

12-1-88

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Wanda Gail Cox, Executrix of)
the Estate of Michael Wayne)
Cox,)

Plaintiff,)

-vs-)

Georgia Gulf Corporation,)
Conoco, Inc., Sumitomo)
Corporation of America,)
Occidental Chemical)
Corporation, Union Carbide)
Corporation, Occidental)
Electrochemicals Corporation,)
The B. F. Goodrich Company,)
Formosa Plastics Corporation,)
Delaware, and Tenneco)
Polymers, Inc.)

Defendants.)

LEO - 1 1988
ANN A. BUCHANAN
CLERK OF COURT

CERTIFICATE OF SERVICE

CASE NO. 8:88-1400-3

CASE NO. 8-88-1399-3

I hereby certify that I have this date served a copy of the Plaintiff's Memorandum and Exhibits in opposition to Defendant's Motion for Summary Judgment on Mary Lou Hill, attorney for the Defendants Georgia Gulf Corporation, Conoco Inc., Occidental Chemical Corporation, Union Carbide Corporation, Occidental Electrochemicals Corporation, The B. F. Goodrich Company, Tenneco Inc. and Tenneco Oil Company, and Tenneco Polymers, Inc., in the above captioned action by delivering to her personally a copy of the same at 1000 East North Street, Greenville, South Carolina this 15th day of December, 1988.

MITCHELL & ARIAIL

UCC 079845

By: s/ Robert M. Ariail
Robert M. Ariail
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Wanda Gail Cox, Executrix of)
the Estate of Michael Wayne)
Cox,)

Plaintiff,)

-vs-)

Georgia Gulf Corporation,)
Conoco, Inc., Sumitomo)
Corporation of America,)
Occidental Chemical)
Corporation, Union Carbide)
Corporation, Occidental)
Electrochemicals Corporation,)
The B. F. Goodrich Company,)
Formosa Plastics Corporation,)
Delaware, and Tenneco)
Polymers, Inc.)

Defendants.)

DOCKETED FILE

880 - 1 10

SAW A. BIRCH, CL

CASE NO. 8:88-1400-3
CASE NO. 8-88-1399-3

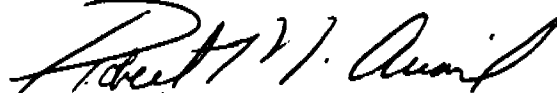
PLAINTIFF'S MEMORANDUM IN RESPONSE TO
MOTION FOR SUMMARY JUDGMENT ON BEHALF OF
TENNECO, INC. AND TENNECO OIL COMPANY

ROBERT M. ARIAIL
MITCHELL & ARIAIL
119 WILLIAMS STREET
GREENVILLE, S. C. 29601
(803) 271-4943
ATTORNEY FOR PLAINTIFF

UCC 079846

7
The Defendants have been dismissed from the action and
no response to their Motion for Summary Judgment is deemed
appropriate

Respectfully submitted,


Robert M. Ariail

UCC 079847

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Lit
Cox
~~Case~~
Court Paper

DEC - 1 1988

11-30-88

Wanda Gail Cox, Executrix of)
the Estate of Michael Wayne)
Cox,)

Plaintiff,)

-vs-)

Georgia Gulf Corporation,)
Conoco, Inc., Sumitomo)
Corporation of America,)
Occidental Chemical)
Corporation, Union Carbide)
Corporation, Occidental)
Electrochemicals Corporation,)
The B. F. Goodrich Company,)
Formosa Plastics Corporation,)
Delaware, and Tenneco)
Polymers, Inc.)

Defendants.)

CASE NO. 8:88-1400-3
CASE NO. 8-88-1399-3

R - RECEIVED
DEC 02 1988

PLAINTIFF'S MEMORANDUM IN RESPONSE TO
MOTION FOR SUMMARY JUDGMENT ON BEHALF OF
GEORGIA GULF, ET AL

ROBERT M. ARIAIL
MITCHELL & ARIAIL
119 WILLIAMS STREET
GREENVILLE, S. C. 29601
(803) 271-4943
ATTORNEY FOR PLAINTIFF

UCC 079848

INDEX

Page No.

Factual Background	1
Plaintiff's Legal Claims	3
Defendant's Motions for Summary Judgment	5
Argument I	7
Argument II	20

UCC 079849

FACTUAL BACKGROUND

The following factual background is based upon the affidavits and exhibits submitted herewith.

Michael Wayne Cox was employed as a laminating machine operator at the Stauffer Chemical Company fabricating plant in Anderson County, South Carolina from June 29, 1979 until September 30, 1982 and September 10, 1985 until March 15, 1986. In March, 1986 Mr. Cox became ill and required hospitalization during which it was determined that he had angiosarcoma of the liver.

Angiosarcoma is a very rare form of cancer which has no known effective treatment or long-term survivors and is invariably fatal within a period of one year from the time of diagnosis. Mr. Cox died at the age of thirty (30) on December 14, 1986 leaving a wife and two young children as his survivors.

The Defendants manufacture and/or sell a product known as polyvinyl chloride resin. The Stauffer Chemical Company fabricating plant bought polyvinyl chloride resin from each of the Defendants during the time in which Mr. Cox was employed at the fabricating plant.

In the process used to make the polyvinyl chloride resin there is an incomplete polymerization of all of the vinyl chloride. The portion of vinyl chloride not polymerized is commonly referred to as a residual vinyl chloride monomer and it remains a part of the resin.

The manufacturers of polyvinyl chloride resin are required, by federal regulation, to remove portions of the residual vinyl chloride monomer from the resin. It is, however, impossible to remove all of the residual vinyl chloride monomer from the polyvinyl chloride resin.

Exposure to vinyl chloride monomer is an extremely dangerous health risk. Such exposure is one of only three known causes of angiosarcoma. The causal connection between exposure to vinyl chloride and resulting angiosarcoma is well established in the medical literature and the consequences of angiosarcoma are fatal.

The polyvinyl chloride resin was shipped by the Defendants to the Stauffer fabricating plant in both bags and bulk form. The resin is powdery in form and fabricated at the Anderson plant into polyvinyl film. The laminating machine which Mr. Cox operated was used to bond that polyvinyl film to other materials to make wallpaper, camouflage material, etc.

The fabrication of polyvinyl chloride resin into film and the processing of that film are the reasonable, expected, normal, intended and foreseeable uses of the resin sold by the Defendants.

