IN THE SUPREME COURT OF NEW JERSEY

Docket No. 081810

ARTHUR G. WHELAN, Plaintiff-Respondent, -v- FORD MOTOR COMPANY, Defendant-Petitioner, and A.O. SMITH CORP., et. al., Defendants.	CIVIL ACTION APP. DIV. Docket No. A-3520-13T4 LAW DIV. Docket No. L-7161-12 ON PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION SAT BELOW: HON. CARMEN H. ALVAREZ, P.J.A.D. HON. WILLIAM E. NUGENT, J.A.D. HON. HEIDI CURRIER, J.A.D.

MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber" or "U.S. Chamber of Commerce"), by and through its undersigned counsel, hereby moves the Court to permit the Chamber to submit the enclosed *amicus curiae* brief in the above-captioned matter for all of the following reasons.

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and corporations of every size, from every sector, and in every geographic region of the country. The Chamber has many members located in New Jersey and many others who conduct substantial business in New Jersey. For that reason, the Chamber and its members have a significant interest in the development of New Jersey civil law on the question of whether a product manufacturer owes any duty to warn of hazards associated with

products or component parts that were made and supplied by others and then incorporated or used with its products post-sale.

Here, as explained below, the Chamber believes that the Appellate Division misapplied negligence-based concepts like "foreseeability" to expand the extent of a defendant's duty in the context of strict liability claims, the only claims at issue in this case. The Appellate Division's ruling broadly and wrongfully exposes product manufacturers to liability for failing to warn of dangers associated with products that they did not make, sell, select, or control.

The Chamber believes that, given the breadth of its organization, it is uniquely situated to brief the Court on the well-established legal principles of duty and the compelling policy reasons that require reversal of the Appellate Division's decision here.

CONCLUSION

For all of the foregoing reasons, the Chamber respectfully requests that the Court grant this motion and take into consideration the enclosed brief.

Respectfully submitted,

K&L GATES LLP
Michael E. Waller
NJ I.D. 031921990
One Newark Center, Tenth Floor
Newark, NJ 07102
973.848.4000 (t)
973.848.4001 (f)

Tara L. Pehush
NJ I.D. 026022006
599 Lexington Ave.
New York, NY 10022
212.536.3900 (t)
212.536.3901 (f)

U.S CHAMBER LITIGATION CENTER
Daryl Joseffer (*pro hac to be submitted*)
Michael B. Schon (*pro hac to be submitted*)
1615 H St., NW
Washington, DC 20062
202.463.5948 (t)

ADDITIONAL *PRO HAC* COUNSEL
Nicholas P. Vari (*pro hac to be submitted*)
Michael J. Ross (*pro hac to be submitted*)
Jake D. Morrison (*pro hac to be submitted*)
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
412.355.6500 (t)
412.355.6501 (f)

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

IN THE SUPREME COURT OF NEW JERSEY

Docket No. 081810

ARTHUR G. WHELAN, Plaintiff-Respondent, -v- FORD MOTOR COMPANY, Defendant-Petitioner, and A.O. SMITH CORP., et. al., Defendants.	CIVIL ACTION APP. DIV. Docket No. A-3520-13T4 LAW DIV. Docket No. L-7161-12 ON PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION SAT BELOW: HON. CARMEN H. ALVAREZ, P.J.A.D. HON. WILLIAM E. NUGENT, J.A.D. HON. HEIDI CURRIER, J.A.D.

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-PETITIONERS

K&L GATES LLP
Michael E. Waller
NJ I.D. 031921990
One Newark Center, Tenth Floor
Newark, NJ 07102
973.848.4000 (t)
973.848.4001 (f)

Tara L. Pehush
NJ I.D. 026022006
599 Lexington Ave.
New York, NY 10022
212.536.3900 (t)
212.536.3901 (f)

Nicholas P. Vari (*pro hac to be submitted*)
Michael J. Ross (*pro hac to be submitted*)
Jake D. Morrison (*pro hac to be submitted*)

U.S CHAMBER LITIGATION CENTER
Daryl Joseffer (*pro hac to be submitted*)
Michael B. Schon (*pro hac to be submitted*)
1615 H St., NW
Washington, DC 20062
202.463.5948 (t)

COUNSEL FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF JUDGMENTS

The Chamber of Commerce of the United States of America (the "Chamber") incorporates by reference the Table of Judgments contained in the Brief of Defendant-Petitioner.

