22-CV-438

In the

District of Columbia Court of Appeals

JO ANN ALLEN,

Appellant,

v.

AC & R INSULATION COMPANY, et al.,

Appellees.

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

REPLY BRIEF FOR APPELLANT

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Appellant, Jo Ann Allen, hereby replies to the Brief of Appellee General Electric Company.

I. INTRODUCTION

General Electric erroneously asserts that because its summary judgment motion was styled as to "all claims," it somehow met its burden under Super. Ct. Civ. R. 56 and 12-I. General Electric makes this assertion, notwithstanding the fact that there is no reference in its motion for summary judgment to Ms. Allen's strict liability design defect claim. Rather, the motion at ¶ 3 delineates three claims on which General Electric sought summary judgment: negligent failure to warn, strict liability failure to warn, and breach of warranty. (A35). Moreover, in its memorandum in support of its motion, there is only one single reference to Ms. Allen's design defect claim. That single reference is the conclusory assertion contained in Footnote 2 of the memorandum (hereinafter referred to as "Footnote 2"). Footnote 2 states in its entirety: "Plaintiff has neither pleaded, nor proffered any evidence to support a design defect or manufacturing defect claim." (A40).

That single footnote does not come close to satisfying the burden imposed on the party moving for summary judgment under the D.C. Rules of Civil Procedure. *See* Super. Ct. Civ. R. 12-I and 56.

Despite Footnote 2 not satisfying the requirements of the D.C. Rules of Civil Procedure for bringing a motion for summary judgment, Ms. Allen nevertheless refuted Footnote 2 in her Opposition. Specifically, Ms. Allen's Opposition flatly refuted General Electric's assertion that there was no design defect plead in the Complaint. Secondly, Ms. Allen's Opposition also set forth all of the facts necessary to satisfy a design defect claim, despite no challenge presented by General Electric as to any specific element of the design defect claim.

Notwithstanding the fact that General Electric did not set forth any specific grounds in support of its purported motion for summary judgment on design defect other than the conclusory assertions contained in Footnote 2, the court, *sua sponte*, granted summary judgment on grounds never raised by General Electric. In doing so, the court violated Rule 56(f).

Finally, *Georgia-Pacific v. Farrar*, 69 A.3d 1028 (Md. 2013) is in no way dispositive on a strict liability design defect claim. Upon even a cursory review of the *Farrar* decision, it is plain that *Farrar* only addressed negligent and strict liability failure to warn cases in the context of a take-home exposure case. *Farrar* has no bearing on a design defect claim.

II. ARGUMENT

A. General Electric did not Properly Move for Summary Judgment on Design Defect

In its Brief, General Electric goes to great lengths to make it seem as if it actually moved for summary judgment on design defect. It clearly did not. The reason General Electric did not file a motion for summary judgment on design defect is because it mistakenly believed that Ms. Allen did not plead a design defect claim. While General Electric vociferously maintains that Footnote 2, standing alone, constitutes a motion for summary judgment on a claim of design defect, it is actually an explanation as to why it did not file a motion addressing a design defect claim. Specifically, General Electric did not think there was one.

On page 7 of its Brief, General Electric further attempts to convince the Court that it moved for summary judgment on design defect by quoting the following language from its memorandum in support of its motion for summary judgment:

> Plaintiff asserts survival claims based upon negligence (Count I), ***strict liability (Count II)***, and breach of Warranty (Count III) and seeks compensatory and punitive damages. Defendant/Cross-Plaintiffs seek contribution. As set forth below, General Electric is entitled to

> summary judgment with regard to ***all claims asserted against it***.

(General Electric's Brief at p. 7) (emphasis in original).

The above quote is directly from General Electric's memorandum in support of its motion for summary judgment. Unfortunately, General Electric left out the very next sentence in the memorandum, which states: "Plaintiff's negligence and strict liability counts fail because, as a matter of governing Maryland law, General Electric had no **duty to warn Ms. Allen regarding asbestos carried home from work by Mr. Phillips**." (A38) (emphasis supplied).

Another clear indication that General Electric did not file for summary judgment on design defect is the headers contained in Section IV of the Argument section of the Memorandum of Points and Authorities in Support of General Electric's Motion for Summary Judgment. There are three separate headers: A) Plaintiff's Negligence and Strict Liability Claims Fail Because General Electric Had No Duty to Warn Ms. Allen Under Maryland Law; B) Maryland Substantive Law Controls in this Case; and C) Plaintiff's Breach of Warranty Claims are Barred by Limitations. (A40, A45, A48). Obviously, none of the arguments raised by General Electric remotely addressed design defect.

