22-CV-438

In the

District of Columbia Court of Appeals

JO ANN ALLEN,

Appellant,

v.

AC & R INSULATION COMPANY, et al.,

Appellees.

Appeals from the Superior Court of the District of Columbia, Civil Division No. CAA3862-20 *(Hon. Alfred S. Irving, Jr., Judge)*

BRIEF FOR APPELLANT

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SEPTEMBER 30, 2022

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CERTIFICATE AS TO PARTIES

Parties and Amici. The parties, intervenors, and amici who have appeared before the Superior Court and in this court are: Robin B. Quinn, Jo Ann Allen, A.O. Smith Corporation, AC&R Insulation Co., Inc., Burnham LLC, C.J. Coakley Co., Inc., Capitol Boiler Works, Inc., Cleaver-Brooks, Inc., Compudyne, LLC, Conwed Corporation, Crane Company, Inc., Crown Cork & Seal USA, Inc., DAP Products, Inc., Duro Dyne Corporation, Exelon Corporation, Exelon Energy Delivery Company, LLC, Exelon Generation Company, LLC, Federated Development, LLC, Foster Wheeler LLC, General Electric Company, H.B. Smith Company, Inc., Hampshire Industries, Inc., John Crane, Inc., Kaiser Gypsum Company, Inc., Krafft-Murphy Company, Lloyd E. Mitchell, Inc., MCIC, Inc., Metropolitan Life Insurance, Co., Noland Company, PEPCO Holdings LLC, Potomac Electric Power Company, Riggs Distler & Company Inc., Riley Power, Inc., Sid Harvey Industries, Inc., Superior Boiler Works, Inc., The Marley-Wylain Company, The Walter E. Campbell Company, Inc., Thos. Somerville Co., ViacomCBS Inc., and York International Corporation.

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APPEAL FROM FINAL ORDER

The current Appeal is an Appeal from a final Order granting summary judgment in favor of Appellee, General Electric Company ("GE").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting summary judgment in favor of GE on the Appellant's strict liability design defect claim.

STATEMENT OF THE CASE

Jo Ann Allen was diagnosed with asbestos-induced malignant mesothelioma in 2020 and died from the disease on April 9, 2021. On September 2, 2020, Jo Ann Allen instituted this asbestos products liability action against several defendants. On November 15, 2021 Robin B. Quinn, the personal representative of the estate of Jo Ann Allen was substituted as plaintiff. (The Appellant will be referred to as Mrs. Allen).

On January 19, 2022, GE filed a Motion for Summary Judgment.[1] On April 27, 2022, the court granted GE's Motion for Summary Judgment and dismissed all of Mrs. Allen's claims against GE.

[1] In GE's Motion for Summary Judgment, it argued that Maryland law applied. Mrs. Allen did not contest the application of Maryland law for purposes of the summary judgment motion.

STATEMENT OF FACTS

Jo Ann Allen was diagnosed with malignant mesothelioma in 2020 and died from the disease on April 9, 2021. (A349; A564). Mrs. Allen's mesothelioma was caused by her exposure to asbestos-containing products manufactured by GE. (A386; A395-432; A434-473). Specifically, during the period between mid-1963 to late-1964, Mrs. Allen's former husband, Willard Phillips, worked as an asbestos insulator during construction of PEPCO's Units 1 and 2 at the Chalk Point Power Plant in Lusby, Maryland. (A386). Mr. Phillips worked for The Walter E. Campbell Company ("WECCO"), a local insulation contractor. (A385). As a result of that work, Mr. Phillips was routinely exposed to asbestos materials that GE was contractually obligated to supply and install. (A395-432; A434-473). Mr. Phillips then carried that asbestos dust on his clothing into the home he was sharing with his wife, Jo Ann Allen. (A174-179).

On June 28, 1963, GE entered into contracts with PEPCO to furnish the steam turbine generators for Unit 1 and Unit 2 at Chalk Point. (A395-432 and A434-473). Pursuant to those contracts, GE sold to PEPCO for the sum of $8,313,840.00, one steam turbine generator that GE manufactured for Unit 1 and for the sum of $8,228,160.00, one steam turbine generator that GE manufactured for Unit 2. (*See* A431 and A472). Included in the

price and in the "Standard Accessories" that GE agreed to supply were all of the asbestos insulation materials to be applied to the turbines and piping systems. (*See* A413 and A455).