During the fabrication and processing of the polyvinyl film there occurs a release of the residual vinyl chloride monomer contained in the resin. It is the release of this residual vinyl chloride monomer from the polyvinyl chloride resin and its fabricated product during the fabrication process which Plaintiff contends is the cause of the exposure of Michael Wayne Cox to vinyl

chloride. Plaintiff contends that such exposure caused Michael Wayne Cox to develop angiosarcoma, a disease from which he died.

PLAINTIFF'S LEGAL CLAIMS

Plaintiff brought the present case under the diversity jurisdiction of this Court and founds her claim in both: (a) negligent failure to warn; and, (b) strict liability under §15-73-10, Code of Laws of South Carolina, 1976 (§402A of the Restatement (Second) of Torts).

The elements of negligent failure to warn, as set forth in Livingston v. Noland Corp., 293 S.C.521, 362 S.E.(2d)16(S.C.S.Ct.1987), are as follows:

(a) Defendant must be a supplier or manufacturer of a product;

(b) Defendant knows or has reason to know the product is or is likely to be dangerous for its intended use;

(c) Defendant does not have reason to believe the user will realize the potential danger;

(d) Defendant fails to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous.

The claim by Plaintiff under strict liability is founded upon the provisions of §15-73-10, Code of Laws of South Carolina,

1976. Plaintiff contends that the polyvinyl chloride resin was defective, within the meaning of the statute, due to the Defendants' failure to adequately warn the Plaintiff's deceased husband about the danger associated with the normal and intended use of the product.

The particular danger was the release of residual vinyl chloride monomer from the polyvinyl chloride resin and its fabricated product during the fabrication process.

South Carolina recognizes that "a product may, by reason of its nature and use, be unreasonably dangerous unless proper instructions and warnings are supplied for its intended use. Many products cannot be made completely safe for use. However, such products may be useful and desirable. If they are properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions, they cannot be said to be defective."

Claytor v. General Motors Corporation, 277 S.C. 259, 286 S.F.2d 129 (S.C.S.C.1982) (Emphasis added)

The failure to provide adequate warnings regarding the dangers associated with the normal and intended use of the product constitute a defect within the meaning of §15-73-10, Code of Laws of South Carolina, 1976. Such defect will subject the manufacturer and/or seller to liability under the statute if the absence of such warning makes the product unreasonably dangerous. Marchant v. Lorain Division of Koehring, 272 S.C.243, 251 S.E.2d 189 (S.Ct.S.C. 1979)

In summary, Plaintiff contends that the Defendants failed to warn Plaintiff's deceased husband about the dangers associated

with the normal and intended use of the polyvinyl chloride resin and its fabricated products. In particular, Plaintiff contends that Defendants failed to warn about the release of residual vinyl chloride monomer from the resin while same was being used, as intended, in the fabrication process at the Stauffer Chemical Company fabricating plant.

Plaintiff asserts that Defendants' failure to warn, as above described, was: (a) negligent; and, (b) created an unreasonably dangerous product within the meaning of §15-73-10, and as a direct result thereof, her husband died.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Defendants contend in their Motions For Summary Judgment that the Plaintiff's claims should be dismissed as a matter of law based upon the so called "sophisticated user" or "knowledgeable user" defense. The "sophisticated user", "sophisticated purchaser", or "knowledgeable user" defense has been stated as follows:

Some hold that where there is a sophisticated purchaser knowledgeable of the dangers of the product, the supplier can, as a matter of law, rely on that purchaser/employer to inform its employees. In Re Asbestos Litigation (Mergenthaler) 542A 2d 1205 (Del. Super.1986)

and

where a bulk product is sold to a skilled industrial user which is familiar with the risks attendant thereto and which totally controls its use, the manufacturer's duty to warn is limited, as a matter of law, to the learned or informed intermediary, and not to an employee thereof. Hall v. Ashland Oil Co., 625 F.Supp. 1515 (D.Conn 1986)

The obvious prerequisites of this defense are that there be

(a) an employer who is (b) knowledgeable. Defendants argue that the employer of Plaintiff's deceased husband was "knowledgeable" within the meaning of this defense, and therefore Defendants had "no duty to warn Stauffer, a "sophisticated user" of polyvinyl chloride, or its employees". (Georgia Gulf, et al Memo Page 6)

The "sophisticated user" defense is recognized in the law in certain limited areas but is not available in all areas. Therefore, to determine its availability as a defense in this case, the underlying basis of the defense must be analyzed and compared to the claims asserted by the Plaintiff in the present action. That analysis will reveal the following:

I. The "sophisticated user" defense is not available to claims founded upon strict liability under §402A of the Restatement (Second) of Torts.

II. In those cases where the "sophisticated user" defense is available, negligence claims, there are numerous factors which must be analyzed from a factual perspective before the defense becomes a complete defense as a matter of law. Those factors are as follows:

- (a) Did the employer possess sufficient knowledge to be "sophisticated" or "knowledgeable" under the law?
- (b) Did the manufacturer provide the employer with adequate warning?
- (c) Did the manufacturer exercise reasonable care to warn?

ARGUMENT I

THE "SOPHISTICATED USER" DEFENSE IS NOT AVAILABLE TO
A CLAIM FOUNDED UPON STRICT LIABILITY UNDER §402A OF
THE RESTATEMENT (SECOND) OF TORTS.

This is a diversity action founded upon South Carolina law. South Carolina, by legislative action, adopted the law of strict liability by enacting §402A of the Restatement (Second) of Torts, §15-73-10, Code of Laws of South Carolina, 1976. Reed v. Tiffin Motor Homes, Inc., 697 F2d 1192 (4th Cir. 1982). The Court in Reed held:

Under the theory of strict liability, the exercise of due care by the Defendant will not relieve him of liability. . . . Because the Plaintiff need not show negligence, the focus of the trier of fact is upon the product itself, not the conduct of the manufacturer. . . This is because:

Public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper person to afford it are those who market the products.
(Emphasis Supplied)

With these principles being recognized as the basis for strict liability, the Courts have held, with virtually no exception, that the sophisticated user defense is not available in a claim founded upon 402A of the Restatement (Second) of Torts. :

Mich.	<u>Russo v. Abex Corp.</u> , 670 F.Supp. 206 (E.D.Mich.1987)
N. J.	<u>Menna v. Johns-Manville Corp.</u> , 585 F.Supp. 1178 (D.N.J. 1984)

3rd Circuit Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d, 481 (3d Cir.1985)

C nn. Hall v. Ashland Oil Co., 625 FF.Supp. 1515 (D.Conn.1986)

3rd Circuit Whitehead v. St. Joe Lead Company, Inc., et al, 792, F.2d 238 (3rd Cir.1984)

