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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| TED SHERMAN,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>GEORGIA-PACIFIC LLC,<br><br>Defendant Below,<br>Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 98, 2014<br><br>Trial Court Below:<br>Superior Court of the<br>of the State of Delaware in<br>and for New Castle County<br>C.A. No. 11C-01-271-ASB |

# APPELLEE GEORGIA-PACIFIC LLC 'S ANSWERING BRIEF

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## NATURE OF PROCEEDINGS

This is an appeal from a defense verdict rendered by a jury following a two week trial of an asbestos case under Virginia substantive law. Plaintiff does not directly challenge the jury's verdict or its findings. Nor does he complain about the exclusion of any evidence. Plaintiff was allowed to fully present his factual case and indeed was permitted to change his testimony on several key points during the trial. Plaintiff's only complaint on appeal is that he was not granted unlimited "Mulligans" or "do overs" in his effort to obtain a verdict against the defendants by means of a shifting claim that he hoped would be easier to prove than the negligent failure to warn claim which he presented throughout the trial.

Plaintiff initially pled a strict liability claim in the Complaint but he was forced to withdraw that claim at the pretrial conference since it is not recognized under the controlling Virginia products liability law. Plaintiff attempted to salvage that lost claim by representing to the Trial Court that a breach of warranty theory was subsumed within his negligence claim pursuant to Virginia law. Near the end of the trial, however, in the context of discussions of the jury instructions, Plaintiff acknowledged that his prior representation regarding the scope of Virginia negligence law was incorrect. Plaintiff then moved to amend and add a separate breach of warranty claim, but the Trial Court properly denied that "do over" motion as untimely and prejudicial. Subsequently, Plaintiff made

one last ditch effort at a "do over" when he attempted to improperly expand the only negligence claim in his draft jury instructions - negligent failure to warn - into an undefined general negligence claim not recognized in Virginia products liability law. Plaintiff did so by withdrawing his agreement to a jury instruction stating the elements of his negligence claim and by submitting a new jury instruction and special verdict form. And Plaintiff did so after the close of evidence and after what was supposed to have been the final prayer conference.

The rulings at issue in this appeal should be affirmed because the Trial Court did not abuse its discretion in denying Plaintiff unlimited Mulligans on presenting his claims. Contrary to the implication in Plaintiff's opening brief, the Trial Court devoted significant time and attention to this matter, conducting exhaustive research of Virginia law in response to Plaintiff's repeated untimely efforts to present an additional unpled claim to the jury. The Trial Court properly excluded the never-pled breach of warranty claim and properly refused to allow Plaintiff to expand his negligent failure to warn claim into an undefined general negligence claim not recognized in Virginia products liability law. The jury was properly instructed on the controlling Virginia law and it returned a defense verdict following two days of deliberations. The judgment should be affirmed.

## SUMMARY OF ARGUMENT

This Court should affirm the judgment below because Plaintiff's arguments lack merit.

1. Denied. The Superior Court properly exercised its discretion in refusing to allow Plaintiff to pursue a breach of warranty claim near the end of the trial since no such claim had been pled. The Trial Court also properly denied Plaintiff's late motion to amend to add such a claim, because it properly found that there was inexcusable delay and prejudice to the defendants.

2. Denied. The Superior Court did not abuse its discretion when it refused to allow Plaintiff to add a new undefined general negligence claim after the evidence had all been presented and the case was ready to be argued to the jury.

3. As a matter of law, the jury's unappealed decision on the adequate warning issue establishes the absence of any unreasonable danger and bars any further claim by Plaintiff.

## STATEMENT OF FACTS

### A. Plaintiff's Factual Claims Were a Continually Moving Target.

On multiple occasions during trial, Plaintiff altered his previous sworn deposition testimony on key issues in an effort to prove his claims. Plaintiff claimed that he was exposed to Georgia-Pacific LLC ("Georgia-Pacific") joint compound, as a bystander, while inspecting new home construction sites for his employer, Central National Bank from 1974-1978. (B14 lines 12-21 & B21 line 18 to B22 line1). In his pre-trial deposition testimony, he described that product five times as a dry product sold in five pound metal cans.[1] (B18 line 4 to B20 line15; B23 line 21 to B26 line 17). That is significant for a couple of reasons. First, Georgia-Pacific never sold a dry joint compound in metal cans. (B31, pg. 254 line 10 to pg. 255 line 9). Rather, dry products were packed only in bags or cardboard boxes. (*Id*; & B34-B35 & B124-B137). Second, if Plaintiff did see a Georgia-Pacific dry joint compound product on the job sites which he visited, that joint compound would not have contained asbestos. (B8, pg. 289 line 19 to B9, pg. 290 line 3). That is because the Akron plant that would have supplied the dry joint compound products to those job sites at that time was producing an asbestos-free