On July 5, 1963, PEPCO issued a Purchase Order to WECCO regarding the insulation on Unit 1 and Unit 2 at Chalk Point (the "Purchase Order.") (A479-483). The Purchase Order specifically states that PEPCO is directing WECCO to "Furnish all material, labor, plant and equipment necessary to install the thermal insulation . . ." on Unit 1 and Unit 2 at Chalk Point. (A479-483). However, the Purchase Order had a specific carve-out for the turbines. Specifically, the Purchase Order went on to say the following: "Furnish labor and equipment only [emphasis in original] to apply the insulating material on the Main Turbines and Boiler Feed Pump Turbines. **Material for this work is to be supplied by the General Electric Company**." (Emphasis supplied). (A479).

GE, in turn, entered into a subcontract with WECCO wherein WECCO agreed to supply and install the thermal insulation materials on the two GE turbines. (*See* A475, A477 and A479-483). GE specified asbestos block insulation and asbestos pipecovering and cement, among other items, to be sued in the construction of its turbines for Unit 1 and Unit 2 at Chalk Point. (*See* A485-489).

Donald Burroughs, a co-worker of Mr. Phillips at Chalk Point, testified that at least 1,000 bags of asbestos insulating cement were used on each turbine. (*See* A386). Mr. Burroughs further testified that he and Mr. Phillips used asbestos-containing pipe insulation during the insulation of the turbines, that the pipe insulation had to be cut, and the cutting created dust. (*See* A386).

Because there were no shower or locker facilities for workers to use at Chalk Point, Mr. Phillips wore his work clothes to and from the jobsite. (A388-389, A391-392).

SUMMARY OF THE ARGUMENT

Superior Court Rule 56(a) requires a party to identify each claim on which they are seeking summary judgment. In GE's Motion for Summary Judgment, they identified the three claims upon which they were seeking summary judgment: negligent failure to warn, strict liability failure to warn, and breach of warranty. Nowhere in the Motion did GE identify strict liability design defect as a claim upon which they were seeking summary judgment.

The only mention of the words "design defect" appears in footnote 2 in the Memorandum of Points and Authorities accompanying GE's Motion for Summary Judgment. That footnote in its entirety states: "Plaintiff has

neither pleaded, nor proffered any evidence to support a design defect or manufacturing defect claim." As discussed in detail *infra*, Mrs. Allen did properly plead a cause of action for strict liability design defect in the Complaint. In addition, Mrs. Allen also proffered facts upon which a jury could reasonably infer that the GE asbestos components were in a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him or her.

GE's Motion also failed to comply with Superior Court Rule 12-I(d)(2),[2] which expressly requires that a motion for summary judgment be accompanied by "a statement of specific points and authorities that support the motion." GE failed to provide specific points and authorities to support a motion for summary judgment on design defect.

Assuming, *arguendo*, that a motion for summary judgment on design defect was properly before the court, the court improperly granted summary judgment on design defect because it did so on grounds that were never raised by GE. The trial court, *sua sponte*, ruled that Mrs. Allen's design defect claim failed as a matter of law because Mrs. Allen could not satisfy

[2] Pursuant to Rule Promulgation Order 22-05, Superior Court Rule 12(I)(d)(2) was deleted as of April 25, 2022. GE's Motion for Summary judgment was filed on January 19, 2022. All of the summary judgment pleadings were completed prior to April 25, 2022.

the consumer expectation test. That argument was never advanced or even mentioned by GE in its summary judgment pleadings. Regardless, even if the consumer expectation argument was properly before the court, the court clearly erred when it ruled that "the asbestos products may have been unreasonably dangerous, but Plaintiff has failed to raise a genuine issue of material fact as to whether they were defective." (A568). The evidence before the court was that the GE turbines were designed and sold containing asbestos-containing thermal insulation. That insulation, when used as intended, released hazardous asbestos dust that deposited on the clothing of Mr. Phillips, who in turn brought it home on his clothing to his wife. Clearly, a jury could reasonably infer that the asbestos-containing components on the turbines were in a condition not contemplated by the ultimate consumer, which would be unreasonably dangerous to him.

