[J-81-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

<table>
<tr><td>Pennsylvania Department of General Services,
Pennsylvania Department
of Transportation, Pennsylvania Public Utility
Commission, Pennsylvania
Emergency Management Agency, and
Pennsylvania Department of State
v.
United States Mineral Products Company,
Certainteed Corporation,
Courtaulds Aerospace, Inc., Chemrex, Inc., Philips
Electronics North
America Corporation, Advance Transformer
Company, and Monsanto Company

Appeal of: Monsanto Company

Pennsylvania Department of General Services,
Pennsylvania Department of
Transportation, Pennsylvania Public Utility
Commission, Pennsylvania
Emergency Management Agency, and
Pennsylvania Department of State, Appellants
v.
United States Mineral Products Company,
Certainteed Corporation, Courtaulds
Aerospace, Inc., Chemrex, Inc., Philips Electronics
North America Corporation,
Advance Transformer Company, and Monsanto
Company, Appellees</td><td>:
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:</td><td>Nos. 173 & 176 MAP 2002

Appeals from the Order of the Commonwealth
Court dated 10/16/02 at Nos. 284 MD 1990 & 244
MD 1996

ARGUED: May 11, 2004</td></tr>
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CONCURRING AND DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: May 25, 2006**

I join the Majority Opinion in its resolution of Issues I and III. However, I respectfully dissent from the Majority's resolution of Issue II and its discussion and determination of strict liability as it applies to the instant matter.

In particular, the Majority concludes that, although a product-defect claim may beallowed based on the general danger of polychlorinated biphenyls (PCBs), a claim for strict liability is not permitted according to prior case law. Maj. Slip Op. at 15 (citing Phillips v. Cricket Lighters, 841 A.2d 1000, 1007 (Pa. 2003) (plurality Opinion)). However, Phillips is not dispositive of this case as it addressed a legally distinguishable scenario. In particular, this Court in Phillips was concerned with the problem of a foreseeable but unintended user in strict liability cases. In an attempt to limit the scope of strict liability, this Court established that a child, as a foreseeable but **unintended user**, may not recover under a theory of strict liability when a lighter failed to have a child-safety lock. Id.

Presently, the issue does not involve an unintended user. Further, the Majority mistakenly attempts to equate unintended user with foreseeable misuse. Maj. Slip Op. at 16. However, the issue also does not center on foreseeable misuse. Rather, as discussed *infra*, the issue concerns the foreseeable conditions a product may face when used as intended by its intended user.

It is necessary to know the background in the confusing field of strict liability doctrine that has developed in this Commonwealth. Phillips discussed the doctrine in detail and highlighted some of the concerns with the present system. Although it is true that Phillips was highly critical of the then-existing strict liability doctrine, ultimately, there was no Majority to conclude that foreseeability considerations **never** have a place in a strict liability case. Instead, the overriding principle set forth in Phillips is that strict liability should be limited to a very small range of cases. In particular, Phillips merely

garnered a Majority that agreed that cases involving an unintended user are outside the scope of the strict liability doctrine.

In evaluating the standards for strict liability, this Court, in Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966), adopted Section 402A of the Second Restatement of Torts (1965), which provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

This Court has opined that a product will be deemed defective only if it "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978). Phillips emphasized the intended user aspect by citing Mackowick v. Westinghouse Electric Corp., 575 A.2d 100 (Pa. 1990) (holding that no claim for strict liability exists where there is a failure to warn of a danger well known to the intended user). "We reasoned that a product need be made safe only

for its intended user." Phillips, 841 A.2d at 1005 (citing Mackowick, 575 A.2d at 102-03).

Phillips was a plurality Opinion from which it is difficult to discern a majority position regarding the application and exceptions to this Court's general restriction on recovery pursuant to a theory of strict liability. Moreover, all comments on precluding any expansion of strict liability were mere *dicta* that failed to garner a majority. In part, as noted by Justice Saylor's Concurring Opinion in Phillips, this is a result of the difficulty and artificiality in parsing negligence concepts from those of strict liability.[1] Phillips, 841 A.2d at 1016 (opining that "the Court should candidly address the ramifications, in particular, the overt, necessary, and proper incorporation of aspects of negligence theory into the equation. . . . I do not agree with the lead Justices that this question can be resolved by the rhetorical exclusion of negligence concepts from strict liability doctrine. . . .") (Saylor, J., concurring, joined by Justices Castille and Eakin).[2] In addition, I wrote a Concurring and Dissenting Opinion in Phillips in which I stated, "[a]ccordingly, the majority properly rejected the strict liability claims in this case

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[1] Notably, because Phillips had only six participating Justices, this Concurring Opinion garnered the support of half the Court and squarely recognized that negligence principles currently exist in a limited manner in strict liability doctrine.