[1] He was familiar with that type of product because he also testified that in the 1960s he had actually used a dry joint compound product in metal cans which was made by U.S. Gypsum and National Gypsum. (B12 lines 15-23 & B13 lines 1-16).

product. (B8, pg. 289 line 19 to B9, pg. 290 line 3**)**. Georgia-Pacific's counsel, in her opening statement, described that deposition testimony by Plaintiff and its significance to the jury. (B2-B6).

At trial, Plaintiff expressly changed his testimony and claimed for the first time that the Georgia-Pacific joint compound which he saw at the work sites that he visited, was a wet, pre-mix product. (Cite B18-B19; B23-B26; B27 line 13 to B28 line 4 & B29 lines 4-18.). He also changed his testimony that the product was packaged in five pound containers and in a number of other ways relating to the extent of his alleged exposure to Georgia-Pacific joint compound. (B20 lines 7-15). For example, he changed his testimony regarding the amount of time that he spent on the job sites (B16 line 16 to B17 line 4), and the number of times per week that he visited the job sites (B15 lines 4-16).

But the moving factual target only tells part of the story. As described below, Plaintiff's legal theories shifted with similar elasticity even after the close of the evidence, and following the prayer conferences.

B. Plaintiff's Legal Claims Were a Continually Moving Target.

1. The Complaint.

Plaintiff correctly states that the Complaint was filed in January 2011, but most of the rest of the description of the Complaint in Plaintiff's opening brief

is inaccurate and is not supported by the cited portions of the Appendix. The Complaint was filed against multiple defendants. (A1-2). Contrary to Plaintiff's claim, however, it does not allege that Plaintiff had occupational exposure to joint compound from 1974 to 1978 as claimed at page 3 of Plaintiff's opening brief. That was a new factual claim that was made in connection with Plaintiff's deposition. Plaintiff's original factual claim as asserted in the Complaint was that he was exposed to joint compound "non-occupationally (i.e. household exposure)" while working on "his own home" beginning in "the 1960s." (A6, ¶ 21a). The Complaint also does not contain the allegations regarding the "design, manufacture and/or labeling" of the joint compound as claimed on page 3 of the opening brief and as cited to page "A7" of the Appendix.

The Complaint, as-filed, contained alleged claims for negligence (Count I), strict product liability (Count II), willful and wanton conduct (Count III) and loss of consortium (Count IV), all of which were allegedly predicated on Virginia law even though Virginia products liability law does not recognize claims for strict liability or loss of consortium.[2] (A8-12). The Complaint did not contain a breach of warranty count.

[2] As previously noted, Plaintiff withdrew his claims in Counts II and IV in advance of trial based on that Virginia law. *See, e.g., Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 424, 374 S.E.2d 55 (1988) (Virginia does not permit tort recovery on a

2. The Pretrial Memorandum.

By the time of the pretrial conference, eleven of the defendants had been dismissed and one defendant had settled, leaving Georgia-Pacific and Union Carbide Corporation ("UCC") as the only active defendants. (A14). The pretrial memorandum ("PTM") repeated many of the allegations of the Complaint.[3] (S*ee*, Op. Br. p. 4). In fact, Plaintiff's portion of the nature of the case section of the PTM expressly "incorporates" the allegations from the "Complaint and Amended Complaint".[4] (A15). Plaintiff thereby appeared to be attempting to reassert the strict liability and loss of consortium claims which are not recognized under the controlling Virginia law. In a subsequent section of the PTM, however, it was expressly stipulated by Plaintiff and Georgia-Pacific that Plaintiff would not pursue a strict liability claim and that Virginia law does not recognize a loss of consortium claim. (A25, ¶¶ C.2. and C.3.). Accordingly, that left the Count I negligence claim and the Count III willful and wanton or punitive damage claim as

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strict liability theory in product liability cases) & *Floyd v. Miller*, 190 Va. 303, 57 S.E.2d 114 (1950) (lost consortium claims not recognized).

