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)*

BRIEF FOR APPELLANT

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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 and General Electric Company.

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APPEAL FROM FINAL ORDER

The current appeal is 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 herein as Mrs. Allen.)

On July 7, 2023, GE filed a Motion for Summary Judgment.[1] On January 31, 2024, the court granted GE's Motion for Summary Judgment and dismissed all of Mrs. Allen's claims against GE.[2]

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[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.

[2] The current appeal is Mrs. Allen's second appeal of the trial court's entering of summary judgment. The first appeal involved GE's first summary judgment motion, filed on January 19, 2022, in which it sought to dismiss the Plaintiff's negligent and strict liability failure to warn claims. GE

STATEMENT OF FACTS

I. MRS. ALLEN AND HER EXPOSURE TO ASBESTOS

Jo Ann Allen was diagnosed with malignant mesothelioma in 2020 and died from the disease on April 9, 2021. (A370; A585). Mrs. Allen's mesothelioma was caused by her exposure to asbestos-containing products sold by GE. (A973; A982-1019; A1021-1060). 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 Units 1 and 2 at PEPCO's Chalk Point Power Plant in Lusby, Maryland. (A973). Mr. Phillips worked for The Walter E. Campbell Company ("WECCO"), a local insulation contractor. (A972). As a result of that work, Mr. Phillips was routinely exposed to asbestos materials that GE was contractually obligated to supply. (A982-1019; A1021-1060). Mr. Phillips then carried that asbestos dust on his clothing into the home he shared with his wife, Jo Ann Allen. (A886-888). Mrs. Allen laundered her husband's

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did not move for judgment on design defect. Notwithstanding that fact, the trial court entered summary judgment on April 27, 2022 on all of the Plaintiff's claims, including the Plaintiff's design defect claim, even though GE had not moved for summary judgment on that issue. Following the appellate court's decision reversing the trial court's first entry of summary judgment on Plaintiff's design defect claim, the trial court, over Mrs. Allen's objection, allowed GE a second bite at the summary judgment apple.

work clothing every other day, which further exposed her to asbestos. (A887).

Mr. Phillips' work clothing generally looked like it had been covered with dust. Mrs. Allen would have to shake off her husband's work clothes before placing them in the washing machine. (A1278). Mrs. Allen recalled seeing dust around the edge of the washing machine after she shook the clothes out. (A1278). She also had to sweep up this dust from the floor. (A1279-1280).

At all times relevant hereto, Mrs. Allen had no understanding that washing her husband's asbestos-laden clothing could cause her any harm. (A1276).

Construction tradespersons, including insulators, and PEPCO plant workers and engineers working in the 1963-64 time period were unaware that asbestos was hazardous. (A1283-1355).

- Excerpts of Deposition of Sanford Brooks (4/14/10) in *Guerieri v. ACandS, Inc., et al*. (*Burns*) (PEPCO boiler and turbine operator starting in 1948; became aware that asbestos was dangerous in the early 1970s) (A1284-1288);

- Deposition of Samuel F. Fullerton (6/1/12) in *Fullerton v. AC&R Insulation Co., Inc.* (insulator; started in the trade in 1958; unaware of the hazards of asbestos until after 1976) (A1290-1297);
- Deposition of William Hahn (6/14/01) in *Hicks v. ACandS, Inc., et al.* (*Wilson*) (PEPCO engineer starting in 1960; became aware of asbestos-related health concerns in the 1970s) (A1299-1307);
- Deposition of Kenneth B. Hill (7/21/22) in *Hill v. ViacomCBS, Inc., et al.* (insulator; started in the trade in 1964; first learned of hazards of asbestos exposure in the 1970s) (A1309-1313);
- Deposition of Michael Lenox (1/31/13; 2/27/13) in *Lenox v. AC&R Insulation Co., Inc., et al*. (insulator helper, carpenter; started in the trade in 1954; first learned that asbestos could be hazardous sometime in 1979) (A1315-1330);
- Deposition of Charles W. Nicolson (6/25/01) in *Hicks v. ACandS, Inc., et al.* (*Wilson*) (PEPCO engineer starting in 1953; became aware of asbestos-related health concerns in the 1970s) (A1332-1338);
- Deposition of Frank Thompson (5/3/12; 5/14/12) in *Thompson v. AC&R Insulation Co., Inc., et al*. (electrician; started in the trade in

1960; became aware of asbestos and that it was potentially hazardous in the late 1970s) (A1340-1348);

- Deposition of Donald Burroughs (6/5/12) in *Sydnor v. AC&R Insulation Co., Inc.* (insulator; worked in the trade in the 1960s; unsure if he was aware of the hazards of asbestos by 1973). (A1350-1355.)

II. GE SOLD ASBESTOS TO PEPCO

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. (A982-1019; A1021-1060). 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* A1018 and A1059). Included in the price and in the "Standard Accessories" GE agreed to supply were all of the asbestos insulation materials to be applied to the turbines and piping systems. (*See* A1000 and A1042).

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"). (A850-854). 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. (A850-854). 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.) (A850).

GE, in turn, entered into a subcontract with WECCO wherein WECCO agreed to supply (free of sales tax, as the asbestos was for GE’s resale to PEPCO) the thermal insulation materials for the two GE turbines. (*See* A847; A848; A850-854). GE would then resell the asbestos materials to PEPCO. (A959; A961). GE specified asbestos block insulation and asbestos pipecovering and cement, among other items, to be used in the construction of its turbines for Unit 1 and Unit 2 at Chalk Point. (*See* A1241-1245).

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* A973). 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* A973).