Lastly, the holding in *Georgia-Pacific v. Farrar*, 69 A.3d 1028 (Md. 2013), which GE relied heavily upon, is not dispositive in this case. The *Farrar* case addressed whether an asbestos manufacturer had a duty to warn the spouse of an individual who was exposed to asbestos at work. The *Farrar* case in no way addressed a claim for strict liability design defect.

STANDARD OF REVIEW

The Court of Appeals reviews the grant of a motion for summary judgment *de novo*, applying the same standard utilized by the trial court. *Grant v. May Department Stores Co.*, 786 A.2d 580 (D.C. 2001).

Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C.R.-Civ. 56(c). The moving party bears the burden of proving the absence of a genuine issue of material fact. *Grant v. May Dept. Stores*, 786 A.2d 580, 583 (D.C. 2001). In reviewing the record, the evidence is to be viewed in the light most favorable to the non-moving party. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005). Summary judgment may be granted only when the moving party is entitled to judgment as a matter of law and it is "quite clear what the truth is." *Sartor v. Arkansas National Gas Corp*., 321 U.S. 620, 627 (1944).

It is not the function of the court to resolve factual issues, but rather merely to determine whether any relevant factual issues exist. *International Underwriters, Inc. v. Boyle*, 365 A.2d 779, 782 (D.C. 1976). Mrs. Allen is entitled to the benefit of all favorable inferences that may be drawn from the evidence. *McCoy v. Quadrangle Dev. Corp.*, 470 A.2d 1256, 1258 (D.C. 1983).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING GE'S MOTION FOR SUMMARY JUDGMENT ON MRS. ALLEN'S STRICT LIABILITY DESIGN DEFECT CLAIM

A. GE Did Not Move for Summary Judgment on Strict Liability Design Defect

Superior Court Civil Rule 56(a) requires a party to identify each claim or the part of each claim on which summary judgment is sought. In compliance with that Rule, GE specifically identified the claims on which it was seeking summary judgment. Specifically, in paragraph 3 of GE's Motion for Summary Judgment, GE stated:

> General Electric is entitled to summary judgment on Plaintiffs' negligence and strict liability failure to warn claims because, as a matter of Maryland law, General Electric owed no legal duty to Ms. Allen. The existence of a legal duty is a question of law for the Court. Under Maryland law, General Electric had no duty to warn Ms. Allen regarding the alleged danger of exposure to dust brought home by Mr. Phillips from his work at the construction of Chalk Point in 1963-1964. Additionally, General Electric is entitled to summary judgment on Plaintiff's claims for breach of warranty as the applicable statute of limitations bars those claims.

(A35).

GE maintained that position in its Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment when it stated at page 4: "Plaintiff's Negligence and Strict Liability Claims Fail Because

General Electric Had No Duty to Warn Ms. Allen Under Maryland Law." (A40).

The above quoted passages from GE's Motion for Summary Judgment and Memorandum of Law set forth *all* of the claims on which GE sought summary judgment, as is required by Superior Court Civil Rule 56(a) ("A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought."). Noticeably absent from the Motion is any identification of Mrs. Allen's strict liability design defect claim.

In addition to Superior Court Civil Rule 56(a), Superior Court Rule 12-I(d)(2) expressly requires that "Each motion must include or be accompanied by a statement of the specific points and authorities that support the motion, including, where appropriate, a concise statement of material facts." *See also* Rule 56(b)(2)(A).[3] Upon even a cursory review of GE's Motion for Summary Judgment and its accompanying Memorandum, it is abundantly clear that GE did not set forth any argument whatsoever, let

[3] Pursuant to Rule Promulgation Order 22-05, Superior Court Rule 56(b)(2)(A) was amended and the requirement of a Statement of Points and Authorities was deleted as of April 25, 2022. GE's Motion for Summary judgment was filed on January 19, 2022. All of the summary judgment pleadings were completed prior to April 25, 2022.