TABLE OF CITATIONS

Cases **Page(s)**

Other Sources

PROCEDURAL HISTORY

The Chamber incorporates by reference the procedural history contained in the Brief of Defendant-Petitioner.

STATEMENT OF FACTS

The Chamber incorporates by reference the statement of facts contained in the Brief of Defendant-Petitioner.

INTEREST OF *AMICUS CURIAE*[1]

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and an underlying membership of more than three million U.S. businesses and corporations of every size, from every sector, and in every geographic region of the country. The Chamber has members located in New Jersey and many others who conduct substantial business in New Jersey. For that reason, the Chamber and its members have significant interest in the development of New Jersey civil law on the question of whether a product manufacturer owes a duty to warn of hazards associated with products or components that were made and supplied by others and then incorporated or used with its products post-sale.

Here, as explained below, the Chamber believes that the Appellate Division misapplied negligence-based concepts like "foreseeability" to expand the extent of a defendant's duty in the context of strict liability claims, the only claims at issue in this case. The Appellate Division's ruling broadly and wrongfully exposes product manufacturers to liability for failing to warn of dangers associated with products that they did not make, sell, select, or control.

INTRODUCTION

[1] No counsel for any party authored this brief in whole or in part. No other entity or person, aside from the Chamber, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

This appeal presents the question of whether entities that did not place the alleged harm-causing material or component part into the stream of commerce, and did not have any role in choosing such material or component part that others incorporated into or added to their products post-sale, should be held liable on a strict liability cause of action under New Jersey law. For the reasons explained below, the public policies that have supported application of strict liability in certain circumstances do not justify imposing such liability when, as here, the defendant did not make, sell, or exercise any control over the alleged harm-causing material or component.

In short, the *Hughes* court's holding that strict liability principles do not apply in these circumstances was correct; the ruling of the Appellate Division here was incorrect and should be reversed. In this case, the Appellate Division improperly used negligence-based concepts like "foreseeability" to define the extent of a defendant's duty in the strict liability context. However, decades of this Court's precedents have made clear that negligence-based concepts have no place in New Jersey's strict liability cause of action.

Contrary to the approach taken by the Appellate Division here, this Court should focus on the role that the defendant played in placing the harm-causing product into the stream of commerce when determining whether strict liability principles should apply in this case. If, as here, the defendant played no such role, then the defendant should not be subject to a strict liability cause of action as a matter of law. Below, the Chamber discusses the New Jersey precedents forming the basis for this conclusion, compares New Jersey's approach to this question with the approaches taken in other jurisdictions, and demonstrates that the decision of the Appellate Division was incorrect and should be reversed.

ARGUMENT

I. A Manufacturer is Not Strictly Liable for Injuries Caused by Exposure to Asbestos-Containing Products it Did Not Manufacture, Supply, or Sell

A. Strict liability may be imposed only on those entities in the "chain of distribution" of a defective product.

In the strict liability context, "the phrase 'duty to warn' is misleading." *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539, 546 (N.J. 1982). "It implies negligence concepts with their attendant focus on the reasonableness of defendant's behavior." *Id.* As this Court has long held, however, "[t]he focus in a strict liability case is upon the product itself." *Michalko v. Cooke Color & Chem. Corp.*, 451 A.2d 179, 183 (N.J. 1982); *Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 627 (N.J. 1996) (same). Thus, to prevail on a strict liability theory, a plaintiff need only establish that the defendant manufactured or supplied a "defective" product that caused the plaintiff's injury. The plaintiff need not show any fault on the defendant's part, and the defendant cannot defend the action by showing that it acted reasonably. *See Beshada*, 447 A.2d at 546 ("[I]n strict liability cases, culpability is irrelevant."); *Myrlak v. Port Auth. of New York & New Jersey*, 723 A.2d 45, 51 (N.J. 1999) ("[A] plaintiff must impugn the product but not the conduct of the manufacturer of the product."); *Michalko*, 451 A.2d at 183 ("Once the product is deemed dangerous, the defendant's lack of fault is irrelevant.").

