Donald's actions were the sole proximate cause of his accident, given the preference plaintiffs' factual allegations are given at the summary judgment stage.

Defendants argue, citing Dr. Storace, that "had fork lift jacks been used, Mr. Donald would not have been injured." Def. Memo. at 15. Defendants seem to conflate cause-in-fact with proximate cause, or in the alternative suggest that the accident had only one cause. But the "substantial factor" test assumes that more than one action can cause an accident. Moreover, accepting defendants' argument is akin to a claim that had the plaintiff in *Amatulli* not dived into the shallow pool, the accident would not have happened. If accepted, the defendants' argument would eliminate strict products liability whenever a plaintiff acted in any way to put herself in danger. The substantial factor test is inconsistent with this logic. Thus, viewing the facts in the light most favorable to the non-moving party, the court rejects defendants' assertion that the only substantial factor in causing Mr. Donald's accident was his failure to use jack stands.

Defendants also claim that Mr. Donald's actions constituted an unforeseen superseding event that broke the proximate cause chain otherwise joining defendants' conduct to the accident. A defendant can defeat a showing of proximate cause by establishing that the plaintiff's conduct was an unforeseeable superseding cause of the accident. *Billsborrow, supra* at 16, 579 N.Y.S.2d 728 ("[A]n intervening act which is 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct ... may well be a superseding act which breaks the causal nexus." ') (internal citations omitted). As with the substantial factor determination, "the questions of whether an act is foreseeable and in the course of normal events are indispensable in a determination of legal causation and are generally subject to varying inferences best left to the finder of fact to resolve." *Id.* at 17, 579

N.Y.S.2d 728.

Here, the court cannot find as a matter of law that Mr. Donald's use of the jack without a jack stand was so unforeseeable as to break the causal link between an alleged defect and his injury. Dr. Storace insists that "the jack is advertised as a Fork Lift Jack and it was reasonably foreseeable that it would be used as it was by Mr. Donald." Pl. Exh. F at 5. Mr. Growney similarly claims that "it is reasonably foreseeable that users will misuse this Omega jack as a load support even though Shinn Fu warns against it." Pl. Exh. G at 6. While mere assertions by experts may be less than conclusive, defendants offer no evidence to the contrary. Their own expert's report does not address the issue, and no where else in the record is the issue of the foreseeability of Mr. Donald's behavior raised. Viewing factual allegations in plaintiffs' favor, the court finds that a reasonable juror could conclude that Mr. Donald's behavior was foreseeable and thus insufficient to supersede the link between the jack's alleged defects and the accident. Defendants' motion for summary judgment on the basis that Mr. Donald's actions broke the causal chain is denied.

c. Failure to Warn

***8** [4] Defendants argue that they had no duty to warn Mr. Donald of any possible danger, rendering meritless plaintiffs' defective warnings claim. "A failure to warn claimant must show (1) that a manufacturer has a duty to warn; (2) against dangers resulting from foreseeable uses about which it knew or should have known; and (3) that failure to do so was the proximate cause of harm." *Colon, supra* at 84. Thus, even if a product was the proximate cause of an accident, as assumed here, a defendant incurs no liability on a defective warning claim if he or she has no duty to warn in the first place.

There are two situations in which a supplier of a product has no duty to warn of known or foreseeable dangers. First, "a supplier has no duty to warn users of a product of its dangers if they are obvious or well known." *Jiminez v. Dreis & Krump Manufacturing Co. ., Inc.*, 736 F.2d 51, 55 (2d Cir.1984). Second, "when the user is fully aware of the nature of the product and its dangers, ... the supplier cannot be held liable for failure to warn him." *Billiar v. Minnesota Mining and Manuf. Co.*, 623 F.2d 240, 243 (2d Cir.1980); *see also Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 241, 677 N.Y.S.2d 764, 700 N.E.2d 303 (1998). Defendants claim that both of these-the obviousness and the knowledgeable user exception apply and thereby render unnecessary any warning.

The knowledgeable user exception rests on a simple rationale. Strict products liability stems from the foundational assumption that suppliers are in a better position to guard against accidents than consumers, since their knowledge of and ability to detect dangers is generally superior. When, however, the user of a product is actually aware of the danger the product poses, this assumption loses purchase. "Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning." *Liriano, supra* at 242, 677 N.Y.S.2d 764, 700 N.E.2d 303; *see also Andrulonis v. United States,* 924 F.2d 1210, 1222 (2d Cir.1991).

The knowledgeable user exception is usually reserved for professionals or other experts who are experienced with the product in question. *Billiar, supra* at 243. Indeed, New York courts have consistently found the exception to apply when plaintiffs are experienced professionals asserting a claim relating to a tool of their profession. *Travelers Ins. Co. v. Federal Pacific Elec. Co.*, 211 A.D.2d 40, 44, 625 N.Y.S.2d 121 (1st Dep't 1995) (knowledgeable user exception applied to a claim stemming from an electrical fire when plaintiff was an electrician); *Bigness v. Powell Electronics, Inc.*, 209 A.D.2d 984, 985, 619 N.Y.S.2d 905 (4th Dep't 1994) (same). Given his extensive experience as a mechanic, particularly his experience with fork lifts and fork lift jacks, Mr. Donald certainly fits this criterion for eligibility for the exception.

***9** Mere membership in a profession is not enough, though; in order for the exception to obviate the supplier's duty to warn, the plaintiff must have "actual knowledge" of the "specific hazard" that caused the injury. *Liriano, supra* at 241, 677 N.Y.S.2d 764, 700 N.E.2d 303; *see also Andrulonis, supra* at 1222 (A knowledgeable user must be "actually aware of the dangerous nature of the product supplied."). Furthermore, the user's knowledge of the hazard cannot be general but must be at a high level of particularity. *Jiminez, supra* at 55-56. Finally, the user must know of the severity

of the potential harm he or she faces. Mere knowledge that a product is dangerous is not sufficient. *Billiar, supra* at 244. For example, a plaintiff who knew of the possibility of injury but not the potential for severe injury did not qualify for the exception. *Id.* When the plaintiff's actual knowledge of the severity or quality of danger he or she faces is in question, the question is more properly addressed to the trier of fact. *Id.*

Here, the court finds that the knowledgeable user exception applies and therefore does not need to leave the duty to warn claim for the factfinder's resolution. No reasonable trier of fact could disagree that Mr. Donald was actually aware that keeping a fork lift elevated without a jack stand was dangerous. According to his own deposition testimony, Mr. Donald claimed to have read and understood the instruction manual, which repeats several times the danger of using a jack without a stand. Moreover, he expressed unease to Mr. Miltz when he discovered that an Omega stand had been ordered in lieu of a Lincoln one. He even told Mr. Miltz that he wouldn't work without a jack stand. As to the specificity of the danger, plaintiffs claim that Mr. Donald must have known not just that the jack would fail, but that the jack would fail because of a hydraulic leak or a slip out. Pl. Memo. at 13. To require a user to be aware of the specific physics of a possible accident would render the knowledgeable user exception nugatory; it is difficult to conceive of a situation where a user of a product is so intimately acquainted with the product's engineering that he or she is aware of all possible ways the product could fail. Moreover, what would be gained by narrowing the exception to the situation plaintiff describes? A person who is aware that his equipment might fail under certain circumstances, causing him catastrophic injury, is no less on notice than the plaintiff who is aware that his equipment might fail under certain circumstances due to particular defects in the equipment's engine ering.

Finally, Mr. Donald was sufficiently aware of the severity of harm he faced. In addition to his general knowledge of fork lift jacks and their intended uses, he testified to reading and understanding the instruction manual, which warned that failure to heed its instructions could result in severe physical injury. Mr. Donald can be distinguished from the plaintiff in *Billiar.* There, the plaintiff read a warning that was nonspecific as to the potential severity of injury. Moreover, she had been injured by the product before but was much less severely hurt. The court found her knowledge of the danger sufficiently in dispute to leave it to the trier of fact to decide. *Billiar, supra* at 244. Here, the warning, however deficient it might have been by Dr. Storace's measure, did alert Mr. Donald to the severity of harm he could expect. Moreover, it is hard to believe that an experienced mechanic would not anticipate severe injury should a fork lift fall on him due to a jack collapse.

***10** Because the court finds that Mr. Donald was a knowledgeable user of fork lift jacks, the court holds that the defendants had no duty to warn him of the danger of a jack collapse. The court is unable to find as a matter of law that the risk Mr. Donald faced was so obvious as to make unnecessary the need for such a warning, but such a finding is unnecessary since the knowledgeable user exception sufficiently obviates the duty to warn. Defendants' motion for summary judgment with regard to the duty to warn claim is granted.

d. Design Defect

[5] Defendants discuss the requirements for making a prima facie case for a design defect cause of action and point out that it is the plaintiff's burden to establish the elements. The plaintiff must show "that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury." *Ramirez v. Sears, Roebuck and Co.,* 286 A.D.2d 428, 430, 729 N.Y.S.2d 503 (2d Dep't 2001).

Regarding the first requirement, a product that is not reasonably safe is one "which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." *Voss, supra* at 108. Usually the jury, not the court, makes this risk-utility calculation by weighing several factors:
In balancing the risks inherent in the product, as designed, against its utility and costs, the jury may consider several factors.... Those factors may include the following: (1) the utility of the product to the public as a whole and to the individual user;

(2) the nature of the product-that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design.

Voss, supra at 109. Plaintiffs have adduced evidence that the jack presents a significant likelihood for injury. Dr. Storace and Mr. Growney both performed tests which led to jack failures. Dr. Storace offers several design improvements that might have made the jack safer. He also claims that these alternative designs were technically and economically feasible at the time of the accident and have been incorporated into similar jacks. Pl. Exh. F at 5. It is true that mere conclusory allegations made by experts may not be enough to establish a prima facie case. *Ramirez, supra* at 430, 729 N.Y.S.2d 503; *Amatulli, supra* at 533-34, n. 2, 569 N.Y.S.2d 337, 571 N.E.2d 645 ("[W]here the expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever...."). However, at least several of Dr. Storace's and Mr. Growney's claims are not conclusory statements but in fact cite evidence backing them up. Defendants do contest their opinions with affidavits from their own expert witness, but they argue the merits of the experts' conclusions, making the disagreement a factual dispute. Thus, the question of whether or not the jack's design was not reasonably safe is better answered by the trier of fact and not the court.