[3] Contrary to the suggestion at page 4 of Plaintiff's brief, Georgia-Pacific did not "agree" to this section of the PTM. Because they could not agree on the wording of this section, each party prepared their own "Nature of the Case" section of the PTM. (A15, A19-20).

[4] Despite this reference to an Amended Complaint, no such pleading was ever filed by Plaintiff.

the only claims for trial.[5] There was no request or motion made in the PTM to amend the pleadings to add a new or additional count for breach of warranty.

Page 5 of Plaintiff's brief contains a block quote from the PTM which he now claims is a statement of his warranty claim. In fact, however, that quoted language is a verbatim restatement of Count II of the Complaint – the strict liability claim – which claim, as previously noted, Plaintiff expressly agreed he was not pursuing several pages later in the very same PTM. (A25, ¶ C.2.).

3. The Trial.

Plaintiff also attempted to change his legal claims at trial by submitting jury instructions and a verdict form that for the first time included a breach of warranty claim. Plaintiff's discussion of the proposed jury verdict forms at page 10 of his brief is, however, inaccurate. Plaintiff did send an email to the Trial Court at approximately 9:41 p.m. on January 20, 2014 along with some on-line links to his initial proposed jury instructions and a verdict form.[6] That one-page email is included in Plaintiff's appendix at page A202. Contrary to Plaintiff's claim, however, the verdict form linked to that email is not included in his Appendix at pages A204-207 or at any other point in his appendix. In addition,

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5 Plaintiff acknowledges at page 4, footnote 2, of the opening brief that Count III was a claim for punitive damages.

6 Monday, January 20th was the start of the second week of the trial but it was also Martin Luther King Day and a Court holiday.

pages 204-207 of Plaintiff's Appendix do not contain the interrogatory questions quoted on p. 10 of his brief.[7]

Plaintiff's proposed verdict form which was sent to the Trial Court on January 20, 2014 consisted of one simple and very general liability question each for Georgia-Pacific and UCC and one question as to the amount of compensatory and punitive damages awarded by the jury. (B140-B141). Plaintiff does not discuss that proposed verdict form in his opening brief and he therefore cannot now claim that the Trial Court erred by failing to adopt that form. Supr. Ct. Rule 14(b)(vi)(A)(3).

On January 22 there was no trial because the Court was closed due to a snow emergency. (A254 & A315). The parties did, however, provide the Trial Court on that date with a joint set of proposed jury instructions, with noted objections, and with competing proposed special verdict forms. (A252-254).[8] An initial prayer conference was also conducted by telephone on that day without a court reporter present. (*Id.*).

Plaintiff's proposed instructions as submitted to the Trial Court on January 22nd, included instructions for claims of negligent failure to warn and

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[7] Contrary to the statement in the email, none of the documents were e-filed with the Trial Court the next day or at any later time.

[8] Those proposed instructions and verdict forms were filed with the Trial Court the following day. (A399, D.I. 312).

breach of warranty. (B79 & B95-B96). Based on those proposed instructions, Plaintiff submitted the proposed interrogatories quoted on page 10 of Plaintiff's brief. Proposed interrogatory number 3 related to the negligent failure to warn claim and numbers 5 and 6 related to a breach of warranty claim which had never been pled by Plaintiff. Defendants objected to the breach of warranty instructions and the related interrogatories on the grounds that no such warranty claim had been pled. (B54). In response, during the off the record conference on January 22nd, Plaintiff for the first time moved to amend the Complaint to assert a breach of warranty claim and the Trial Judge took the motion under advisement. (A88).

Trial resumed on January 23rd. That morning, the Trial Judge noted the pending issue relating to the request to amend the Complaint to add a breach of warranty claim and he stated that he was going to hold Plaintiff's counsel to his representation on the first day of trial regarding the claims to be tried. (A88). The Trial Judge explained that he was not going to allow an amendment to add a new cause of action at this late stage of the trial. (*Id.*). As a result, the Trial Judge warned Plaintiff's counsel that the claim could not be pursued unless Plaintiff's counsel came up with support for his representation that, under Virginia law, an implied warranty claim was subsumed within a negligence claim. (*Id.*).