The decision to impose strict liability in a particular context is primarily "a matter of public policy ... based on concepts of fairness, feasibility, practicality and functional responsibility." *Zaza*, 675 A.2d at 635; *O'Neil v. Crane Co.*, 266 P.3d 987, 1005 (Cal. 2012) ("The question whether to apply strict liability in a new setting is largely determined by the policies underlying the doctrine."). Indeed, strict liability is an inherently policy-laden doctrine, aimed at ensuring that the "risk of loss" stemming from an "unsafe" product is "rationally allocated to the manufacturers, distributors, and other parties in the stream of commerce."

Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993); *see also Zaza,* 675 A.2d at 636 ("[P]rinciples of public policy, the foundation that undergirds legal responsibility, are appropriate considerations in the strict liability context."); *Beshada*, 447 A.2d at 546 (explaining that strict liability is premised on the notion that "if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them.")

Consistent with these underlying policies, New Jersey courts have limited strict liability to those entities responsible for a defective product reaching the market—namely, product manufacturers and other entities similarly situated in the "chain of distribution," such as retailers or other distributors. *Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 186 (N.J. App. Div. 2014); *see, e.g. Miltz v. Borroughs-Shelving, a Div. of Lear Siegler, Inc.*, 497 A.2d 516, 525 (N.J. App. Div. 1985) (to prevail on a strict liability theory, the plaintiff must "establish that the defect did in fact exist when the product was distributed by the manufacturer or seller into the stream of commerce"); *Mettinger v. Globe Slicing Mach. Co.*, 709 A.2d 779, 783 (N.J. 1998) ("A consumer injured by a defective product may bring a strict liability action against any business entity in the chain of distribution."); *Mort v. Besser Co.*, 671 A.2d 189, 194 (N.J. App. Div. 1996) ("Because it was in the chain of distribution and in the business of selling items of this kind, it could be held strictly liable in tort."); *Promaulayko v. Johns Manville Sales Corp.,* 562 A.2d 202, 205 (N.J. 1989) ("In a strict-liability action, liability extends beyond the manufacturer to all entities in the chain of distribution.").

New Jersey courts apply this approach because the entities in the chain of distribution of an injury-causing product are those that can best avoid the product's risks, insure against them, and bear the costs associated with them. "Regardless of a defendant's position in the chain of

distribution, 'the basis for his liability remains that he has marketed or distributed a defective product' ... and that product caused the plaintiff's injury." *O'Neil*, 266 P.3d at 995.

Relatedly, and for the same reasons, New Jersey courts have also held that "[a] manufacturer or seller is not liable for defects created or caused by others down the line of distribution after the product leaves the manufacturer's or seller's control." *Miltz*, 497 A.2d at 525; *see also Scanlon v. Gen. Motors Corp., Chevrolet Motor Div.*, 326 A.2d 673, 678 (N.J. 1974) (explaining that "an explicit element of an action in strict liability in tort" is that "the defect was present while it was in the control of the particular defendant being sued").

In line with these settled principles, New Jersey courts have expanded the scope of strict liability only when doing so would impose liability on those that profit from, and can influence, the marketing of the injury-causing product. *See, e.g. Promaulayko*, 562 A.2d at 205 (distributors and retailers); *Michalko*, 451 A.2d at 183 (rebuilders and component manufacturers); *Realmuto v. Straub Motors, Inc.*, 322 A.2d 440, 443 (N.J. 1974) (used car dealer); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769, 781 (N.J. 1965) (lessors). In these examples, the defendant may not have been the manufacturer or initial supplier of the product, but clearly played a significant role in bringing the product to market, and thus possessed the ability to influence the product's manufacture and/or marketing.