***11** The second and third requirements for proving a design defect-that the product could have had a safer design and that the defect caused the injury, respectively-have both been addressed. In fact, defendants do not seem to contest that plaintiffs have met the elements for the design defect prima facie case. They claim-accurately-that it is the plaintiffs' burden to prove each of these elements. *Fane v. Zimmer, Inc.,* 927 F.2d 124, 128 (2d Cir.1991) (placing the burden on the plaintiff to prove that the product was not safe and that it could have been designed more safely); *Bickram v. Case I.H. et al.,* 712 F.Supp. 18, 21 (E.D.N.Y.1989) (placing the burden on the plaintiff to demonstrate that the defect was the proximate cause of the accident). It might be the case that plaintiffs' claims made in resisting the summary judgment motion ultimately may not be enough to convince a jury that the jack was defectively designed. However, in drawing all factual inferences in favor of the non-moving party, the court finds that plaintiffs have met their burden in establishing a prima facie case that the jack is defectively designed.

The gravamen of defendants' motion regarding the alleged design defect is that Mr. Donald's failure to use optional safety equipment negates any claim that the jack was defectively designed. The defendants reiterate the point that had Mr. Donald used a jack stand-the optional safety equipment-the accident would not have happened. It is true that under certain circumstances, a plaintiff's failure to use optional safety equipment makes his or her design defect claim impossible. *See generally Jackson v. Bomag GmbH et al.,* 225 A.D.2d 879, 638 N.Y.S.2d 819 (3d Dep't 1996); *Patane v. Thompson and Johnson Equipment Co., Inc.,* 233 A.D.2d 905, 649 N.Y.S.2d 547 (4th Dep't 1996); *Rainbow v. Albert Elia Building Co., Inc.,* 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dep't 1981). The New York Court of Appeals designed a three-pronged test to determine when this failure exonerates a defendant: a "product is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and risks of not having the safety device in the specifically contemplated circumstances of *the buyer's* use of the product." *Scarangella et al. v. Thomas Built Buses, Inc.,* 93 N.Y.2d 655, 661, 695 N.Y.S.2d 520, 717 N.E.2d 679 (1999) (emphasis in original).

In *Scarangella,* plaintiff, a bus driver, was injured in the bus parking yard when a bus backing up hit her. The bus did not have a beeping alarm, an optional safety feature included on other of defendant manufacturer's buses at an extra cost. The New York Court of Appeals held that plaintiff was properly barred from presenting her design defect

claim to the jury because her company did not choose to incorporate the optional safety feature. The Court reasoned that "if knowledge of available safety options is brought home to the purchaser, the duty to exercise reasonable care in selecting those appropriate to the intended use rests upon him. He is the party in the best position *to exercise an intelligent judgment to make the trade-off between cost and function,* and it is he who should bear the responsibility if the decision on optional safety equipment presents an unreasonable risk to users." *Id.* at 660, 695 N.Y.S.2d 520, 717 N.E.2d 679, *citing Biss v. Tenneco, Inc.,* 64 A.D.2d 204, 207, 409 N.Y.S.2d 874 (4th Dep't 1978) (emphasis in original).

***12** The *Scarangella* Court went through the three-part analysis for determining whether the failure to use optional safety equipment defeated the design defect claim and concluded that it did. First, the bus company, as a proxy for the plaintiff, was a thoroughly knowledgeable customer and was certainly aware of the danger of a bus in reverse. Second, the risk of harm from the absence of an alarm was found not to be substantial. Thus, the court reasoned that the bus could be used in certain circumstances where the absence of the alarm would not be unreasonably dangerous. Finally, the court concluded that the bus company knew the uses to which it put buses and was therefore well-positioned to calculate the risk of using buses without alarms.

Significantly, with regard to the second prong-the normal circumstances of safe use-the court found that no evidence suggested that buses were put in reverse anywhere but in the bus yard, where any person who might be in jeopardy would be aware of the risk. However, the court went on to say that "had this accident occurred out of the bus parking yard, or had plaintiff ... submitted evidence of some incidence of buses backing up outside the yard, at least a triable issue might have been created as to whether there was an actual separate and distinct normal use of the buses without back-up alarms which was reasonably safe." *Id.* at 662, n. 1, 695 N.Y.S.2d 520, 717 N.E.2d 679. That is, with such evidence it is possible that the plaintiff could have shown that no normal circumstances of use that were reasonably safe existed. The willful failure to use optional safety features thus would not negate a design defect claim. *Id.* at 661, 695 N.Y.S.2d 520, 717 N.E.2d 679 ("When the factors are not present, there is no justification for departure from the accepted rationale imposing strict liability upon the manufacturer....").

Here, plaintiffs argue that there are no normal circumstances of use in which the jack is not unreasonably dangerous. On the current record, the court agrees that a reasonable juror could reach that conclusion. Based on his examination of the jack, Dr. Storace concluded in his second report that "a user will be put at risk, while raising the load before the stands are in place, or while lowering the load, after [the stands] have been removed for lowering ." Pl. Exh. F at 5. If this is true-and the court assumes it is at this stage in the litigation-then there is evidence from which a juror could reasonably conclude that there are no circumstances in which the use of the jack is safe. Thus, even though Mr. Donald was a knowledgeable user, and even assuming he was in a good position to judge the risk of lifting the fork lift without a jack stand, defendants fail to show that the *Scarangella* optional safety equipment test is met as a matter of law.

Because plaintiffs make a prima facie case for a liability due to defective design, and because Mr. Donald's failure to use optional safety equipment does not, as a matter of law, render the design defect a nullity, defendants' motion for summary judgment on the design defect claim is denied.

e. Manufacturing Defect

***13** [6] Plaintiffs' third and final claim under strict products liability alleges that the jack had a manufacturing defect. Defendants contest the merits of this claim in their motion for summary judgment. Def. Memo. at 16. Their arguments, going to the facts of the dispute, are not proper fodder for the court on a motion for summary judgment. However, plaintiffs fail to offer anything more than conclusory allegations that the jack had a manufacturing defect. Neither of Dr. Storace's reports conclude that the jack had such a defect, and a review of the record reveals no evidence other than plaintiffs' bare assertion that such a defect existed. Without any more support, plaintiffs' claims of a manufacturing defect cannot survive a summary judgment motion. "[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment." *Sackman v. Liggett Group, Inc.,* 965 F.Supp. 391, 394 (E.D.N.Y.1997)

Plaintiffs argue, though, that they do not have to offer any specific evidence of a manufacturing defect. Instead of detailing a particular manufacturing defect, they offer an argument akin to a *res ispa loquitur* theory, positing that "[t]he existence of a defect may be inferred from the circumstances of the accident and from proof that the product did not perform as intended." *Landahl v. Chrysler Corp.*, 144 A.D.2d 926, 926, 534 N.Y.S.2d 245 (4th Dep't 1988). The Restatement of Torts (Third), upon which plaintiffs base their argument, gives the following description of *res ipsa loquitur* in the strict products liability setting:
It may be inferred that the harm suffered by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Restatement (Third) of Torts: Products Liability § 3 (1998). This doctrine applies in particular to manufacturing defect claims. *Id.* cmt. a ("The most frequent application of this Section is to cases involving manufacturing defects...."). If New York courts had adopted the Restatement's version of this theory without alteration, plaintiffs' allegation of a manufacturing defect would survive summary judgment, even absent any evidence supporting the claim.

However, New York's version of *res ipsa loquitur* in the strict products liability context differs from the Restatement's. For an inference of liability to be drawn, the Restatement mandates that the injury not be *solely* the result of causes other than product defect. For example, a plaintiff only needs to show that her injury was not solely the result of her own negligence. Here, by the Restatement's rule, plaintiffs would be able to proceed in spite of the allegation of Mr. Donald's own negligent failure to use a jack stand. However, in New York, a plaintiff asserting a *res ipsa loquitur* theory of strict products liability must "exclud[e] all causes of the accident not attributable to defendant" in order to go forward. *Halloran et al. v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 388, 393 N.Y.S.2d 341, 361 N.E.2d 991 (1977); *see also Henry v. General Motors Corp.*, 201 A.D.2d 949, 949, 609 N.Y.S.2d 711 (4th Dep't 1994) ("In a case based entirely upon circumstantial evidence, the jury may infer that the product was defective when it left the manufacturer's control only if plaintiff excludes all causes of the accident not attributable to defendant."). As soon as a defendant counters the inference of a manufacturing defect with some sort of proof that the accident was attributable to another cause, the plaintiff must come forward with some direct proof of the cause of the accident to maintain a claim of manufacturing defect. *Brandon et al. v. Caterpillar Tractor Corp.*, 125 A.D.2d 625, 626, 510 N.Y.S.2d 165 (2d Dep't 1986). Failure to do so renders the claim inadequate as a matter of law. *Brandon, supra* at 626, 510 N.Y.S.2d 165.

***14** Here, defendants assert that Mr. Donald's failure to use a jack stand caused the accident and have adduced evidence in the form of warnings in the instruction manual and on the jack itself to support this argument. Plaintiffs have not excluded Mr. Donald's own negligence as a cause of the accident. Moreover, plaintiffs have not come forward with any specific proof of a manufacturing defect.

Plaintiffs cite four cases to support their argument that *res ipsa loquitur* preserves their manufacturing defect cause of action. In *Caprara v. Chrysler Corp. et al.*, 52 N.Y.2d 114, 436 N.Y.S.2d 251, 417 N.E.2d 545 (1981), the court wrestled with the admissibility of certain evidence in a strict liability suit premised in part on *res ipsa loquitur;* it did not, however, elaborate upon the substance of the doctrine other than merely to restate it. *Id.* at 123-24, 436 N.Y.S.2d 251, 417 N.E.2d 545. Plaintiffs' discussion of *Halloran* is similarly unhelpful in supporting their claim, since the opinion offers little more than a recitation of the doctrine. *Id.* at 388, 393 N.Y.S.2d 341, 361 N.E.2d 991. *Landhal* is easily distinguished. In that case, the defendants failed to come forward with any proof to rebut plaintiffs' allegations, whereas here defendants have offered an alternative explanation for the cause of the accident and have specifically contested plaintiffs' claim of a manufacturing defect with their own expert's affidavit. *See* Def. Exh. K. Finally, the court in *Sanders v. Quik Stak,* 889 F.Supp. 128 (S.D.N.Y.1995), the last case relied upon by defendants, admits that "if ... the defendant produces *any* evidence that the accident was not necessarily attributable to a defect, the plaintiff must

come forward with direct evidence of a specific defect." *Id.* at 131, n. 5 (emphasis added). Since defendants here have produced such evidence, *Sanders* does not help plaintiffs' claim.