alone specific points and authorities, in support of a motion for summary judgment on Mrs. Allen's strict liability design defect claim.[4]

The only mention of design defect in GE's Motion and Memorandum is in footnote 2 in the Memorandum that states: "Plaintiff has neither pleaded, nor proffered any evidence to support a design defect or manufacturing defect claim." (A40). Under any objective reading of that footnote, there is no way to construe it as an argument citing specific points and authorities in support of a motion for summary judgment on a design defect claim, as required by Rules 12-I and 56. Rather, the footnote is a concise explanation as to why GE opted not to move for summary judgment on the design defect claim (or a manufacturing defect claim). The reason GE did not move for summary judgment on strict liability design defect is because it mistakenly believed that there was no design defect claim in this case.

[4] GE argued in its pleadings that the Motion for Summary Judgment was styled as "General Electric Company's Motion for Summary Judgment as to All Claims." Regardless of what GE chose to call its motion, it is not excused from complying with Rules 12-I(d)(2) and 56(b)(2)(A), which require a statement of the specific points and authorities that support the motion. If it were otherwise, a party could simply file a summary judgment motion entitled "Motion for Summary Judgment on All Claims" and say no more.

GE is demonstrably incorrect in its assertion that Mrs. Allen did not plead a design defect claim. The following passage can leave no doubt that Mrs. Allen adequately plead a claim sounding in strict liability design defect. The Complaint states at ¶¶ 6-7 in relevant part the following:

> [T]he illness, injury, and damages suffered by Ms. Allen were a direct and proximate result of the design . . . of asbestos-containing products, by Defendants, which were defective and/or unreasonably dangerous to the user and/or consumer . . . The asbestos-containing products were further designed as defective and/or unreasonably dangerous in that their intended use and maintenance contemplated that the asbestos materials would be disturbed, releasing respirable asbestos fibers . . . Defendants named above are now or have been engaged in the business of designing, manufacturing, selling . . . asbestos-containing products . . . The asbestos products that caused injury to Ms. Allen reached her without substantial change in the condition in which they were sold. Ms. Allen was unaware of the dangerous propensities of the asbestos products which rendered them unsafe and unfit for their intended use and, at the time she was exposed to these products, such exposure was anticipated by or should reasonably have been anticipated by Defendants. As a direct and proximate result of the strict liability of Defendants herein, Ms. Allen developed mesothelioma.

(A356).

Because GE mistakenly believed that Mrs. Allen did not plead a claim for strict liability design defect in the Complaint, it did not raise specific

points and authorities in its Memorandum as to why it was entitled to summary judgment on Mrs. Allen's design defect claim. Had GE actually moved for summary judgment on strict liability design defect, Mrs. Allen would have addressed those arguments. Likewise, GE is incorrect in its assertion that Mrs. Allen did not proffer any evidence to support a design defect claim. As discussed in more detail *infra*, there is no dispute that GE designed, specified and sold the turbines at issue with asbestos-containing thermal insulation, i.e., pipecovering, block and cement. The turbine components were *designed* to contain asbestos at the time of the sale and, when used as intended, released hazardous dust that deposited on the clothing of Mr. Phillips.

B. Assuming, *Arguendo*, That There Was a Motion for Summary Judgment on Design Defect Properly Before the Trial Court, the Trial Court Erred in Granting Summary Judgment on Mrs. Allen's Strict Liability Design Defect Claim on Grounds That Were Never Raised by GE

It is well established that summary judgment may not be entered on a ground that was not raised by the moving party without first providing the non-movant adequate notice and opportunity to respond. (Superior Court Civil Rule 56(f)). The D.C. Court of Appeals has expressly stated that Rule 56(f) "plays a critical access-to-justice role in the civil process by guaranteeing all litigants meaningful notice and a fair opportunity to defend

the legal sufficiency of their claims and defenses before judgment can be entered against them." *Radbod v. Moghim*, 269 A.3d 1035, 1042 (D.C. 2022).