On Friday, January 24th, after the close of evidence, the Court held a second prayer conference. (B38 lines 19-22 & and B39 lines 3-4). At the start of

that prayer conference, the Court asked Plaintiff's counsel if he had any further argument on amending the Complaint to add a breach of warranty claim or on the idea that, under Virginia law, breach of warranty claims are subsumed within a negligence claim (A114, lines 2-23 & A115, lines 1-2). Plaintiff's counsel responded that he had no "further argument" and he also stated that Plaintiff did not have a breach of warranty claim. (A115, lines 3-4 & 14-16). Following that exchange the Trial Judge ruled that he would not permit an amendment to add a breach of warranty claim at that late stage of the trial. (A115, line 17 to A117, line 7).[9]

A prayer conference was then held and the Court ruled on the parties' objections to the remaining jury instructions. The Trial Judge had earlier noted that he devoted "a lot of time" researching the cases, even analyzing the Virginia pattern instructions. (B33 lines 8-10). At the conclusion of that prayer conference, the Trial Judge asked if a verdict sheet had been prepared and he was told that there were competing forms prepared by the parties, neither of which could be used at that point due to the Court's recent rulings on the instructions. (B41 line 22 to B42 line 23). There was then a discussion of the competing forms and the Trial

[9] Contrary to plaintiff's claim at page 11 of his brief, the Trial Court did not rule that plaintiff "had abandoned" the warranty claim when he stipulated in the PTM that there was no strict liability claim. In addition, his counsel did not "immediately" make an oral application to amend the pleadings following the Trial Court's ruling.

Court provided guidance on the redrafting of the form, leaving the parties to work out the language (B43-B51).

Over the following weekend, there was another off-the-record conference with the Trial Court regarding the jury instructions and verdict form. (A122, lines 3-5). That conference was necessary because over the weekend, Plaintiff sought to withdraw his agreement with respect to the jury instruction on the elements of the negligence claim. That agreed instruction read as follows:

> **NEGLIGENCE ELEMENTS [agreed and ruled upon <u>insturciont] [sic]</u>**
>
> Before Mr. Sherman is entitled to recover from a defendant on the negligence theory, he must prove by a preponderance of the evidence each of the following elements against that defendant:
>
> (1) Mr. Sherman's exposure to chrysotile asbestos from products manufactured and/or sold by that defendant was sufficient to cause mesothelioma in humans;
>
> (2) At the time of Mr. Sherman's exposure, that defendant knew, or had reason to know that its product could cause injury to persons when the product was being used in a reasonably foreseeable manner;
>
> (3) <u>*That defendant failed to adequately warn of such a danger*</u>; and…

(A260) (emphasis added).

Plaintiff sought to replace that agreed instruction with an undefined and vague general instruction which read as follows:

**NEGLIGENCE ELEMENTS [Plaintiff's proposal]**

> Before the Mr. Sherman is entitled to recover from a defendant on the negligence theory, he must prove by a preponderance of the evidence each of the following elements against that defendant:
>
> (1) Mr. Sherman's exposure to chrysotile asbestos from products manufactured and/or sold by that defendant was sufficient to cause mesothelioma in humans;
>
> (2) At the time of Mr. Sherman's exposure, that defendant knew, or had reason to know that its product could cause injury to persons when the product was being used in a reasonably foreseeable manner;
>
> *(3) That defendant failed to exercise ordinary care with the respect to the manufacture and/or sale of its product*; and…

(A261) (emphasis added).

Plaintiff also sought to replace the jury interrogatory which he had previously proposed with respect to the negligence claim, which was specifically tied to the failure to warn claim,[10] with a new interrogatory which made no reference to failure to warn or even design defect and instead was a vague general question about ordinary care.[11]

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[10] Plaintiff's previously proposed interrogatory on this issue read as follows:

> "Do you find by a preponderance of the evidence that Georgia-Pacific failed to adequately warn of such a danger?" (B117 ¶ 3) (emphasis added).

[11] Plaintiff's new proposed vague interrogatory read as follows:

At the start of the day on Monday, January 27th, the Trial Judge asked the parties to put their positions from that Sunday conference on the record and noted that "the Court has made itself available on a moment's notice, on weekends, at any time possible." (A127, at lines 6-8). The parties stated their positions and then the Trial Judge put on the record his ruling denying Plaintiff's request to use this vague, general instruction and interrogatory because it was not consistent with Virginia law. (A122-131).