This theory of liability is better suited for situations in which a plaintiff cannot identify the particular defect causing his or her injury. Also, at the summary judgment stage, allowing a plaintiff to proceed on a *res ipsa loquitur* theory is more appropriate when a plaintiff needs additional discovery to uncover a particular defect. *McDermott v. City of New York,* 50 N.Y.2d 211, 220-21, 428 N.Y.S.2d 643, 406 N.E.2d 460 (1980). Here, plaintiffs offer evidence as to the specific design defects that allegedly caused the accident based on information unearthed in the discovery process, a fact of particular significance. *Brandon, supra* at 627, 510 N.Y.S.2d 165 (reasoning in rejecting a *res ipsa loquitur*-based strict products liability claim that "[i]t is also significant that the plaintiffs proceeded upon a theory of liability which was premised on the allegation of a specific design defect...."). Having done so, plaintiffs are not the type of claimants for whom *res ipsa loquitur* is intended. They cannot circumvent their duty to offer evidence raising genuine issues of material fact to defeat summary judgment on their claim of a manufacturing defect. Plaintiffs' conclusory allegations and their *res ispa loquitur* theory are not enough; defendants' motion for summary judgment is granted with regard to the manufacturing defect claim.

5. MVP's and Ace's Liability

***15** [7] Defendants argue that MVP and Ace are not liable to plaintiffs because, as mere retailers, they had no duty to inspect the jack. They assert that the reliable reputation of the manufacturer obviates their duty to inspect. Moreover, they argue that retailers cannot be liable where the product is purchased in a sealed package, even if testing would have revealed a hidden danger. With regard to plaintiffs' strict liability claims, defendants' arguments fail. The Appellate Division confronted this issue head-on in *Mead v. Warner Pruyn Division et al.,* 57 A.D.2d 340, 394 N.Y.S.2d 483 (3d Dep't 1977). The question addressed to the court was "whether or not a retailer of goods which he does not manufacture and over which he has no control as to hidden or latent defects can be subjected to the remedy of strict products liability simply as a retailer of such goods...." *Id.* at 340-41, 394 N.Y.S.2d 483. The court answered in the affirmative, reasoning that "strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." *Id.* at 342, 394 N.Y.S.2d 483.

Each case cited by defendants in support of their argument has causes of action in negligence or breach of warranty, not strict products liability, at its heart. *Cosgrove v. Estate of Virginia Delves,* 35 A.D.2d 730, 315 N.Y.S.2d 369 (2d Dep't 1970) (breach of warranty); *Travelers Indemnity Co. v. Hunter Fan Co., Inc.,* 2002 WL 109567 (S.D.N.Y.2002) (negligence); *Krumpek et al. v. Millfeld Trading Co.,* 272 A.D.2d 879, 709 N.Y.S.2d 265 (4th Dep't 2000) (negligence); *Santise v. Martins, Inc.,* 258 A.D. 663, 17 N.Y.S.2d 741 (2d Dep't 1940) (negligence); *Bravo v. C.H. Tiebout & Sons, Inc.,* 40 Misc.2d 558, 243 N.Y.S.2d 335 (Sup.Ct., Bronx Co.1963) (negligence and breach of warranty); *Brownstone v. Times Square Stage Lighting Co., Inc.,* 39 A.D.2d 892, 333 N.Y.S.2d 781 (1st Dep't 1972) (negligence and breach of warranty); *Alfieri v. Cabot Corp.,* 17 A.D.2d 455, 235 N.Y.S.2d 753 (1 st Dep't 1963) (negligence). They are inapposite to plaintiffs' strict products liability claim, and the doctrine they elaborate cannot serve as a valid basis for defendants' motion. Ace's and MVP's motion for summary judgment with regard to the strict liability claims is denied.

[8] As for the negligence claims, it is true that "where a vendor buys from a reputable source of supply, he has reasonable grounds for believing that the product which he purchases is free from defects, and he therefore has no duty to inspect same." *Bravo, supra* at 561, 243 N.Y.S.2d 335. The court has no reason to doubt the reputation of Shinn Fu; nor has plaintiff supplied the court with any such evidence. Moreover, "a retailer cannot be held liable for injuries sustained from the contents of a sealed product even though ... testimony ha[s] uncovered a potential danger...." *Travelers Indemnity Co., supra* at 7. It is uncontested that the jack arrived at Midwood in a sealed carton. Def. Rule 56.1 Statement; Pl. Memo. at 19. Moreover, plaintiffs do not contest any of defendants' arguments. Thus, Ace

and MVP, as mere retailers, cannot be held liable in negligence for plaintiffs' injuries. Defendants' motion for summary judgment with regard to negligence claims asserted against Ace and MVP is granted.

6. Sufficiency of Expert Testimony

***16** Defendants argue that plaintiffs' claims arising in defective design must be supported by expert testimony, and that the expert's theory regarding causation must be premised upon the plaintiff's description of the accident. Their memorandum of law does not actually make the argument that plaintiffs' expert testimony in this case is in some way insufficient but is apparently urging that Dr. Storace's theories of causation are not supported by Mr. Donald's description of the accident. If this were true, the court could grant defendants' motion on the design defect claim. *Jarvis v. Ford Motor Co.*, 69 F.Supp.2d 582, 597 (S.D.N.Y.1999) ("Where the plaintiff's testimony as to his or her actual injury differs from the chain of events that would lead to an injury caused by the alleged defect, courts have been particularly willing to hold that no reasonable jury could find liability.").

Here, defendants' argument fails. Dr. Storace offers two theories for why the jack failed. One is consistent with a slow collapse of the fork lift; the other is consistent with a sudden slippage of the jack. Mr. Donald gave an ambiguous description of how the fork lift fell upon him, claiming that it descended upon him but also asserting that it "happened fast." Given this ambiguity, it is up to the trier of fact to determine both how the accident happened and why the jack failed. If at trial it is determined that the jack failed in a way at odds with the expert's testimony, defendant can move for a directed verdict on the design defect claim.

Defendants elaborate upon this argument in their reply to plaintiffs' response. They argue that the sum total of evidence upon which Dr. Storace premises his "slip out" theory of jack failure is a statement by Mr. Miltz in his deposition that Mr. Donald told him that the jack slipped out from under the fork lift. Defendants argue that this statement is hearsay and therefore Dr. Storace's theory is meritless. Defendants also argue that Mr. Miltz's testimony is the only evidence that the jack slipped out, and therefore plaintiffs have not created a genuine issue of fact suggesting that the jack did indeed slip out. If this is the case, defendants seem to contend, then Dr. Storace's theory of jack slippage cannot be offered to the trier of fact, warranting summary judgment.

In responding to a motion for summary judgment, a party must create a genuine issue of fact based on admissible evidence. *Karmel v. Liz Claiborne, Inc.*, 2002 U.S. Dist. LEXIS 4912, 24-25 (S.D.N.Y.2002); *Mattel, Inc. v. Robbarb's, Inc.*, 2001 U.S. Dist. LEXIS 11742, 26-27 ("To raise an issue of fact, affidavits submitted in connection with a summary judgment motion must be admissible or contain evidence that will be admissible at trial."). If the statement Mr. Donald gave to Mr. Miltz is indeed hearsay and is the only evidence that the jack slipped out, plaintiffs have failed to create an issue of fact as to how the jack collapsed. Thus, this court would have to find that the jack collapsed slowly.

***17** However, the court does not believe that Mr. Miltz's deposition testimony is the only evidence that the jack fell quickly. Mr. Donald testified that the jack started descending slowly, but that it then fell quickly. Mr. Donald's description of the accident is ambiguous, making it inappropriate for the court to determine exactly how the accident happened rather than leaving the determination to the trier of fact. Also, as plaintiffs remind the court, Mr. Donald's powers of observation at the time were quite compromised, given that a four-ton fork lift was collapsing upon him. Based on the record, the court cannot conclude that there is no genuine dispute as to how the jack collapsed.

With regard to Dr. Storace's purportedly "meritless" report, it is first noted that an expert can base his opinions on any evidence, notwithstanding its supposed inadmissibility. Fed.R.Evid. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."). The report itself can thus be based on hearsay statements.

However, Dr. Storace's theory cannot help plaintiffs resist summary judgment if it is not based on the facts as to how the accident happened. *Sanchez v.*

Stanley-Bostich, Inc., 1999 U.S. Dist. LEXIS 12975 (S.D.N.Y.1999) (entering summary judgment where expert had testified that allegedly defective gun would fire when bumped, but where there was no evidence that the gun actually was bumped, causing it to fire inadvertently); *Jarvis, supra* at 597, n. 32 ("Where the plaintiff's testimony as to his or her actual injury differs from the chain of events that would lead to an injury caused by the alleged defect [described by the expert], courts have been particularly willing to hold that no reasonable jury could find liability."). If the court found that there is no dispute as to how the lift descended, and if Dr. Storace's only theory of causation required the jack to have slipped out, defendants would deserve summary judgment on all claims because plaintiffs' claims would be unsupported by expert testimony. *Jarvis, supra* at 592 (stating that expert testimony is essential in a technical, scientific case).

As noted above, though, the court does not find at this time that the fork lift fell slowly. Moreover, since Dr. Storace based his conclusions on several inspections of the jack itself, in addition to the deposition transcripts of Mr. Donald and Mr. Miltz, Dr. Storace's theory of causation is not exclusively dependent on a particular sequence of events that might be unsupported by Dr. Storace's testimony. Additionally, Dr. Storace has offered two theories, only one of which would require the jack to have slipped out suddenly. His hydraulic defect theory, offered in his first report and restated, not renounced, in his second, is consistent with the lift descending slowly. Defendants' motion for summary judgment on all claims based on the argument that Dr. Storace's opinions are "meritless" is denied.

7. Local Rule 56.1 Statement

***18** [9] In their reply, defendants point out that plaintiffs, in their Rule 56.1 Statement of Facts, did not submit any genuine issues of fact warranting a trial. Defendants thus argue that summary judgment is proper because plaintiffs do not assert any material facts demonstrating the existence of a genuine issue of fact meriting a trial. Local Rule 56.1 requires that "the papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Local Rule 56.1(b). It is true that plaintiffs did not submit a proper Rule 56.1 statement since, in lieu of disputing the particulars of defendants' situation, they claim that there are no genuine issues to be tried. However, the court refuses to dismiss plaintiffs' case summarily for this oversight. The remainder of the record is sufficiently complete, and the plaintiffs' affidavit is sufficiently detailed, for the court to discern what factual issues are material and contested.