Despite General Electric's efforts to create the illusion that it moved for summary judgment on design defect, a plain reading of its motion for summary judgment and supporting memorandum demonstrates that it did not.

B. Calling a Motion for Summary Judgment an "All Claims" Motion and Inserting a Conclusory Footnote That States That There is no Evidence to Support a Claim Does not Meet the Burden Under the D.C. Rules of Civil Procedure

In its Brief, General Electric argues that "A moving party need only demonstrate that the plaintiff failed to 'make a showing sufficient to establish the existence of an element essential' for the non-moving party to prove its case." (General Electric Brief at p. 6, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Footnote 2 does not satisfy that burden.

In *Celotex*, Justice White stated the following in his concurring Opinion:

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. **But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or**

with a conclusory assertion that the plaintiff has no evidence to prove his case.

Celotex Corp., 477 U.S. at 328 (emphasis supplied). Here, General Electric offers only its conclusory assertion in Footnote 2.

In *Beatty v. Washington Metropolitan Area Transit Authority*, 860 F.2d 1117, 1121 (U.S. Ct. App. D.C. 1988), the United States Court of Appeals for the District of Columbia Circuit quoted Judge White's reasoning in *Celotex* in reversing the District Court's entry of summary judgment and held that the crucial question is always whether the movant "properly and sufficiently supported its motion for summary judgment in showing that there was no genuine issue as to any material fact and that it was entitled to a judgment as a matter of law." *Id*. at 1121; *see also Fano v. O'Neill*, 806 F.2d 1262, 1266 (5th Cir. 1987) ("*Celotex* does not change the settled rule that '[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.'").[1]

[1] Super. Ct. Civ. R. 56 and Fed. R. Civ. P. 56 are identical in all relevant respects. Where a local rule is identical to a Federal Rule, federal case law is persuasive. *See*, *Williams v. United States*, 878 A.2d 477, 482 (D.C. 2005) ("When a local rule and federal rule are identical, we may look to federal court decisions in interpreting the federal rule as persuasive authority in interpreting the local rule."). In addition, while Maryland law governs the substantive law in this case, the law of the forum governs procedural matters see *Parker v. K & L Gates, LLP*, 76 A.3d 859 (D.C. 2013).

In its motion for summary judgment, General Electric did not cite any depositions, answers to interrogatories, or any other discovery responses, documents or evidence to support Footnote 2's conclusory assertion that "Plaintiff has neither pleaded, nor proffered any evidence to support a design defect or manufacturing defect claim." Indeed, Footnote 2 is precisely the type of conclusory assertion that Judge White and the courts in *Beatty* and *Fano* ruled was insufficient to warrant entry of summary judgment.

For these reasons, Footnote 2 does not satisfy the burden set forth under the D.C. Rules of Civil Procedure for filing a proper motion for summary judgment.[2]

C. Assuming, *Arguendo*, a Motion on Design Defect was Properly Made, Ms. Allen did set Forth Facts in Her Opposition to the Motion for Summary Judgment Demonstrating There was a Genuine Issue for Trial

When a motion for summary judgment is properly made and supported in accordance with Rule 56, the non-moving party must "'set forth specific facts showing that there is a genuine issue for trial' by responding

[2] If the only claim in this case was a design defect claim, and General Electric filed a motion for summary judgment on "all claims" and simply stated in the body of its motion the language that is contained in Footnote 2, and **nothing else**, save for a signature block and Certificate of Service, the motion would clearly be insufficient.

with affidavits, depositions, answers to interrogatories and admissions on file." *Beatty* at 1120, *citing Celotex Corp.* at 324.

Despite General Electric's failure to move as to any aspect of Ms. Allen's strict liability design defect claim, Ms. Allen set forth in detail specific facts demonstrating that there was a genuine dispute as to whether there was a design defect claim. Specifically, Ms. Allen averred in her Opposition that General Electric *designed*, specified and sold the turbines at issue with asbestos-containing thermal insulation in the form of pipecovering, block and cement. The Opposition further averred that each of those General Electric 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 Ms. Allen's husband, Willard Phillips. All of these facts were contained in the Statement of Facts at ¶¶ 6, 11, 13, 16, 17 and 19 in Ms. Allen's Opposition to General Electric's motion for summary judgment. (A350-A353).