The parties then proceeded with closing arguments and the Trial Court read the instructions. Instructions 26 and 27, which were agreed on by the parties, dealt with Plaintiff's negligent failure to warn claim and explained that an adequate warning would "cure or obviate" the danger posed by the product. After deliberating for two days, the jury returned a verdict for Georgia-Pacific and UCC determining, among other things, that an adequate warning had been given. (A 325-29). Plaintiff thereafter filed an appeal as to Georgia-Pacific but not as to UCC. The jury's finding that Georgia-Pacific provided an adequate warning has not been challenged in this appeal.

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"Do you find by a preponderance of the evidence that Georgia-Pacific failed to exercise ordinary care with respect to the manufacture and sale of its joint compound products?"

(A268 ¶ 5)(emphasis added).

## ARGUMENT

### I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT REFUSED TO ALLOW PLAINTIFF TO ADD A NEW BREACH OF WARRANTY CLAIM AFTER MOST OF THE EVIDENCE HAD BEEN PRESENTED.

#### A. Question Presented.

Did the Trial Court properly exercise its discretion when it rejected Plaintiff's attempt to pursue a breach of warranty claim after most of the evidence had been presented at trial and when it denied a motion to amend to add such a claim? (A406-409).

#### B. Standard and Scope of Review.

A trial court's decision denying a motion to amend the pleadings is reviewed on an abuse of discretion basis. *Mergenthaler, Inc. v. Jefferson,* 332 A.2d 396, 398 (Del. 1975).

#### C. Merits of the Argument.

##### 1. Plaintiff's Complaint Does Not State A Warranty Claim.

Plaintiff's initial argument that the Complaint included a breach of warranty claim cannot withstand scrutiny. Plaintiff does not, and cannot, point to any specific paragraph or paragraphs where this phantom claim is pled in the Complaint. Instead he simply cites the entire 13 pages of the Complaint. *See,* Op.

Br. page 19. That shotgun approach does not work and not even the notice pleading standard can save it.

The Complaint sets out four specific claims, Negligence (Count I), Strict Product Liability (Count II), Willful and Wanton Conduct (Count III) and Loss of Consortium (Count IV). (A8-12). It simply does not allege a claim for breach of warranty and the Trial Court properly so found.

2. The PTM Does Not Contain A Warranty Claim.

Plaintiff's back up argument that a breach of warranty claim is asserted in the PTM is similarly fallacious. As discussed above in the statement of facts section, the paragraph which Plaintiff quotes from the PTM as allegedly asserting a breach of warranty claim is, in fact, a verbatim restatement of his Count II strict liability claim from the Complaint, which claim he subsequently stipulated in the PTM he was not pursuing. (A18 & A25, ¶ C. 2.). Plaintiff did the exact same thing with the consortium claim. On page 2 of the PTM, he reasserted a loss of consortium claim for his wife even though he expressly stipulated several pages later, on page 12 of the PTM, that Virginia does not recognize a loss of consortium claim. (A15 & A25, ¶ C. 3.). The PTM therefore cannot be fairly read to allege a breach of warranty claim and it certainly does not contain any request to amend the pleadings to allege such a claim.

Moreover, Plaintiff has not cited to any record evidence that he ever argued to the Trial Court that the PTM contained a breach of warranty claim. Since he failed to make that argument to the Trial Court, he cannot now raise it on this appeal. Supr. Ct. R. 8.

### 3. The Trial Judge Properly Exercised His Discretion When He Denied The Motion To Amend.

The Trial Judge properly exercised his discretion in denying the untimely motion to amend to add a warranty claim and to effectively allow Plaintiff a "do over". In so doing, the Trial Judge properly took into account the confusion created by the Plaintiff with respect to his claims and found that Plaintiff's delay in moving to amend to add a new claim was inexcusable. (A407-408). As the Trial Court correctly noted, it was Plaintiff who asserted a strict liability claim in the Complaint and then dropped it at the pretrial stage. It was Plaintiff who specifically told the Trial Judge at the start of the trial that there was no separate warranty claim to be tried and then reversed course near the end of the trial and tried to assert a separate warranty claim. On these facts, the Trial Judge's decision was not an abuse of discretion but rather a sound use of discretion to control the management of the trial. *See Christina Care Health Serv., Inc. v. Crist*, 956 A.2d 622, 625 (Del. 2008) (quoting *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008)).

