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Case Number 98,2014

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

TED SHERMAN,	:	
	:	No.: 98, 2014
Plaintiff Below,	:	
Appellant,	:	
	:	Trial Court Below:
v.	:	Superior Court of the State of
	:	Delaware for New Castle County
GEORGIA PACIFIC LLC,	:	
	:	C.A. No.: N11C-01-271 ASB
Defendant Below,	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

Joseph J. Rhoades, Esquire (I.D. 2064)
Stephen T. Morrow, Esquire (I.D. 4891)
1225 King Street, 12th Flr.
P.O. Box 874
Wilmington, Delaware 19801
(302) 427-9500
Attorneys for Appellant/Plaintiff
Below Ted Sherman

LEVY KONIGSBERG LLP
Donald P. Blydenburgh, Esquire
Jerome H. Block, Esquire
800 Third Avenue, 11th Flr.
New York, New York 10022
(212) 605-6200

DATE: May 27, 2014

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NATURE OF PROCEEDINGS

Appellant hereby incorporates herein by reference the Nature of Proceedings set forth in the Opening Brief and adds the following.

On May 12, 2014, Appellee filed its Answering Brief. This is Appellant's Reply Brief in response thereto.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM SUBMITTING TO THE JURY A BREACH OF IMPLIED WARRANTY CLAIM UNDER VIRGINIA LAW AS SUCH CLAIM WAS PROPERLY PLED AND NOT ABANDONED BY APPELLANT. THE SUPERIOR COURT COMPOUNDED ITS ERROR IN DENYING APPELLANT'S MOTION TO AMEND HIS PLEADINGS TO CONFORM TO THE EVIDENCE TO INCLUDE A CLAIM FOR BREACH OF IMPLIED WARRANTY AS THE EVIDENCE ADMITTED AT TRIAL SUPPORTED SUCH CLAIM AND APPELLEE WOULD NOT HAVE BEEN PREJUDICED OR SURPRISED BY SUCH AN AMENDMENT.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY PRECLUDING THE JURY FROM DETERMINING WHETHER APPELLEE BREACHED A DUTY TO EXERCISE ORDINARY CARE IN THE DESIGN, MANUFACTURE AND SALE OF ITS ASBESTOS JOINT COMPOUND AND BY LIMITING APPELLANT'S NEGLIGENCE CLAIM SUBMITTED TO THE JURY TO A FAILURE TO WARN CLAIM ONLY.

STATEMENT OF FACTS

Appellant incorporates herein by reference the Statement of Facts as set forth in his Opening Brief and adds the following.

A. Appellant Was Exposed To Asbestos From Appellee's Joint Compound During The Same Time In Which Appellee Was Manufacturing And Selling Asbestos-Free Joint Compound.

Appellee devotes the first portion of its Statement of Facts to argue that Appellant's testimony regarding his exposure to joint compound was a "moving factual target." *See*, Appellee Georgia-Pacific LLC's Answering Brief filed May 12, 2014 (hereinafter referred to as the "Answering Brief") at 5. The jury did, as a matter of fact, determine that Appellant was exposed to asbestos from Georgia-Pacific joint compound. A325-A329. This jury finding is not challenged in this appeal by either party. Therefore, Appellee's attack on Appellant's credibility is irrelevant to this appeal and simply a transparent attempt to improperly divert this Court's attention from the actual issues to be decided. Suffice to say, Appellant did not waver in his consistent identification of Georgia-Pacific joint compound that came in metal buckets. A50-A51. Appellee concedes that its joint compound, which came in metal buckets during Appellant's exposure period, contained asbestos. Answering Brief at 4-5. Appellee concedes that during Appellant's exposure period, Appellee was manufacturing and selling a joint compound that was asbestos-free that came in bags. *Id.* Despite the evidence at trial and

Appellee's admission on this appeal, the jury was not permitted to decide whether Appellee's decision to manufacture asbestos containing joint compound constituted a breach of warranty or negligence. A325-A329.