In addition to the above facts that were set forth in Ms. Allen's Opposition to General Electric's Motion for Summary Judgment, General Electric also included in the record below, Ms. Allen's Answers to Interrogatories, which also specifically set forth the basis of Ms. Allen's strict liability design defect claim. Specifically, the Answers stated:

> Defendants are liable under the theory of **strict liability as a 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 defective and/or unreasonably dangerous in that they contained deleterious, toxic and carcinogenic asbestos fibers** . . . **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 are now or have been engaged in the business of designing, manufacturing, selling, specifying in use and/or distributing asbestos-containing products. **The asbestos products that caused injury to Mrs. Allen reached her without substantial change in the condition in which they were sold. Mrs. 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 her father and ex-husband used these products, such use was anticipated by or should reasonably have been anticipated by Defendants.

(A281-A282) (Emphasis supplied).

Moreover, it was undisputed that (a) Ms. Allen was exposed to the asbestos fibers brought home by Willard Phillips' work with General Electric's products and (b) Ms. Allen developed mesothelioma. General

Electric's Statement of Material Facts About Which There is No Genuine Dispute at ¶¶ 1, 4 (A51) (which Ms. Allen did not dispute).[3]

The only known cause of mesothelioma is asbestos.[4]

Accordingly, despite no challenge presented by General Electric in its Motion as to any element of Ms. Allen's strict liability design defect claim, Ms. Allen properly alleged and adduced evidence supporting the basic elements of that claim.[5]

In a strict liability design defect claim under Maryland law, "the plaintiff need not prove any specific act of negligence on the part of the seller" but 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). As clearly set forth above, Ms. Allen set forth facts sufficient to support a design defect claim under *Phipps*.

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[3] In her interrogatory responses (appended as Exhibit B to General Electric's Motion), Ms. Allen states that her mesothelioma was caused by exposure to Defendants' products. (A259-260).

[4] *See Norfolk & Western Ry. Co. v. Ayers*, 583 U.S. 135, 123 S.Ct. 1210 at n. 4 (2003).

[5] In its Brief at page 12, General Electric argues that Ms. Allen did not address the consumer expectation test in her Opposition. This argument is spurious. General Electric *never raised the consumer expectation test at any time in its motion for summary judgment*. Assuming there was a proper motion for summary judgment as to Ms. Allen's claim for design defect, Ms. Allen adduced sufficient facts to support such a claim in her Opposition (coupled with General Electric's Statement of Undisputed Facts, certain of which were admitted).

D. The Court Granted Summary Judgment Against Ms. Allen on Her Design Defect Claim on Grounds Never Articulated or Raised by General Electric, and Thus ran Afoul of the *Radbod* Decision and Rule 56(f)

Other than the much-discussed Footnote 2, which states "Plaintiff has neither pleaded, nor proffered any evidence to support a design defect or manufacturing defect claim" (A40), General Electric never again raised the term "design defect," much less the consumer expectation test. Nevertheless, the trial court based its grant of summary judgment against Ms. Allen on design defect on an alleged failure to satisfy the consumer expectation test. (A567-A568). Rule 56(f) specifically provides that a court can only grant summary judgment on grounds not raised by a party after "giving notice and a reasonable time to respond." The D.C. Court of Appeals 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 v. Moghim*, 269 A.3d 1035, 1042 (D.C. 2022) (emphasis supplied).

In complete disregard of *Radbod*, the trial court granted summary judgment against Ms. Allen on her design defect claim on grounds never

once raised by General Electric in its motion for summary judgment and, therefore, ran afoul of Rule 56(f) and *Radbod*.

In its Brief, General Electric attempts to distinguish this case from *Radbod* by arguing that Footnote 2 put Ms. Allen on notice that Ms. Allen had not produced sufficient evidence to satisfy the consumer expectation test. That argument is spurious, as discussed *infra*. The language in Footnote 2 in no way put Ms. Allen on notice that General Electric was claiming Ms. Allen had not satisfied the consumer expectation test. In reality, the only thing Footnote 2 did was inform Ms. Allen that General Electric did not believe that Ms. Allen had brought a design defect claim.[6]

[6] Despite having never raised the argument below, General Electric argues for the very first time in its Brief that the consumer expectation test is not applicable to Ms. Allen's design defect claim based upon *Lloyd v. General Motors Corp.*, 275 F.R.D. 224 (D. Md. 2011). *See*, *Gillespie v. Washington*, 395 A.2d 18, 21 (D.C. 1978) ("It is a well-established rule that a party who fails to raise an issue at trial generally waives the right to raise that issue on appeal. [Citations omitted]. This rule applies specifically in a case of summary judgment."). Regardless of whether or not this argument was raised below, the *Lloyd* case in no way trumps the Maryland Court of Appeals decision in *Halliday v. Sturm, Ruger & Co., Inc.*, 792 A.2d 1145 (Md. 2002), which clearly establishes that in a case such as this, where the product behaves as intended but is inherently defective because it involves an unreasonable risk, the consumer expectation test applies.