Because there were no shower or locker facilities for workers to use at Chalk Point, Mr. Phillips wore his work clothes home. (A975-976; A978-979).

III. KNOWLEDGE OF THE DANGERS OF HOUSEHOLD EXPOSURE TO ASBESTOS DUST

Toward the beginning of the 20th century, scientific publications addressed the hazards associated with bringing toxic dusts home on workers' clothing. In 1913 and 1914, seminal texts on safety and prevention of occupational diseases emphasized the importance of leaving dust-covered work clothing at the factory so as not to bring the hazard home. (A1359-1361). Plaintiffs' expert, Barry I. Castleman, Sc.D., outlined in an affidavit submitted in opposition to Defendant's motion a *far from exhaustive list* of important historical documents predating 1965 that addressed the need to avoid taking hazardous substances, and specifically asbestos, home on clothing. (A1357-1363). Dr. Castleman's Affidavit provided the following information:

In **1942** (thirty years before OSHA), the Pennsylvania Department of Labor published a safe practice bulletin (No. 93), Occupational Disease Prevention, which focused on the use of **asbestos** at a General Electric (GE) manufacturing facility in York, Pennsylvania. This bulletin described various mechanisms to protect the health of workers at the GE plant,

including **procedures to avoid bringing asbestos home on clothing**. In the section entitled "Health Routine," GE was advised to distribute to its plant employees booklets on rules and precautions of safety and health requiring employees' signatures. The following procedures, among others, were recommended:

> 4. Distribution and *furnishing of following materials*:
>
> (a) *Clothing – coveralls – underwear – caps – gloves*
>
> (b) Towels – soap – protective cream
>
> (c) *Lockers – one for street clothes – one for work clothes*
>
> (d) Shower baths – 15 minutes allowed in work schedule
>
> (e) Trained nurse – routine inspection and first aid
>
> (f) Lunch room facilities
>
> *Employees enter the plant through the locker rooms provided, street clothes are deposited in a special locker room and working clothes provided are worn during factory operations. The reverse cycle is carried out at the close of the day*.

(Emphasis added.) The bulletin concluded by observing that these measures, along with others described, would aid in the "control of any health problem . . . incident to the handling of **asbestos fiber** employed in the manufacture of electrical insulation for wire and wire products." (Emphasis added.) (A1360 at ¶ 11).

The following year, in **1943**, the U.S. Public Health Service published its Manual of Industrial Hygiene. In the manual, after recognizing **asbestosis** (among other forms of pneumoconioses) as an occupational disease hazard, the Division of Industrial Hygiene for the NIH recommended "Two-compartment lockers, or preferably two individual lockers, should be provided in dressing rooms for employees whose clothes are exposed to contamination with poisonous, infectious or irritating material." (A1360-1361 at ¶ 12).

In **1946**, the Journal of the American Medical Association (JAMA) published an article by Dr. Wilhelm Heuper entitled "Industrial Management and Occupational Cancer" that recommended that workers handling carcinogenic materials, including **asbestos**, be provided with showers and special rooms for storing street clothes. (A1361 at ¶ 13).

In a **1948** document circulated to members of the American Petroleum Institute's Medical Advisory Committee, Roy S. Bonsib, an industrial hygienist for Standard Oil of New Jersey, stated:

> Appropriate work clothes, properly fitted and maintained, play a prominent part in an industrial worker's health and efficiency. This is especially true when persons are working with more or less toxic or carcinogenic materials or where cleanliness is a factor in the maintenance of product quality. Consequently, many of the more progressive industrial organizations, such as E.I. DuPont de Nemours & Company, the American Cyanamid Company and the Borden Company, have for years supplied

> their employees with work clothing and have instituted a laundry service.

(A1361 at ¶ 14).

In **1949**, the National Institutes of Health (Dr. Wilhelm Hueper, Chief of the Environmental Cancer Section of the U.S. National Cancer Institute) published Environmental and Occupational Cancer. The publication recognized asbestos as a source of occupational lung cancer. In describing measures to eliminate or control such cancer, Dr. Hueper recommended that exposed workers should be furnished with suitable protective clothing, gloves, masks and similar safety devices; and urged "separate lockers for street clothes and work attire". He also recommended that "workers should be familiarized through lectures repeated at regular intervals of the type of carcinogenic hazard present, so as to obtain their willing cooperation in the enforcement of the various precautionary measures." (A1361-1362 at ¶ 15).

The **1949** Model Code of Safety Regulations for Industrial Establishments for the Guidance of Governments and Industry issued by the International Labor Office ("ILO") contained a series of regulations designed to reduce the hazards of exposure to dangerous substances (Ch. X). The dangerous substances described included fibers and toxic dusts. The ILO stated that all personnel exposed to irritating or toxic substances shall be provided with suitable working clothing and head coverings where

needed which "shall not be taken out of the factory by the users for any purpose," and shall be "washed, cleaned or changed for clean clothing at least once a week." The ILO also emphasized instruction of workers, noting that "personnel shall be thoroughly informed, by means of posters and by verbal instruction of the health hazards connected with their duties and the measures to be taken to protect themselves therefrom." (A1362 at ¶ 16).

A **1952** document entitled Safety and Health Standards for Contractors performing Federal Supply Contracts under the Walsh-Healey Public Contracts Act required that contractors provide facilities to prevent the communication of hazardous air contaminants, including **asbestos**, from work clothes by contact to street clothes. Subsequently, Walsh Healey regulations were published in the Federal Register in 1960. These regulations provided that, "Where employees' work clothes are exposed to contamination by poisonous, infectious, or irritating material, facilities shall be provided in change rooms so that street and work clothes will not be stored in contact with each other." (A1362 at ¶ 17).