N. J. Olencki v. Mead Chemical Co., 507A 2d 803 (N.J.Supp.1986)

Penn. Neal v. Carey Canadian Mines, 548 F.Supp. 357 (E.D. Penn.1982)

Penn. Berkebile v. Brantley Helicopter Corporation, 337A 2d 803 (Sup.Ct.Penn,1975)

3rd Circuit Brown v. Caterpillar Tractor Co., 741F 2d 656 (3d Cir.1984)

Ill. Hammond v. North American Asbestos Corporation, 454 N.E.2d 210 (S.Ct.Ill.1983)

Minn. Todalen v. United States Chemical Company, (Ct.App.Minn.1988) 424 N.W.2d 73

N.Y. Billsborrow v. Dow Chemical, U.S.A., 527 N.Y.S.2d 352 (Sup.1988)

9th Circuit Jackson v. Coast Paint and Lacquer Company, 499 F.2d 809 (9th Cir.1974)

check these

The underlying premise for these decisions is that the "sophisticated user" defense is a creation of the law of negligence as developed in either the common law or as adopted in the form of §388 of the Restatement (Second) of Torts. Russo v. Abex Corporation, supra at 207. Therefore, because the basis of the "sophisticated user" defense is a negligence concept, it has been determined to be inapplicable to a strict liability claim.

In reading the case law involving the "sophisticated user" defense, it is essential to determine the basis of the Plaintiff's claim, i.e. negligence or strict liability under §402A, to accurately analyze the holding of the case. The holdings of the

various cases is directly governed by the premise of plaintiff's claim.

The Negligence basis of the "sophisticated user" defense is clearly illustrated in the case upon which Defendants so heavily rely, Goodbar v. Whitehead Brothers, 591F Supp. 552 (W.D.Va. 1984). There the Court said:

The allegations of strict liability in tort have previously been dismissed by the Court since the Supreme Court of Virginia has not adopted the doctrine of strict liability set forth in the RESTATEMENT (SECOND) OF TORTS, §402A (1965). . . This opinion will now focus upon the remaining legal theories of negligence and breach of implied warranty of merchantability. . .

In Neal v. Carey Canadian Mines, 548 F.Supp. 357 (E.D.Penn.1982). . . Their claims were predicated on strict liability and negligence under Restatement §402A and 388, respectively. Under the strict liability theory, the Court, relying on a Pennsylvania State decision, held that the supplier/defendants of an inherently dangerous product like asbestos had a nondelegable duty to provide adequate warnings that would reach the ultimate user. . . Neal may be correct that the duty to warn is nondelegable under Pennsylvania's strict liability doctrine, but it simply does not hold true as to the §388 duty to warn requirements on a negligence claim.

The affirmation of the Goodbar decision on appeal also clearly established that it was founded solely upon negligence principles, not strict liability, when the Court in Beale v. Hardy, 769 F.2d 213(4th Cir.1985) stated:

The District Court correctly analyzed this issue under the Restatement (Second) of Torts, §388 (1965), which has been adopted as the law of Virginia by the Supreme Court of Virginia.

The Fourth Circuit's own recognition of the very limited factual and legal basis for the holding in Goodbar and Beale is illustrated by its decision in Oman v. Johns-Manville Corpo-

ration, 764 F.2d 224 (4th Cir.1985). This decision, written by Circuit Judge Robert Chapman two months prior to Beale, affirm d the lower court in its refusal to charge the jury on the "sophisticated user" defense. The Court held, citing Comment "n" to §388;

The defendants argue that the District Court should have charged the jury that the manufacturer's duty to warn the ultimate users, the employees, is satisfied if a sophisticated employer is aware of the dangers involved in the use of the product. . . In this case the product, because it contained asbestos fibers, was very dangerous. . . We cannot say that the District Court erred in refusing to give the charge requested by the manufacturers under the set of facts involved in this case. (Emphasis Added)

In reviewing those cases which deal directly with the availability of the "sophisticated user" defense to a strict liability claim under §402A, the Courts have held as follows:

Russo v. Abex, supra at 207

The "sophisticated user" defense developed in negligence cases because, there, liability turns on the reasonableness of defendant's conduct. However, the defense does not exist under strict liability in tort principles because, in that context, a seller is duty bound to warn all foreseeable users and the risk of an employer's failure to warn employees is one of the risks imputed to the seller as a matter of law.

Menna v. Johns-Manville Corporation, supra at 1184

A close examination of the "sophisticated user" defense along with prior interpretations of New Jersey law has lead me to conclude that this defense should be available as to Plaintiff's negligence claims but not as to Plaintiff's strict liability claims.

Crucial to this determination is an understanding of the distinctions between strict liability and negligence. The primary difference is that negligence law focuses on the reasonableness of defendant's conduct, while strict liability focuses on defendant's product without regard to conduct or fault. . .

X

It follows logically that the duty to warn under §402A cannot depend on a particular buyer's knowledge or level of sophistication. . . . Judge Gibbons, writing for the Court, noted that in a "failure to warn" case under §402A, the risk of failing to warn of a product's dangers are imputed to all sellers. One such risk is that employers using a product may not adequately warn their employees of the product's hazards. As knowledge of this risk is imputed, the Court concluded. . . . that an employer's sophistication cannot obviate a supplier's duty to warn. . . .

Olencki v. Meade Chemical Company, supra at 806.

Defendants contend that they were absolved of the duty to warn because RCA was a "sophisticated purchaser". . . .

There is an important difference between these negligence counts and the strict liability counts. Constructive knowledge of the dangers to foreseeable users is imputed to a defendant in a strict liability action. There is no need to prove that the manufacturer knew or should have known of any dangerous propensity of its product in a strict liability action. . . . Furthermore, knowledge of the risk that employers may not adequately warn the employees as is imputed to the defendants in a strict liability action. Whitehead v. St. Joe Lead Company, Inc., 729 F.2d 238, 247 (3rd Cir.1984). Thus, in a strict liability action against the manufacturer, the manufacturer cannot be absolved of the duty to warn.

Neal v. Cary Canadian Mines, Ltd., supra at 368

First, supplier defendants contend that they had no duty to warn as a matter of law. The jury found that, pursuant to §402A Product Liability, the asbestos fiber supplied by supplier/defendants was defective because it was not accompanied by an adequate warning. . . .

In strict products liability actions under §402A of the Restatement (Second) of Torts, the Pennsylvania Supreme Court, in Berkebile v. Brantley Helicopter Corp., 462 PA.83, 337A 2d 893(1975) made it clear that a manufacturer of an inherently dangerous product has a nondelegable duty to provide warnings to the ultimate consumer or user.