On the other hand, New Jersey courts have declined to expand the scope of strict liability in circumstances where "[h]olding [the] defendant liable would result in an unreasonable expansion of the products liability law." *Zaza*, 675 A.2d at 636; *see, e.g. Miltz*, 497 A.2d at 525 ("The courts have not yet extended the law of strict liability so far as to make a contractor strictly liable for defects in products which his subcontractor has manufactured or sold[.]"); *Ranalli v. Edro Motel Corp.*, 690 A.2d 137, 140 (N.J. App. Div. 1997) ("The principles and policy

concerns noted in *Dixon* and *Dwyer* apply with equal force here. We are of the view that to apply the broad brush of strict liability to motel owners would impose an unusual and unjust burden."); *Dwyer v. Skyline Apartments, Inc.*, 301 A.2d 463, 467 (N.J. App. Div. 1973), *aff'd*, 311 A.2d 1 (N.J. 1973) ("The underlying reasons for the enforcement of strict liability against the manufacturer, seller or lessor of products or the mass builder-vendor of homes do not apply to the ordinary landlord of a multiple family dwelling. Such a landlord is not engaged in mass production whereby he places his product—the apartment—in a stream of commerce exposing it to a large number of consumers."); *Ranalli v. Edro Motel Corp.*, 690 A.2d 137, 140 (App. Div. 1997) ("Among the critical factors weighing against strict liability, we pointed to the fact that furnishing the [bowling] ball was a part of a larger service supplied by the [bowling alley] owner, that there was no separate fee charged for use of the ball, and that the patron's possession of the ball was intended to be short term."); *see also O'Neil*, 266 P.3d at 1005 ("[T]he strict liability doctrine derives from judicially perceived public policy considerations and therefore should not be expanded beyond the purview of these policies.").

The common theme underlying these refusals to expand the scope of the strict liability cause of action is a recognition that the defendant did not play a significant role in bringing the alleged harm-causing product to market and thus did not exercise significant (or, indeed, potentially *any*) control over the manufacture or the marketing of the harm-causing product. As discussed below, that is exactly the case in the matter *sub judice*.

B. A manufacturer owes no duty to warn of dangers associated with products it did not make or sell, even if it is foreseeable they will be used with its products.

Applying the principles discussed above in the context of an actual controversy, courts have correctly determined that it is a "fundamental principle" of products liability that a plaintiff must "prove, as an essential element of his case, that the defendant manufacturer actually made

the particular product which caused the injury." *Brown ex rel. Estate of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 515 (D.N.J. 2002) (quoting *Namm v. Charles E. Frosst & Co.*, 427 A.2d 1121, 1125 (N.J. App. Div. 1981)); *O'Neil*, 266 P.3d at 994–95 ("A bedrock principle in strict liability law requires that the plaintiff's injury must have been caused by a defect in the defendant's product."); 63 Am. Jur. 2d Prods. Liab. § 157 (2d ed. 2011) ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendant manufacturer made the product which caused the injury.").

Thus, to prevail on a strict liability claim, the plaintiff must show that the alleged defect "existed when the product left the manufacturer's control" and "proximately caused injuries to the plaintiff." *Myrlak*, 723 A.2d at 52. The law does "not extend[] manufacturer liability to products manufactured by another, even when used in combination, unless the manufacturer's own product creates the risk of harm." *Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 357 (6th Cir. 2009); *see, e.g. O'Neil*, 266 P.3d at 1004 (strict liability does not require manufacturer to "warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together."); *Firestone Steel Prod. Co. v. Barajas*, 927 S.W.2d 608, 616 (Tex. 1996) ("A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products."); *Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986) ("The duty to warn must properly fall upon the manufacturer of the replacement component part."). Established treatises reaffirm this principle of black-letter law. *See,* Restatement (Third) of Torts: Prod. Liab. § 5 cmt. a (1998); 63A Am. Jur. 2d Prods. Liab. § 1027.