A **1955** publication by the Illinois State Federation of Labor entitled Cancer in Industry (Herbert K. Abrams, M.D.) explained that, as a safeguard against developing **asbestos-induced lung cancer** (and other occupational cancers), the worker should be furnished protective clothing, goggles,

gloves, and respirators and should change his work clothing daily with showers at the end of the day. (A1362-1363 at ¶ 18).

In a **1959** publication entitled Industrial Carcinogens, R.E. Eckardt, M.D., Ph.D., FACP (then director of the medical research division of Esso Research and Engineering Company), discussed **asbestos-induced lung cancer and asbestosis** and recommended for workers handling asbestos "the use of double lockers, one for street clothes and one for work clothes". (A1363 at ¶ 19).

In **1963**, the National Safety Council published Dusts, Fumes, and Mists in Industry and described various forms of pneumoconiosis, including **asbestosis**. In this publication, the NSC described various methods to control the dissemination of injurious dust and concluded by stating "contaminated work clothes should not be taken home where a toxic dust could contaminate the home or expose other members of the family." (A1363 at ¶ 20).

In October of **1964**, Newhouse and Thompson presented a paper at the seminal Conference on Biological Effects of Asbestos held in New York wherein they described a series of patients who were exposed to **asbestos** dust brought home by a family member and later were diagnosed with mesothelioma. Newhouse and Thompson concluded in their paper that

"there seems little doubt that the risk of mesothelioma may arise from both occupational and domestic exposure to asbestos ...". (A1363 at ¶ 21).

IV. HOUSEHOLD EXPOSURE TO ASBESTOS CAN, AND DID, CAUSE MRS. ALLEN'S MESOTHELIOMA AND DEATH

As indicated above, it was clear prior to Mrs. Allen's exposure to GE's asbestos that domestic, or household, exposure to asbestos dust could cause disease. Plaintiff's expert in occupational medicine, Dr. Arthur Frank, stated "[i]t has been repeatedly and consistently demonstrated in the medical and scientific literature that family members exposed to asbestos dust from laundering a worker's clothing have a significantly increased risk of developing mesothelioma." (A1396 at ¶ 70). Dr. Frank, citing the well-recognized Helsinki Criteria (a consensus report of leading experts on asbestos disease), confirmed that mesothelioma can occur in cases with low asbestos exposure. (A1364; A1574 at ¶ 403). Dr. Frank reviewed the facts of this case and Mrs. Allen's medical records and concluded that Mrs. Allen developed, and died from, malignant mesothelioma caused by exposure to asbestos dust generated by Defendants' asbestos products and brought home on her husband's work clothing. (A963-964).

SUMMARY OF THE ARGUMENT

The trial court ruled that the Plaintiff was not a bystander who could recover damages in a design defect strict liability claim because GE did not

owe a common law negligence duty to Mrs. Allen. The court based its ruling on a common law negligence analysis relying primarily on two negligence cases. But this appeal concerns a strict liability design defect claim – not a negligence claim.

The Maryland Supreme Court ruled in *Phipps v. General Motors Corporation*, 278 Md. 337 (1976), that the justification for imposing strict liability is based on the notion that the seller, by marketing its product for use, "has undertaken and assumed a special responsibility toward *any member of the consuming public* who may be injured by it." *Phipps*, 278 Md. at 532 (emphasis added). In particular, the Supreme Court of Maryland eliminated the need to prove elements of negligence (*i.e.*, duty and breach) and instead of focusing on the conduct of the seller, it focused solely on the product.

The trial court also failed to heed the holding in *Valk Manufacturing Co. v. Rangaswamy*, 74 Md. App. 304 (Md. Ct. Spec. App. 1988). In *Valk*, the Court discussed how modern strict liability design defect law in Maryland liberated the plaintiff from having to prove a duty of care on the part of the manufacturer. Notwithstanding the longstanding and well-settled Maryland case law, the trial court imposed upon the Plaintiff the requirement of proving a common law negligence tort duty in order to

succeed on a strict liability design defect claim. The court then held that GE did not owe a duty to Mrs. Allen and granted summary judgment in GE's favor. The court was simply incorrect in imposing the requirement of proving negligence (duty and breach) upon Mrs. Allen in a strict liability design defect claim.

In doing so, the court engrafted a new element (what the court called "element zero") by requiring the plaintiff, as an initial matter, to prove the negligence element of duty.

In order for a plaintiff to succeed in a design defect claim in Maryland, they must satisfy the four elements set forth in *Phipps*. In this case, Mrs. Allen has set forth sufficient evidence to satisfy the four elements of a strict liability design defect claim. Specifically, Mrs. Allen has set forth credible evidence that (1) GE's product was defective at the time it left GE's control, (2) the product was unreasonably dangerous to Mrs. Allen, (3) the defect, i.e., the fact that the product contained deadly asbestos, was the cause of Mrs. Allen's injuries, and (4) the GE asbestos-containing product was expected to and did reach Mrs. Allen without substantial change in its condition. Finally, Mrs. Allen has set forth adequate and credible evidence that it was foreseeable for GE to be on notice that asbestos could be taken

home on the clothes of workers exposed to GE's asbestos-containing products from their ordinary and anticipated use.