Although, Plaintiff's motion to add a warranty claim was obviously untimely, that untimeliness does not raise a relation back issue in this case, as suggested by Plaintiff at pages 20-21 of his brief. Rather it is a question, as the Trial Judge correctly noted, of whether the delay in asserting the motion was inexcusable. Here, just as in the *Whaley* case, the moving party cannot deny that he had full knowledge of the potential warranty claim at the time the Complaint was filed and Plaintiff has not asserted any reason, much less a valid reason, for the three year delay in seeking to assert that claim. *See, H & H Poultry Co. v. Whaley*, 408 A.2d 289, 291 (Del 1979). The Court should therefore conclude, as it did in *Whaley*, that the Trial Judge properly exercised his discretion in denying the motion to amend. *Id.*

The Court's decision in *Bellanca*, does not require a different result. Procedurally, the *Bellanca* case was the opposite of this case in that the trial court had granted the motion to amend. *Bellanca Corp v. Bellanca*, 169 A.2d 620, 622 (Del. 1961). This Court reviewed the decision on an abuse of discretion standard and it found no abuse. The claims and the facts were also different in that case. In *Bellanca*, the plaintiff sought to enforce an express contract for a commission in connection with a sale of a plant. *Id.*, at 621. After the plaintiff had rested his case, and before the defendant put on any evidence, the plaintiff moved to amend to assert a claim for *quantum meruit. Id.*, at 622. The Court found, in that context,

that the granting of the motion by the trial judge was not an abuse of discretion because no additional evidence was needed to assert or defend the new claim and there was no prejudice to the defendant. *Id.* Here, on the other hand, the Trial Judge found that there was prejudice caused by Plaintiff's moving target approach to his claims. (A407-408). That finding is supported by the record and therefore his decision to deny the motion to amend cannot be an abuse of discretion.

Finally, Plaintiff's argument that the Trial Judge's decision was an abuse of discretion because Plaintiff did not need to present any additional evidence to support a warranty claim misses the point. There was no "implied litigation" of a warranty claim and the Trial Judge properly so found (B40 lines 2-7). It was defendants who were prejudiced and who could have tried the case differently if they had known that a breach of warranty design defect claim was being asserted. Based on the claims pled and tried, counsel for Georgia-Pacific made a strategic decision to submit limited testimony from its corporate representative, Howard Schutte, and no testimony from its designated corporate representative, Charles W. Lehnert. Had Georgia-Pacific known that a warranty claim was being pursued by Plaintiff, it would have submitted additional testimony from both of its corporate representatives on alternative designs including Georgia-Pacific's efforts to eliminate asbestos from its products, replacement options considered by Georgia-Pacific and the challenges the company faced in developing

asbestos-free products. Georgia-Pacific would have also submitted additional internal corporate documents into evidence related to its efforts to develop asbestos-free products. The Trial Judge did not abuse his discretion by recognizing this prejudice to Georgia-Pacific.

## II. THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION WHEN HE REFUSED PLAINTIFF'S ATTEMPT TO REPACKAGE HIS REJECTED WARRANTY CLAIM AS A VAGUE AND UNDEFINED GENERAL NEGLIGENCE CLAIM.

### A. Question Presented.

Did the Trial Judge properly refuse Plaintiff's attempt to repackage his rejected warranty claim as a vague undefined general negligence claim? (A414-419)

### B. Standard and Scope of Review.

The Trial Court's decision is equivalent to a denial of a motion to amend and is reviewed on an abuse of discretion standard. *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975).

### C. Merits of The Argument.

#### 1. The Trial Judge Properly Exercised His Discretion.

Having failed in his effort to add a breach of warranty claim at the end of the case, Plaintiff tried again for a do over by repackaging his rejected warranty claim as a negligence claim.[12] As explained above in the statement of facts, the Trial Judge denied Plaintiff's motion to amend to add a warranty claim on Friday,

[12] Plaintiff cites to comments by Georgia-Pacific's counsel on its motion for judgment as a matter of law as allegedly recognizing an additional negligence claim, but at that time, Plaintiff was still *only* advancing his failure to warn and breach of warranty theories in his jury instructions. He did not seek to raise this vague undefined negligence claim until his effort to pursue a warranty claim was rejected by the Court.