On dated April 27, 2022, the court entered an Order granting the motion for summary judgment on all claims, even on those grounds not advanced by GE in its motion, i.e., strict liability design defect. With no motion and memorandum of points and authorities before it relative to design defect, the court not only determined the issue adverse to Mrs. Allen, but did so on grounds that were never raised by GE in any of its pleadings.

In its April 27, 2022 Order, the trial court, *sua sponte* ruled that Mrs. Allen's design defect claim failed as a matter of law because Mrs. Allen could not satisfy the consumer expectation test articulated in *Phipps v. General Motors Corp.*, 363 A.2d 955, 962 (Md. 1976). (A567-568). The trial court made that ruling notwithstanding the fact that GE never argued that Mrs. Allen could not satisfy the consumer expectation test or any aspect of it, let alone allege any absence of material facts in connection with the consumer expectation test, which might have merited a response (factual and/or legal) from Mrs. Allen. Indeed, nowhere in GE's Motion for Summary Judgment or accompanying memorandum, or in GE's Reply

Memorandum in Support of its Motion for Summary Judgment, do the words "consumer expectation test" even appear.

In ruling that Mrs. Allen could not satisfy the consumer expectation test, the court ran afoul of both Rule 56(f) and *Radbod*. The court in *Radbod* stated that Rule 56(f) "makes plain that a Superior Court judge has authority to grant summary judgment in favor of a party who has not requested it—or on a ground not advanced by any moving party—only if the judge has provided the party against whom judgment would be entered notice of the possibility of an adverse pretrial determination of a claim". *Radbod* at 1092. *See also Baicker-McKee and Janssen*, Fed. Civil Rules Handbook, 2022, p. 1211 ("Litigants must appreciate that they are targets of summary judgment inquiry and possess that motivation when preparing their response.").

C. Assuming, *Arguendo*, that GE Properly Moved for Summary Judgment on Strict Liability Design Defect, and That It Was Permissible for the Trial Court to Grant Summary Judgment on the Design Defect on Grounds Never Raised by GE, the Court Still Erred Because Mrs. Allen Can Satisfy the Consumer Expectation Test

The Court of Appeals has held that there are two varieties of strict liability design defect claims recognized under Maryland law: (1) cases in which the design causes the product to malfunction (*i.e.*, something goes wrong), and (2) cases in which the product behaves as intended but is inherently defective because its use involves an unreasonable risk. *Halliday*

v. Sturm, Ruger Co., 368 Md. 186, 195-200 (2002). In design defect *malfunction* cases, the Court applies a risk-utility test which weighs a series of factors including whether a safer design was feasible. *Id*.[5] In contrast, absent a malfunction, the Court applies the consumer expectation test to a strict liability design defect claim. *Id*. at 200 (Court applied consumer expectation test and held "the risk-utility test does not apply to a design defect unless the product malfunctions in some way.").

These two varieties of design defect claim are embodied in separate Maryland Civil Pattern Jury Instructions. MPJI-Cv 26:14 "Defective Condition – Design Defect" sets forth the "consumer expectation test" used in cases such as this, where the product functions as intended but nevertheless poses an unreasonable risk: "A product is defectively designed if it is made as designed by the manufacturer, but the design puts the product in a condition not contemplated by the ultimate user which condition is

[5] In the trial court's April 27, 2022 Order granting summary judgment, the court stated that: "there is no indication that the asbestos-containing products malfunctioned or were otherwise defective." (A568). In Maryland, there is no requirement that a product malfunction in order to be subject to a strict liability design defect claim *unless* a plaintiff is seeking to apply the risk utility test as opposed to the consumer expectation test. *Halliday v. Sturm, Ruger Co.*, 368 Md. 186, 200 (2002) ("the risk-utility test does not apply to a design defect unless the product malfunctions in some way"). The consumer expectation test, in contrast to the risk-utility test, does not require proof of malfunction. *Id*. at 194.

unreasonable dangerous to the user." (A copy of MPJI-Cv26:14 is attached to the Addendum at Page ADD1).