Defendants also argue that plaintiffs' failure to reply to their Rule 56.1 statement means that plaintiffs accept by their silence that the following is true: (1) that Mr. Donald knew he needed jack stands, (2) that the carton in which the jacks were shipped was sealed and undamaged when delivered, (3) that the jack was never in possession of Ace but went directly from MVP to Midwood, (4) that Mr. Donald read the instructions manual, (5) that Mr. Donald read the warning affixed to the jack itself, (6) that Mr. Donald understood the warnings, (7) that the fork lift jack was being lifted without jack stands at the time of the accident, (8) that the jack descended slowly, and (9) that the jack was trapped under the lift with Mr. Donald when the lift fell. The failure to reply to the defendants can be grounds for deeming true all the facts contained in the defendants' Rule 56.1 statement. *McEvily v. Medisense, Inc. et al.,* 2002 U.S. Dist. LEXIS 11679, 3, n. 1 (S.D.N.Y.2002). However, "a district court has broad discretion whether to overlook a party's failure to comply with local court rules." *Travelers Indemnity Co. v. Hunter Fan Co., Inc.,* 2002 U.S. Dist. LEXIS 1238, 20 (S.D.N.Y.2002). The court accepts that all of these statements of fact except those numbered (9) and (10) are true, since the record offers no evidence to the contrary. With regard to statements (9) and (10), it is clear from the record that there is dispute as to how the accident happened. Accordingly, the truth of these factual assumptions must be left for resolution by the jury.

CONCLUSION

All defendants have moved for summary judgment on plaintiffs' breach of warranty claims and their strict products liability claims. For the reasons stated above, the court grants defendants' motion for summary judgment on the claims relating to the following theories of liability: (1) breach of express warranty, (2) strict products liability-failure to

warn, and (3) strict products liability-manufacturing defect. Defendants' motion for summary judgment is denied on claims relating to (1) breach of implied warranty and (2) strict products liability-design defect.FN2

FN2. In their complaint, plaintiffs allege a cause of action arising in negligence against all defendants. Defendants have not moved for summary judgment on this negligence claim. Thus, it too survives summary judgment, although it has not been addressed in this opinion.

***19** In addition, Ace and MVP have moved for summary judgment on all claims on the basis that as retailers they are not liable for a product's defects when a plaintiff receives the product in a sealed container. The court denies this motion as to plaintiffs' strict products liability claims but grants it as to plaintiffs' negligence claim.

All defendants move for summary judgment on all claims on the basis that plaintiffs' expert's report is meritless and unrelated to plaintiffs' description of how the accident happened. The court denies this motion as to all claims.

Finally, all defendants move for summary judgment on all claims on the basis that plaintiffs have not submitted a valid Rule 56.1 statement with their response to defendants' motion. The court denies this motion as to all claims.

SO ORDERED.

E.D.N.Y.,2002.
Donald v. Shinn Fu Co. of America
Not Reported in F.Supp.2d, 2002 WL 32068351 (E.D.N.Y.)

Briefs and Other Related Documents (Back to top)

. 1:99cv06397 (Docket) (Oct. 06, 1999)

END OF DOCUMENT

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,N.D. Indiana, Fort Wayne Division.
WESTCHESTER FIRE INSURANCE COMPANY, as Subrogee of the Hammond Group, Inc., Plaintiff,
v.
AMERICAN WOOD FIBERS, INC., Defendant.
No. 2:03-CV-178-TS.

March 21, 2006.

Joseph G. Lyons, Cozen O'Connor PC, Chicago, IL, Paul R. Bartolacci, Cozen O'Connor PC, Philadelphia, PA, for Plaintiff.
James L. Hough, James T. McNiece, Spangler Jennings & Dougherty PC, Merrillville, IN, Karol A. Schwartz, John P. Twohy, Paul A. Rake, Eichhorn & Eichhorn, Hammond, IN, for Defendant.

OPINION

SPRINGMANN, J.

***1** This matter is before the Court on the Defendant's Motion for Summary Judgment, filed on August 31, 2005. This case arises out of a fire that occurred at Hammond Expanders on August 8, 2001. Plaintiff Westchester Fire Insurance Company is suing as subrogee of the Hammond Group, who owns the Hammond Expanders Plant. Defendant American Wood Fibers manufactures wood flour and sold wood flour to Hammond Expanders. Hammond Expanders stored the flour in bags on pallets inside the plant. The Plaintiff is suing American Wood Fibers on the theory that the fire that destroyed the Hammond Expanders Plant was caused by spontaneous combustion, that is, self-ignition, of wood flour supplied by American Wood Fibers and that American Wood Fibers is liable for the fire damage because their wood flour was defective and carried no warning of the possibility of spontaneous combustion.

A. Summary Judgment Standard

The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "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." Fed.R.Civ.P. 56(c). "In other words, the record must reveal that no reasonable jury could find for the nonmoving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.*, 16 F.3d 832, 836 (7th Cir.1994) (citations and quotation marks omitted). After adequate time for discovery, summary judgment must be given against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A party seeking summary judgment bears the initial responsibility of informing a court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may discharge its "initial responsibility" by simply " 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When the non-moving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* at 323, 325; *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 n. 3 (7th Cir.1994); *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir.1990). However, the moving party may, if it chooses, support its motion for summary judgment with affidavits or other materials and thereby shift to the non-moving party the burden of showing that an issue of material fact exists. *Kaszuk v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 791 F.2d 548, 558 (7th Cir.1986); *Bowers v. DeVito*, 686 F.2d 616, 617 (7th Cir.1982); *Faulkner v. Baldwin Piano & Organ Co.*, 561 F.2d 677, 683 (7th Cir.1977).

***2** Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. Fed.R.Civ.P. 56(e); *Donovan v. City of Milwaukee*, 17 F.3d 944,

947 (7th Cir.1994). Federal Rule of Civil Procedure 56(e) establishes that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts to establish that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Anderson v. Liberty Lobby,* 477 U.S. 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Juarez v. Ameritech Mobile Commc'ns, Inc.,* 957 F.2d 317, 322 (7th Cir.1992). Only material facts will preclude summary judgment; irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Anderson,* 477 U.S. at 248-49. If there is no genuine issue of material fact, the only question is whether the moving party is entitled to judgment as a matter of law. *Miranda v. Wise. Power & Light Co.,* 91 F.3d 1011, 1014 (7th Cir.1996).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *NLFC, Inc. v. Devcom Mid-Am., Inc.,* 45 F.3d 231, 234 (7th Cir.1995); *Doe v. R.R. Donnelley & Sons Co.,* 42 F.3d 439, 443 (7th Cir.1994); *Beraha v. Baxter Health Care Corp.,* 956 F.2d 1436, 1440 (7th Cir.1992). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson,* 477 U.S. at 249-50; *Doe,* 42 F.3d at 443. However, a party's evidence must be "competent evidence of a type otherwise admissible at trial." *Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 562 (7th Cir.1996).

B. Material Facts

Resolving all genuine disputes and drawing all reasonable inferences in the Plaintiff's favor, the following facts are presumed true for the purposes of deciding whether summary judgment is appropriate.

American Wood Fibers processes wood remnants into wood flour. Their manufacturing process creates wood flour uniform in particle size and composition. The flour is dried by blowers and packed by air compression in one way kraft paper bags. Each bag is fifty pounds. The bags include a warning that wood flour is combustible and that wood dust is an explosion hazard. The warning also states open flames and sparks should be kept away from wood flour and that wood flour should be stored in a dry, cool, clean and ventilated area. The warning does not mention spontaneous combustion.

***3** The Hammond Expanders facility was destroyed by fire on August 8, 2001. The building was made primarily of concrete and steel and consisted of a one-story section joined to a two-story section, with an attached three-story office building of the same height as the two-story section. The plant used wood flour and other materials to manufacture a form of paste or expander that is put into the electrolyte of automotive batteries to extend their charge life. The compressor room was in the northwest part on the ground floor. Wood flour was stored outside of the compressor room. Between the wood flour pallets and the south wall of the compressor room was a wooden overhead garage door. The wood flour was stacked two pallets high, two pallets deep, and about five pallets wide.

On the day of the fire, the outside temperature reached 95 degrees Fahrenheit, and was the hottest of a long stretch of extremely hot and humid days. The garage door between the compressor room and the wood flour storage area was open at the time of the fire. Employees would open the door when the compressor room became too warm to release heat into the rest of the facility.

On August 8, 2001, around 5:30 a.m., a fire started at the Hammond Expanders plant. Plant personnel saw smoke and called 911. The Hammond fire department responded, but could not save the building. The one-story section was destroyed and the two-story section was badly damaged.

There is a dispute over the cause of the fire. The Plaintiff argues the wood flour spontaneously combusted. As considered further below, there is a material issue of fact as to whether spontaneous combustion of wood flour caused the fire. The Plaintiff's causation evidence consists mainly of the testimony of four experts. Two of the experts, David Bellis and Robert Lucas, relied on witness

statements, burn patterns, and their expertise to determine that the starting location of the fire was the wood flour stored outside of the compressor room. They saw no potential ignition source in the area other than the wood flour. They discovered the wood flour pile to be shaped like a dome, with the unburned dome surrounding a smouldering center. A third expert, Russell Ogle, consulted scientific literature and performed testing to determine whether this pattern was consistent with spontaneous combustion. They determined that it was. The Plaintiff's fourth expert, Jimmie Oxley, consulted scientific literature to determine whether spontaneous combustion of the wood flour was possible in the conditions at Hammond Expanders and the configuration the wood flour was stored. She determined that it was scientifically possible for the wood flour to spontaneously combust.

There is also a dispute as to the Hammond Group's knowledge of the dangers of spontaneous combustion of wood flour. The Defendant argues that the Hammond Group knew, or should have known, that wood flour could spontaneously combust. The Plaintiff responds with an affidavit of the foreman of the Hammond Expanders factory, James Fowler, that they did not know wood flour could spontaneously combust and that they would have relied on safety instructions to avoid spontaneous combustion if they had been warned. There is a material issue of fact on this issue as well.

