NO. 313PIO 26TH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHEYENNE SALEENA STARK, a Minor, CODY BRANDON STARK, a Minor, by their Guardian ad Litem, NICOLE JACOBSEN,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Defendant-Appellant.

From Mecklenburg County
No. 04 CVS 7636
COA No. 09-286

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

Dan J. McLamb (N.C. Bar #6272)
(COUNSEL OF RECORD)
YATES, MCLAMB & WEYHER, LLP
One Bank of America Plaza
421 Fayetteville Street, Suite 1200
Raleigh, NC 27601
Tel: (919) 835-0900 Ext. 129
dmclamb@ymwlaw.com

Counsel for Amici Curiae

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
mbehrens@shb.com
csilverman@shb.com

Of Counsel

(Additional Of Counsel listed on next page)

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
Tel: (202) 682-1163

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
Tel: (847) 553-3826

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that a manufacturer or seller of a product may be denied a defense under N.C. Gen. Stat. § 99B-3 for the post-sale alteration or modification of a product simply because the person who altered or modified the product was not a named "party" to the action at the time of trial.[1]

INTEREST OF *AMICI CURIAE*

Amici are associations representing product manufacturers and sellers of all sizes and their insurers. Accordingly, *amici* have a substantial interest in ensuring that North Carolina's product liability law is fair and reflects sound public policy. These principles were violated by the Court of Appeals' decision. The appellate court's interpretation of N.C. Gen. Stat. § 99B-3 would result in product liability defendants being held liable whenever a product is altered or modified post-sale and the person who made the alteration or modification is unknown, immune, beyond the jurisdictional reach of North Carolina courts, or, for any other reason, not a party to the action at trial. *Amici*'s members would be adversely affected if this outlier ruling is allowed to stand.

STATEMENT OF THE CASE

Amici adopt Defendant-Appellant's Statement of the Case.

---

[1] *Amici* are not addressing other issues presented in the appeal, but support Appellant's position. For this brief, *amici* assume but do not concede that the person who altered the product at issue was not a party to the action.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to the Legislature's intent, as well as principles of fundamental fairness and sound public policy, the Court of Appeals interpreted N.C. Gen. Stat. § 99B-3 as permitting liability to be imposed on a manufacturer or seller of a product whenever the person who altered or modified the product is not a named "party" to the action at the time of trial. The appellate court's reading also conflicts with other North Carolina product liability law and is out of step with the approach in every other state. One of the judges below even acknowledged that the holding "appears inconsistent with general principles of negligence, modification defenses in all other states, and *possibly even* the intent of our legislature itself." *Stark v. Ford Motor Co.*, 693 S.E.2d 253, 262 (N.C. Ct. App. 2010) (Wynn, J., concurring) (emphasis in original). Furthermore, if left to stand, the lower court's ruling will raise the costs and complexity of product liability litigation in North Carolina, and encourage gamesmanship. It also will encourage forum shopping in North Carolina courts. Only in North Carolina would plaintiffs have the ability to recover damages against manufacturers who are not responsible for modifications of the products that caused injury. North Carolina's reputation among job-creators as a fair place to do business would be undermined.

For these reasons, this Court should reverse the decision below.

ARGUMENT

I. THE COURT OF APPEALS' WOODEN INTERPRETATION OF N.C. GEN. STAT. § 99B-3 CONFLICTS WITH THE LEGISLATURE'S INTENT AND WIDELY ACCEPTED PRINCIPLES OF PRODUCT LIABILITY LAW

The North Carolina General Assembly has decided, "There shall be no strict liability in tort in product liability actions." N.C. Gen. Stat. § 99B-1.1; *see also* Matthew William Stevens, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, The Products Liability Act*, 74 N.C. L. Rev. 2240 (1996). Consistent with this policy decision, the Legislature provided manufacturers and sellers of products with a defense to liability whenever a product is modified or altered post-sale. *See* N.C. Gen. Stat. § 99B-3. Likewise, the General Assembly provided that manufacturers and sellers are not liable for harms caused by product misuse. *See* N.C. Gen. Stat. § 99B-4.