B. Appellant Has Consistently Maintained That Appellee Was Negligent In Including Asbestos In Its Joint Compound.

1. Appellant Alleged In The Complaint That Appellee Negligently Included Asbestos In Its Joint Compound.

A plain review of the Complaint demonstrates that Appellant alleged that Appellee was negligent, *inter alia*, for including asbestos in its joint compound:

> The Defendants were negligent in that they failed to exercise ordinary care and caution for the safety of TED SHERMAN in one or more of the following respects:
>
> a. Included asbestos in their products, even though it was completely foreseeable and could or should have been anticipated that persons such as TED SHERMAN, working with and around them, would inhale, ingest or otherwise absorb asbestos;
>
> b. Included asbestos in their products when the Defendants knew or should have known that said asbestos would have a toxic, poisonous and highly deleterious effect upon the health of persons inhaling, ingesting or otherwise absorbing them;
>
> c. *Included asbestos in their products when adequate substitutes for the asbestos in them were available. . .*

A8-A9 (emphasis added).

2. Appellant Reiterated His Claim For Negligent Design In The Pretrial Memorandum And At The Pretrial Conference.

The above allegations comprising Appellant's negligence claim under Virginia law, were realleged in the Pretrial Memorandum:

> Defendants were negligent in that they failed to exercise ordinary care and caution for the safety of Plaintiff in conducting the above activities despite the fact that Defendants knew or should have known that asbestos exposure could result in serious injury, disease and/or death, and Defendants:
>
> a. *Failed to substitute, suggest, promote or require the substitution of materials other than asbestos in their products when adequate substitutes for the asbestos in those products were available;*
>
> b. Included asbestos in their products, even though it was completely foreseeable and could or should have been anticipated that persons such as Plaintiff working with and around them would inhale, ingest or otherwise absorb asbestos . . .

A15-A16 (emphasis added). Moreover, during the Pretrial Conference, the Trial Court ruled in favor of Appellant on the admission of certain documentary evidence based on Appellant's recognized claims, including negligent defective design. See Appellant's Reply Brief Appendix, AR3-AR5.[1]

3. Appellant Steadfastly Maintained The Full Scope Of His Pleaded Negligence Claim Against Appellee Through Trial.

Appellant stated to the jury during opening statement that he would ask the jury to find Appellee negligent for its inclusion of asbestos in its joint compound: "We made a couple of claims in this case. One of them is that asbestos should never have been in that product to begin with." AR9-AR10. Appellant's counsel

[1] Hereinafter, all references to Appellant's Reply Brief Appendix will be made in the following manner: "AR__."

further argued without objection that if Appellee had removed asbestos from its product when it was feasible, Appellant would not have been exposed to its asbestos. AR9.

Moreover, during trial, Appellant admitted evidence that was only relevant to his claims of Appellee's wrongful use of asbestos in its products and its failure to substitute. This evidence included documentation and corporate representative testimony[2] concerning Appellee's delayed substitution of asbestos from its joint compound products, including Appellee's admission that it continued to manufacture an asbestos joint compound for profit through 1977, and continued to market and sell asbestos joint compound even after the Consumer Protection Safety Commission publicly expressed its intention to ban asbestos joint compound for its unreasonably dangerous nature. A189, A171-172, A159, A167-170, A178, A163, A173, A330, A182, A175, A186, A151, A181; AR117-AR121. None of this evidence relates to Appellant's failure to warn claim, and instead relates to his negligence and breach of warranty claims. [3]

[2] Additionally, Appellant's certified industrial hygienist testified that, in the field of industrial hygiene, the first resort is to substitute the hazard, and, if not possible, the next option is to protect the worker with controls and knowledge of the hazard. AR26-AR27.

[3] Notably, the trial court allowed a punitive damages charge to go the jury. Such willful misconduct was discussed in the context of Appellee's substitution efforts and its delayed removal of asbestos from the product. AR3-AR5. The punitive damages claim was almost certainly not permitted by the Court based on the failure to warn claim in a case where a warning was present on the product.

4. At Trial, Appellee Demonstrated Its Awareness of Appellants' Claims Based On The Inclusion Of, And Failure To Substitute, Asbestos Through Argument And Evidence At Trial Directed Solely To Refute Such Claim.

While Appellee now feigns surprise as to Appellant's claims based on the negligent design of its joint compound, Appellee manifested its notice by addressing the issue during opening statement and admitting evidence whose sole purpose could only be to justify its use of asbestos in its compound.[4] During opening, Appellee dedicated a substantial amount of time to the specifics of its substitution effort, defending the reasonableness of its actions. AR11-AR22.