January 24, 2014. Over that following weekend, as the parties attempted to finalize the verdict sheet and after two prayer conferences, Plaintiff requested yet another conference with the Trial Court. At that conference Plaintiff sought to replace an agreed upon instruction on the elements of a negligent failure to warn claim with a vague undefined general instruction on "ordinary care". (A250, 260-261). Plaintiff also sought to change a straight forward verdict form question on failure to warn into a vague general question about "ordinary care". The conference at which these proposals were discussed was off the record on Sunday, January 26, 2014. (A250-51 & A410-11). As described in the fact section above, the parties then put their respective positions on the record on Monday, January 27, 2014, and the Trial Judge properly rejected Plaintiff's last request for a Mulligan.

There are several problems with Plaintiff's argument that the Trial Judge's decision on this issue was in error. First, it is obvious that Plaintiff's effort to revise the jury instructions at the last minute reflected an effort to take his just rejected warranty claim, which was a repackaging of his withdrawn strict liability claim, and somehow transform it into a negligence claim. As Georgia-Pacific argued at the time, that effort was untimely and prejudicial.

Second, Plaintiff's argument on appeal is not consistent with his actual proposals to the Trial Court at trial. Plaintiff's argument is that Virginia law recognizes forms of negligence other than a negligent failure to warn claim, and

therefore the instructions to the jury should not have been limited to just failure to warn. However, Plaintiff's first set of proposed instructions contained instructions for only one form of negligence – failure to warn. The subsequent negligence instruction and verdict sheet question which Plaintiff belatedly proposed to the Trial Court, on the other hand, did not properly address any form of negligence recognized in Virginia product liability law.

It is undisputed that the elements of a negligent failure to warn claim under Virginia law are that the defendant:

1. knows or has reason to know that its product is or is likely to be dangerous for the use for which it is supplied,

2. has no reason to believe that those for whose use the product is supplied will realize the danger, and

3. fails to adequately warn them of the danger.

*See, Featherall v. Firestone Tire and Rubber Company*, 252 A.2d 358, 366 (Va. 1979). The "Negligence Elements" instruction which the Trial Court was planning to give as of January, 24, 2014, the Friday before the case was submitted to the jury, properly instructed the jury on those elements. (A260). The alternative proposal which Plaintiff came up with over the following weekend did not properly instruct the jury on the elements of that claim and did not even mention the issue of an adequate warning. (A261).

Similarly, according to the cases cited by Plaintiff to support a negligent design defect argument, the elements of such a claim are that:

1. a product, as designed, is unreasonably dangerous as normally used, and

2. the unreasonably dangerous condition existed when the product left the defendant's hands.

*Morgan Industries, Inc. v. Vaughan*, 471 S.E. 2d 489, 492 (Va. 1996). Again, the elements of that claim were not reflected, discussed or explained in Plaintiff's proposed jury instruction.

The same is true with respect to the proposed verdict sheets. Prior to the Trial Court's ruling on the warranty claim, Plaintiff had proposed negligent failure to warn questions for the verdict sheet which read as follows:

> 2. Do you find by a preponderance of the evidence that at the time of Ted Sherman's exposure, Georgia-Pacific knew, or had reason to know, that its products could cause injury to persons when the product was being used in a reasonably foreseeable manner?
>
> Yes _____ No _____
>
> 3. *Do you find by a preponderance of the evidence that Georgia-Pacific failed to adequately warn of such a danger?*
>
> Yes _____ No _____

(B117)(emphasis added).

When Plaintiff came up with his new proposal over the final weekend, he deleted the second question and replaced it with the following:

> Do you find by a preponderance of the evidence that Georgia-Pacific *failed to exercise ordinary care with respect to the manufacture and sale of its joint compound products?*

(A268, ¶5)(emphasis added).

Plaintiff's last minute verdict form proposal did not include any question which asked the jury to determine if an adequate warning had been given and it also did not contain any questions for the jury to answer with respect to the specific elements of any negligent defective design claim. The Trial Court's rejection of that vague, general and undefined last minute proposal therefore was proper and should be upheld.

## III. THE JURY'S UNAPPEALED DECISION ON THE ADEQUATE WARNING ISSUE BARS ANY FURTHER CLAIM BY PLAINTIFF.

### A. Question Presented.

As a matter of law does the jury's unchallenged decision on the adequacy of Georgia-Pacific's warning on its product preclude any finding of an unreasonable danger, thereby foreclosing any further claim by Plaintiff?

### B. Standard and Scope of Review.

Questions of law are reviewed *de novo*. *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993).