C. Procedural Background

***4** The Plaintiff filed its Complaint on May 15, 2003. The Complaint contained two counts: one for negligence and the second for strict liability in manufacturing and selling the wood flour. The Defendant moved for summary judgment on August 31, 2005. The Plaintiff responded on October 4, 2005. The Defendant replied on October 24, 2005. On the same day, the Defendant filed its motions to strike the affidavits of James Fowler and Jimmie Oxley. The Plaintiff responded on November 4, 2005, and the Defendant replied on November 14, 2005. On November 2, 2005, the Plaintiff filed its motion to strike the Defendant's Reply due to it being filed late. The Defendant responded on November 17, 2005. The Defendant moved to strike the testimony of Gary Steen and Joseph Hoffman on November 15, 2005, to which the Plaintiff responded on November 29, 2005, and the Defendant replied on December 8, 2005.

D. Motions to Strike

(1) Defendant's Motion to Strike the Affidavit of James Fowler

The Defendant argues that part of James Fowler's affidavit must be stricken because he gives no basis that his statements are within his personal knowledge. The Defendant challenges three paragraphs. In paragraph three, Fowler states that Hammond Expanders used wood flour from American Wood Fibers and relied upon them for proper warnings and instructions. In paragraph four, he states that the wood flour provided by American Wood Fibers contained no warnings that the flour could self heat and spontaneously combust and provided no instruction on how to avoid spontaneous combustion. In the fifth paragraph, he says the Hammond Group was not aware of the fact that wood flour could spontaneously combust and that Hammond Expanders would have handled the wood flour differently had it been so warned.

Federal Rule of Civil Procedure 56(e) states: "Supporting and opposing 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 testify to the matters stated therein." Fed.R.Civ.P. 56(e).

Fowler's affidavit shows he is competent to testify to the matters he does, because he states that he is the General Foreman of Hammond Expanders. A witness may give opinions when they are based on or inferred from his own observations. *See* Fed.R.Evid. 602, 701. As foreman of the factory, common sense suggests Fowler has personal knowledge of the products used in the Hammond Expanders factory and the methods and practices at the factory regarding the use of those products, including the reliance placed on warnings and instructions. *Davis v. Valley Hospitality Servs., LLC,* 372 F.Supp.2d 641, 653 (M.D.Ga.2005) ("[C]ommon sense dictates that if an affiant is an employee of a company, she has personal knowledge of events and circumstances that occurred at the company within her sphere of observation."). Also, he states that he has personal knowledge of the operations of Hammond Group at the time the fire occurred. With his observations and experiences as

foreman, Fowler can testify that the Hammond Group was not aware wood flour could spontaneously combust and that it would have handled wood flour differently had it been warned.

(2) Defendant's Motion to Strike Oxley's Affidavit

***5** The Defendant argues that Oxley's affidavit must be stricken because it impermissibly contradicts her deposition testimony and supplements her expert report in violation of Federal Rule of Civil Procedure 26. The Defendant's Motion identifies no contradiction between her deposition testimony and her affidavit and points to no opinion in her affidavit that is not in her expert report. In its Reply, after rehashing summary judgment arguments for excluding Oxley's testimony under Federal Rule of Evidence 702, the Defendant identifies one issue: Oxley relied on an article in her affidavit that she did not rely on in her expert report.

After extensive review of Oxley's deposition, report, and affidavit, the Court declines to strike Oxley's affidavit. "[W]here the deposition testimony is ambiguous or incomplete, as it is here, the witness may legitimately clarify or expand upon that testimony by way of an affidavit." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir.1999). Parts of Oxley's deposition were ambiguous or incomplete and her affidavit helps to clarify her deposition statements. The Court sees no contradiction between her deposition and the affidavit, and the Defendant has not pointed to any.

As to whether the Oxley's affidavit impermissibly supplements her expert report in violation of Rule 26(e), the Court finds that it does not. Rule 26(a)(2)(B) requires expert reports to express the expert's opinions and the basis for those opinions. Rule 26(e) requires a party to supplement its 26(a) disclosure requirements, including expert reports and depositions, if the information is in some material respect incomplete or incorrect. Though citing a new article adds to the basis for her opinion, it is not a material change in the basis. The article discusses the causes of spontaneous combustion in wood chips and sawdust and the portion cited by Oxley states that "[t]he direct chemical oxidizations probably become important above 42<<Degrees>>C." (Spontaneously Combustible Solids; A Literature Survey, Naval Surface Weapons Center, White Oak Lab (May 1975), Def. Ex. 19; DE 47). This adds no new information to Oxley's report; her report relies on a graph from another article for the same information. (Oxley Report, Figure 1, Def Ex. 12; DE 42.) Also, the Defendant has shown no prejudice from not having this article during Oxley's deposition. The Defendant does not question the reliability of either the article Oxley relied on in her report or the new article she cites in her affidavit.

If Oxley's citation of the new article was material, the Court would find that it was harmless under Federal Rule of Civil Procedure 37(c)(1), and would not strike it. Oxley's opinion is supported by information from the other articles she cites, and excluding this article would make no difference in the outcome of the Defendant's motion.

(3) Plaintiff's Motion to Strike the Defendant's Reply

The Plaintiff seeks to strike the Defendant's Reply because it was filed late. The Court finds the Reply was not filed late because, pursuant to Federal Rule of Civil Procedure 6(a) and (e), the Defendant had until October 24, 2005, to file its Reply. The Defendant filed its Reply on that day. The Plaintiff's motion to strike the Defendant's Reply is denied.

E. Admissibility of Oxley's Testimony Under Federal Rule of Evidence 702

***6** The Defendant challenges the admissibility of Oxley's testimony under Federal Rule of Evidence 702. It does not challenge the admissibility of any of the Plaintiff's other experts, though it does contest the sufficiency of those experts to create an issue of material fact as to the cause of the fire.

(1) Standard for Admitting Expert Testimony

For expert testimony to be admissible, it must be relevant and reliable, as required by Federal Rule of Evidence 702. Rule 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles

and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), listed several factors to be considered when determining whether scientific evidence is reliable: 1) whether the theory or technique can be or has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) a technique's "known or potential rate of error and the existence and maintenance of standards controlling the technique's operation;" and 4) whether the theory or technique has gained widespread acceptance in the relevant scientific community. *Id.* 593-94. Also, the 2000 Advisory Committee's Notes to Rule 702 suggest other factors to determine expert reliability, including:(5) whether "maintenance standards and controls" exist; (6) whether the testimony relates to "matters growing naturally and directly out of research they have conducted independent of the litigation," or developed "expressly for purposes of testifying"; (7) "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion"; (8) "[w]hether the expert has adequately accounted for obvious alternative explanations"; (9) "[w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting"; and (10) "[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give."

Fuesting v. Zimmer, Inc., 421 F.3d 528, 534-35 (7th Cir.2005) (quoting Fed.R.Evid. 702 advisory committee's notes (2000 amendments)). The list is not exclusive, and the Supreme Court emphasized the inquiry is a flexible one: "Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability-of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert,* 509 U.S. at 594-95. A witness's own training and experience may be the foundation for an expert opinion, but "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed.R.Evid. 702 (advisory committee's notes (2000 amendments)). The burden of showing an expert's testimony to be relevant and reliable is with the proponent of the evidence. *Bradley v. Brown,* 852 F.Supp. 690, 697 (N.D.Ind.1994).

(2) Analysis

***7** In her expert report and deposition testimony, Oxley gave her opinion that spontaneous combustion of the wood flour stored at Hammond Expanders was possible under the conditions it was exposed to. Her conclusion that spontaneous combustion was possible along with the conclusions of the Plaintiff's other experts led Oxley to conclude that spontaneous combustion caused the fire. The Defendant questions whether Oxley's conclusions are based on sufficient facts or data and whether she reliably applied the science concerning spontaneous combustion. The Defendant does not question Oxley's qualifications and the parties appear to agree on most of the scientific principles that explain spontaneous combustion. Several articles and book excerpts dealing with spontaneous combustion relied on by the parties have been submitted as exhibits. None of these articles has been called into question. The Defendant offers few citations to scientific literature in support of its arguments that Oxley required more data to support her conclusions. The Court's review of these materials and Oxley's report and deposition testimony leads it to conclude that Oxley has reliably applied the principles in question and has based her conclusions on sufficient facts and data.

For the most part, the general scientific principles underlying spontaneous combustion relied on by the Plaintiff's experts are undisputed. For spontaneous combustion to be possible, the material needs to be susceptible to self-heating and self-heating must be sufficient to lead to thermal runaway. Thermal runaway is self-heating that rapidly accelerates to high temperatures, often leading to smoldering or flaming. Self-heating occurs when the rate at which heat is generated is greater than the rate heat is dissipated. Self-heating can be the result of biological activity or chemical oxidation or both. Chemical oxidation is the process in which molecules of a substance react with molecules of oxygen in the air, generating heat. Wood flour, like sawdust and wood chips, is a material susceptible to self-heating.

Spontaneous combustion can only occur if the ambient temperature is hot enough and the pile is large enough. The larger the pile, the more likely it is to spontaneously combust. Also, the greater the temperature of the air surrounding the pile, the more likely the pile is to spontaneously combust because high surrounding temperature restricts heat loss. The size of the pile is related to the critical temperature at which spontaneous combustion can occur: the higher the surrounding temperature, the smaller the critical radius, and vice versa.

Other factors affect the heat generation and dissipation and allow spontaneous combustion to occur at a temperature or pile size that it otherwise would not. One obvious factor is the composition of the substance itself. Different materials have different rates of oxidization. Pine wood flour is more likely to spontaneously combust than wood flour from other types of trees because it contains more extractives that oxidize at a higher rate. Another factor is the existence of insulating factors that hinder the dissipation of heat, such as being piled against a wall. Also, finely divided materials are more likely to combust. More of the surface of the material is exposed to oxygen in finely divided materials, and finely divided materials accumulate heat more easily. Finally, the longer a combustible material sits, the more likely it is to spontaneously combust.

i. Reliability of Oxley's Opinion that Biological Activity Occurred

***8** It is Oxley's opinion that conditions were such that biological activity within the wood flour was possible, and this led to spontaneous combustion. The Defendant argues that for Oxley to conclude biological activity was possible, she had to know how much moisture is required for biological activity and test the Defendant's wood flour. Because Oxley has no testing or data supporting her conclusions, the Defendant claims her conclusions are unreliable. The Plaintiff argues that testing was impossible and the relevant data unavailable. The Court agrees. A new wood flour sample would be in a different condition than the wood flour that existed at Hammond Expanders immediately before the fire. Wood flour from the fire site would be contaminated by the fire and fire fighting activity. Thus, the moisture content of the wood flour at the only relevant time, the days before the fire, is not available. The Defendant does not specifically state what type of testing should have been done or how any tests could provide the missing information.