Appellee also admitted evidence alleging that asbestos was necessary to the superior characteristics of creaminess and stability in its product. A148. Appellee's corporate representative further testified about customers' aversion to the non-asbestos joint compound. AR119-AR120. In fact, counsel for Appellee stood in front of the jury and read into evidence from a Georgia-Pacific October 7, 1971 memo between the company President and product chemist:

> In any event, we will expedite our efforts to get rid of the asbestos in the joint compounds. This will be far more difficult because the asbestos controls the working properties which are essential to acceptance by the contractors.

AR49-AR50, AR122. Appellee's counsel also read into evidence a report of the proposed ban's impact on asbestos joint compound:

[4] Appellee also demonstrated its notice during discovery in its answers to interrogatories read into evidence at trial in which its efforts to substitute asbestos out of each of its joint compound products were discussed. AR31-AR35.

> The utility derived from the product by consumers and drywall contractors may be adversely affected; many substitute formulations are expected to have poorer performance qualities than those containing asbestos. This is likely to be noticed more by professional applicators…

AR107-AR113. This evidence has no relevance to a warnings claim and was only admitted to rebut Appellee's negligent design and warranty claims.

C. At The Close Of The Evidence, Appellee Conceded, And The Trial Court Acknowledged, That Appellant Had A Viable Claim For Negligence Beyond A Failure To Warn Claim.

On January 24, 2014, Appellee's trial counsel acknowledged that, in the event the trial court dismissed as a matter of law the failure to warn claim, the remainder of Appellant's negligence claim would survive – "I'm not up here asking for judgment as a matter of law on a negligence claim. That's – that's why he has a negligence claim." A98, A101. Appellant reaffirmed the full breadth of his litigated negligence claim during the prayer conference: "It's negligence, Your Honor, that they included asbestos in the product when they didn't have to." A118-A120. The Trial Court recognized Appellant had proved a negligence claim broader than failure to warn: "It's even clear in your [Appellee's] literature." *Id.* *See also,* AR40, where the Trial Court acknowledges that "the allegation is that the parties continued to market asbestos when substitutes were available…"

D. At The Final Prayer Conference, Appellee's Counsel Led The Trial Court Into Error By Conflating "Design Defect", A Strict Liability Concept, With Appellant's Consistently Asserted Claim That Appellee Negligently Included Asbestos In Its Product.

During the final prayer conference, Appellee's counsel did an "about-face" and objected to Appellant's proposed jury charge reflecting the full scope of his negligence claim as not being properly pleaded and not recognized under Virginia law. Counsel led the Trial Court into error by conflating 'design defect,' a strict liability concept, and negligent design, concerned with a manufacturer's conduct:

> Georgia-Pacific's position is that negligence has to take a form. From our review of Virginia asbestos case law, the forms appear to be failure to warn, a manufacturing defect, and a ***design defect***. To the extent that there is others -- others under Virginia law we have not found them. Plaintiff pled the elements of a design defect claim in Count 2 of their complaint, strict products liability, which they stipulated in advance of trial they were not pursuing.

A123-A124 (emphasis added). Appellant then objected to the paring of his claim:

> Plaintiff has proven through the evidence presented in this case that the defendants knew or had reason to know that their products were hazardous to health long before Mr. Sherman began to be exposed in 1974, and that the joint compound to which Mr. Sherman was exposed could have been made without asbestos, and, in fact, was made without asbestos throughout the period of time of Mr. Sherman's exposure. Virginia law recognizes a negligence products liability claim beyond failure to warn, and plaintiff's position is that this jury should be instructed on this theory of negligence and given a verdict form that allows them to find for plaintiff on this theory of negligence...

A122-A123. Because of the Court's ruling, Appellant was not permitted to argue, and the jury was not permitted to determine, whether Appellee acted wrongfully when it included asbestos in its product when asbestos-free substitutes were available.

ARGUMENT

I. THE TRIAL COU RT ABUSED ITS DISCRETION IN PRECLUDING APPELLANT FROM SUBMITTING TO THE JURY A BREACH OF IMPLIED WARRANTY CLAIM UNDER VIRGINIA LAW.

A. Question Presented

Appellant hereby incorporates by reference the Question Presented as set forth in the Opening Brief.

B. Standard and Scope of Review

Appellant hereby incorporates by reference the Standard and Scope of Review set forth in the Opening Brief.

