24-CV-199

In the

District of Columbia Court of Appeals

ROBIN B. QUINN, PERSONAL REPRESENTATIVE FOR JO ANN ALLEN,

Appellant,

v.

GENERAL ELECTRIC COMPANY,

Appellee.

Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2020-CA-003862-A *(Hon. Alfred S. Irving, Jr., Judge)*

REPLY BRIEF FOR APPELLANT

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OCTOBER 25, 2024

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I. INTRODUCTION

The Court is in receipt of just under 100 pages of briefing, collectively from the parties, addressing numerous issues. To refocus and potentially streamline this Court's analysis it is worthwhile to take stock of some salient points.

(A) As an initial matter, following remand from this Court the trial court granted GE's second motion for summary judgment, ruling: "Because the Court finds that Mrs. Allen is not a bystander who may recover damages, the Court need not address the Parties' arguments concerning the existence of a prima facie case as to each of the four elements of a strict liability claim under Maryland law." A1608. Appellant (and in turn, Appellees) nevertheless supplied this Court with analysis of the four strict liability factors to avoid the prospect of a third appeal.

(B) Maryland has determined that under appropriate facts a household member exposed to asbestos dust by laundering the product user's clothing may pursue a bystander strict liability claim.

(C) In Maryland, strict liability failure to warn and negligent failure to warn claims require proof of the elements of negligence, including duty and breach, in contrast to a design defect strict liability claim.

II. ARGUMENT

A. Manufacturer Liability for Asbestos-Exposed Household Members

1. *Grimshaw* is Controlling Law on the Issue of Bystander Liability

In ruling that Mrs. Allen was not a bystander entitled to recover under her strict liability design defect claim, the trial court disregarded what it termed "dubious"[1] case law from Maryland's intermediate appellate court. Specifically, the trial court ignored the decision in *Anchor Packing Co. v. Grimshaw*, 115 Md.App. 134, 191- 94 (1997), *vacated on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452 (1998), which expressly held that the doctrine of strict liability extends to foreseeable bystanders, including household members exposed to asbestos dust brought home on the worker's clothing: "Whether it was foreseeable to [the defendant] that asbestos workers would bring home asbestos-covered clothes and expose their households to harm is an issue to be determined by the jury." *Id*. at 191 (emphasis added).

It is well beyond the trial court's authority to abrogate, vacate or effectively overrule controlling case law from a sister state. *See*, *e.g.*, *West v. AT&T Co.*, 311 U.S. 223, 237 61 S.Ct. 179, 85 L.Ed. 139 (1940). Where "an

[1] A1629.

intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Waremart Foods v. N.L.R.B.*, 354 F.3d 870, 876 (D.C. Cir. 2004) (citing U.S. Supreme Court in *West, supra*). This is especially true where the Maryland Supreme Court had every opportunity to abrogate or overrule the intermediate appellate decision in *Grimshaw* when deciding the *Farrar* case, another asbestos take-home case. *See Georgia Pacific, LLC v. Farrar*, 432 Md. 523 (2013).

Instead of overruling *Grimshaw*'s holding that a foreseeable, asbestos-exposed household bystander was entitled to recovery if the jury so determined, the *Farrar* Court acknowledged that the intermediate appellate court dealt with the factual record before it which was different from the evidentiary record presented in the *Farrar* case. *Id*. at 534. The *Farrar* Court did not contend that the analysis in *Grimshaw* was "dubious", as the trial court did here, but rather determined that foreseeability is a fact specific inquiry and found plaintiff's evidence wanting on the record before it. *Farrar* left undisturbed the holding of *Grimshaw* - that foreseeability of

injury to an asbestos-exposed household bystander presents a jury question – and, accordingly, it remains good law.

It is axiomatic that the Court in *Farrar* was limited to the evidence presented for its review. The Court observed on multiple occasions that it was addressing "the evidence before us" and the "record before us". *Farrar*, 432 Md. at 534, 541. In *Farrar*, while there was evidence presented dating back to 1930 of the danger from bringing "toxic substances" generally into the home, the Court was unable to conclude that it was foreseeable in the 1960s that asbestos dust could be brought into the home on a worker's clothing and potentially injure a spouse.[2] In fact, the earliest evidence in the record about the dangers of *asbestos* being brought into the home was a single reference from 1960.