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 Dept. Stores*, 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. Super. Ct. Civ. R. 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 SUMMARY JUDGMENT TO GE IN CONNECTION WITH PLAINTIFF'S STRICT LIABILITY DESIGN DEFECT CLAIM

GE's primary summary judgment argument was that the Plaintiff could not adduce evidence to satisfy the four elements of a strict liability design claim under Maryland law.[3] GE further, erroneously, argued that the consumer expectation test did not apply, but rather the risk utility test applied to the analysis of whether the Plaintiff could prove a design defect claim. The trial court essentially side-stepped those arguments and, based on a fundamental misunderstanding of Maryland's strict liability law, ruled that Mrs. Allen was not a bystander who could recover damages in a design

[3] GE also argued that Rule 402A does not contemplate liability for unfinished products still in the process of being manufactured. Plaintiff responded to that argument in her summary judgment opposition, citing Maryland Courts & Judicial Proceedings Article, Section 5-115, which clearly states that component parts are part of the product, and also cited a line of cases that hold that strict liability applies to unfinished products. *See Lantis v. Astec Industries, Inc.*, 648 F.2d 1118, 1121 (7th Cir. 1981); *Vaughn v. Daniels Co. (West Virginia) Inc.*, 841 N.E.2d 1133, 1141 (Ind. 2006). The trial court's order did not address this argument. GE also argued in its motion for summary judgment that Rule 402A did not apply because GE was not in the business of selling insulation material. The trial court rejected that argument in Footnote 14 on pages 23 and 24 of the Order.

defect strict liability claim because GE did not owe a duty to Mrs. Allen. The trial court's reasoning was based on a common law duty analysis divined from two ***negligence*** cases.[4] For the reasons set forth conclusively below, the court misapplied negligence principles to Mrs. Allen's design defect claim by holding that her strict liability design defect claim failed because GE did not owe her a common law tort duty predicated on negligence cases.

A. Strict Liability in Maryland for Design Defect Under § 402A of the Restatement (Second) of Torts

The Supreme Court of Maryland adopted strict liability as set forth in the Restatement (Second) of Torts § 402A in the seminal case of *Phipps v. General Motors Corporation*, 278 Md. 337 (1976). Strict liability subjects *sellers* of defective and unreasonably dangerous products to liability for harm caused by their products. To be deemed defective, a product must be in an unreasonably dangerous condition at the time it leaves the hands of the seller.[5] *Phipps*, 278 Md. at 244. Sellers include the manufacturer of the

[4] The trial court used the "Patton/Ashburn multi-factor test" to determine whether GE owed a duty to the Plaintiff. Both *Patton v. U.S. Rugby Football, Union, Ltd.*, 851 A.2d 566 (Md. Ct. Spec. App. 2004) and *Ashburn v. Anne Arundel Cnty.*, 510 A.2d 1078 (Md. 1986) are negligence cases and have nothing to do with a strict liability design defect claim.

[5] "Unreasonably dangerous" is defined as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases

product and any entity in the distribution chain. *Stein v. Pfizer Inc.*, 228 Md.App. 72, 91-92 (2016).

The elements of a strict liability claim require a plaintiff to demonstrate that (1) the product was defective at the time it left the control of the seller, (2) it was unreasonably dangerous to the user or consumer, (3) the defect was a cause of the injuries, and (4) the product was expected to (foreseeably) and did reach the consumer without substantial change in its condition. *Phipps*, 278 Md. at 344. A product may be "defective" based on any of three separate reasons: (1) there is a flaw in the product at the time of sale making it more dangerous than intended ("manufacturing flaw"); (2) the manufacturer of the product fails to warn adequately of a risk or hazard related to the way the product was designed ("failure to warn"); or (3) the product has a defective design ("design defect"). *Nissan Motor Co. Ltd. v. Nave*, 129 Md.App. 90, 118 (1999). Here, as in *Phipps*, the product – the GE turbine – was defectively designed in that it was designed specifically to incorporate asbestos insulation materials including pipe covering and block

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it, with the ordinary knowledge common to the community as to its characteristics." *Phipps*, 278 Md. at 244.

that would have to be cut to fit upon installation, thereby releasing hazardous asbestos dust.[6]

The justification for imposing strict liability is based on the notion that the seller, by marketing its product for use, "has undertaken and assumed a special responsibility toward *any member of the consuming public who may be injured by it*." *Phipps*, 278 Md. at 352 (emphasis added). The assumption of this "special responsibility" to injured persons imposed on sellers of defective products represents a clearly articulated policy decision. The Supreme Court of Maryland has held that public policy dictates that the burdens of accidental injuries caused by products be placed on those that market them and "should be treated as a cost of production against which liability insurance can be obtained." *Id*.; *see also Nissen Corp v. Miller*, 323 Md. 613, 624 (1991) (strict liability represents a policy consideration of "shifting the risk of loss to those better able to bear it financially.").

Accordingly, a strict liability claim does not require proof of negligent conduct or a duty on the part of the manufacturer or seller but, rather, the focus is on the product itself. *Halliday v. Sturm, Ruger & Co., Inc.*, 368 Md.

[6] *Phipps* involved a design defect in a General Motors vehicle which caused the accelerator to become stuck without warning.

186, 201 (2002); *Phipps*, 278 Md. at 344 ("strict liability action focuses not on the conduct of the manufacturer but rather on the product itself.").

As observed by the Maryland Supreme Court in *Nissen Corp v. Miller*, 594 A.2d 564, 569 (Md. 1991) (emphasis supplied):

> It is clear that Maryland espoused the doctrine of strict liability in tort in order to relieve plaintiffs 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.

In other words, the plaintiff need not prove a duty (and concomitant breach) existed on the part of the seller so long as she can meet the four elements of a design defect claim set forth in *Phipps*.

Simply put, in Maryland, "sellers who place defective and unreasonably dangerous products on the market are at fault when a user is injured by that activity and should bear responsibility," regardless of whether the elements of negligence are proven. *Nissen*, 323 Md. at 624. A manufacturer has a duty to the public to sell a product which is not unreasonably dangerous. Placing a defective product on the market which is unreasonably dangerous represents a breach of that duty and is a form of negligence per se. *Phipps*, 278 Md. at 351.

> Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of

> the seller sufficient to justify imposing liability for injuries caused by the product.

Id. at 352 (emphasis added).

Despite well-settled Maryland law, that does not require a plaintiff to prove a negligence tort duty in a strict liability design defect claim, the trial court in this case insisted that the plaintiff prove that GE owed a negligent tort duty to Mrs. Allen. The court then went on to hold that "General Electric did not owe a duty to Mrs. Allen." (A1621). The court's reasoning simply ignores the longstanding strict liability design defect law that started with *Phipps*, that the justification for imposing strict liability is based on the notion that a manufacturer or seller "has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it." *Phipps* at 352. Maryland's strict liability design defect law does not require proof of a duty or any other type of negligent conduct, but rather the focus is exclusively on the product itself.[7]

In its Memorandum, GE laments that "It would be incongruous to hold that General Electric did, however, owe a duty of design to Mrs. Allen" (A671) when the Court has already held that GE did not owe Mrs. Allen a duty to warn. The trial court expressly agreed with that argument on page

[7] Product misuse remains a defense, among others, available to a seller in a strict liability design defect claim.

17 of the order. (A1619). GE's argument, and the trial court's agreement with it, demonstrates a fundamental misunderstanding of strict liability law in Maryland. Both negligent and strict liability *failure to warn* cases are based upon negligence principles and focus on the conduct of the seller. *Gourdine v. Crews*, 955 A.2d 759, 782 (Md. 2008) ("We have recognized, therefore, that negligence concepts and those of strict liability have 'morphed together' as a result in failure to warn cases.") (emphasis added);[8] *Mazda Motor of Am., Inc. v. Rogowski*, 659 A.2d 391, 394 (Md.App. 1995) ("Concepts of duty, breach, causation, and damages are present in both" strict liability and negligent *failure to warn* claims). A strict liability design

[8] The trial court relied heavily on *Gourdine*, a case that GE argued was not a failure to warn case (GE Mem. at 18). To be clear – aside from a fraud claim, the only claims at issue in *Gourdine* were the plaintiff's Counts 1 and 2 alleging that the manufacturer breached a duty to the plaintiff (driver of car who was fatally injured) *to warn* an intermediary (the driver of separate car which was cause of accident) of the dangers of its product. The trial court discussed the similarities between negligence and strict liability *failure to warn* claims, demonstrating that both were undergirded by negligence concepts. Then the Court contrasted the deficient failure to warn (an intermediary) claims at issue before it with the claims at issue in *Valk Manufacturing Co. v. Rangaswamy*, 74 Md. App. 304 (Md. Ct. Spec. App. 1988), *rev'd on other grounds*, 562 A.2d 1246 (Md. 1989) – a strict liability design defect case where the product itself (a defective snowplow) physically contacted and harmed a bystander – in which the Court observed the product directly caused the decedent's injury. As in *Valk*, this case does not involve a failure to warn Mrs. Allen's husband of the hazards of asbestos, but rather involves defective design whereby the asbestos from GE's product came into routine physical contact with Mrs. Allen herself and was directly causative of her mesothelioma.

defect claim, however, requires no proof of negligent conduct because the focus is on the product itself and duty and breach are implied by the marketing of an unreasonably dangerous product which causes injury to a foreseeable user or bystander. *See*, *Nissen Corp. v. Miller*, 594 A.2d 564, 569 (Md. 1991) (negligence, i.e., duty and breach, is implied when the plaintiff can prove the product is defective and unreasonably dangerous when placed in the stream of commerce).

Therefore, the fact that the court found there was no duty to warn does not mean the court is somehow prohibited from finding that GE's product was defectively designed.

In *Valk Manufacturing Co. v. Rangaswamy*, 74 Md. App. 304 (Md. Ct. Spec. App. 1988), the Maryland Appellate Court ruled that a bystander could recover on a strict liability design defect claim. The court stated:

> An appreciation of the significant change that has taken place in recent decades in the undergirding philosophy of tort law with respect to products liability will help to liberate us from earlier limiting notions such as 1) some duty of care on the part of the manufacturer/seller (a heavy factor under contractual theories of liability based on express or implied warranties as well as in negligence law) and 2) the necessity for some sort of moral fault or blame in the manufacturer/seller (a dominant factor in 19th Century tort law). Strict liability in tort is today largely a societal decision that the cost of injury should be borne by those best able to bear such costs.

Id. at 311 (emphasis added). Clearly, the trial court in this case was not liberated from the notion that some duty of care on the part of the seller was required in order for Mrs. Allen to recover in a strict liability design defect case. As a result, the trial court's decision is incorrect.

Strict liability also eliminated the need for proof of privity of contract, a historic prerequisite for a party injured by a seller's product to seek recovery. *Nissen Corp.*, 323 Md. at 622. The doctrine of strict liability in Maryland allows for recovery by non-consumers of the defective product as well as non-users and bystanders. In *Valk*, the Court reviewed the policy considerations behind the adoption of strict liability and extended its protections to non-users of a defective product observing that the movement towards expanding coverage to bystanders was "massive and essentially unanimous." *Id.* at 323. Thereafter, the Court in *Anchor Packing Co. 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.

B. The Plaintiff has Adduced Sufficient Evidence to Satisfy the Elements of a Design Defect Claim Under *Phipps*

As set forth above, in order to prove a strict liability design defect claim, 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, (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*, 363 A.2d at 958.