Indeed, and importantly here, "*even when it is foreseeable* that a product will be used in

combination with another, courts [...] have declined to impose liability on a manufacturer for the product it did not manufacture." *Dreyer*, 326 F. App'x at 357 (emphasis added); *see also O'Neil*, 266 P.3d at 1005 ("[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product, or one whose arguably defective product does not actually cause harm."). This is because "[f]oreseeability, alone, does not define duty." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001). Rather, "it merely determines the scope of the duty once it is determined to exist." *Id.*; *see Simonetta v. Viad Corp.*, 197 P.3d 127, 131 (Wash. 2008) (*en banc*) ("Foreseeability does not create a duty but sets limits once a duty is established.").

Against these bedrock principles, the majority of courts to consider the issue presented here have categorically held that a manufacturer owes *no* duty to warn of hazards associated with asbestos-containing replacement parts that it did not manufacture or supply. *See, e.g. O'Neil,* 266 P.3d 987; *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 500 (Wash. 2008); *Thurmon v. Georgia Pac., LLC*, 650 F. App'x 752 (11th Cir. 2016); *Grant v. Foster Wheeler, LLC*, 140 A.3d 1242 (Me. 2016); *Whiting v. CBS Corp.*, 982 N.E.2d 1224 (Mass. App. Ct. 2013); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012); *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414 (Cal. Ct. App. 2009); *Lindstrom v. AC Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Evans v. CBS Corp.*, Civ. No. 15-681-SLR-SRF, 2017 WL 240079 (D. Del. Jan. 19, 2017); *Schaffner v. Aesys Techs., LLC*, No. 1901 EDA 2008, 2010 WL 605275 (Pa. Super. Jan. 21, 2010); *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019 (S.D. Ill. 1989).[2]

[2] The minority of courts that have created exceptions to this non-liability rule have done so far more narrowly than the Appellate Division did here. For example, those courts have held that a manufacturer is not liable for injuries caused by replacement parts it did not make or supply unless the product ***required*** the use of asbestos to function or, in some cases, that the manufacturer ***specified or directed*** the use of asbestos with its product. *See, e.g. In re New York City Asbestos Litig. (Dummitt)*, 59 N.E.3d 458 (N.Y. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 998 (Md. 2015); *Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 656 (E.D. Pa. 2015); *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1076 (Wash. 2012).

Outside of the asbestos context, courts have also consistently applied the same principles to hold that a manufacturer should not bear liability for injuries caused by a product it did not manufacture, sell, or distribute. *See Dreyer*, 326 F. App'x at 357 (manufacturer of a paint sprayer had no duty to warn of injuries caused when a solvent used to clean sprayer ignited, even though the use of the solvent was clearly foreseeable to the sprayer's makers); *Baughman*, 780 F.2d at 1133 (manufacturer cannot be liable for injuries caused by replacement component parts used with its product that it neither manufactured nor supplied); *Exxon Shipping Co. v. Pacific Resources, Inc.*, 789 F. Supp. 1521 (D. Hawaii 1991) (maker of mooring terminal not responsible for defective "chafe chain" because there was no evidence that the defendant "designed, manufactured, distributed, sold, or otherwise supplied the specific chafe chain which failed"); *Brown v. Drake-Willock International, Ltd.*, 530 N.W. 2d 510, 515 (Mich. Ct. App. 1995) ("The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else."); *Toth v. Economy Forms Corp.* 571 A. 2d 420, 423 (Pa. Super. 1990) ("Once again, we emphasize appellee [manufacturer] did not supply the 'defective' product. Appellants' theory would have us impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking that it did not supply. Pennsylvania law does not permit such a result."); *Walton v. Harnischfeger* 796 S.W.2d 225, 227-282 (Tex. App. 1990) (crane manufacturer had no duty to warn about rigging it did not place into the stream of commerce); *Newman v. General Motors Corp.*, 524 So.2d 207, 209 (La. Ct. App. 1988) ("A manufacturer cannot be liable in a product liability claim where it shows that it did not manufacture or install the component of the product alleged to be defective").