The Defendant also misstates the record. The Defendant claims Oxley said a 20% moisture level would be required for biological activity and that she has no support for concluding that this level of moisture existed. That is incorrect; Oxley stated that a moisture level of 20% is probably too high for spontaneous combustion to occur because higher moisture levels allow greater dissipation of heat. (Oxley Dep. 103, Def. Ex. 18; DE 47.) Regarding what level of moisture is required for biological activity, Oxley stated in her deposition that "almost all organic material has biological activity, which is why we store our food in the refrigerator." (Oxley Dep. 104, Def. Ex. 18; DE 47.)

The Court finds that Oxley's method for reaching her conclusion to be sufficiently reliable. Because the level of moisture in the wood flour prior to the fire is unknown, to determine whether biological activity could have taken place in the wood flour, Oxley looked at what is necessary for biological activity to occur and determined whether those necessary conditions could have existed at Hammond Expanders before the fire. This method is reliable, as is her application of the method. It is undisputed that bio-organisms exist in organic compounds like wood flour and that moisture affects the level of biological activity. Also, the Defendant's process for making wood flour does not eliminate bio-organisms. Though the Defendant's wood flour is shipped at 8% moisture, according to the Defendant's webpage, that level is subject to change, depending on climactic conditions. (American Wood Fibers FAQ, at http://www.awf.com/industrial_faq.htm, Pl.Ex. P; DE 42.) Prior to the fire, the wood flour had been sitting in the Hammond Expanders factory for several months, it was stored next to the hot compressor room, the weather had been hot and humid, and the wood flour was insulated by the size of the pile and plastic wrap. Oxley's conclusion that the necessary conditions-heat, moisture, and presence of bio-organisms-existed making biological activity leading to spontaneous combustion possible is a reliable application of the relevant scientific principles. The Defendant has not provided any evidence that biological activity was not possible under these conditions or cited any scientific

literature calling into doubt the general principles or methods on which Oxley relied.

***9** Also, even if no biological activity took place, Oxley stated that the conditions were sufficient for the wood flour to reach thermal runaway from chemical oxidation alone and, as stated below, that opinion is admissible under Rule 702. (Oxley Aff. 5, Pl.Ex. M; DE 42.) Thus, for purposes of summary judgment, even if Oxley's opinion as to the possibility of biological activity was found inadmissible, there would still be an issue of material fact as to whether chemical oxidation caused the Defendant's wood flour to spontaneously combust.

ii. Reliability of Oxley's Opinion Despite Her Failure to Calculate a Biot Number

The Defendant argues that this conclusion is not scientific because she did not calculate the "biot number." The Defendant says that the biot number is the dimensionless ratio of surface heat transfer to bulk heat transfer, but cites to no scientific literature that further describes the calculation or states such a calculation is necessary to know whether spontaneous combustion is possible.

The Plaintiff argues that no biot calculation is necessary. The Plaintiff claims that using mathematical equations to determine whether spontaneous combustion was possible requires assuming values for variables. Because much of the necessary information regarding the conditions of the wood flour prior to the fire is not available, there is insufficient data to make the calculations reliable. The Court agrees; because assumptions are required for the calculations advocated by the Defendant, the Court is not convinced calculating a biot number would result in greater reliability than the methods used by Oxley.

Rather than assuming values and using mathematical formulas, Oxley used a graph taken from a scientific article that suggests spontaneous combustion of the wood flour was possible if the ambient temperature around the wood flour was 40 degrees Celsius, or 104 degrees Fahrenheit. (Oxley Report, Def. Ex. 12; DE 36.) The graph shows that a sphere with a critical radius of 2 meters can spontaneously combust at about 40 degrees Celsius. Oxley said that the combination of other factors would make it possible for wood flour with a smaller critical radius to spontaneously combust, such as the added heat and air from the compressor room and the increased insulation of the wood flour from being wrapped in cellophane and stacked against a wall. (Oxley Dep. 124-126, Def. Ex. 18; DE 47.) The graph she cites supports her conclusion and the relevant scientific literature includes as factors increasing the likelihood of spontaneous combustion the same factors Oxley relied on. In her affidavit, she cites a literature survey that states direct chemical oxidations probably become important over 42 degrees Celsius. (Oxley Aff., Pl.Ex. M; DE 42.)

The Defendant suggests that Oxley said no biot number was needed only if real-world testing was conducted, and that she did not do any testing. The Defendant's interpretation of Oxley's statements is misleading. In her deposition, when discussing her reliance on the graph in her report, Oxley was asked whether an abstract calculation could be done to calculate the various factors related to spontaneous combustion and Oxley said there was not.

***10** Q.... But is there-see this Biot number calculation relative to ... wood flour that allows one to calculate this thermal reaction. Is there not an abstract way of calculating the air void or the oxygen void size, the heat generated from the oxidation of the wood flour and the amount of water and the amount of thermal dissipation that occurs to calculate the characteristics of spontaneous combustion over time?

A. No. What people can calculate-the original question was from laboratory scale tests. What people can and do calculate is critical temperatures of thermal runaway. But in doing that calculation, if I'm now going to apply it to the real world, I will go out and test every time.

(Oxley Dep. 117-18, Def. Ex. 18; DE 47.) In the context of the rest of the questioning, taking all reasonable inferences in the Plaintiff's favor, it appears that Oxley meant that one cannot abstractly calculate the factors mentioned, but critical temperature can be calculated. However, in concrete applications, testing to determine the critical temperature is more reliable than calculations. The exchange occurs in the context of a discussion as to the type of laboratory testing used to create the graphs relating critical temperature to critical radius-the type of graph relied upon by Oxley. Because this type of testing was already done and collected in the

graph, Oxley had no reason to do her own testing. (Oxley Dep. 124-126, Def. Ex. 18; DE 47.) Oxley never admitted a biot number was necessary and the Court agrees that it was not needed to make her conclusions reliable.

iii. Whether Oxley Failed to Determine the Critical Dimension for Wood Flour

A related objection is the Defendant's argument that Oxley never determined the critical dimension at which its wood flour could spontaneous combust. The Defendant quotes Oxley's deposition testimony where she says there are tests that can be done to calculate critical radius and that those tests were not done. However, Defendant leaves off her following statement that "Maybe I should add that even if you did those tests, it would be hard to know that you were duplicating exactly the conditions of this wood flour." (Oxley Dep. 141, Def. Ex. 18; DE 47.) Rather than testing based on unreliable estimations as to what the conditions were at Hammond Expanders during the time the wood flour was there, to determine whether the wood flour pile was sufficiently large to allow for spontaneous combustion in the temperature ranges it was likely exposed to, Oxley relied on the Canadian Research Council graph and other scientific literature. The graph Oxley relied on shows the critical radius for pine sawdust at 40 degrees Celsius as around two meters.

The Court finds Oxley's methods and conclusions to be reliable. Though she did not calculate the critical radius for wood flour, she relied on the graph to determine the critical radius for pine sawdust. It is not clear what the Defendant thinks further testing might show. The Defendant has not questioned the reliability of the Canadian Research Council's work, and Oxley does not need to confirm their results with further testing for her opinion to be reliable.

iv. Whether Oxley's Failure to Calculate the Void Volume of Wood Flour Makes Her Opinion Unreliable

***11** The Defendant argues Oxley stated that a propensity to self heat depends on the oxidation, which in turn depends on the size of the voids between the particles, and that she made no calculation as to what the void volume of wood flour could be. This argument also fails. It is not true that Oxley made no calculation. For the purpose of calculating the amount of heat that would be generated by the oxidization of all oxygen packed in the wood flour bag, Oxley used the Defendant's expert's void volume calculation of 39%. She found that the temperature would rise 6 degrees Celsius, an amount she characterized as certain to result in spontaneous combustion. (Oxley Dep. 93-98, Def. Ex. 18; DE 47.) Thus, Oxley's opinion is that even under the Defendant's own calculations of void volume, spontaneous combustion was possible. Failing to make an independent void volume calculation does not affect the reliability of her opinion.

v. Whether Oxley Has Shown There To Be Sufficient Oxygen To Allow Spontaneous Combustion

The Defendant also disagrees with Oxley's conclusion that bags of wood flour with 39% void volume could self-heat by 5.97 degrees Celsius by oxidizing the amount of oxygen contained in the bag. The Defendant simply disagrees with her calculation and offers no argument as to why it is wrong. The Defendant also argues that heating a portion of the wood flour by 6 degrees Celsius is insufficient to cause spontaneous combustion because there was insufficient oxygen to allow oxidation to generate sufficient heat for spontaneous combustion. Oxley disagrees, and states in her affidavit that a 6 degree temperature variation would cause more oxygen and more material to become involved. (Oxley Aff. 7; DE 42.) At her deposition, Oxley stated there was plenty of oxygen because of the nature of the substance and the aerated stacking pattern. (Oxley Dep. 99-100, Def. Ex. 18; DE 47.) Her conclusion is also supported by the scientific literature. (Brian Gray, Spontaneous Combustion and Self-Heating 2-224, Pl.Ex. L; DE 42) (stating that packing porous materials by compression "increases the density (thus lowering the [critical ambient temperature]) and has virtually no effect on the availability of oxygen.") The Defendant has not shown Oxley's opinion to be unreliable in this regard.

vi. Whether It Was Necessary For Oxley To Identify the Extractives in the Wood Flour

Next the Defendant argues Oxley failed to identify the extractives that she found in the wood flour that would make it more likely to spontaneously

combust. Oxley identified the extractives as having the property that makes their presence important when considering the possibility of spontaneous combustion, which was whether they were oxidizable. Having found that they were oxidizable, further examination would be superfluous. The Defendant does not object to the testing methodology employed to identify the extractives as oxidizable compounds. Her conclusion is supported by testing and is reliable.

vii. Whether Oxley Wrongly Applied Scientific Principles to the Bagged Wood Flour that Apply Only to Bulk Substances

***12** Finally, the Defendant indirectly raises the argument that Oxley was wrongly applying scientific articles to the wood flour stored at Hammond Expanders because the literature refers to bulk piles of combustible material and the wood flour at Hammond Expanders was bagged and on pallets. During her deposition, when asked whether there was a difference between bagged wood flour and bulk piles of wood flour, Oxley stated the difference is not large. Her view is supported by the scientific literature. "The larger the size of the body of material, the greater the likelihood of spontaneous ignition. By *size of the body* we mean the parts that are in thermal contact. A large pile of cotton bales with aisles through it would not necessarily be a large body in the thermal sense used here." (Brian Gray, Spontaneous Combustion and Self-Heating 2-224, Pl.Ex. L; DE 42.)