1. The product was defective when it left the seller's – GE's – control

The evidence shows that GE satisfied its obligation to PEPCO to sell the asbestos insulation materials by engaging a subcontractor, WECCO, to supply it with the asbestos pipe covering, block and cement *that GE resold to PEPCO*. (A934 at ¶ 21; A959; A961).

There is no dispute that GE designed its turbine to be covered with the insulation materials it specified; that those materials were designed to, and did, contain asbestos at the time of their sale from GE to PEPCO; and that those materials had to be mixed and/or cut in order to be installed, thereby releasing hazardous asbestos dust onto the clothing of the user. As set forth above, this hazardous condition would have been dangerous to an extent

beyond that which would have been contemplated by an ordinary user in the 1963-64 timeframe. *See* FN 6, *supra*.

This evidence supports the design defect claim alleged by Plaintiff. *See Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984) ("plaintiffs established that Kaylo [asbestos pipe covering 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 also no dispute that GE **sold to PEPCO**, as part of its "Standard Accessories" (and included in the more than $8,000,000 price of each turbine) the asbestos insulation materials used by Mr. Phillips at Chalk Point. The adjective "Standard" as used here describes accessories which are "usual; regular or typical; not special or extra."[9] Thus, per its usual or typical turbine sale, GE acted as the seller of the insulation materials to its purchaser, PEPCO. While GE was in the business of selling turbines, those asbestos insulation accessories are a part of its product as defined under Maryland law.

[9] *Webster's New World Dictionary* (4th college ed. 2004).

Moreover, the sale of thermal insulation as a "standard" part of its product was consistent with GE's typical practice in the 1960s. (A934 at ¶ 19; A1087-1088; A1137-1138; A1187-1188). Thus, while GE states, with no evidentiary support, that it was merely an equipment manufacturer and not an insulation supplier, its regular practice was to supply thermal insulation as "standard equipment" with the sale of its turbines. And while § 402A of the Restatement (Second) of Torts may exempt the "housewife who, on one occasion sells to her neighbor a jar of jam," or "the owner of an automobile who, on one occasion, sells it to his neighbor," strict liability applies to any manufacturer engaged in the business of selling products. *Id*. at comment (f). "It is not necessary that the seller be engaged solely in the sale of such products." *Id*. The sale of the insulation accessories was part of GE's standard sales practice and that insulation was part of its product.

a. The Maryland legislature's definition of "manufacturer" and "product" support holding GE liable for the sale of its turbine

The Maryland legislature has defined both a manufacturer and a product. The Courts and Judicial Proceedings Article § 5-115 ("Product liability cases") defines a "manufacturer" as follows:

> (a)(3)(i) "**Manufacturer**" means a **designer**, assembler, fabricator, constructor, compounder, producer, or processor **of a product** or its component parts. (Emphasis added.)

It is undisputed that GE designed, manufactured and sold the turbine to PEPCO at Chalk Point. Moreover, GE *designed* and specified the turbine to include asbestos insulation products. (A1000; A1042). The question, then, is whether the turbine – including its asbestos-containing insulation accessories – is a product. Courts and Judicial Proceedings Article § 5-115 ("Product liability cases") defines a "product as follows:

> (a)(4) "**Product**" means a tangible article, **including attachments, accessories, and component parts,** and accompanying labels, warnings, instructions and packaging. (Emphasis added.)

In this case, the Sales Contract between GE and PEPCO specifically identified the asbestos insulation materials as part of the "Standard Accessories" included in the price of the turbine. The GE turbine, a tangible article including its asbestos-containing accessories is, definitionally, a product. Moreover, the thermal insulation components themselves were designed to contain asbestos, and their sale alone subjects GE (the seller) to strict liability.

2. The product was unreasonably dangerous to the user

The second element of a strict liability design defect claim is satisfied with evidence that the product was unreasonably dangerous to the user. The term "unreasonably dangerous" means "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*, 363 A.2d at 959. Mrs. Allen has demonstrated that neither she nor tradespersons working around asbestos in the 1963-64 time period had any knowledge of the hazards posed by asbestos, let alone knowledge that exposure to dust carried home on clothing could pose a fatal hazard. Clearly the asbestos insulation was dangerous to an extent beyond that contemplated by the ordinary user or consumer in that timeframe. *See Saller v. Crown Cork & Seal Co., Inc.*, 187 Cal.App.4th 1220, 1234 (2010) ("The design failure was in Kaylo's[10] 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.'").

Additionally, as discussed *supra*, under Maryland strict liability law, the injured party need not be the actual user of the product but may be a

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

foreseeable bystander. Strict liability eliminated the need for proof of privity of contract, a historic prerequisite for a party injured by a seller's product to seek recovery. *Nissen Corp.*, 594 A.2d at 568. In *Valk Manufacturing Co. v. Rangaswamy*, 74 Md. App. 304, 310-313 (Md. Ct. Spec. App. 1988), *rev'd on other grounds*, 562 A.2d 1246 (Md. 1989), the Maryland Appellate Court reviewed the policy considerations behind the adoption of strict liability and extended its protections to non-users of a defective product, observing that the movement towards expanding coverage to bystanders was "massive and essentially unanimous." *Id.* at 323. Thereafter, the Court in *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5, 34-35 (Md.App. 1997), *vacated on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Md. 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.[11] Thus, while Mrs. Allen was not "the user" of the product, she was a bystander (or the ultimate user) entitled to recovery under Maryland strict liability law.

[11] The trial court's order described the *Grimshaw* holding as "dubious." The fact of the matter is that the holding in *Grimshaw* (aside from the section dealing with the damages cap overturned by *Scribner*) is the law of Maryland because *Grimshaw* was never overturned. The trial court stated that the *Farrar* case described the *Grimshaw* holding as "dubious," yet the word "dubious" appears nowhere in the *Farrar* opinion.