Here, in stark contrast, and to eliminate any similar concerns, Plaintiff's expert, Dr. Barry Castleman, submitted an affidavit describing a sizeable body of historical information on household exposures to asbestos and providing a "far from exhaustive list" of governmental and scientific publications addressing the dangers of take-home asbestos dust and remedial

[2] *Farrar* also held that even if it was foreseeable, it was not feasible for the manufacturer to warn the worker's spouse. *Id.* at 540-541.

steps to avoid taking *asbestos* dust home dating from 1942, 1943, 1946, 1949, 1952, 1955, 1959, 1963 and 1964. A394-A401.

2. *Gourdine* Does Not Absolve GE of Liability

GE relies heavily on the case of *Gourdine v. Crews*, 405 Md. 722 (2008). In *Gourdine*, the Court found that a pharmaceutical manufacturer (Eli Lilly) did not owe a duty to warn the driver of a vehicle that was struck by an individual who suffered an adverse reaction to the pharmaceutical's medication.

Gourdine was a failure to warn case, unlike this case, which is a design defect case. In Maryland, negligent failure to warn and strict liability failure to warn claims have "morphed together" and are virtually the same claim. *Gourdine v. Crews*, 405 Md. 772, 743 (2008). More specifically, "concepts of duty, breach, causation and damages are present in both." *Mazda Motor of Am., Inc. v. Rogowski*, 105 Md.App. 318, 325, *cert. denied*, 340 Md. 501 (1995). "Duty, thus, is an essential element of both negligence and strict liability causes of action for failure to warn," *Gourdine*, 405 Md. at 743. In a strict liability <u>failure to warn</u> claim, "liability is no longer entirely 'strict'". *Id*. at 742 (citation omitted).

In contrast, in a strict liability design defect claim, a plaintiff is relieved from proving the elements of negligence such as duty and breach.

Nissen Corp. v. Miller, 323 Md. 613, 624 (1991). In fact, the policy behind a strict liability design defect claim is to liberate the plaintiff from proving a duty of care or moral fault on the part of the manufacturer/seller as is required in a negligence case. *Valk Mfg. Co. v. Rangaswamy*, 74 Md.App. 304, 311 (1988), *rev'd on separate grounds sub nom. Montgomery County v. Valk Mfg. Co.*, 317 Md. 185 (1989). Simply put, in a design defect claim, the plaintiff need not prove a duty and concomitant breach thereof because it is implied. *Nissen Corp. v. Miller*, 323 Md. 613, 624 (1991) ("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."). Nevertheless, the trial court insisted on Plaintiff proving just that by relying on a series of negligence cases (*Patton/Ashburn*) and strict liability/negligent failure to warn cases. Creating new law, the lower court engrafted its own threshold determination for the viability of a Maryland strict liability *design defect claim* that it coined "element zero" – proof of a common law tort duty as found in a negligence case and failure to warn claims. A1617-A1618.

In *Gourdine*, since the strict liability failure to warn claim was effectively a negligence claim, the Court was required to determine whether

a duty existed on the part of the drug manufacturer to Gourdine. The Court found that "there was no direct connection between Lilly's warnings, or the alleged lack thereof, and Mr. Gourdine's injury. In fact, there was no contact between Lilly and Mr. Gourdine whatsoever." *Gourdine* at 750. As a result, there was no feasible way for the drug manufacturer to warn Gourdine.

The *Gourdine* Court specifically cited with approval *Valk, supra*, 74 Md. App. 304 (1988), which extended liability for a strict liability design defect to a bystander. In *Valk,* the plaintiff was struck by a truck with a defective snowplow attachment on the front which made direct contact with the plaintiff. The Court in *Gourdine* stated: "In *Valk Manufacturing,* however, the defective product was directly involved in the accident and caused the decedent's injury." *Gourdine* at 751. Because of that direct contact with a bystander, the *Gourdine* Court approved the extension of design defect liability to the unrelated bystander in *Valk*.

The present case, just like *Valk,* is a design defect claim. It does not implicate the feasibility of a manufacturer to warn the injured party. Rather, just like in *Valk,* Mrs. Allen came into direct contact with GE's asbestos by inhaling it when it was foreseeably brought into her home on her husband's clothing. Here, the defect – namely, the presence of asbestos incorporated

into GE's insulation products – directly caused Mrs. Allen's exposure to asbestos and mesothelioma.

GE complains that it would be "incongruous" and "absurd" for there to be a viable design defect claim when there is no duty to warn. The court in *Valk* found that there was a viable design defect claim. Clearly, a failure to warn claim would not have been viable in *Valk* because the manufacturer of the plow would have had no feasible way to warn the plaintiff, who was a driver on the roadway with no connection to the plow until it struck him. Similarly, GE had no duty to warn Mrs. Allen. However, by virtue of the fact that it sold an unreasonably dangerous product into the stream of commerce that came into direct contact with Mrs. Allen, GE is liable under a design defect theory.