C. Merits of Argument

Breach of warranty is a recognized claim under Virginia law. *See, Garrett v. I.R. Witzer Co.*, 258 Va. 264 (1999). While based in contract, not strict liability, the warranty cause of action bears considerable similarity to the Restatement 2d, Torts, §402A, not adopted in Virginia. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1114 (4th Cir. 1988). Appellant in his Complaint and the Pre-trial Memorandum set out facts and allegations sufficient to apprise Appellee of the warranty claim against it under notice pleading rules. *See, VLIW Tech., L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 610 (2003).

Moreover, Appellee's argument that Appellant stipulated not to pursue

"Count II" of his Complaint in the pretrial memorandum (see Answering Brief at 8, 16) is misleading. Appellee's counsel acknowledged the intent of the parties' agreement in the Pretrial Memorandum – "[Appellant is] not pursuing claims for strict liability or loss of consortium, because Virginia law does not recognize such claims." A19, at fn. 4. This is a subtle distinction with a substantial difference as it is the *allegations*, not the count headings, that are determinative of the claims stated against a defendant. See, *State Farm Fire & Cas. Co. v. Gen. Elec. Co.*, 2009 Del. Super. LEXIS 460, at *18-19 (Del. Super. Ct. Dec. 1, 2009). Accordingly, while Appellant agreed to not pursue claims based in strict liability, its allegations against Appellee pled a warranty claim under Virginia law.

An amendment to a pleading to include an alternative theory of liability is appropriate where, as here, the evidence in support of both theories is in large part the same, and fair notice of the general fact situation in the original pleading was given. *Bellanca v. Bellanca*, 169 A2d 620, 622-623 (Del. 1961). Here, the evidence to support Appellant's claims against Appellee for the negligent inclusion of asbestos in its products also supports the breach of warranty claim. Additionally, the allegations set forth in the Complaint put defendant on fair notice of the elements of a warranty claim. *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952). Moreover, the prejudice alleged by Appellee is illusory. Appellee admitted evidence solely aimed at refuting a claim that its product as designed was

unreasonably dangerous for its intended use. A148, AR45-113. That Appellee now states that it could have sought admission of exhibits in addition to those in evidence is conclusory, and does not rise to the level of the undue difficulty contemplated in *Deakyne v. Comm's of Lewes*, 416 F.2d 290, 300 (3rd Cir. 1969).

Appellant respectfully submits that the Trial Court's ruling improperly prohibited Appellant from arguing, and the jury from determining, whether Appellee's inclusion of asbestos in its joint compound, even when it marketed a non-asbestos version, rendered the product unreasonably dangerous. This error requires a new trial on that issue.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT LIMITED APPELLANT'S NEGLIGENCE CLAIM SUBMITTED TO THE JURY TO A FAILURE TO WARN THEORY ONLY.

A. Question Presented

Appellant hereby incorporates by reference the Question Presented set forth in the Opening Brief.

B. Standard and Scope of Review

Appellant hereby incorporates by reference the Standard and Scope of Review set forth in the Opening Brief.

C. Merits of Argument

1. Appellant Sufficiently Pleaded A Negligent Design Claim Under Applicable Virginia Substantive Law And Delaware Procedural Law.

In addition to a duty to adequately warn, Virginia recognizes a separate duty of a manufacturer to design, manufacture and sell a product reasonably safe for its intended use. *See* 2-34 Virginia Model Jury Instructions – Civil Instruction No. 34-140, at AR123-AR124; *Morgen Indus. v. Vaughan*, 252 Va. 60, 65-66 (1996); *Roll 'R' Way Rinks v. Smith*, 218 Va. 312, 329 (1977); *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245 (1975); *Ward v. Honda Motor Co.*, 33 Va. Cir. 400 (Cir. Ct. Fairfax 1994).

Appellant sufficiently pled claims against Appellee for negligent inclusion of asbestos in its products while it manufactured and marketed a non-asbestos formulation. Del. Super. Ct. R. Civ. P. 9(b); *Doe v. Bradley*, 58 A.3d 429 (Del.

Super. Ct. 2012). Appellant's claims were consistently maintained throughout the pretrial phase, as well as during argument and presentation of evidence at trial.

2. Appellant Did Not Abandon His Negligent Design Claim When He Submitted Proposed Jury Instructions And The Trial Court Was Ultimately Responsible For Charging The Jury On The Proper Law.