Hammond v. North American Asbestos Corporation, supra

Defendant also contends it did not have a duty to warn in this case because it sold the asbestos to sophisticated purchasers who had as much or more know-

1 dge of the dangers associated with th asbestos than it had. Defendant argues it was ntitled to rely on an employer/purchaser such as UNARCO to give the necessary warnings to its employees. . .

We disagree. . . . In strict liability, sellers are liable not just to those in privity to whom they sell their product, but also to the ultimate user or consumer. (Suvada v. White Motor Company 1965, 32 Ill.2d 612, 617, 210 N.E.2d 182.) Moreover, a manufacturer is under a nondelegable duty to produce a product which is reasonably safe. . . . Given the facts in this case, defendant could not expect or rely on others to intervene and make its products safe.

The above cited excerpts are characteristic of the holdings in all of the cases cited on page 8. According to this writer's research there are only two cases in the entire country which reach results that are contrary to those previously cited. Those two cases are Higgins v. E.I. DuPont de Nemours and Company, Inc., 671 F.Supp.1055, (D.Md.1987) and Dendinger v. Chrysler Plastic Products Corporation, C-87-7117 (Slip Opinion W.D. Ohio,1987) (Attached as Exhibit E to the memorandum of Defendants Georgia Gulf, et al).¹

A close analysis of the Higgins and Dendinger cases will indicate that they should not be persuasive authority.

In the Dendinger case the Court made a "finding of fact" that the plaintiff's employer was a sophisticated and knowledgeable user of the product and therefore defendant was entitled to summary judgment. There is no analysis in that case of the

¹The Dendinger opinion has not been published and the case has been settled between the plaintiff and the defendant which was granted summary judgment. The remaining defendants are scheduled for trial in the case beginning in January, 1989.

X

facts and therefore it is impossible to determine whether the "finding of fact" was appropriate.²

However, even assuming that the employer was a "sophisticated user", there is no analysis in the Dendinger case of why that fact disposes of the employee's claim against the manufacturer. The Court simply did not discuss the legal aspects of the employer's knowledge binding the employee who admittedly had no knowledge of the dangers involved.

Lastly, and most importantly, there is absolutely no citation of legal authority in the Dendinger opinion in support of the Court's determination that the defendant/manufacturer was entitled to summary judgment based upon the "sophisticated user" defense.

The Higgins case, on the other hand, is a better reasoned opinion. However, it is so confined in its legal scope and also based upon such unusual facts as to be nonpersuasive in light of the overwhelming authority to the contrary.

The Court in Higgins, although recognizing the existence of a portion of the contrary authority cited in this memorandum, refused to follow same stating: (supra page 1060 Footnote 3)

While decisions of the federal courts in other circuits might be persuasive in the absence of authority within the Fourth Circuit, this Court is not bound by such decisions.

The Court then continued by holding that there is essentially no difference between a negligent failure to warn and a

²Plaintiff disputes Defendants' contention in the present case that the employer of Plaintiff's husband was a "sophisticated employer" and discusses later the issue of fact surrounding the knowledge of the employer.

strict liability claim founded upon failure to warn. Based upon the absence of any distinction between the two the Court concluded that the Maryland Court of Appeals would recognize the "sophisticated user/bulk supplier" under 402A.

The Court's conclusion in Higgins that there is no distinction between the negligent failure to warn and strict liability claims based upon failure to warn ignored the previously cited holding of the Fourth Circuit in Reed v. Tiffin, supra (page 7 hereof)

Furthermore, that facts of Higgins are so significantly different from the present case as to render the opinion inapplicable.

In Higgins the defendants moving for summary judgment were Eastman and Union Carbide who had manufactured and sold a chemical to Dupont which incorporated it as a part of a paint it mixed and sold to the Baltimore Fire Department. The plaintiff was an employee of the fire department who claimed his child suffered birth defects as a result of the plaintiff's exposure to the chemical manufactured by Union Carbide and Eastman.

In the Higgins case the Court, in actuality, allowed the assertion of the sophisticated user defense between "sophisticated users", i.e. Union Carbide and Eastman on the one hand and Dupont on the other hand. Dupont, the ultimate manufacturer, thereby took the ultimate responsibility for liability to the plaintiff. The application of the "sophisticated user" defense did not deny the plaintiff the right to claim against the manufacturer of the product which injured him but simply shifted the

burden of the responsibility for that liability between "sophisticated users" involved in the manufacturing chain.

The Court in Higgins ignored the legal authority to the contrary and allowed the assertion by the defendant of the "sophisticated user" defense on the basis of the assumption that the Maryland Court of Appeals would permit the assertion of the defense. This basis of the Higgins case requires that that case be distinguished from the present case founded in South Carolina law because the South Carolina Supreme Court has rejected the argument of the applicability of the "sophisticated user" defense to a strict liability failure to warn claim under §15-73-10. In Marchant v. Lorain Division of Koehring, supra, the plaintiff sued the manufacturer in strict liability for failing to warn him of the dangers associated with the operation of a crane. The plaintiff was in a bucket on the end of the crane and was injured when it fell due to a condition known as "double blocking".

The operator of the crane, a co-employee of plaintiff, testified that he knew of the potential for the crane to double block. The Court found this knowledge by the operator to be insufficient to defeat the claim of plaintiff and held:

There was no showing that the appellant, Marchant, was cognizant of the crane's tendency to two block when he boarded the bucket. Therefore, a jury issue was created as to whether Lorain was liable in strict tort for its failure to warn a user such as Marchant of this possible hazard. Marchant, supra at S.C. 248 (Emphasis Supplied)

The logic and holding of this opinion is directly applicable to the present case. The deposition of Michael Wayne Cox reveals that he was not aware of any danger associated with the

use of the polyvinyl chloride resin sold by Defendants. Therefore, regardless of the knowledge of others who were his co-employees at Stauffer, whether they be his supervisors, executives, health and safety officers, plant managers, etc., there is a jury issue created as to whether the Defendants are liable in strict tort for their failure to warn a user such as Cox of the possible hazard.

For these reasons, Plaintiff submits the Higgins case is not applicable to the present case.

Defendants may argue that the authority cited in support of Plaintiff's position is not applicable because it does not deal with "bulk suppliers". In anticipation of that argument, Plaintiff would point out that the following cases involve bulk suppliers:

A. Russo v. Abex, supra

Defendants were bulk suppliers of raw asbestos to companies where workers manufactured brake linings.