### C. Merits of The Argument.

#### 1. The Jury's Unchallenged Finding That Georgia-Pacific's Warning On Its Product Was Adequate Means That The Product With The Warning Was Not Unreasonably Dangerous and Thus Forecloses Any Effort to Re-litigate That Issue Under Any Alternative Theories.

By virtue of the language of the agreed-upon jury instructions in this action coupled with the jury's ruling in favor of the defendants, which Plaintiff does not appeal or challenge, Plaintiff is now barred as a matter of law from pursuing any theory of recovery requiring a showing of unreasonable danger. As shown below, the instructions equated a finding of adequate warning with an effective cure and removal of any danger. The jury found that the warning here was adequate which

means any danger was thereby cured by the warning. Since Plaintiff did not appeal that finding by the jury, he is bound by it. He cannot seek to re-litigate the issue of product danger that has been decided against him by the jury and not appealed.

One of the elements of Plaintiff's alternative negligence theory is that the product was unreasonably dangerous. (*See*, page 25 above). It is also an element of his proposed breach of warranty theory. *Morgan Industries,* 471 A.2d at 492. However, since the jury conclusively determined that Georgia-Pacific's product **was not dangerous and Plaintiff has not challenged that determination on appeal,** Plaintiff is barred from re-litigating that issue in connection with either alternative theory of liability. *See, JGR, Inc. v. Thomasville Furniture Industries, Inc.*, 550 F.3d 529, 531(6th Cir. 2008)(holding that party that did not challenge lost profits award on appeal waived any right to re-litigate the issue in a retrial). He therefore is barred from trying to prove an essential element of both of his alternative theories of liability.

By agreement of the parties, instruction number 27 told the jury that if Georgia-Pacific knew or had reason to know that its joint compound might be "**dangerous**" then it had "the duty" to provide an adequate warning. (A301) (emphasis added). The jury was further expressly instructed, by agreement of the parties, that an adequate warning was one:

…which may reasonably be expected to **cure or obviate such *danger…***[13] (*Id.*)(emphasis added).

The instruction quoted above was number 27 in the set of instructions as read to the jury. (A301). It was number 28 in the set of instructions submitted to the Trial Court by the parties on January 22nd and later filed on the record on January 23rd. (B92). Plaintiff did not object to that instruction at that time. (B53). In fact Plaintiff could hardly object to the instruction because it was an instruction which was originally proposed by Plaintiff (A209 & A230) and eventually submitted as a proposed joint instruction (B92). Plaintiff did not and cannot challenge that instruction now. *See, Eustice v. Rupert*, 466 A.2d 507, 510-11 (Del. 1983).

In completing the Special Verdict Form, the jury expressly found that Georgia-Pacific had provided an "**adequate warning** for its product". (A326)(emphasis added). Neither instruction 27 nor the jury's finding on the adequacy of Georgia-Pacific's warning has been challenged on appeal. That finding by the jury is supported by evidence in the record and it therefore may not be disturbed. *Grand Ventures*, 632 A.2d at 71.

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[13] Plaintiff references this jury instruction on page 15 of his brief but omits the critical language referenced above.

In short, Plaintiff may not re-litigate the fact that Georgia-Pacific's product contained a warning and that, with the warning, the product was not dangerous since the warning "cure[d] or obviate[d] such danger". As a result, Plaintiff simply could not ever establish the elements for the additional claims at issue in his appeal and therefore the judgment should be affirmed.

## CONCLUSION

There is no doubt that Plaintiff was given a full and fair trial of his negligent failure to warn and punitive damage claims and Plaintiff does not contend otherwise. He presented all of the evidence he had to support those claims and the jury found against him. Plaintiff's appeal complains only that his multiple requests for Mulligans were denied. The Trial Court properly rejected Plaintiff's efforts, at the conclusion of the case, to be given a do over on alternative theories of liability and any confusion relating to those theories was created by Plaintiff. Finally, the jury's unchallenged finding with respect to the failure to warn claim – specifically, that the alleged danger associated with the Georgia-Pacific product at issue was cured by the warning Georgia-Pacific provided –now bars any further claim by Plaintiff with respect to those alternative liability theories. For all of the foregoing reasons therefore, Georgia-Pacific respectfully submits that the judgment should be affirmed.

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May 12, 2014

## CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 12th day of May 2014, a copy of an Appellee's Answering Brief was served via File and Serve Xpress on the following counsel of record:

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