Appellee argues that Appellant somehow abandoned or waived its negligent design claims when it initially proposed a verdict sheet and jury questions relating only to breach of warranty and negligent failure to warn. However, Appellant was simply trying to streamline the instruction by having the jury determine its design and failure to substitute claim within the breach of warranty count and the failure to warn claim in the negligence count, while avoiding the risk of contradictory findings by the jury.[5] *See Vaughan*, 252 Va. at 65 (warranty and negligence have shared elements under Virginia law).

In any event, given that Appellant consistently pleaded and pursued his negligent design claims, the Court was ultimately responsible for properly charging the jury on that claim to assure a full and fair trial. Indeed, the jury instructions that the Court must give for the guidance of the jury, and the nature of those instructions, depends upon the evidence presented in the particular case. *See, Green v. Ruffin*, 141 Va. 628, 640 (1924). The judge is more than a mere referee

[5] Instructions involving Virginia claims of warranty and negligence were similarly crafted in *Boomer v. Ford Motor Co.*, Case No. CL05-010647-00, in the Circuit Court for the County of Albemarle, November 15, 2013 ("*Boomer II"*), which formed the basis for the jury instructions in this matter. *See, Boomer II* jury instructions and transcript at AR125- AR206.

during the process, and shall properly instruct the jury on the law. *See Moore v. Warren*, 203 Va. 117, 125 (1961); *Williams v. Lynchburg Traction & Light Co.*, 142 Va. 425, 432 (1925). Delaware courts have similarly held that a trial judge is charged with properly instructing the jury under the appropriate law: "A trial court must give instructions to a jury as required by evidence and the law whether the parties request the instruction or not." *Balderson v. Freeman*, 2007 Del. Super. LEXIS 494, *5-6 (Del. Super. Ct. May 9, 2007); *Bullock v. State*, 775 A.2d 1043 (Del. 2001); *Culver v. Bennett*, 588 A.2d 1094, 1098 (Del. 1991). Accordingly, Appellee cannot attribute the failure of the Court to charge the jury on negligent design, and to permit the jury to decide that issue, to the proposed jury charge that Appellant initially submitted based on his belief that the Court would also be charging the jury on a breach of warranty claim.

3. Appellant's "Ordinary Care" Interrogatory Was Not Undefined And Encompassed The Full Scope Of Appellant's Claim Under Virginia Law.

Appellant's proposed negligence jury question and instructions were not "undefined" and were fully consistent with Virginia law on negligence. Virginia law specifically recognizes a duty to "use ordinary care to design, manufacture and instruct a product..." AR123-AR124; *see also Boomer II* Verdict Form, AR167-AR168 (instructions include "ordinary care" language and verdict form simply stated: "We the jury find in favor of _____."). Indeed, the jury instructions in this

case, which were largely based on the charge in *Boomer II*, stated that, to find in favor of the Appellant, the jury had to find the Appellee negligent, A291-A292, which was defined as the "failure to use ordinary care," A297, and charged that a determination of a breach of a manufacturer's recognized duty to inspect and test a product constitutes negligence. A303. Despite being charged on multiple duties owed to Appellant under the law, and that the breach of any of these duties would constitute negligence, by court ruling, the jury interrogatory began and ended with the duty to warn despite broader encompassing instructions. A325-A329. Without doubt, such abbreviated interrogatories must have perplexed a jury, which heard prolonged evidence from both parties regarding Appellee's wrongful inclusion of asbestos and Appellee's delay in substituting asbestos out of the product.

4. The Trial Court Erred By Conflating "Design Defect", A Strict Liability Concept, With Appellant's Consistently Asserted Claim That Appellee Negligently Included Asbestos In Its Product, And By Precluding The Jury From Determining Whether Appellee Was Negligent In Including Asbestos In Its Product.

Virginia law recognizes a duty of the manufacturer of a product to "use ordinary care to design a product that will be reasonably safe for its intended purpose…" AR123-AR124. Failure to perform this duty is negligence. *Id. citing Garrett*, 258 Va. at 267; *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 148 (1998); *Ford v. Bartholomew*, 224 Va. 421, 432 (1982). The basic difference between negligence and strict liability with regard to design is that "strict liability concerns

in the condition (dangerousness) of an article which is designed in a particular way, while negligence involves the reasonableness of the manufacturer's actions in designing and selling the article as he did." *Roach v. Kononen*, 525 P.2d 125, 129 (Or. 1974). However, the trial court conflated the concepts of 'design defect', a strict liability concept not recognized under Virginia law and 'negligent design' to erroneously disregard any duty of Appellee other than its duty to warn.