B. Menna v. Johns-Manville Corporation, supra

Defendants were bulk suppliers of raw asbestos to companies where workers manufactured insulation.

C. Hall v. Ashland Oil Company, supra

Ashland Oil is a manufacturer and distributor of petro chemicals, including benzene, a substance found in the natural environment. From 1972 to 1977 Pfizer purchased benzene from Ashland. Ashland delivered the benzene in bulk liquid form to Pfizer in 4,000 gallon tank trailers. At the Groton plant the benzene was piped from the trucks into storage tanks located at the side of Building 123. Hall, supra at 1517.

D. Neal v. Cary Canadian Mines, Ltd., supra

Defendants were bulk suppliers of raw asbestos to companies where workers made asbestos products.

E. Hammond v. North American Asbestos Corporation, supra

Defendants were bulk suppliers of raw asbestos to companies where workers made asbestos products.

F. Billsborrow v. Dow Chemical U.S.A., supra

Defendants were bulk suppliers of chemical solvent delivered by tank cars to plaintiff's employer.

The defendants also argue in their memorandum that the Fourth Circuit concluded in Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir.1984) that South Carolina would adopt the "learned intermediary" defense. Defendants go on to argue that: "the reasoning (for the "learned intermediary" defense) is the same in a "sophisticated user/employer" situation where the employer, who is warned or already has knowledge of the danger, is in a better position than the supplier to determine which employees are at risk and to convey information and warnings." (Memo, Georgia Gulf, et al page 15).

Plaintiff agrees that South Carolina may adopt the "learned intermediary" defense in the context of the facts presented in Brooks. However, it is interesting to note that there is no citation of legal authority for the proposition in Defendant's memorandum, that the reasoning behind the "learned intermediary" defense is the same as the "sophisticated user" defense. The reason for the absence of citation is that all courts that have considered this same argument have rejected it. The following

are some of those cases: Hall v. Ashland Oil Company, supra; Billsborrow v. Dow Chemical USA, supra; Todalen v. U.S. Chemical Company, supra.

These cases, in rejecting the argument that the rationale of the "learned intermediary" exception to the duty of a manufacturer to warn the ultimate user should be applied to the employer/employee relationship, stated the following reasons:

1. The Courts have limited the "learned intermediary" exception to the medical field.

2. The "learned intermediary" exception is based upon the uniqueness of the doctor/patient relationship.

3. The selection of medication or medical apparatus for a patient is essentially a medical decision involving an assessment of the medical needs of the patient and the risk involved.

4. Only the doctor has the knowledge and training necessary to make the appropriate decision.

5. There exists a fiduciary relationship between the doctor and patient that does not exist between the employer/employee.

6. The choice of a product to be used by an employer is not governed primarily by the health risk it may pose to an employee.

7. There is no guarantee that the ordinary industrial employer is an expert on health risks to employees of products it chooses to use in its business.

8. Industrial chemicals and supplies are not as highly regulated, tested, etc. as products in the medical field and

therefore, there is no assurance of an informed decision by an employer of the health risk posed to his employees.

9. The doctor/patient relationship is one-on-one where the doctor assesses the individual needs of the patient. In the industrial workplace large numbers of people are affected by one decision to use a certain product and an employer who may be aware of direct effects of the product may be unaware of more subtle risks associated with its use.

The last and most important reason for rejecting the application of the "learned intermediary" doctrine to the employer/employee relationship is that:

The prescription drug cases, in relieving manufacturers of the duty to warn drug users, shift that duty onto a party who can be held legally liable to the patient for failing to fulfill it. This powerful incentive is absent in the case of an employer whose liability is limited by the exclusive remedy provisions of Workman's Compensation statutes. Hall, supra at 1520

The enactment of §402A of the Restatement (Second) of Tort as §15-73-10, Code of Laws of South Carolina, 1976 by the South Carolina Legislature amounts to a policy statement by the legislature as to the requirements that are applicable to a manufacturer/seller of a product sold in this state. That legislative mandate has not been lightly regarded by the courts in the past and its basis and purpose were emphatically stated in Reed v. Tiffin, supra.

These two factors, the basis and purpose of §402A and its legislative enactment require that the manufacturer/seller of unreasonably dangerous products in this state be held strictly

accountable and that persons injured ther by be afforded maximum protection.

To deny an injured employee the right to sue a manufacturer of an unreasonably dangerous product simply because his employer had knowledge of the danger does not maximize the injured party's protection. It, in fact, minimizes the protection and limits the employee to a recovery under Worker's Compensation.

Such a result negates the intended purpose of §402A which was to place the burden of loss caused by an unreasonably dangerous product upon the manufacturer and nullifies the legislative intent behind the enactment of §402A.

For these reasons, Plaintiff submits that the "sophisticated/user" defense is not available to Defendants in regard to Plaintiff's claim founded upon §15-73-10, Code of Laws of South Carolina, 1976.

ARGUMENT II

THERE EXISTS IN THE RECORD A GENUINE ISSUE OF MATERIAL FACT AS TO THE ELEMENTS OF PLAINTIFF'S CLAIM BASED UPON NEGLIGENT FAILURE TO WARN.

As previously discussed, Plaintiff's Second Cause of Action is founded upon a claim that Defendants negligently failed to adequately warn regarding the risks and dangers associated with the use of their polyvinyl chloride resin. It is acknowledged that a manufacturer is not under a duty to warn a user about dangers associated with the use of his product if such dangers are open and obvious.

X

To the contrary, a manufacturer is liable to all whom they should expect to use the chattel or be endangered by its use if:

(a) they know or have reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) they lack reason to believe that the user will realize the potential danger; and

(c) they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous.

Gardner v. Q.H.S., Inc., 448 F.2d 238(4th Cir.1971), cited with approval in Livingston v. Noland Corporation, supra S.C. at 525.

The above cited language from Gardner sets forth, almost verbatim, the provisions of §388, Restatement (Second) of Torts. The provisions of that section of the Restatement have been adopted by the Courts of this jurisdiction as the guidelines for a claim founded upon a negligent failure to warn. Gardner, supra; Livingston, supra. Therefore, the basis of Defendants' Motion for Summary Judgment must be viewed in light of the requirements of §388 and the cases that have construed that section.

The Defendants presently assert the "sophisticated user/employer" defense as a grounds for summary judgment. The "sophisticated user/employer" defense is a creation of the law of negligence and is therefore recognized as a potential defense to a products liability claim founded in negligent failure to warn. However, a review of the case law dealing with this issue reveals that the availability and success of the defense depend upon the facts and circumstances of each case.