Earlier this year, in the case of *Williams v. J-M Manufacturing Company*, 102 Cal.App.5th 250 (2024), the California Appellate Court addressed the very issue that GE's counsel refers to as "absurd" and "incongruous" – that in a household asbestos product liability case where there was no duty on the part of the defendant to warn the injured plaintiff, a viable strict liability design defect claim could be pursued.

In *Williams*, the plaintiff, a bystander, was the asbestos worker's brother and was routinely at the brother's house where he was exposed to

asbestos. He developed mesothelioma and filed suit. The court stated that his "strict liability cause of action did not require him to prove any element of duty. '[S]trict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages).'" *Id.* at 260 (quoting *Elsheref v. Applied Materials, Inc.*, 223 Cal.App.4th 451,464 (2014)). The court held that even though there was no viable negligence failure to warn claim because there was no duty on the part of the defendant to warn, a viable strict liability design defect claim survived. *Williams* at 256-264.

As in *Williams*, Mrs. Allen's strict liability design defect claim does not rest on proving duty or negligence factors.

B. At the Time Mrs. Allen was Exposed to GE's Asbestos Fibers, it was Completely Foreseeable to GE That Asbestos Dust Could Be Brought Home on the Clothes of Workers

In Dr. Barry Castleman's Declaration, he sets forth the state-of-the-art evidence relating to the knowledge available to companies, such as GE, regarding whether asbestos dust could pose a hazard as a result of being brought home on a worker's clothing. The trial court improperly took on the role of factfinder and granted all reasonable inferences to be taken from Dr. Castleman's Declaration against Mrs. Allen. In so doing, the trial court invaded the province of the jury, which is entitled to determine whether the

evidence regarding the foreseeability of harm from take-home asbestos dust was foreseeable. *See Grimshaw*, 115 Md.App. at 191 (foreseeability of potential household exposure is an issue to be determined by the jury).

The trial court also ignored its role as gatekeeper with regard to expert testimony. Dr. Castleman has dedicated more than 40 years to the study of scientific, governmental, corporate and regulatory documents, texts and literature to place in context the knowledge that was available to companies at various points in time pertaining to asbestos hazards. He has been qualified in state and federal courts (including the D.C. Superior Court) countless times as a state-of-the-art expert in asbestos litigation. His textbook has been cited as authoritative by this Court (*see Bragg v. Owens-Corning Fiberglas Corp.*, 734 A.2d 643, 651 (D.C. 1999)) and his testimony has been relied on by the Supreme Court of Maryland (*see Eagle Picher Industries v. Balbos*, 326 Md. 179, 195 (1992)).

Dr. Castleman opined in his affidavit that there were numerous historic publications "predating 1965 that address the need to avoid taking hazardous substances, including asbestos, home on clothing." A1359. Dr. Castleman identifies exemplars of such evidence dating from 1942, 1943, 1946, 1948, 1949, 1952, 1955, 1963 and 1964. One such publication was a 1942 document concerning occupational disease prevention and the need to

follow certain health routines when handling asbestos at a GE plant in York, Pennsylvania. As to each of the remaining publications referenced in Dr. Castleman's affidavit, (1) the knowledge contained within them is imputed to GE and forms its constructive knowledge regarding the potential hazards of bringing asbestos dust home on clothing;[3] and (2) the potential injury described is sufficient to place GE on notice of a foreseeable hazard, the precise injury need not be mesothelioma. *Balbos*, 604 A.2d at 196-197.

The trial court, on motion for summary judgment, improperly weighed and assessed the credibility of Dr. Castleman's expert affidavit in a light least favorable to Plaintiff. *Weakley v. Burnham*, 871 A.2d 1167, 1173, 1175-76 (D.C. 2005) ("On summary judgment, the court does not make credibility determinations or weigh the evidence"). Here, the lower court exceeded its proper function as gatekeeper. A "trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *Motorola v. Murray*, 147 A.3d 751, 757 (D.C. 2016). Rather, expert testimony is to "be tested by the adversary process and evaluated by the jury." *Id*. The lower court's rejection of Dr. Castleman's opinion that

[3] A manufacturer of a product is held to the level of an expert in the field and must keep abreast of any scientific knowledge and discoveries that relate to its product. Actual knowledge of an individual manufacturer is not the issue. *Owens-Illinois v. Zenobia*, 325 Md. 420, 445 (1992).

there was ample literature regarding the hazards of household asbestos exposure prior to 1965 must be reversed.