This error is most poignant when the trial court read directly from Count I in Appellant's Complaint:

> Finally, I looked at the cause of action, and I went through it, and on the record. Paragraph 30 is the negligence. It says "Included asbestos in their products when adequate substitutes for the asbestos in them were available. That's the closest I could get to on that design defect.

A128-A129. Thus, the Court was explicitly searching for a "design defect" claim – a strict liability concept – in the Negligence count of the Complaint when a negligent design claim was clearly set forth in the same Negligence count. It was this negligent design claim, which was clearly pleaded and tried in front of the jury, that the Court did not permit the jury to decide.

5. <u>The Jury's Finding Of An Adequate Warning Does Not Bar Appellant From Pursuing His Negligent Design Claim.</u>

Contrary to Appellee's contention, the language of the jury charge on the issue of adequate warning did not amount to a jury determination on the separate and undecided claim of negligent design. The jury's determination is dictated by

the specific jury questions answered by the jury. "The test for applying collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment." *Naylor v. Taylor*, 1996 Del. Super. LEXIS 440, *4-7 (Del. Super. Ct. Aug. 23, 1996) *citing Messick v. Star Enterprise*, 655 A.2d 1209, 1211 (Del. 1995). Appellant's claims for negligent design and negligent failure to substitute were not only precluded from jury determination, but Appellant's counsel was foreclosed from arguing those claims in closing argument. Such claims were certainly not "litigated" and "determined."

Moreover, Virginia recognizes two distinct duties in design and warning, and "warnings are not a substitute for the provision of a reasonably safe design." Restatement 3d, Torts: Product Liability, §2, comment *l* [6], at AR220 (only when an alternative design cannot be reasonably implemented will adequate instructions and warnings be sufficient to render the product reasonably safe); *Abbot v. American Cyanamid Co.*, 844 F.2d at 1115 ("[U]nder Virginia law, an adequate warning does not foreclose a design defect claim in either warranty or tort."); *see Roll 'R' Way Rinks*, 218 Va. at 329. Notably, in *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949 (1979), a case cited by Appellee in support, the Virginia Supreme Court recognized separate and

[6] Restatement 3d, Torts is instructive here as Appellee's Virginia counsel was quick to state that the Virginia Supreme Court in *Boomer* "embraced" the Restatement 3d, Torts. AR114-AR115.

distinct duties for design and warning. *Id.* at 964-967 (although manufacturer's product was not negligently designed, it owed a duty to warn of danger which may result from the foreseeable use of an as-designed component of the product).

Appellee's continued design and sale of its asbestos joint compound, despite designing and selling the same product without asbestos, directly led to Appellant's exposure to asbestos fibers. It was critical to Appellant's claim – particularly given that Appellant did not use the Appellee's product directly and was not in an optimal position to read any product warnings – to be permitted to argue the full scope of Appellee's duty to employ ordinary and reasonable care in the design, manufacture and sale of its products. It is respectively submitted that the Trial Court's preclusion of Appellant's negligence claim *in toto* was error and deprived Appellant of a fair trial.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Honorable Court find that the rulings of the Trial Court precluding Appellant/Plaintiff Below from submitting a breach of warranty claim under Virginia law, denying Appellant's motion for amendment of the pleading under Del. Super. Ct. R. Civ. P. 15 without any showing of prejudice or surprise suffered by the Appellee, and restricting Appellant's negligence claim to a failure to warn constituted reversible error, and a new trial should be ordered.

Respectfully submitted,

LAW OFFICE OF JOSEPH J. RHOADES

/s/Joseph J. Rhoades

Joseph J. Rhoades, Esquire (I.D. 2064)
Stephen T. Morrow, Esquire (ID 4891)
1225 King Street, 12th Floor
Wilmington, Delaware 19801
(302) 427-9500

-and-

LEVY KONIGSBERG LLP
Donald P. Blydenburgh, Esquire
Jerome H. Block, Esquire
800 Third Avenue, 11th Fl.
New York, New York 10022
(212) 605-6200
Attorneys for Appellant/Plaintiff
Below Ted Sherman

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