[2] In addition, Justice Saylor wrote that this Court should consider the reasoned approach of the Third Restatement of Torts: Products Liability § 2 (1998). Id. at 1019-20 (utilizing a risk-utility test). As in Phillips, an argument concerning the Third Restatement of Torts is not before us. I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer's liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.

because the lighter was safe for its intended use by adults." Phillips, 841 A.2d at 1023. As such, I agreed that a child, as an unintended user, could not recover under a theory of strict liability. However, I did not address the issue of an intended user. Instead, I concluded that "[m]anufacturers, distributors, and sellers have a duty to provide products that are not unreasonably dangerous when operated as intended by their intended users." Id. at 1024.

Importantly, the case at hand involves neither an unintended user nor an unintended use.[3] Rather, the building material was used in the construction and

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[3] The Majority misreads and mischaracterizes this central line of reasoning in this Opinion. In no way have I proposed that an alteration to existing case law be adopted by allowing reasonably foreseeable unintended use to enable recovery pursuant to a theory of strict liability. As emphasized throughout my Concurring and Dissenting Opinion, the building materials in this case were **used as intended by the intended user**. The ability to recover may exist only if these two prerequisites are met. Azzarello, *supra*. When a manufacturer designs a product that must be safe for its intended user and intended use, common sense dictates that such safely intended use must include all reasonably foreseeable conditions and events affecting that intended use. Thus, a sense of fair play to the innocent consumer mandates that recovery is allowable pursuant to a theory of strict liability. Moreover, as the materials were used in their intended fashion by their intended user, no prior case law in this Commonwealth precludes recovery. Rather, the Majority appears to equate foreseeability of conditions of intended use with foreseeable misuse. Maj. Slip Op. at 16 ("Madame Justice Newman posits that the Court should extend the liability without fault of manufacturers, beyond the realm of injuries occasioned in the actual course of the use of a product as the manufacturer intended, to injury or damage occasioned by exposure of a product to some unintended but reasonably foreseeable condition of use or 'outside cause or instigator.'") (citing Concurring and Dissenting Slip Op., Newman, J. at 2, 6, 7, 8-10). In reality, the two are distinguishable; namely, the product was used as intended and, thus, the negligence doctrines of "foreseeable misuse" and "foreseeable unintended user" are not implicated. Accordingly, I would find that: (1) it is those negligence concepts that have no place in strict liability; and (2) foreseeability may play a role in determining the conditions to which a product may be subjected **when used as intended**.

maintenance of a building, per its intended use, and the intended user, the owner of the building, used the materials. The Majority states that " [a]s it is undisputed that the incineration of building products is not a use intended by the manufacturer . . . damages in strict liability are unavailable for the fire-related contamination." Maj. Slip Op. at 21. Although it is true that subjecting building products to fire is not a use intended by the manufacturer, this is not a case of misuse by the user. Instead, the product was used in the manner for which it was designed, but was exposed to the easily anticipated conditions to which any building material, properly used, may be subject.

As such, this case is readily distinguishable from the concerns present in the Lead Opinion in Phillips regarding the oft-misplaced foreseeability argument in strict liability cases. The instant scenario is more akin to a "crashworthiness doctrine" situation than to Phillips. As noted by the Majority, the Third Circuit predicted that this Court would adopt the crashworthiness doctrine relative to vehicle manufacturers. Maj. Slip Op. at 15, n.10 (citing Oddi v. Ford Motor Co., 234 F.3d 136, 143 (3d Cir. 2000)); see also Hutchinson v. Penske Truck Leasing Co., 876 A.2d 978, 983 (Pa. Super. 2005) ("The crashworthiness doctrine is a subset of strict products liability, most applicable to vehicular accidents. By this doctrine, the liability of manufacturers and sellers is extended to situations where the defect did not actually cause the injury-producing accident, but rather led to an increase in the severity of the injury incurred.") (citing Colville v. Crown Equip. Corp., 809 A.2d 916, 922 (Pa. Super. 2002), appeal denied, 829 A.2d 310 (Pa. 2003)); Harsh v. Petroll, 840 A.2d 404 (Pa. Cmwlth. 2003), appeal granted, 862 A.2d 581 (Pa. 2004), ("A subset of both the design defect and the manufacturing defect claims is what is known as the 'crashworthiness' claim which Plaintiffs did not specifically raise, but which is an aspect of strict liability.") (citing

Kupetz v. Deere & Co., 644 A.2d 1213, 1218 (Pa. Super.), appeal denied, 653 A.2d 1232 (Pa. 1994)). Colville summarized the crashworthiness doctrine well in stating:

> Historically, a Section 402A strict products liability action only created liability for injuries proximately caused by a defect where the defect also caused the accident. Barris v. Bob's Drag Chutes & Safety Equipment, Inc., 685 F.2d 94, 99 (3rd Cir. 1982). However, the crashworthiness doctrine extends the liability of manufacturers and sellers to "situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the design defect." Kupetz, 644 A.2d 1213, 1218 (Pa. Super. 1994) (citing Mills v. Ford Motor Co., 142 F.R.D. 271 (M.D. Pa. 1990)).

Colville, 809 A.2d at 922 (citations modified). In summary, the crashworthiness doctrine is an exception to the general prohibition of strict liability for intended use.