C. Mrs. Allen has Adduced Sufficient Evidence to Satisfy the Elements of a Design Defect Claim

The parties agree that, in order to prove a strict liability claim in Maryland, the plaintiff must demonstrate that (1) the product was defective when it left the seller's possession or control; (2) it was unreasonably dangerous to the user or consumer or bystander; (3) the defect caused the injuries; and (4) the product was expected to and did reach the user or consumer without substantial change in its condition. *Phipps v. General Motors Corp.*, 278 Md. 337, 344 (1976). Mrs. Allen incorporates by reference here her argument regarding satisfaction of the *Phipps* elements set forth in her initial brief at pages 26-40. That said, GE raises a handful of arguments which merit a response.

1. Mrs. Allen has presented sufficient evidence that General Electric's Products were Defective and Unreasonably Dangerous

GE argues that the appropriate test for determining whether a product's design is defective and unreasonably dangerous is the risk utility test. Appellee Br. at pp. 36-43. GE is wrong.

a. The Consumer Expectation Test Applies here under Controlling Maryland Law

Despite well-settled case law in Maryland that holds that the consumer expectation test is utilized in a design defect claim, GE continues to maintain that the risk utility test should be applied.

The Supreme Court of Maryland 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.*, 792 A.2d 1145, 1153-54 (Md. 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*. In contrast, absent a malfunction, the Court applies the consumer expectation test to a strict liability design defect claim. *Id*. at 1153 ("the risk-utility test does not apply to a design defect unless the product malfunctions in some way.").

In its brief, GE ties itself in knots trying to convince the court that the risk-utility test applies. It consistently tries to hammer a square peg into a round hole and misstates the holding in *Halliday*. Indeed, GE cites to *C&K Lord v. Carter*, 536 A.2d 699 (Md.App. 1988) and *Klein v. Sears, Roebuck*

& Co., 608 A.2d 1276 (Md.App. 1992), two cases that were expressly criticized by the Supreme Court in the *Halliday* decision. Specifically, the Court, citing *Carter* and *Klein*, among other cases, stated, "In a string of other cases, however, the Court of Special Appeals continued to apply the risk-utility test in design defect cases involving the lack of a safety device, sometimes, unfortunately, by **misconstruing, side-stepping, or ignoring** what we said in *Kelley*." *Halliday* at 1153. The Court in *Halliday* observed that substituting a risk-utility analysis for the consumer expectation test "has attracted considerable criticism and has been viewed by many as a retrogression, as returning negligence concepts and placing a very difficult burden on plaintiffs." *Id*. at 1154. GE's reliance on *Carter* and *Klein* demonstrates that its attempt to apply the risk-utility test in this case is misguided, at best.

To the extent that GE contends that the *Halliday* decision does not adequately address the issue of whether the consumer expectation test is utilized in a design defect case, a recent decision of the Appellate Court of Maryland settles the issue. *See*, *Basil-Flippen v. Gen. Elec. Co.*, No. 1427-2022, 2024 WL 488559 (Md. Ct. App. Feb. 8, 2024).[4] In the *Basil-Flippen*

[4] Maryland Rule 1-104(a)(2)(B) provides that "an unreported opinion issued on or after July 1, 2023 may be cited for its persuasive value only if no reported authority adequately addresses an issue before the court." While the

case, the Appellate Court was faced with a similar fact pattern as the case at hand. In *Basil-Flippen*, the plaintiff was exposed to asbestos that was brought home on her husband's clothing as a result of his work at a power plant with a Westinghouse turbine. While the court ultimately decided that a design defect claim could not be upheld because the Westinghouse product never left Westinghouse's control (an issue not present in this case), the court stated that in an asbestos design defect claim, the consumer expectation test would apply. The court in *Basil-Flippen* specifically stated that the "consumer expectation constitutes the primary basis for the determination of whether a product is in defective condition." *Basil-Flippen* at *3. The court went on to state in footnote 8 that "Another basis for the determination of defective condition is known as the risk/utility test, which is not in issue in the present appeal." *Id*. at *4, n. 8. The court went on to say that "The risk/utility test has been used where a product malfunctions or where a safety device is feasible but not included in the product." *Id*. Clearly, under facts almost identical to the present case, the Appellate Court of Maryland upheld that the consumer expectation test applies.