GE argues in a footnote that *Grimshaw* was implicitly overruled by *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028 (Md. 2013).[12] As an initial matter, it is axiomatic that the Court in *Farrar* was limited in its review to the evidence before it. The Court went out of its way to emphasize its ruling was constrained by "the evidence before us" and the "record before us", in contrast to the record evidence presented to the intermediate appellate court in *Grimshaw* as well as another household exposure case (*ACandS v. Abate*, 710 A.2d 944, 988-89 (Md.App. 1998), *abrogated on separate grounds*, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002)) allowing recovery for household-bystander asbestos exposures. *Farrar* at 1035, 1039 ("The Court of Special Appeals dealt with the record and arguments before it in those cases").

Importantly, in *Farrar* the record evidence showed that the *earliest* generalized reference to a concern about household exposure to asbestos (ironically presented by defendant's expert) was a 1960 article. *Id*. at 1036

[12] *Farrar* was a failure to warn claim requiring, as explained above, proof of negligence on the part of the manufacturer – an issue absent here. The holding in *Farrar* ultimately was based on the conduct of the manufacturer and specifically the feasibility, or lack thereof, of the manufacturer issuing a sufficient warning. The Court held, even if the manufacturer should have foreseen that a household plaintiff was in the zone of danger, "there was no practical way that any warning given by it to any of the suggested intermediaries would or could have avoided the danger." *Id*. at 1039.

("The earliest reference to a concern about household exposure to asbestos mentioned in this case was . . . a 1960 article"). In stark contrast, in this case, Plaintiff has presented evidence that GE was on *direct* notice decades earlier, in 1942, from the Pennsylvania Department of Labor – in a Safe Practice Bulletin on Occupational Disease Prevention – to implement procedures to avoid transmitting asbestos fibers home on the clothing of its plant workers. (A937 at ¶ 33; A1360 at ¶ 11). Plaintiff here also presented evidence (missing from the record in *Farrar*) relating specifically to dangers of take-home asbestos from 1943, 1946, 1949, 1952, 1955, 1959 and 1963. GE, held to the knowledge level of an expert, is charged with that knowledge under the law. *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 639 (Md. 1992) ("manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.") (citation omitted).

The trial court's order sets forth an extensive analysis of the Plaintiff's evidence on the state of knowledge regarding the foreseeability of asbestos being brought into the homes of asbestos workers. Rather than granting all reasonable inferences in favor of the non-moving party as it was required to do, the trial court took on the role of factfinder and, essentially, disregarded all of the documentary evidence and opinions of Mrs. Allen's state-of-the-art

expert, Dr. Barry Castleman. *See Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005); *see also* Super. Ct. Civ. R. 56(c).

Dr. Castleman is a nationally recognized expert on state-of-the-art for asbestos hazard knowledge, and has placed the 1942 Pennsylvania Department of Labor document in context amongst a series of historical documents dealing with similar concerns of the hazards of asbestos dust being taken home.[13] The 1942 Pennsylvania Department of Labor document, after discussing various methods of preventing dust from being left on workers' street clothes, states that "The installations which I have described, together with an intelligent cooperation of employer and employee have provided the **essential measures of control of any health problem** or housekeeping problem incident to the **handling of asbestos fiber** employed in the manufacture of electrical insulation for wire and wire products." (A1648). Clearly, one reasonable inference to be gleaned from that document is that GE did not want its employees transmitting asbestos dust home from work so as to avoid any health problem. (A1360 at ¶ 11). The trial court improperly took on the role of factfinder and thought otherwise by granting all reasonable inferences to be taken from Dr. Castleman's

[13] Dr. Castleman's opinions have been cited with approval numerous times by the Maryland appellate courts. *See, e.g., Eagle-Picher, Inc. v. Balbos,* 604 A.2d 445, 460 (Md. 1992).

documents against Mrs. Allen. In doing so, 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 for household asbestos exposure is an issue to be determined by the jury.).

GE did not argue in its motion or put forth any evidence (expert or otherwise) that it was unaware in the early 1960s of the prospect that asbestos fibers could be transmitted home on clothing. Even if it had, there would then be a dispute of fact for the jury to resolve based on the evidence put forth by Dr. Castleman in this case. *Farrar* did not implicitly overrule *Grimshaw's* holding that, based on proper evidence, a household member exposed to asbestos dust constitutes a foreseeable bystander under strict liability principles.[14]

[14] In contrast to a failure to warn claim, in a strict liability design defect claim knowledge of the hazard is irrelevant. *See Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 639 n. 5 (Md. 1992) ("Those jurisdictions which hold that evidence of knowledge of dangerous quality is relevant in a failure to warn case, do not regard lack of knowledge as a factor in a strict liability design defect case."). All that is needed is to show that the Plaintiff could come into contact with the unreasonably dangerous product through its foreseeable use. Nevertheless, Plaintiff here provides evidence of both actual knowledge of the hazards of household exposures and constructive knowledge imputed to GE.

3. The defect caused Mrs. Allen's mesothelioma and death

The next element of Mrs. Allen's strict liability claim is satisfied by medical testimony from her expert, Arthur Frank, M.D., Ph.D. Dr. Frank has opined that Mrs. Allen's exposure to asbestos dust (that qualifies as above background) produced by the insulation accessories to the GE turbines was a substantial contributing factor to her mesothelioma. Dr. Frank, relying on OSHA and NIOSH (among other sources), avers that there is no safe level of asbestos exposure and that exposures are best represented by a linear dose-response curve. He explained that exposure periods ranging from as brief as one day to three months are capable of producing mesothelioma and that household exposures involving low-level or intermittent casual exposures are capable of causing mesothelioma.