At the very core of these policy determinations is the general principle that a manufacturer or seller of a product may be held responsible for foreseeable harms caused by a defect existing at the time of sale, but should not be held liable for harms caused by others beyond the manufacturer's or seller's control. This principle has at least three public policy underpinnings. First, it is fundamentally unfair to hold defendants responsible for harms caused by others. Only in very narrow and special situations not present here is vicarious liability ever imposed in tort law. Second, if businesses believe that tort outcomes have little to do with

their own behavior, then there is no reason for them to shape their conduct so as to minimize tort exposure. Third, unpredictable and open-ended liability can raise problems of insurability, raise costs for consumers, and impact the availability of products.

The Court of Appeals' reading of N.C. Gen. Stat. § 99B-3 is plainly contrary to North Carolina's overall tort liability scheme; it would result in the imposition of liability on manufacturers and product sellers whenever a harm is caused by the alteration or modification of the product and the modifier is not a party to the action at the time of trial. When a product is modified or altered by a third party, the element of control that is essential to the ordinary imposition of tort liability is missing—the defendant has no way to safeguard the ultimate consumer; no way to modify its own behavior to minimize the risk; and no way to determine the extent of the potential risk to be insured against or that reserves must be set aside to cover.

The only reading of N.C. Gen. Stat. § 99B-3 that is sound and follows the spirit of North Carolina product liability law generally is one holding that the General Assembly intended a defense to be available whenever a product is altered or modified by anyone after it has left the control of the manufacturer or seller. While the General Assembly chose the word "party" to describe such persons, it is clear that the Legislature intended that term to be given its ordinarily "plain

English" meaning and was not referring to a legal term of art (i.e., "party to the action"). Indeed, it appears that the Legislature viewed this additional clarifying language as mere surplusage. If the Legislature intended the statute to be read narrowly, creating a defense only if the product's modifier is a "party to the action at the time of trial," it would have said so.

Additional evidence to support this view is found in the North Carolina's Pattern Jury Instruction for the § 99B-3 defense, *see* N.C.P.O. Civ. 744.07 (2009) (providing that the defense is available when the modification is made by "someone other than the defendant"), the work of leading North Carolina legal experts and commentators, and by reference to numerous other North Carolina statutes. These sources are all thoroughly documented by Appellant; for the sake of judicial economy, we refer the Court to that compelling and persuasive research.

II. THE COURT OF APPEALS' READING OF N.C. GEN. STAT. § 99B-3 WILL PRODUCE ABSURD RESULTS NOT INTENDED BY THE LEGISLATURE

It is also unreasonable to presume that the General Assembly intended to dramatically preclude the availability of the § 99B-3 defense in a wide range of circumstances in which it should be available as a matter of logic and fairness. There are many situations where a manufacturer or seller could be held absolutely liable under the Court of Appeals' holding for harms caused by products that have

been altered and rendered dangerous by persons or entities that are not parties at the time of trial.

For example, products that are expected to be used for a long time, such as an automobile, may be resold many times over, making the identity of the product's modifier unknown and unidentifiable. In some situations, the person who made the alteration may be beyond the jurisdiction of the court, unable to be located, or deceased. In other instances, the product's modifier may be named initially as a co-defendant but settle with the plaintiff prior to trial. A plaintiff also could simply dismiss a defendant modifier for any other reason prior to trial and preclude the availability of the defense to the remaining defendant. In each of these situations, under the Court of Appeals' ruling, a manufacturer's liability would turn on the happenstance that the person who allegedly modified the product is before the court at the time of the trial.

Even in cases in which it is undisputed that someone other than the plaintiff significantly altered the product after its initial sale, and that this modification caused the plaintiff's injury, the manufacturer would have no defense when the altering party is not present at trial. *Compare Rich v. Shaw*, 391 S.E.2d 220, 222-23 (N.C. Ct. App.), *rev. denied*, 395 S.E.2d 689 (N.C. 1990) (holding that manufacturer was not liable where evidence showed that safety guard that was bolted to trenching machine when produced was no longer attached when the

plaintiff picked up machine at a rental business). Manufacturers would arbitrarily have a legitimate defense stripped away when those who modify their products cannot be brought before the court. Such inconsistency and unpredictability in product liability would discourage manufacturers from doing business in North Carolina, raise insurance premiums, and increase the price of goods for consumers.