In contrast, MPJI-Cv 26:15 "Defective Condition – Design Defect (Alternative Instruction if Product Malfunctioned)" sets forth the "risk-utility test" and 7 factors to be weighed (including feasibility of alternative designs) which may be informed by expert testimony. (A copy of MPJI-Cv26:15 is attached to the Addendum at Page ADD1).

In the present case, the GE turbine's components were defectively designed in that the thermal insulation was designed to contain toxic, lethal asbestos which, during intended use, was released onto the clothing of Mr. Phillips and brought home to his wife. Thus, even when the pipecovering, block and cement specified by GE were used exactly as designed and intended, those components presented an unreasonably dangerous and potentially lethal hazard to the ultimate user far beyond that which would be contemplated by an ordinary consumer with ordinary knowledge common to the community in 1963-1964. *See Halliday* at 193 ("Comment g to § 402A defines 'defective condition' as a 'condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.'"). Today, those same components that were used on the GE turbines at Chalk Point – pipecovering, block and cement – are no longer defective and

unreasonably dangerous because they are designed with a non-asbestos binder in lieu of asbestos as an ingredient.

1. The trial court erred in its application of the consumer expectation test

In its April 27, 2022 Order, the trial court stated:

> While a jury may be able to conclude that Defendant's product is unreasonably dangerous, there are no facts from which a jury could conclude that "the product [was], at the time it [left Defendant's] hands, in a condition not contemplated by the ultimate consumer." See Phipps, 363 A.2d at 959. Put another way, the asbestos products may have been unreasonably dangerous, but Plaintiff has failed to raise a genuine issue of material fact as to whether they were defective.

(A568).

Essentially, the trial court concluded, as a matter of law, that there was no evidence from which a jury could reasonably infer that the asbestos components were in a condition not contemplated by the ultimate consumer, which would be unreasonably dangerous to him or her. That conclusion ignores the fact that a consumer in 1963-1964 would have no way of knowing that the pipecovering, block and cement contained toxic, lethal asbestos which during its intended use would be released onto the clothing of Mr. Phillips and brought home to his wife, resulting in her terminal cancer. *See Saller v. Crown Cork & Seal Co., Inc.*, 187 Cal.App.4th 1220,

1234 (2010) ("The design failure was in Kaylo's[6] emission of highly toxic, respirable fibers in the normal course of its intended use and maintenance as a high-temperature thermal insulation. It is a reasonable inference from the evidence that this emission of respirable fibers, which were capable of causing a fatal lung disease after a long latency period, was a product failure beyond the 'legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.'"). *See Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (1984) ("plaintiffs established that Kaylo [asbestos pipecovering and block] was 'defective' when they proved that it was unreasonably dangerous as designed; they were not required to show additionally that the manufacturer or designer was 'at fault,' as that concept is employed in the negligence context.").

There is no dispute that GE designed, specified and sold the turbines at issue with asbestos-containing thermal insulation components in the form of pipecovering, block and cement. Each of those turbine components was *designed* to contain asbestos at the time of sale and, when used as intended, released hazardous dust that deposited on the clothing of the insulator (i.e., Mrs. Allen's husband, Willard Phillips). (A413 and A455). Accordingly,

[6] Kaylo is a brand of asbestos-containing thermal insulation that was sold in pipecovering and block forms. *Saller* at 1234.

despite no challenge presented by GE as to any element of her strict liability design defect claim, Mrs. Allen properly alleged, and proffered evidence supporting, the basic elements of that claim.

2. The *Farrar* case is not dispositive of Mrs. Allen's strict liability design defect claim

In GE's Motion for Summary Judgment, they rely heavily on *Georgia-Pacific v. Farrar*, 69 A.3d 1028 (Md. 2013). However, the *Farrar* Decision is not dispositive to Mrs. Allen's design defect claim because the *Farrar* case specifically stated that it was called upon to address whether a manufacturer of an asbestos-containing product had a duty to warn the spouse of an individual who was exposed to asbestos at work. *See Farrar* at 1030, 1031. Consequently, *Farrar* dealt with negligent and strict liability failure to warn claims, and not a strict liability design defect claim.