II. *Hughes* Correctly Held that a Manufacturer is Not Strictly Liable for Injuries Caused by Products it Did Not Make or Sell

In its decision below, the Appellate Division disregarded or misapplied many of these

settled principles in favor of adopting a virtually limitless conception of strict liability based on negligence concepts like "foreseeability" and a defendant's subjective knowledge. *See Whelan v. Armstrong Int'l Inc.,* 190 A.3d 1090, 1107 (N.J. App. Div. 2018) ("Here, it was foreseeable, at the time defendants placed their products into the marketplace, that asbestos-containing component parts of the product would be replaced with similar asbestos-containing parts."). In doing so, it explicitly departed from the rule established just four years earlier in another asbestos case, *Hughes v. A.W. Chesterton Co.*, 89 A.3d 179 (N.J. App. Div. 2014), in which the court held that strict liability requires proof of "exposure to an *injury-producing element* in [a] product that was manufactured or sold by [the] defendant." *Id.* at 190 (emphasis added).

Though the *Hughes* court couched its analysis in terms of proximate causation,[3] rather than duty, its reasoning was fundamentally correct in light of the principles discussed above. *See Zaza v. Marquess & Nell, Inc.*, 675 A.2d 620, 635 (N.J. 1996) (like the concept of legal duty, "[u]tilization of the term proximate cause to draw judicial lines beyond which liability will not be extended is fundamentally ... an instrument of fairness and policy"). As the *Hughes* Court cautioned, if plaintiffs were permitted to "prove causation by showing exposure to a product without also showing exposure to an injury-producing element in the product that was manufactured or sold by [the] defendant," the defendant "who failed to give a warning could be strictly liable for alleged injuries long after the product entered the marketplace even if the injury-producing element of the product no longer existed." *Hughes*, 89 A.3d at 190. "The imposition of liability based upon such proofs would rest upon no more than mere guesswork ... and would fail to limit liability 'only to those defendants to whose products the plaintiff can

[3] Specifically, the *Hughes* court found that "medical causation" was lacking where a plaintiff's injury is caused by an asbestos-containing part that is not made, sold, or supplied by the defendant. "Medical causation" is a term commonly used by New Jersey courts in asbestos or other toxic exposure cases to refer to the requirement that a plaintiff "demonstrate that his or her injuries were *proximately caused* by exposure to *defendant's asbestos product.*" *Coffman v. Keene Corp.*, 628 A.2d 710, 716 (N.J. 1993) (emphasis added).

demonstrate he or she was intensely exposed.'" *Id.*

In addition to improperly relying on negligence and foreseeability concepts that have no place in the analysis of a strict liability claim, the Appellate Division here erred in defining the "products" at issue in this case. The Appellate Division indicated that the defendants' "products" were the equipment as it was delivered (i.e., with the original asbestos-containing component parts). However, in this case the plaintiff did not encounter any such original parts, but alleged asbestos exposure only from subsequently installed asbestos-containing replacement parts that the defendants did not make, sell or supply. The Appellate Division nonetheless opined that"[a] defect that existed when the product left the manufacturer's control is neither ameliorated nor diminished when it arises from a component that has been replaced with a component that contains the identical injury-producing element." *Whelan*, 455 N.J. Super. at 604. Accordingly, in the view of the Appellate Division, because a duty to warn applied to defendants' products as delivered, then such duty continued to apply even after the original asbestos-containing materials in the defendants' equipment were replaced with other asbestos-containing materials made, sold, or delivered by other parties.

Put simply, what the *Hughes* Court correctly recognized, and the Appellate Division here did not, was that even if the inclusion of an asbestos-containing part could constitute a "defect" in a manufacturer's equipment, there must be a causal link between *that* "defect" and the plaintiff's injury. Where, as here, the plaintiff never encountered the particular asbestos-containing part supplied by the manufacturer, there is no causal link, and thus no cognizable strict liability claim. In such circumstances, it is the manufacturer of the defective part that *actually harmed the plaintiff* who is liable.