III. OTHER COURTS RECOGNIZE THAT A "PARTY" MAY MEAN MORE THAN THE LITIGANTS BEFORE THE COURT

Courts in other states have found that language such as that in N.C. Gen. Stat. § 99B-3 can be reasonably read to include any third party. Judge Wynn's concurring opinion recognizes that every other state applies its defense regardless of who altered or modified the product after its sale. He found that many state statutes are silent on the identity of the modifier, provide a defense as long as the manufacturer or seller is not responsible for the modification, or apply to modifications by "any person or entity." *See* 693 S.E.2d at 263 (Wynn, J., concurring). No state limits the defense to situations in which individual or entity that allegedly modified the product is a party at the time of trial. Nevertheless, Judge Wynn concluded that the majority below properly interpreted "party" to require such a result. What both Judge Wynn and the majority overlooked, however, is that even in the context of many state civil liability laws, "party" is often synonymous with "person," "entity," or "third party."

For instance, even though some comparative negligence statutes explicitly provide that the fact finder is to allocate fault among any person or entity that may have contributed to a plaintiff's injury, other statutes refer to "a party." In interpreting such language, some courts have found that a jury must be given the opportunity to allocate fault between all persons responsible for a plaintiff's injury, not just the parties before the court. The Kansas, Mississippi, and Wyoming Supreme Courts have followed this approach.

Kansas law provides, "Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court." Kan. Stat. Ann. § 60-258a(b).[2] Given the purpose of comparative fault, the Kansas Supreme Court interpreted "party" in this context to include "all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." *Brown v. Keill*, 580 P.2d 867, 876 (Kan. 1978).

---

[2] Kan. Stat. Ann. § 60-258a was recently amended by H.B. 2656, § 132 (Kan. 2010) (signed by Governor on May 13, 2010).

Mississippi's comparative fault statute similarly states, "In actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault without regard to whether the joint tort-feasor is immune from damages." Miss. Code Ann. § 85-5-7(5). The Mississippi Supreme Court has recognized that "the term 'party,' as used in § 85-5-7(7), refers to any participant to an occurrence that gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial." *Hunter v. General Motors Corp.*, 729 So. 2d 1264, 1276 (Miss. 1999).

Wyoming's Comparative Negligence Act mixes use of both "person" and "party":

> (a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of *the person against whom recovery is sought.* Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering. . . .
>
> (b) The court may, and when requested by any party shall:
>
> (i) If a jury trial, direct the jury to find separate special verdicts;
>
> (ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable *to each party.* The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering. . . .

Wyo. Stat. § 1-1-109 (emphasis added). Although this language arguably provides a stronger basis for limiting consideration to litigants before the court than to any individual or entity whose negligence contributed to the injury, the Wyoming Supreme Court followed the latter interpretation. The court held that "in a comparative negligence case the jury must consider the negligence of not only the parties but all the participants in the transaction which produced the injuries sued upon. Further, the verdict form must allow the jury to apportion the total negligence proximately causing the injury among the participants." *Board of County Commissioners v. Ridenour*, 623 P.2d 1174, 1191-92 (Wyo. 1981); *see also Beard v. Brown*, 616 P.2d 726, 738 (Wyo.1980) ("Even though not a party to a particular claim, the percentage of negligence, if involved, must be computed and apportioned by the jury as though that party were joined.") (citing *Chrysler Corp. v. Todorovich*, 580 P.2d 1123 (Wyo. 1978).

As these examples demonstrate, not only is "party" used throughout the North Carolina General Statutes as equivalent to the terms "individual," "person," or "entity" (*see* Appellant's Brief, at Addendum), other state high courts have interpreted "party" in the context of civil litigation, where appropriate, to include anyone who contributed to an injury. Certainly, this is a logical and appropriate interpretation of N.C. Gen. Stat. § 99B-3.

IV. THE DECISION WILL RESULT IN GAMESMANSHIP AND INEFFICIENCY IN NORTH CAROLINA COURTS

The Court of Appeals' narrow interpretation of "party" will not only impose unjust liability on manufacturers for modifications of their products that are beyond their control, it will also result in gamesmanship and inefficiency in North Carolina courts. Under this ruling, plaintiffs will have a strong incentive to settle claims against the person who modified a product and is responsible for the plaintiff's injury. By removing the modifying party from the litigation, the plaintiff would be able to sue a "deep pocket" manufacturer, while precluding that company from asserting a legitimate defense. The court should not sanction an interpretation of the statute that authorizes such gamesmanship.