Appellant contends that the *Halliday* decision conclusively states that the consumer expectation test must be applied in a design defect claim, GE does not. The *Basil-Flippen* case settles the issue.

b. Mrs. Allen's Evidence Satisfies the Consumer Expectation Test

The parties agree that the Consumer Expectation Test requires the plaintiff to prove that the product at issue is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Phipps*, 278 Md. at 344. Here, Mrs. Allen proffered ample evidence that neither she nor tradespersons working around asbestos in the 1963 to 1964 time period had any knowledge of the hazards posed by asbestos, let alone knowledge that exposure to asbestos dust carried home on clothing could pose a fatal hazard. *See* Appellant Initial Br., Statement of Facts, at pp. 3-5.

c. The Design Defect in General Electric's product caused Mrs. Allen's mesothelioma and death

GE's thermal insulation products were defective in that they were designed to contain lethal asbestos. Those products, when used as intended, generated substantial amounts of asbestos dust which deposited on the clothing of Mrs. Allen's husband. That asbestos was routinely brought into the household and Mrs. Allen was in direct contact with the asbestos material through her laundering of her husband's work clothing. Mrs. Allen incorporates here that portion of the argument set forth in her initial brief at

pp. 36-37 demonstrating that her inhalation of GE's asbestos was directly causative of her mesothelioma and death.

GE raises for the first time in its brief before this court the notion that its products were not a proximate legal cause of Mrs. Allen's injuries, referencing the frequency, proximity and regularity factors set forth in *Balbos*, *supra*, 604 A.2d at 460. As this argument is raised for the first time on appeal, it is not properly before the court. Regardless, Mrs. Allen easily satisfies not only the medical causation aspect of her claim but also the proximate cause component.

Over the course of more than two months, Mrs. Allen's husband was regularly exposed to GE's asbestos materials and the dust generated by their use while he insulated the turbines at Chalk Point. On a daily basis, he carried that asbestos dust on his clothing into the home he shared with his wife. As observed by Plaintiff's occupational medicine expert, Dr. Arthur Frank, in countering the notion that household exposures are low-level exposures:

> Once asbestos is carried home by the workman, it accumulates in the home, and its presence in the home is likely to be permanent. Once it gets into the rugs, for example, it becomes re-suspended by movements such as brushing and walking and therefore, family members are getting a 24-hour-a-day, 7-day-a-week, exposure, relatively speaking, rather than a partial exposure.

A1404-A1405.

Moreover, Mrs. Allen laundered her husband's work clothing every other day during that time period. The clothing looked like it had been covered with dust. Mrs. Allen would shake off the work clothes before placing them in the washing machine. She additionally had to sweep up the asbestos dust from the floor. In laundering the clothing, Mrs. Allen could not have been more proximately or directly exposed to the asbestos at issue. This evidence is sufficient to go to the jury. *Palmer v. State*, 223 Md. 341, 352 (1960) ("question of proximate cause is usually a question of fact for the determination of the jury"). More importantly, "[w]hether the exposure of any given bystander to any particular supplier's [asbestos] product will be legally sufficient to permit a finding of substantial-factor causation is fact specific to each case." *Balbos*, 326 Md. at 210.

d. GE's asbestos reached Mrs. Allen, the bystander, without substantial change in its condition

In its brief, GE argues:

> It is beyond dispute that those products never reached Ms. Allen. Instead, Plaintiff alleges that residual dust from the construction activities at Chalk Point, including from the insulation material installed on the General Electric turbines, was carried miles away from Chalk Point on Mr. Phillips' clothing to the home he shared with Ms. Allen in Riverdale, Maryland."

(GE brief at 47-48). Based on that assertion, GE then argues that there is no way for a jury to conclude that the GE product reached Mrs. Allen without substantial change in its condition. That argument is specious. First, GE's argument is belied by *Grimshaw*, *supra*. Moreover, the very nature of a bystander's exposure, by definition, means that such a person is exposed to residual asbestos dust generated by the actual user of the asbestos product. If GE's contention is correct, no bystander could recover from being exposed to residual dust whether carried on the clothing of the user or carried in the air as a result of the product's intended use. That is clearly not the law in Maryland. As set forth in *Balbos*, bystanders who do not actually use or work with a product may recover in an asbestos action. *See Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 460 (Md. 1992); *Anchor Packing v. Grimshaw*, 692 A.2d 5 (Md.App. 1997); *ACandS v. Abate*, 710 A.2d 944 (Md.App. 1998). Mrs. Allen was exposed to the exact asbestos dust generated from the use of GE's products that Mr. Phillips was exposed to when the dust deposited onto his clothing. Those asbestos fibers did not undergo some magical change by virtue of a car ride from work to home.

III. CONCLUSION

For the foregoing reasons and those stated in her initial brief, Mrs. Allen requests that this Court reverse the decision of the trial court and remand her strict liability design defect claim for trial.

Respectfully Submitted,

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