The Appellate Division's analysis bypassed entirely the core component of the "duty"

analysis in the strict liability context. As described above, "[t]he focus in a strict liability case is upon the product itself," *Michalko*, 451 A.2d at 183, and the role that the defendant played in placing the "injury-producing element in the product" *Hughes,* 89 A.3d at 190, into the "stream of commerce." *Coffman*, 628 A.2d at 718. By bypassing this fundamental first question in the analysis of "duty," the Appellate Division imposed strict liability on entities that did not make, sell, distribute, market, select, profit from, or otherwise exercise any control whatsoever over the alleged harm-causing product.

This result is contrary to *Hughes* and New Jersey precedent. Under this Court's precedent, strict liability "should be imposed only when the manufacturer is responsible for *the defective condition*," *Zaza*, 675 A.2d at 627 (emphasis added), not merely the larger system in which a third-party's defective product is later installed. *See, e.g. id.* at 631 ("Plaintiff does not allege any manufacturing defect in the quench tank itself. The quench tank was not in and of itself dangerous or defective. It was a sheet metal tank with holes in it."); *Miltz*, 497 A.2d at 525 ("[A] manufacturer or seller is not liable for defects created or caused by others down the line of distribution after the product leaves the manufacturer's or seller's control.").

In imposing strict liability on entities not in the chain of distribution of a harm-causing product, the Appellate Division relied heavily on its prior decision in *Seeley v. Cincinnati Shaper Co.*, 606 A.2d 378 (N.J. App. Div. 1992). The Appellate Division reasoned that, since strict liability was applied in *Seeley* when a defendant's press brake machine had been modified by, among other things, the inclusion of replacement components, strict liability could equally apply here in view of the "modification" of defendants' equipment. But *Seeley* is inapposite. In *Seeley*, there was no dispute that the cause of the injury *was the defendant's machine*. Here, by contrast, there is no evidence, or even argument, that Mr. Whelan was injured by a metal piece of

equipment made, sold, or supplied by defendants. Rather, the only allegation is that Mr. Whalen was injured when he encountered asbestos-containing parts made or sold by others post-sale.

III. The "Exceptions" to the General Rule of Non-Liability Established Under Maritime Law in *DeVries* are Negligence Concepts with No Relevance to Strict Liability

Finally, the United States Supreme Court's recent decision in *Air & Liquid Sys. Corp. v. DeVries*, — S.Ct. —, 2019 WL 1245520 (2019) does not impact the analysis discussed above. First and foremost, *DeVries* is directly binding only in **maritime** cases, in which courts are guided by the law's "longstanding solicitude for sailors." *DeVries*, 2019 WL 1245520, at *3, 5, 6 ("We do not purport to define the proper tort rule outside of the maritime context.").

Second, *DeVries* is a negligence only case. *Id.* ("In this negligence case, we must decide whether a manufacturer has a duty to warn when the manufacturer's product requires later incorporation of a dangerous part..."). *DeVries,* and other cases like it, incorporate and rely on principles of negligence that are not relevant to strict liability claims like that at issue here, such as the subjective knowledge and culpability of the manufacturer, and the reasonableness of the manufacturer's conduct in light of those factors. *See DeVries*, 2019 WL 1245520, at *2 ("...the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses...."). Such considerations are foreign to strict liability, which instead places the "focus [] on the alleged injury-producing asbestos product itself." *Whelan*, 190 A.3d at 1104. In particular, the duty analysis in the strict liability context focuses solely on the role that the defendant played in the marketing and distributive chain of the harm-causing product.

CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Division and remand with instructions to reinstate the trial court's orders of summary judgment with respect to Defendant-Petitioner.