In addition, if a plaintiff has not asserted a claim against the modifier of the product, a manufacturer would need to name that person as a third-party defendant in order to assert a Section 99B-3 defense. Such action serves no purpose where it is undisputed that the product was modified or when the party responsible for the modification is judgment-proof. The result is judicial inefficiency.

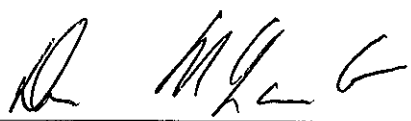
By effectively eliminating the ability to assert an alteration defense in many legitimate cases, the Court of Appeals' ruling will also encourage forum shopping in North Carolina courts. Only in North Carolina would plaintiffs have the ability to recover damages against manufacturers who are not responsible for modifications of the products that caused injury.

As this Court appreciates, companies that operate in interstate commerce have a choice regarding where to locate facilities and create jobs. The decision involves various considerations but the fairness of a state's legal climate is certainly one of the issues that must be considered. North Carolina currently ranks seventeenth among all fifty states in the fairness of its legal environment, according to a 2010 survey by the U.S. Chamber of Commerce's Institute for Legal Reform. No North Carolina court has ever been identified as a Judicial Hellhole by the American Tort Reform Foundation. This Court should send a message that North Carolina remains a fair place to do business. Recognizing the General Assembly's decision to preclude liability against product manufacturers and sellers for harms caused by post-sale modifications or alterations by others will do that.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals' decision.

Respectfully submitted,



Dan J. McLamb (N.C. Bar # 6272)
(Counsel of Record)
YATES, MCLAMB & WEYHER, LLP
One Bank of America Plaza
421 Fayetteville Street, Suite 1200
Raleigh, NC 27601
Tel: (919) 835-0900 Ext. 129
dmclamb@ymwlaw.com

Attorneys for Amici Curiae

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
mbehrens@shb.com
csilverman@shb.com

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 637-3000

Robin S. Conrad
Sheldon Gilbert
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
Tel: (202) 682-1163

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
Tel: (847) 553-3826

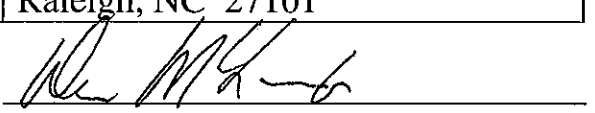
Of Counsel

Dated: March 4, 2011

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief conforms to the requirements of Rule 28 of the North Carolina Rules of Appellate Procedure. The length of this brief, which is presented in proportionally spaced type (Times New Roman), 14-point size, is no more than 3,750 words, including footnotes, but excluding covers, indexes, tables of authorities, certificates of service, and the certificate of compliance with this rule. I further certify that a copy of the foregoing Brief was served upon the following by first class U.S. mail, postage prepaid, addressed as follows:

K. Edward Greene Tobias S. Hampson WYRICK ROBBINS YATES & PONTON P.O. Drawer 17803 Raleigh, NC 27619	Adam H. Charnes Richard J. Keshian Richard D. Dietz KILPATRICK STOCKTON LLP 1001 West Fourth Street Winston-Salem, NC 27101
Kirk G. Warner Christopher R. Kiger SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN L.L.P. P.O. Box 26611 Raleigh, NC 27602	Andrew H. Erteschik Burley B. Michell, Jr. WOMBLE CARYLE SANDRIDGE & RICE, PLLC 150 Fayetteville Street, Suite 2100 Raleigh, NC 27101
Robert L. Wise Sandra Giannone Ezell BOWMAN AND BROOKE LLP 1111 East Main Street, Suite 2100 Richmond, VA 23219	Andrew H. Erteschik Burley B. Michell, Jr. WOMBLE CARYLE SANDRIDGE & RICE, PLLC 150 Fayetteville Street, Suite 2100 Raleigh, NC 27101



Dated: March 4, 2011

Dan J. McLamb