In no way could this point be made clearer than in a comparison of two Fourth Circuit cases on this issue written by

Judge Robert Chapman in June and August, 1985. Beale v. Hardy, 769 F.2d 213 and Oman v. Johns-Manville Corporation, 764 F.2d 224. (en banc)

Both of these cases arose in Virginia and involved an injured employee suing a manufacturer under the negligent failure to warn aspects of §388 of the Restatement (Second) of Torts. The defendants asserted the "sophisticated user/employer" defense and under the facts it is clear that both employers were aware of risks associated with the use of defendants' product.

In the Beale case the Court granted summary judgment to defendant on the basis of the "sophisticated user/employer" defense. In the Oman case the Court in an en banc hearing affirmed the lower court in its refusal to even charge the jury on the issue of the "sophisticated user/employer" defense.

The reason for the different results in the two cases arise out of the differences in the facts and circumstances of each case. There also are a number of cases from other jurisdictions that discuss the "sophisticated user/employer" defense in a negligent failure to warn context and a reading of those cases, along with the Beale and Oman cases, reveals that there are numerous the elements of that defense which must be considered in analyzing the availability and success of same in each case.

Those elements are hereinafter individually discussed in the context of the facts of this case for the purpose of revealing the factual dispute which exists on the elements of the "sophisticated user/employer" defense in this case.

X

1. DID THE EMPLOYER POSSESS SUFFICIENT KNOWLEDGE TO BE "SOPHISTICATED" OR "KNOWLEDGEABLE" UNDER THE LAW?

(a) Legal Aspects

The determination of whether the employer is "knowledgeable" or "sophisticated" within the meaning of the law is a threshold issue in the assertion of the "sophisticated user/employer" defense. If the Defendants fail to establish factually, beyond dispute, that Mr. Cox's employer was "knowledgeable" or "sophisticated", within the meaning of the law there is no need for further consideration of the "sophisticated employer" defense.

However, even if the Defendants factually establish, beyond dispute, that Mr. Cox's employer was "knowledgeable" and "sophisticated" in a legal sense, such fact is not dispositive of the present claim by Plaintiff. This is an aspect of the "sophisticated user/employer" defense which has presumably not been recognized by the Defendants as it is nowhere discussed in their memorandum. It will be discussed by Plaintiff after a review of the legal and factual aspects of the issue bearing upon the knowledge and sophistication possessed by Mr. Cox's employer.

The Court of Appeals of New Mexico held in a "learned intermediary" case (doctor-patient relationship) that:

Actual knowledge in these cases means knowledge of the nature and extent of the danger. . . Jones v. Minnesota Mining and Manufacturing Company, 669 Pac.Rept.2d 744(Ct.Appls. N.M.1983)

The Court of Appeals of Minnesota has echoed this same position when it stated that:

UCC 079872

Even an employer who is aware of direct effects of the chemical may be unaware of more subtle or diffuse risks. Todalen v. U.S. Chemical Co., 424 N.W.2d 73 (Ct. of App. Minn. 1988)

The district court noted in Hall v. Ashland Oil Company, supra, at page 1520, that:

Knowledge of a risk is not necessarily the same thing as knowledge of the extent of the risk.

The Supreme Court of South Carolina held in McClain v. Charleston & W.C. Ry. Co., 191 S.C. 332, 45 E.2d 280 that:

The test of knowledge of danger is not the exercise of ordinary care to discover the danger, but whether the danger was known to or plainly observable by the [employer].

With this as the legal measuring stick regarding knowledge, Plaintiff submits that a review of the facts will establish that there exists a genuine dispute as to whether Mr. Cox's employer was "knowledgeable" or "sophisticated" within the meaning of the "sophisticated user/employer" defense.

(b) Factual Aspects

The Defendants, in their affidavits, have established that Stauffer Chemical Company, through two of its employees, Mr. Clifford Gandis and Dr. Hubert Northup had certain knowledge regarding vinyl chloride, polyvinyl chloride and the asserted link between these two products and cancer. However, the proximate cause of the death of Michael Wayne Cox was his exposure to residual vinyl chloride monomer, released from a film made from Defendants' polyvinyl chloride resin, while Mr. Cox processed that film through his laminating machine. It is this particular condition of the product about which Plaintiff contends the Defendants failed to warn.

X

The knowledge of the employer must be measured in regard to the condition which was the proximate cause of the death of Mr. Cox. In this case the focus of attention should be on the employer's knowledge concerning the release of the residual vinyl chloride monomer from the film, made from the Defendants' polyvinyl chloride resin, as it was processed through the laminating machine operated by Mr. Cox.

The affidavits, submitted on behalf of Defendants, contain only general statements regarding knowledge of co-employees Gandis and Northup about vinyl chloride, polyvinyl chloride, cancer and angiosarcoma. Those affidavits do not address knowledge of these employees in the specific area of the release of the residual vinyl chloride monomer from the film as it was processed through the laminating machine operated by Mr. Cox.

To the contrary, the affidavit of Mr. Gandis, submitted on behalf of the Plaintiff (attached hereto as Exhibit A) reveals a total absence of knowledge by him, as the plant manager, of the condition which was the proximate cause of the death of Mr. Cox.

Mr. Gandis states, in particular, that:

(a) Affiant did not believe and was not advised nor informed by any supplier of the polyvinyl chloride resin that the use of such resin in the fabricating process at the Anderson plant would pose any health risks or danger to the workers in the plant;

(b) That Affiant did not believe and was never advised or informed by any supplier of polyvinyl chloride resin that the processing of the vinyl film, made from the resin, through the

X

laminating machine operated by Mr. Cox, would pose any health risks or danger to Mr. Cox or any of the other workers in the plant;

(c) That Affiant did not believe and was never advised or informed by any supplier of polyvinyl chloride resin that the use of such resin in the fabricating process at the Anderson plant would potentially expose the employees of the plant, including Michael Wayne Cox, to levels of vinyl chloride monomer which would be harmful to their health;

(d) That Affiant knew that polyvinyl chloride resin contained residual vinyl chloride monomer but did not believe and was not advised nor informed by any supplier of polyvinyl chloride resin contained residual vinyl chloride monomer but did not believe and was not advised nor informed by any supplier of polyvinyl chloride resin that the heating of the film made from the polyvinyl chloride resin, at the temperatures used in the fabricating process at the Anderson plant, would result in a release of vinyl chloride monomer from the vinyl film which would be harmful to employees' health.