April 10, 2019

Respectfully submitted,

K&L GATES LLP
Michael E. Waller
NJ I.D. 031921990
One Newark Center, Tenth Floor
Newark, NJ 07102
973.848.4000 (t)
973.848.4001 (f)

Tara L. Pehush
NJ I.D. 026022006
599 Lexington Ave.
New York, NY 10022
212.536.3900 (t)
212.536.3901 (f)

U.S CHAMBER LITIGATION CENTER
Daryl Joseffer (*pro hac to be submitted*)
Michael B. Schon (*pro hac to be submitted*)
1615 H St., NW
Washington, DC 20062
202.463.5948 (t)

ADDITIONAL *PRO HAC* COUNSEL
Nicholas P. Vari (*pro hac to be submitted*)
Michael J. Ross (*pro hac to be submitted*)
Jake D. Morrison (*pro hac to be submitted*)
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
412.355.6500 (t)
412.355.6501 (f)

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATION OF SERVICE

TARA L. PEHUSH, of full age, certifies as follows:

1. I am an attorney at law of the State of New Jersey and a partner in the law firm K&L Gates LLP, attorneys for proposed amicus Chamber of Commerce of the United States of America (the "Chamber" or "U.S. Chamber of Commerce") in this matter.

2. On this date, I caused the original and eight copies each of the Chamber's Motion for Leave to Appear as *Amicus Curiae* and accompanying proposed Amicus Brief to be hand-delivered via courier for filing to:

Office of the Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

3. On this date, I caused two copies each of the Chamber's Motion for Leave to Appear as *Amicus Curiae* and accompanying proposed Amicus Brief to be served via e-mail and overnight mail on:

Rachel A. Placitella, Esq.
Cohen, Placitella & Roth, P.C.
127 Maple Avenue
Red Bank, New Jersey 07701
Attorneys for Plaintiff-Respondent

Shannon K. Tully, Esq.
The Lanier Law Firm PLLC
126 E. 56th Street, 6th Floor
New York, New York 10022
Attorneys for Plaintiff-Respondent

Sean Marotta, Esq.
Hogan Lovells US LLP
555 Thirteenth Street, N.W.
Washington D.C. 20004
Attorneys for Defendant-Petitioner Ford Motor Company

Joseph F. Lagrotteria, Esq.
Adam G. Husic, Esq.
LeClairRyan PLLC
One Riverfront Plaza
1037 Raymond Boulevard
Newark, New Jersey 07102
Attorneys for Defendant-Petitioner Ford Motor Company

Karen J. Stanzione, Esq.
Michelle B. Cappuccio, Esq.
Colleen B. Cavanaugh, Esq.
Reilly, McDevitt & Henrich, P.C.
3 Executive Campus, Suite 310
Cherry Hill, New Jersey 08002
Attorneys for Defendant-Petitioner Cleaver-Brooks, Inc.

Nancy McDonald, Esq.
Joseph D. Rasnek, Esq.
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
Morristown, New Jersey 07962
Attorneys for Defendant-Petitioner Burnham LLC

Marc S. Gaffrey, Esq.
Anita S. Cohen, Esq.
Hoagland, Longo, Moran, Dunst & Doukas, LLP
40 Paterson Street
New Brunswick, New Jersey 08903
Attorneys for Defendant-Petitioner Johnson Controls, Inc.

Lisa M. Pascarella, Esq.
Stephanie A. DiVita, Esq.
Pascarella DiVita, PLLC
2137 Route 35, Suite 290
Holmdel, New Jersey 07733
Attorneys for Defendant-Petitioner NIBCO, Inc.

Sara K. Saltsman, Esq.
Mayfield, Turner, O'Mara & Donnelly, P.C.
2201 Route 38, Suite 300
Cherry Hill, New Jersey 08002
Attorneys for Defendant-Petitioner Carrier Corporation

Thomas J. Kelly, Jr., Esq.
Vasios, Kelly & Strollo, P.A.
2444 Morris Avenue, Suite 304
Union, New Jersey 07083
Attorneys for Defendant-Petitioner Armstrong International, Inc.

4. On this date, I caused one copy each of the Chamber's Motion for Leave to Appear as *Amicus Curiae* and accompanying proposed Amicus Brief to be served via overnight mail on:

Office of the Clerk
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
CN-006
Trenton, New Jersey 08625

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

Tara L. Pehush (NJ ID 026022006)

Dated: April 10, 2019