(3) Summary

Oxley's conclusion is that the available evidence shows it was scientifically possible for the wood flour to spontaneously combust under the conditions to which it was exposed and in the configuration in which it was stored. The Court, in exercise of its gatekeeping function under Rule 702, after considering the *Daubert* factors, finds Oxley's testimony to be admissible. Oxley's methodology was to first determine what conditions were necessary for spontaneous combustion to occur. She did this by consulting the scientific literature on the subject. The scientific principles she relied on, including the graph showing pine sawdust to be combustible at 40 degrees Celsius, were the product of the testing of other scientists, published in peer reviewed articles, and are generally accepted within the scientific community. Then, she looked to whether these conditions could have existed at Hammond Expanders before the fire. Because of the nature of the fire, not all of the necessary information could be obtained. It is not known how moist the wood flour was, how exactly the wood flour was configured, or how high the ambient temperature around the wood flour was. Under these circumstances, a scientist must make assumptions. Most of the Defendant's objections relate to the fact that Oxley did little testing or mathematical calculation. Testing and calculation would also require assumptions, but the Court does not see how they would result in greater reliability. Though there is a high rate of error in making conclusions with so many unknown facts, the Court is not aware of a better method, and the Defendant has not shown there to be one. Oxley has " 'good grounds,' based on what is known" for her conclusions. *Daubert,* 509 U.S. at 590. As stated by the *Daubert* court, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 596.

F. Sufficiency of Plaintiff's Causation Evidence

Oxley's opinion is only a part of the Plaintiff's evidence that spontaneous combustion caused the fire. By itself, her testimony likely would be insufficient to show causation, but her testimony that spontaneous combustion was possible, combined with the testimony of the Plaintiff's other experts, is sufficient to create a genuine issue of fact as to whether spontaneous combustion of wood flour caused the fire.

***13** Indiana's Products Liability Act governs actions brought by a user of a product against the product's manufacturer for physical harm caused by the product, "regardless of the substantive legal theory or theories upon which the action is brought." Ind.Code § 34-20-1-1. Thus, the Act governs Plaintiff's strict liability and negligence claims. *U-Haul Int'l., Inc. v. Nulls Mach. & Mfg. Shop,* 736 N.E.2d 271, 281 (Ind.App.2000). To establish a claim for liability under the act, a plaintiff must show "(1) the product was defective; (2) as a result of the defect, the product was unreasonably dangerous; (3) the defect existed when the product left the control of the defendant and reached the

plaintiff without substantial alteration; (4) plaintiff was injured; and (5) plaintiff's injury was proximately caused by the product." *Owens v. Ford Motor Co.*, 297 F.Supp.2d 1099, 1103 (S.D.Ind.2003); Ind.Code § 34-20-2-1.

Because causation is an essential element of the Plaintiff's claims, to survive summary judgment, the Plaintiff must submit admissible evidence that the Defendant's product caused the fire. "When the issue of causation is within the understanding of a lay person, testimony of an expert witness is not necessary." *Smith v. Beaty*, 639 N.E.2d 1029, 1034 (Ind.App.1994). The Plaintiff argues the fire was caused by the spontaneous combustion of the Defendant's wood flour. Spontaneous combustion is not a process within the understanding of a lay person and so the Plaintiff is required to produce admissible expert testimony to carry its burden in showing the Defendant's product caused the fire.

"By the very nature of fire, its cause must often be proven through a combination of common sense, circumstantial evidence and expert testimony." *Standard Commercial Tobacco Co., Inc. v. M/V Recife*, 827 F.Supp. 990, 1001 (S.D.N.Y.1993). Direct evidence of causation is not required; circumstantial evidence is sufficient if it allows a factfinder to draw a reasonable inference of causation. *Smith v. Ford Motor Co.*, 908 F.Supp. 590 (N.D.Ind.1995). "[A] plaintiff may use circumstantial evidence to establish that a manufacturing defect existed only when the plaintiff produces evidence by way of expert testimony, by way of negating other reasonable causes, or by way of some combination of the two." *Smith*, 908 F.Supp. at 593 (quoting *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1209 (7th Cir.1995)); *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 902 (7th Cir.1994). However, a plaintiff is not required to negate every possible cause "no matter how speculative, remote, or unsupported by the record." *Smith*, 908 F.Supp. at 596.

The Plaintiff's evidence consists of the testimony, reports, and affidavits of four experts: David Bellis, a certified fire investigator with Engineering and Fire Investigations; Robert Lucas, a certified fire investigator with a company named Exponent; Russell Ogle, Ph.D., a chemist with Exponent; and Jimmie Oxley, Ph.D., a chemist. The sum of the Plaintiff's expert testimony is that the fire started in the location where the wood flour was stored, the wood flour was the only ignition source in the area, the evidence found after the fire was consistent with spontaneous combustion of the wood flour, and that the conditions that existed at the Hammond Expanders plant made spontaneous combustion of the wood flour possible. The Defendant challenges the Plaintiff's evidence, arguing that it is insufficient to show the fire was not caused by something other than spontaneous combustion of the wood flour and the possibility that its product, as manufactured and packaged, could spontaneously combust.

***14** By first determining that the fire started where the wood flour was stored, the Plaintiff's experts eliminated all potential causes in other locations. Looking at the potential causes in the area of the wood flour, the experts found no other ignition sources and concluded spontaneous combustion was the most likely cause. First, there were no other viable ignition sources in close proximity to the wood flour. Second, they found a smoldering region within a pile of unburned wood flour suggesting spontaneous combustion. They engaged in testing to determine whether this pattern was consistent with spontaneous combustion and found that it was. A second test simulating a fire starting outside of the wood flour pile did not result in a similar pattern. The testimony of the Plaintiff's experts that the only cause of fire that could have started in the wood flour storage area and left an unburned dome of wood flour surrounding a central charred region was spontaneous combustion of wood flour eliminates all other reasonable potential causes of the Hammond Expanders fire. Oxley's testimony that spontaneous combustion was scientifically possible supports their conclusion. If a jury believed the Plaintiff's experts, they could reasonably conclude that spontaneous combustion of the wood flour caused the fire. There is a genuine issue of material fact as to whether spontaneous combustion of the wood flour caused the fire.

G. Whether the Defendant Fulfilled its Duty to Warn

The Defendant argues that it had no duty to warn that wood flour can burn because this condition is known to expected users. The Defendant's characterization of the issue is incorrect. Of course it is obvious that wood products can burn. The Plaintiff claims Hammond Expanders was unaware

wood flour could cause a fire by spontaneous combustion. The question is whether the Defendant had a duty to warn that wood flour can spontaneously combust, that is, ignite on its own without the aid of any other ignition source.

Section 34-20-2-1 requires a plaintiff bringing a products liability claim to show a product was defective and the defect made it unreasonably dangerous. Ind.Code § 34-20-2-1. In failure to warn cases, the "unreasonably dangerous" inquiry is not a separate inquiry from whether the defect is latent or hidden. *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682, 690 n. 5 (7th Cir.2004). "A product is defective under this article if the seller fails to (1) properly package or label the product to give reasonable warnings of danger about the product; or (2) give reasonably complete instructions on proper use of the product." Ind.Code. § 34-20-4-2. "The determination of whether a duty to warn exists is generally a question of law for the court to decide rather than one of fact. However, the adequacy of the warning is a question of fact for the jury." *Natural Gas Odorizing, Inc. v. Downs,* 685 N.E.2d 155, 161 (Ind.Ct.App.1997). "A manufacturer has a duty to warn with respect to latent dangerous characteristics of the product, even though there is no 'defect' in the product itself." *Id.*

***15** The Court finds that spontaneous combustion is a latent dangerous characteristic of wood flour. That wood flour could, under certain conditions, spontaneously combust and ignite a fire is a dangerous and non-obvious characteristic. Thus, the Defendant had a duty to warn of this possibility and provide instruction on how to safely store wood flour to avoid spontaneous combustion.

The Defendant claims its warning was sufficient because it stated that its product can burn and recommended storage in a cool dry place. However, the warning makes no mention of spontaneous combustion and the Court finds that there is a material issue of fact as to the adequacy of the warning.

The Defendant also argues that summary judgment is appropriate because the sophisticated user doctrine discharges its duty to warn when the user knew or should have known the dangers associated with the product. The scope of this doctrine does not appear to be well defined by Indiana courts, and it is not clear how it relates to Indiana's statutory framework for product liability. Nevertheless, Indiana courts have considered the doctrine, and the Seventh Circuit has recognized its existence. *Smock Materials Handling Co. v. Kerr,* 719 N.E.2d 396 (Ind.Ct.App.1999); *American Eurocopter,* 378 F.3d at 691 n. 8.

A sophisticated user is one who has special knowledge, sophistication, or expertise in relation to the product. 63A Am.Jur.2d *Products Liability* § 1163. "Under the 'sophisticated user' exception, there is no duty to warn when the dangers posed by the product are already known to the user." *Kerr,* 719 N.E.2d at 403 (quoting *Downs,* 685 N.E.2d at 163). Knowledge may be actual or constructive, and exists where the user knew or should have known of the dangers of a product. *Id.* at 403-404. Actual or constructive knowledge may be found where "the supplier has provided an adequate explicit warning of such dangers or information of the product's dangers is available in the public domain." *Id.* This is almost always a question of fact. *Id.* The doctrine is an affirmative defense, and the burden of proof is on the Defendant. *Id.* at 403 (titling relevant section "Analysis-'Sophisticated User' Defense"); 63A Am.Jur.2d *Products Liability* § 1215 ("[T]he manufacturer which claims to have no duty to warn because of the knowledge of the user has the burden to offer evidence that the danger was or should have been obvious or known.").

James Fowler states in his affidavit that Hammond Expanders had no knowledge of the dangers of spontaneous combustion and relied on the Defendant for instruction on use and storage of wood flour. The Defendant attempts to show Hammond Expanders to be a sophisticated user by pointing out Hammond Expanders had problems with hot bags of its own product having to be segregated to avoid combustion. Also, the Defendant argues Hammond Expanders is a sophisticated user because it mixes wood flour to create its final product, and knows the potentially dangerous attributes of wood flour.