Defendants seem to rely heavily, almost exclusively on the fact that for a period of time (1975 through 1982) Stauffer Chemical Company was a manufacturer and supplier of polyvinyl chloride resin. Defendants seem to argue that the knowledge acquired by Stauffer Chemical Company as a manufacturer/supplier is sufficient to make it a "knowledgeable employer".

Plaintiff would point out that this alone does not establish that Mr. Cox's Employer, the Anderson facility, was-

"knowledgeable" and "sophisticated" regarding the danger which was the proximate cause of Mr. Cox's death, because:

1. Mr. Cox did not work in, around, or near a facility that manufactured polyvinyl chloride resin or vinyl chloride.

2. The people who supervised Mr. Cox and the operation of the Anderson fabricating facility were not involved with the manufacture of polyvinyl chloride resin or vinyl chloride.

3. The Anderson plant was a fabricating facility and did not have any involvement or connection with the manufacture of polyvinyl chloride resin or vinyl chloride.

4. The knowledge of the risks and dangers associated with the manufacture of polyvinyl chloride resin or vinyl chloride would have been concentrated in the divisions of the corporation most closely associated with those activities.

5. It cannot be legally assumed that the knowledge of danger possessed by persons in a different division of the corporation was transferred, including the full extent of the danger, to another division of the corporation. Such transfer of knowledge would have to be established factually.

6. It was not reasonable for Defendants to assume that the Anderson fabricating plant, to which they were selling and shipping their resin, had the same knowledge as a manufacturer. It would be obvious from the fact that the Anderson plant was buying the resin from Defendants that (a) the Anderson plant did not make it, and (b) the Anderson plant was not closely associated with or controlled by the manufacturing part of Stauffer Chemical.

Otherwise, the Anderson plant would have bought only from the manufacturing part of Stauffer Chemical Company.

The basic reason for the "sophisticated user/employer" defense is that, aside from the manufacturer, there exists a reasonable alternative (the "knowledgeable employer"), to warn the ultimate user of the dangers associated with the use of the product. Therefore, before this defense becomes valid, it must be shown that it was reasonable to assume that the knowledge of the employer would be transferred to the employee.

In this context Plaintiff submits as a practical consideration that "knowledge" possessed somewhere in a corporate structure does not make a manufacturer "knowledgeable" or "sophisticated" until that knowledge is transferred to and possessed by the appropriate party in the corporate structure who can actually and adequately warn the employee.

In the present case, the corporate employer was multifaceted with numerous facilities outside its corporate headquarters. The corporate headquarters were in Westport, Connecticut while its manufacturing, production and fabricating plants were located in numerous places around the United States. The knowledge possessed by each of the employees at these many different locations was obviously not possessed by all employees.

For this reason, Plaintiff submits that it must be factually shown by Defendants that the knowledge of the danger, which was the proximate cause of Mr. Cox's death, was possessed by persons who could provide adequate warnings to Mr. Cox.

This was the underlying basis for the Court's decision in Beale v. Hardy where the Fourth Circuit Court of Appeals stated:

Furthermore, the district court found that the Lynchburg Foundry was cognizant of the problems of silica dust and silicosis since at least the 1930's and that, from the late 1950's and early 1960's onward, the foundry's knowledge was nothing less than extensive. . .

After analyzing. . . the evidence that the foundry had extensive knowledge of the hazards associated with inhaling silica dust, the disease of silicosis, . . . the district court correctly held that no duty to warn (the employees) existed.
(parenthetical expression added)

Based upon the record before this Court, Plaintiff submits that there is clearly a dispute of fact as to whether anyone at the Anderson facility had knowledge of the dangerous condition of Defendants' product which was the proximate cause of Mr. Cox's death.

2. DID THE DEFENDANTS/MANUFACTURER PROVIDE THE EMPLOYER WITH ADEQUATE WARNINGS?

(a) Legal Aspects

Even assuming that this Court concludes that Mr. Cox's employer was "sophisticated" and "knowledgeable" as a matter of law, such would not be dispositive of the present claim based upon a negligent failure to warn. In actuality, such a factual determination is but the first in a series required in analyzing this defense.

The next step in this inquiry is to determine whether the Defendants gave sufficient warnings to Mr. Cox's employer regarding the dangers of the product. The law requires that the Defendants provide even the "knowledgeable" employer with adequate

X

warnings of the dangers of the product as a prerequisite to the assertion of the "sophisticated user/employer" defense.

The Defendants, in their memorandum (Georgia Gulf page 9) referred to this requirement but failed to thereafter discuss it. It was argued by Defendants: "While §388 defines the duty of a manufacturer/supplier to warn those who may ultimately use the product, Comment "n" of §388 explains that the duty can be discharged by the supplier's reasonable reliance on a third party to convey the information supplied by the supplier to the ultimate users, in this case, the employers." (emphasis added)

The important language in this quotation is: "those who may ultimately use the product"; "duty can be discharged"; and, "to convey the information supplied by the supplier".

The court in Billsborrow v. Dow Chemical, U.S.A., supra at 354, citing Hall v. Ashland Oil Company, supra, held, in regard to the "sophisticated user/employer" defense, that:

The doctrine . . . requires both the existence of a learned intermediary in the chain of distribution and establishment that the manufacturer has provided adequate warning to that intermediary. (emphasis supplied)

The obvious meaning of the language cited by Defendants in their memorandum from Comment "n", as further amplified by the courts in Hall and Billsborrow, is that the manufacturer may be relieved (discharged) of his duty to warn the employee (ultimate user) only if the manufacturer has adequately warned the employer of the danger associated with the use of the product.

The reason for this requirement is clear upon a complete reading of the provisions of §388 which state as follows:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

As is evident from the terms of §388, (c) the manufacturer is required to exercise reasonable care to warn the ultimate user of the product. However, the "sophisticated user/employer" defense may relieve the manufacturer of that duty and permit warning of the employer only if the employer of the ultimate user is a "knowledge" or "sophisticated" user. The reason for this exception to the duty to warn the ultimate user is based upon the consideration that it is reasonable for the manufacturer to assume that the "sophisticated employer", due to his increased knowledge, will pass on the warning of the dangers of the product to his employees. However, the manufacturer still must exercise "reasonable care" to warn. Only the person to whom that warning is directed is altered by the "sophisticated employer" defense.

Therefore, the "sophisticated employer" defense therefore involves only item (b) of §388 which deals with the reasonableness of the manufacturer's belief that those who ultimately use the chattel will realize its dangerous condition.

Even where it is reasonable for the manufacturer to believe that the ultimate user will be warned, by his employer, the manu-

facturer still must comply with subsection (c) of §368 which requires that the manufacturer "exercise reasonable care to inform" the user of the dangerous condition or of the facts which make it likely to be dangerous.