The underlying reasoning for the exception is that the intended use of a vehicle is not to crash it; but instead to use it safely without accident. However, the majority of jurisdictions that have addressed the crashworthiness doctrine have been persuaded by the rationale that an intended user who uses the product in its intended fashion may still be involved in a crash through no fault or misuse of his or her own. The crashworthiness doctrine permits strict liability as a means of ensuring that automobile manufacturers create a product that is safely designed for its purpose, including foreseeable conditions that do not involve misuse on the part of the user. Those same considerations exist in a case such as this one; namely, that the producer of building materials designs a product that is inherently safe when used as intended by the intended user and foreseeable misfortune occurs through no fault of that user. Ultimately, the defect is one that increases the severity of the injury due to a foreseeable outside cause or instigator of the injury. This is not a situation where the

user intentionally or unintentionally was the direct cause of the injury, and I do not profess to address a scenario where a user has intentionally set the material on fire. In contrast, this is a situation where the inherent defect increased the severity of the injury through no fault or misuse on the part of the intended user.

The Majority asserts that Phillips foreclosed the expansion of strict liability and that to allow the present claim to be subject to strict liability would be to expand the doctrine. Maj. Slip. Op. at 15. The Majority notes that both Oddi, *supra.*, and Davis v. Berwind Corp., 690 A.2d 186, 190 (Pa. 1997) (holding that a manufacturer may be held strictly liable for foreseeable alterations to an otherwise safe product), allow for some targeted exceptions to this limitation on strict liability. Id. at 15, n.10. The present matter is akin to the crashworthiness doctrine in Oddi and would not be an expansion of the existing, limited applicability of the doctrine of strict liability.[4]

Moreover, the Majority states that:

> While Justice Newman's threshold proposition may be accurate as concerns Phillips, it fails to account for prior majority decisions of this Court that have based their holdings squarely on the proposition that negligence concepts have no place in strict liability doctrine. See, e.g., Kimco Dev. Corp. v. Michael D's Carpet Outlets, 536 Pa. 1,

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[4] The Majority opines**,** "we are of the view that the metamorphosis of the particularized crashworthiness doctrine into a generalized conditions-of-use/outside-cause-or-instigator exception to the general bar against resort to foreseeability concepts in the strict liability arena would, in fact, represent an extension of the type that was disapproved by a majority of Justices in Phillips." Maj. Slip Op. at 18-19. The application of the crashworthiness doctrine to this matter is not an extension; rather, it is a necessary logical corollary and mere formalization of the implied existence of the crashworthiness doctrine in Pennsylvania.

> 7-9, 637 A.2d 603, 606-07 (1993) (predicating a holding that manufacturers may not assert a comparative negligence defense in strict liability cases on the notion that negligence concepts do not properly extend into the strict liability arena).

Maj. Slip Op. at 18; see also Maj. Slip Op. at 19 (summarizing Kimco as stating "that negligence concepts have no place in strict liability theory to justify substantial restrictions on use-related defenses in strict liability cases, by prohibiting manufacturer defendants from pursuing a comparative negligence defense based on the plaintiff's conduct.") Kimco is entirely consistent with my proposed holding today. In Kimco, a manufacturer was not allowed to rely on misuse on the part of the defendant to receive a reduction in damages based on comparative negligence. The foam product was defective in that it was flammable and could be placed near sources of heat. Thus, the doctrine of foreseeable misuse was not implicated, as that is part of an analysis of negligence and not one of strict liability. Kimco allowed for strict liability recovery when a product was used as intended by its intended user under foreseeable conditions. Moreover, the defendant in Kimco was estopped from asserting a comparative negligence claim because the product was used as intended even if subjected to questionable, yet foreseeable, conditions. Presently, the defendant should also not be allowed to assert a comparative negligence claim of foreseeable misuse. Much as in Kimco, the material was used as intended and subjected to foreseeable conditions that resulted in harm. Accordingly, Kimco supports the proposition that misuse never plays a role in strict liability; it is foreseeable conditions of intended use, even if negligent on the part of the end-user, that may still subject a manufacturer to strict liability.

Thus, I find that, under current strict liability law, a colorable strict liability issue exists for the jury in a case such as this. Namely, when a product is used by its

intended user (building owner) and for its intended use (in the construction and maintenance of a building), a question exists as to whether or not the product was "lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Azzarello, 391 A.2d at 1027; Second Restatement of Torts. The jury has already made a determination pursuant to strict liability standards involving the foreseeable conditions to which the product used in its intended way may be subjected. As such, I would hold that no new trial is necessary concerning liability. However, a remand is needed on issue II to determine the damages caused by the product defect. In particular, the jury must distinguish non-compensable injury that would have occurred absent the product defect from the enhanced and compensable harm resulting from the product defect. See Kupetz v. Deere & Co., 644 A.2d 1213 (Pa. Super. 1994); Colville, supra. Ultimately, though, because I concur with the Majority Opinion regarding Issues I and III, I agree that a new trial is warranted on those grounds.

Mr. Justice Baer joins this concurring and dissenting opinion.