***16** Whether Hammond Expanders was a sophisticated user and whether it should have known of the dangers of spontaneous combustion of wood flour is a question of fact for the jury. Fowler's affidavit is sufficient to raise a genuine issue of fact whether Hammond Expanders was a sophisticated user. Even without Fowler's testimony, the

Defendant does not have sufficient evidence to carry its burden and prove as a matter of law that Hammond Expanders had the requisite knowledge.

H. Other Matters

(1) Plaintiff's Motion for Sanctions

Unrelated to the motion for summary judgment, the Plaintiff filed for sanctions on December 9, 2005, arguing that the Defendant did not come to a mediation conference with all individuals necessary to engage in good faith settlement negotiations. The Defendant responded on December 19 that it engaged in negotiations in good faith.

Local Rule 16.6 for the Northern District of Indiana states that the Indiana Rules for Alternative Dispute Resolution apply to ADR Processes. N.D. Ind. L.R. 16.6. Indiana ADR Rule 2.7(B)(2) states: "All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court." Indiana ADR Rule 2.7(B)(2). It appears from the evidence submitted by the Plaintiff that not all necessary parties for the Defendant appeared at the mediation conference.

Indiana ADR Rule 2.10 states: "Upon motion by either party and hearing, the court may impose sanctions against any attorney, or party representative who fails to comply with these mediation rules, limited to assessment of mediation costs and/or attorney fees relevant to the process." Indiana ADR Rule 2.10. The Court declines to exercise its discretion to impose sanctions on the Defendant. The Defendant's violation is not part of a pattern of bad behavior, is not terribly egregious, and does not appear to have been done in bad faith. Also, there were many other issues that prevented successful mediation other than the absence of all necessary parties.

(2) Defendant's Motion to Bar the Testimony of Gary Steen and Joseph Hoffman

The sufficiency of the Plaintiff's evidence of damages was not challenged by the Defendant's motion for summary judgment, yet the Defendant seeks to bar testimony of two of the Plaintiff's witnesses, Gary Steen and Joseph Hoffman, insofar as they might testify at trial to the Plaintiff's damages. Gary Steen is an insurance adjuster who was an employee of the Plaintiff Westchester and was primarily responsible for handling the payment of claims submitted by the Hammond Group arising from the fire that burned down their plant. Joseph Hoffman is a public adjuster who assisted the Hammond Group in obtaining payments on its insurance claim from Westchester. The Defendant offers two reasons to strike their testimony. First, the Defendant argues Steen and Hoffman are experts and no expert report was filed as required by Federal Rule of Civil Procedure 26(a)(2). Second, the Defendant claims their testimony is not relevant because it addresses only replacement cost, and the standard for damages in this case is fair market value. In its reply, the Defendant raises for the first time the argument that the testimony of Steen and Hoffman must be stricken because it was not provided in response to an interrogatory request. The Court finds that this argument is deficient because the Plaintiff's interrogatory answers were sufficient.

***17** The Defendant's motion to strike the testimony of Steen and Hoffman is denied. Because Steen and Hoffman were not retained, Rule 26(a)(2) does not require them to file a report. *See Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756-57 (7th Cir.2004) . Rule 26(a)(2)(B) states that the disclosure of the identify of an opinion witness must be accompanied by a report "with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Fed.R.Civ.P. 26(a)(2)(B). As stated by the *Musser* court, "[t]he commentary to Rule 26 supports this textual distinction between retained experts and witnesses providing expert testimony because of their involvement in the facts of the case: a 'treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report." ' *Musser,* 356 F.3d at 757 (quoting Fed.R.Civ.P. 26 advisory committee's notes (1993 amendments)). Steen and Hoffman are comparable to treating physicians. Their involvement in this case was to negotiate and determine the amount Westchester would have to pay on the Hammond Groups' policy for the factory. They have knowledge of this case from their own experience and observations. Their

involvement in this matter is not primarily to provide expert testimony. As such, they belong to the class of experts that did not need to file expert reports under Rule 26(a)(2)(B). Also, the Plaintiff identified Steen and Hoffman as fact and opinion witnesses and the Defendant had ample opportunity to depose them as such.

The Defendant also seeks to bar the testimony of Steen and Hoffman as irrelevant because their testimony relates to replacement cost and the Defendant can only be liable for the fair market value of the building. At this time, on the facts before it, the Court cannot exclude the testimony of Steen and Hoffman as irrelevant. The proper measure for damages and whether the issue is for the jury will be determined at a later stage in proceedings when the Court has heard more argument if the parties cannot agree on the issue.

ORDER

For the reasons stated above, the Defendant's motions to strike [DE 45, 46, 53] are DENIED. The Plaintiff's motion to strike [DE 48] is DENIED. The Defendant's Motion for Summary Judgment [DE 36] is DENIED. The Plaintiff's Motion for Sanctions [DE 61] is also DENIED.

SO ORDERED.

N.D.Ind.,2006.
Westchester Fire Ins. Co. v. American Wood Fibers, Inc.
Slip Copy, 2006 WL 752584 (N.D.Ind.)

Briefs and Other Related Documents (Back to top)

. 2006 WL 1930054 (Trial Motion, Memorandum and Affidavit) Plaintiff, Westchester fire Insurance Company's, Reply to Defendant's Response to Plaintiff's Motion for New Trial (Jun. 23, 2006) Original Image of this Document (PDF)
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. 2005 WL 4167970 (Trial Motion, Memorandum and Affidavit) Reply in Support of Motion to Strike or Bar Testimony of Gary Steen and Joseph A. Hoffman (Dec. 8, 2005) Original Image of this Document (PDF)
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. 2005 WL 4167966 (Trial Motion, Memorandum and Affidavit) Defendant's Reply In Support of Motion To Strike Affidavit of James D. ""Von'' Fowler (Nov. 14, 2005) Original Image of this Document (PDF)
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. 2005 WL 3284554 (Trial Motion, Memorandum and Affidavit) Plaintiff's Brief in Opposition to Defendant's Motion to Strike Affidavit of James D. ""Von'' Fowler (Nov. 4, 2005) Original Image of this Document (PDF)
. 2005 WL 3284552 (Trial Motion, Memorandum and Affidavit) American Wood Fibers, Inc.'s Reply in Support of Its Motion for Summary Judgment (Oct. 24, 2005) Original Image of this Document (PDF)
. 2005 WL 2885554 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Oct. 4, 2005) Original Image of this Document (PDF)
. 2005 WL 4163442 () Affidavit of Jimmie C. Oxley (Sep. 21, 2005) Original Image of this Document (PDF)
. 2005 WL 4163445 () (Partial Testimony) (Sep. 20, 2005) Original Image of this Document (PDF)
. 2005 WL 4163458 () Deposition of: Lennard Wharton, Ph.D., P.E. (Sep. 20, 2005) Original Image of this Document (PDF)
. 2005 WL 2738709 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Motion for Summary Judgment (Aug. 31, 2005) Original Image of this Document (PDF)
. 2005 WL 4163440 () (Report or Affidavit) (Aug. 31, 2005) Original Image of this Document (PDF)
. 2005 WL 4163459 () (Partial Testimony) (Jul. 28, 2005) Original Image of this Document (PDF)
. 2005 WL 4163444 () Deposition of: James G. Gallup, P.E., C.S.P. (Jul. 22, 2005) Original Image of this Document (PDF)
. 2005 WL 4163452 () (Partial Testimony) (Jul. 22, 2005) Original Image of this Document (PDF)
. 2005 WL 4163447 () Deposition of: David Bellis (Jul. 12, 2005) Original Image of this Document (PDF)
. 2005 WL 4163454 () (Partial Testimony) (Jul. 12, 2005) Original Image of this Document (PDF)
. 2005 WL 4163443 () Deposition of: Jimmie C. Oxley, Ph.D. (Jul. 8, 2005) Original Image of this Document (PDF)
. 2005 WL 4163455 () (Partial Testimony) (Jul. 8, 2005) Original Image of this Document (PDF)
. 2005 WL 4163614 () (Deposition) (Jul. 8, 2005) Original Image of this Document (PDF)
. 2005 WL 4163441 () Deposition of: Russell A. Ogle, Ph.D. (Jul. 7, 2005) Original Image of this Document (PDF)
. 2005 WL 4163448 () Deposition of: Robert J. Lucas, CFI (Jul. 7, 2005) Original Image of this Document (PDF)
. 2005 WL 4163453 () (Partial Testimony) (Jul. 7, 2005) Original Image of this Document (PDF)
. 2005 WL 4163449 () (Report or Affidavit) (Jun. 30, 2005) Original Image of this Document (PDF)
. 2005 WL 4163456 () (Report or Affidavit) (Jun. 30, 2005) Original Image of this Document (PDF)
. 2005 WL 4163457 () (Report or Affidavit) (Jun. 30, 2005) Original Image of this Document (PDF)
. 2005 WL 4163451 () (Report or Affidavit) (Jun. 29, 2005) Original Image of this Document (PDF)
. 2005 WL 4163439 () (Report or Affidavit) (May 25, 2005) Original Image of this Document (PDF)
. 2005 WL 4163446 () (Report or Affidavit) (May 25, 2005) Original Image of this Document (PDF)
. 2004 WL 4092517 (Trial Motion, Memorandum and Affidavit) Motion to Compel Discovery (Apr. 15, 2004) Original Image of this Document (PDF)
. 2:03cv00178 (Docket) (May 15, 2003)
. 2003 WL 24902366 () (Partial Testimony) (2003) Original Image of this Document (PDF)
. 2003 WL 24902367 () (Partial Testimony) (2003) Original Image of this Document (PDF)
. 2003 WL 24902368 () (Partial Testimony) (2003) Original Image of this Document (PDF)
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PROOF OF SERVICE

[Code Civ. Proc. § 1013a]

I, **Kathy Turner**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. On **September 14, 2006**, I served the within document entitled:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT AMERICAN STANDARD, INC.

on the parties in the action by placing a true copy thereof addressed as follows and delivering in the below-stated manner:

Parties Served:

SEE ATTACHED MAILING LIST

[✓] (BY MAIL) by placing a true copy thereof in an envelope addressed as follows [as indicated on the attached service list]. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **September 14, 2006**, at Encino, California.

Kathy Turner

Kathy Turner

MAILING LIST FOR PROOF OF SERVICE

(*Johnson v. American Standard, Inc.* • Case No.: S139184)

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