It is a question of fact for the jury to resolve whether that alleged design defect caused Mrs. Allen's injuries. *John Crane, Inc. v. Linkus*, 988 A.2d 511, 523-24 (Md.App. 2010) (lay testimony describing dust from asbestos products coupled with expert testimony describing dose-response relationship and lack of safe threshold of exposure was sufficient to create jury question on causation). Specifically, in a household exposure case, substantial factor causation is an issue for the jury upon presentation of

sufficient evidence. In *ACandS v. Abate*, 710 A.2d at 989,[15] the Maryland Appellate Court held:

> In sum, there was evidence that Glensky's father was exposed to spraying by Hampshire, that he carried dust from the spraying home on his coveralls, and that Glensky was exposed to the dust when he shook off the coveralls. There was medical testimony that household exposure to asbestos dust can cause disease. The evidence was sufficient to permit the jury to conclude that Glensky's exposure was a substantial factor in causing his illness.

As set forth above, GE specifically designed its turbines to be covered with thermal insulation and specified the use of asbestos block, pipe covering and cement. Mrs. Allen's husband's use of the insulation accessories resulted in the lethal dust depositing on his clothing brought home to Mrs. Allen to wash. Mrs. Allen described the visible dust released from shaking the clothing and cleaning up the dust. This evidence, coupled with Dr. Frank's medical testimony, demonstrates that Plaintiff has presented sufficient evidence to permit the jury to consider whether GE's asbestos product was a substantial contributing factor as averred by Dr. Frank.

[15] *Abate* was abrogated on separate grounds by *John Crane v. Scribner*, 800 A.2d 727 (Md. 2002) on the issue of the application of Maryland's statutory cap on damages.

4. The product reached the user without change in its condition

GE complains that Mrs. Allen was not the consumer or user of the asbestos products at issue. GE's argument ignores over 30 years of Maryland jurisprudence where the appellate courts have consistently held that manufacturers and sellers of asbestos products can be held liable for bystander exposures to dust released from their asbestos products. Whether sounding in negligence or strict liability, in all asbestos bystander cases, the bystander is not the "user" of the asbestos product. *See, e.g., Eagle-Picher, Inc. v. Balbos*, 604 A.2d 445, 460 (Md. 1992) (bystanders who do not actually use or work with product may recover in asbestos action); *Grimshaw*, 692 A.2d 5, 35 (Md.App. 1997) (strict liability extends to foreseeable bystanders including household members exposed to asbestos dust on clothing); *Abate*, 710 A.2d 944, 989 (Md. 1998) (plaintiff entitled to recover where father brought asbestos home on coveralls and shook out dust). In each bystander case, the injured party is exposed to asbestos fibers generated by the user's work with the product and the dust that is transported by air or by clothing into the proximate breathing zone of the injured plaintiff. This is the mechanism by which disease is caused. This case is no different. Thus, the fact that Mrs. Allen is not the actual user but rather was

exposed to asbestos dust (or residue) transported on her husband's clothing is of no moment to evaluating the viability of her claim.

The evidence shows that the standard accessory asbestos insulation materials sold by GE were delivered to Chalk Point. The pipe covering, block and cement were, in fact, those materials specified by GE. There is nothing to suggest those materials had been altered or damaged. To the contrary, the evidence shows those materials arrived precisely as specified and were used and installed, as intended, by Mr. Phillips, which resulted in large quantities of asbestos dust depositing on his clothing. Donald Burroughs and Mr. Phillips applied roughly 1,000 bags of dry asbestos cement (which had to be mixed with water) to each turbine and sawed asbestos-containing pipe covering and block to be placed on the turbine. The asbestos insulation accessories reached the user – i.e., Mr. Phillips – without substantial change. Mrs. Allen was an unfortunate, foreseeable bystander to his use of those materials. GE's argument that the asbestos products never reached Mrs. Allen simply ignores Maryland bystander law.

In footnote 14 of the trial court's order, the court stated as follows:

> *Balbos*, 604 A.2d at 460-61, compels the conclusion that the fourth element is not satisfied if a product merely "reach[es] the consumer" or user where the claim is premised on injury to a bystander. Instead, the product must reach the *bystander* as well.

As an initial matter, that quote from *Balbos* does not appear to exist in the case.

Secondly, the *Balbos* discussion regarding the plaintiff's proximity to the asbestos work being performed has nothing to do with the elements of a strict liability design defect claim. Rather, the question of proximity to the work being performed relates to causation. Specifically, "The causation question here is whether the evidence and inferences most favorable to the plaintiff supports a finding that exposure to Eagle's product was a substantial factor in the death of each decedent." *Balbos* at 460. Clearly, the *Balbos* discussion about proximity to the work related to whether or not the plaintiff could meet their burden to prove that their exposure to the asbestos product was a substantial factor in causing the disease.

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

In GE's Motion for Summary Judgment, it relies heavily on *Georgia-Pacific v. Farrar*, 69 A.3d 1028 (Md. 2013). However, the *Farrar* decision is not dispositive of Mrs. Allen's design defect claim because *Farrar* 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, 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 must merely 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).[16]

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

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

> 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 Comment c to Section 402A, Restatement (Second) of Torts).[17]

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*. Because Mrs. Allen has pled and proffered sufficient evidence

[17] *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.

to support a strict 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,

/s/ Matthew E. Kiely

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INDEX OF PERTINENT STATUTES AND REGULATIONS

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 July 10, 2024, 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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