E. The *Farrar* Decision has no Bearing on Ms. Allen's Design Defect Claim

General Electric's Motion for Summary Judgment relies predominantly on *Farrar*, *supra*, which addressed *failure to warn* claims on the record facts before the Court in that case. *Farrar* unequivocally did not address whether the plaintiffs alleged or adduced evidence of a design defect claim. The word "design" appears nowhere in the Opinion. There is no discussion of whether Georgia-Pacific's joint compound was defectively designed and unreasonably dangerous because it was designed to contain asbestos as an ingredient rather than a non-carcinogenic binding agent (i.e., as Georgia-Pacific designs it today). It was simply not an issue on appeal in *Farrar*.

Accordingly, the trial court's ruling restricts its analysis (appropriately) of the *Farrar* case to Ms. Allen's strict liability and negligent failure to warn claims. (A568-571). While Plaintiff disagrees with the trial court's decision on those counts, Plaintiff has not appealed that aspect of the ruling.

F. User or Consumer

As its final argument, General Electric presses the argument disregarded by the trial court – i.e., that *Farrar* implicitly addresses the wholly separate concept of a strict liability design defect claim without ever

mentioning "design defect". Further, General Electric suggests that *Farrar* looked at whether a manufacturer's duty to sell a product free of design defects extended to household members by analyzing the user/consumer language of 402A of the Restatement (Second) of Torts (*see* General Electric's Brief at pp. 17-18). However, once again, neither the word "user" nor "consumer" appears anywhere in *Farrar*.[7]

Importantly, *Maryland courts recognize that the doctrine of strict liability extends protection to non-users and non-consumers and bystanders*. In *Valk Mfg. Co. v. Rangaswamy*, 74 Md.App. 304, 317 (1988), *rev'd on other grounds*, 317 Md. 185 (1989), the Court of Special Appeals extended the doctrine of strict liability to include non-users and non-consumers. After reviewing the policy considerations behind the adoption of strict liability, the intermediate appellate court extended its protections to non-users observing that the movement towards expanding coverage to bystanders was "massive and essentially unanimous." *Id*. at 323. Thereafter, the Court of Special

[7] General Electric also states that *Farrar* found a household member has no connection to the product (General Electric's Brief at p. 18), citing mistakenly to a page from the *Phipps* decision. The proper pinpoint citation is to *Farrar*, 69 A.3d at 540-41. A review of this excerpt from *Farrar*, in the proper context, however, reveals that the court's concern was directly cabined to the *feasibility of warning* a household member with no connection to the product, underscoring the court's focus on *failure to warn* claims – not design defect claims.

Appeals, in *Anchor Packing v. Grimshaw*, 115 Md.App. 134, 191-95 (1997), *vacated on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452 (1998), recognized, relying on *Valk*, that the doctrine of strict liability extends to foreseeable bystanders, including household members exposed to asbestos dust brought home on the worker's clothing. Subsequently, the Court of Appeals confirmed that *Valk* correctly sets forth the law of Maryland:

> Appellants correctly state that "liability for injuries which are foreseeable resulting from a defective product extends to bystanders who are put in peril by the defect." *See e.g., Valk Mfg. Co. v. Rangaswamy*, 74 Md.App. 304, 322-23, 537 A.2d 622 (1988), *rev'd on other grounds sub nom. Montgomery County v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 1246 (1989).

Gourdine v. Crews, 405 Md. 722, 734 (2008). *Gourdine* makes clear that, contrary to General Electric's argument, Maryland law does not limit recovery in strict liability to persons who are deemed a "user or consumer." Thus, General Electric's argument fails.[8]

[8] Additionally, and while not necessary for rejection of General Electric's argument regarding "users and consumers," Ms. Allen does not concede that she falls outside the definition of "user and consumer." Comment *l* to § 402A expressly states that family members of users and consumers fall within the protected class, as do others passively using or consuming the product.

CONCLUSION

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

Respectfully Submitted,

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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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