This continuing obligation to warn even the "knowledgeable employer" springs from the recognition that "knowledge of a risk is not the same thing as knowledge of the extent of the risk". Hall v. Ashland Oil Company, supra, page 1520. The "sophisticated" and "knowledgeable" employer, even though more likely to adequately warn his employees, still needs to be fully informed of the extent of the dangers in order to adequately protect his employees.

The Supreme Court of New York in Billsborrow v. Dow Chemical U.S.A., supra at 356, citing Jones v. Meat Packers Equipment Co. 723 F.2d 370(4th Cir.1983) held:

Whether the manufacturer has discharged its duty to warn the ultimate user by providing an adequate warning to a responsible intermediary in light of the aforementioned consideration is a question of fact.

(b) Factual Aspects

The factual evidence before the Court as to the warning provided by the Defendants to Stauffer Chemical Company shows that a factual issue exists as to the adequacy of those warnings. Only Georgia Gulf Corporation and Tenneco Polymers have submitted any evidence of warnings to the employer. Tenneco Polymers' evidence is Exhibit #4 while Georgia Gulf's evidence is Exhibit #2 to their memorandum in support of the Motion for Summary Judgment.

ment. None of the other Defendants submitted any evidence of warnings being made to Stauffer Chemical Company.³

Of the Material Safety Data Sheets and other documents attached to the memorandum of Defendants Georgia Gulf, et al, as Exhibits 1 through 5, Exhibit #5 was not received by Stauffer Chemical Company until December 1, 1986 which was well after Mr. Cox had become ill and left the Company. For this reason its contents are not relevant to the present inquiry.

The important aspects of Defendants' Exhibits 1 through 4 are that:

(a) they do not contain any warning that even discusses that the use of the polyvinyl chloride resin may result in the release of residual vinyl chloride monomer, exposure to which may result in cancer;

(b) on page 2 of Exhibit 3 the most warning given is that "Polyvinyl Chloride Polymers may contain vinyl chloride monomer". This statement does not even acknowledge the uncontroverted fact that all polyvinyl chloride resin contains residual vinyl chloride monomer (Marullo Affidavit, Plaintiff's Exhibit B);

(c) Exhibit 4, section II on page 1 excludes from the scope of the warnings "handling or use of 'fabricated products'". Since Mr. Cox was handling a "fabricated product" the warning contained in Exhibit 4 would not have been deemed by the reader to apply to Mr. Cox.

³Exhibit #3 to the Memorandum submitted by Georgia Gulf, et al is a Material Safety Data Sheet from Firestone Plastics Company who is not a defendant in this action.

Based upon the foregoing, Plaintiff submits that there is absolutely no evidence in this record to establish that any of the defendants gave warnings to the Anderson facility regarding the condition of the polyvinyl chloride resin which was the proximate cause of Mr. Cox's death. For that reason, the Motion for Summary Judgment should be denied.

3. DID THE MANUFACTURER EXERCISE REASONABLE CARE TO WARN?

(a) Legal Aspects

The third element of any analysis of the availability of the "sophisticated user/employer" defense in a negligent failure to warn claim centers on the requirements of subsection (c) of §388 of the Restatement (Second) of Torts. That is the provision which requires the exercise of reasonable care by the manufacturer/supplier to warn of the dangers associated with the use of the product.

We have previously discussed that the requirement of "reasonable conduct" may be satisfied by a warning of the employer, rather than the "ultimate user", if the employer is "knowledgeable" and "sophisticated" in regard to the dangers posed by the product. There also may be that extreme case where the knowledge of the employer is so extensive as to the particular and precise danger which was the proximate cause of the plaintiff's injury, that no warning would be required.

However, because this is an issue, the determination of which varies with each case, the courts have established six factors to be analyzed in each case. Those factors were set out

by the Fourth Circuit Court of Appeals in Oman v. Johns-Manville Corporation, supra at page 233 where the court said:

Comment "n" discusses the various factors a court must balance to determine what precautions the manufacturer or supplier of a product must take to satisfy the requirement of reasonable care found in §388 (c). These factors include:

1. the dangerous condition of the product;
2. the purpose for which the product is used;
3. the form of any warnings given;
4. the reliability of the third party as a conduit of necessary information about the product;
5. the magnitude of the risk involved; and
6. the burdens imposed upon the supplier by requiring that he directly warn all users.

The two most important factors in the analysis are: (1) the dangerous condition of the product; and (5) the magnitude of the risk involved. The more dangerous the condition and the greater the magnitude of the risk involved the higher the degree of care which will be required of the manufacturer/supplier. Oman v. Johns-Manville, supra

This sliding scale, derived from Comment "n" to §388, was cited as the basis of the court's decision in Oman. There the court affirmed the district court in its refusal to charge the "sophisticated user/employer" defense to the jury and cited, by way of footnote, the following language from Comment "n" as support for that decision:

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose

character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. (emphasis supplied)

(b) Factual Aspects

The evidence before this Court is that the danger associated with exposure to residual vinyl chloride monomer is extremely high as it is one of only three known causes of angiosarcoma, a form of cancer which has no known treatment or cure and is always fatal. (Affidavit of Dr. Latham, Exhibit C)

The magnitude of the risk is also extremely high because there are no medically established safe levels of exposure to vinyl chloride. Therefore, even the smallest exposure may result in development of angiosarcoma which is invariably fatal. (Affidavit of Dr. Latham, Exhibit C)

Due to the extreme risk and danger associated with exposure to residual vinyl chloride monomer released from polyvinyl chloride resin and its fabricated products, the Defendants are under a duty which requires the exercise of the highest degree of care to insure that both the Plaintiff and his employer were fully warned of the potentially fatal dangers of the use of Defendant's product. Plaintiff submits that there is a dispute of fact on that issue in the record before the Court. Accordingly, the Motion by Defendants for Summary Judgment should be denied.

Lastly, Plaintiff directs the Court's attention to the language of the Superior Court of Delaware in the case of In Re: Asbestos Litigation (Mergenthaler, 542 A.2d 1205(1986) where the Court stated:

While a "sophisticated purchaser" defense is available to the defendant, however, summary judgment cannot be granted on this basis because a jury may find that Herty knew or should have known that Haveg's employees were not receiving adequate warnings, the absence of which might cause their product to be defective.

Dated: November 30, 1988

Respectfully submitted,

MITCHELL & ARIAIL

By: 
Robert M. Ariail

119 Williams Street
Greenville, SC 29601
(803) 271-4943
Attorneys for Plaintiff