Indeed, nowhere in the *Farrar* Decision do the words "design defect" even appear because the Court was only addressing negligent failure to warn and strict liability failure to warn claims. That distinction is critical because in a strict liability design defect context, "the plaintiff need not prove any specific act of negligence on the part of the seller," and merely must demonstrate "proof of a defect existing in the product at the time it leaves

the seller's control." *Phipps v. General Motors Corp.*, 363 A.2d 955, 962 (Md. 1976).[7]

Maryland's highest court noted in *Nissen Corp. v. Miller*, 594 A.2d 564, 569 (Md. 1991):

> It is clear that Maryland espoused the doctrine of strict liability in tort in order to **relieve plaintiffs of the burden of proving specific acts of negligence by permitting negligence to be implied where plaintiffs can prove a product is defective and unreasonably dangerous when placed in the stream of commerce**." (Emphasis added.)

The Court further observed that:

> The justification for the strict liability has been said to be that the seller, by marketing the product for use and consumption, has undertaken a special relationship toward *any member of the consuming public* who may be injured by it . . . 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 . . .

Phipps, 363 A.2d at 963 (emphasis added) (*quoting as persuasive* the rationale espoused in the Comment c to Section 402A, Restatement (Second)

[7] In both a negligence and strict liability design defect theory, it is axiomatic that a plaintiff still must demonstrate causation and injury.

of Torts); *see also Payne v. Soft Sheen Products*, 486 A.2d 712, 721 (D.C. 1986).[8]

A design defect claim, focusing on the product and its defective nature leading to injury, stands in contrast to a failure to warn claim where the focus is on the existence of a duty owed to the plaintiff (the issue at the crux of GE's motion) and the conduct of defendant evidencing a breach of that duty. *See, e.g., Farrar*, 69 A.3d at 1031-1032 (outlining the classic elements of negligence – duty, breach, injury, causation). However, as observed, *supra*, in a strict liability *design defect* claim, proof of negligence is irrelevant. *Nissen, 594 A.2d* at 569. Having placed an unreasonably dangerous product in the stream of commerce, negligence (duty plus breach) is implied. *Id*.; *see also Payne v. Soft Sheen Products*, 486 A.2d at 720 ("there is a liability imposed for injury caused by placing a defective product into the stream of commerce in the District of Columbia.") (quoting *Cotton v. McGuire Funeral Service, Inc.*, 262 A.2d 807, 809 (D.C. 1970)). Because Mrs. Allen has pled and proffered sufficient evidence to support a strict

[8] *Phipps* recognized that strict liability can be analogized to negligence per se in that the doctrine deems that placing a defective product on the market which is unreasonably dangerous to the user is, in and of itself, sufficient to impose liability. *Phipps*, 363 A.2d at 962.

liability design defect claim, Mrs. Allen should be allowed to present that claim to a jury.

CONCLUSION

For all the reasons set forth above, Mrs. Allen requests that this Court reverse the decision of the trial court and allow Mrs. Allen's claim on strict liability design defect to proceed to trial.

Respectfully Submitted,

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MPJI-Cv 26:14
Defective Condition—Design Defect

A product is defectively designed if it is made as designed by the manufacturer but the design puts the product in a condition not contemplated by the ultimate user which condition is unreasonably dangerous to the user.

MPJI-Cv 26:15
Defective Condition—Design Defect
(Alternative Instruction if Product Malfunctioned)

If a product fails to function as intended or expected, its design should be considered defective if the dangers posed by the design outweigh the usefulness of the design. In deciding whether the dangers outweighed the usefulness of the design, you should consider these factors:

(1) the usefulness and desirability of the product;

(2) the availability of other and safer products to meet the same need;

(3) the likelihood of injury and its probable seriousness;

(4) the obviousness of the danger;

(5) common knowledge and normal public expectation of the danger (particularly for established products);

(6) the avoidability of injury by care in the use of the product (including the effect of instructions and warnings); and

(7) the ability to eliminate danger without seriously impairing the usefulness of the product or making it unduly expensive.

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, a copy of the foregoing was served via Appellate E-Filing system and a copy was served via electronic mail on the following:

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Matthew E. Kiely
Signature

22-cv-438
Case Number(s)

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