

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: CATALYST LITIGATION

Master Docket No.

SX-05-CV-799

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

JOHN BULLY,

Plaintiff

v.

AMERADA HESS CORPORATION, et al.,

Defendants

Individual Docket No.

SX-05-CV-812

MEMORANDUM OPINION

THIS MATTER came before the Court on Defendant Amerada Hess Corporation's (hereinafter "Hess") Motion for Summary Judgment and Statements of Undisputed Facts in Support of its Motion for Summary Judgment, filed on October 2, 2009. On October 28, 2009, Plaintiff John Bully filed an Opposition to Defendant Hess' Motion for Summary Judgment and Statement of Undisputed Facts. On November 20, 2009, Defendant Hess filed a Reply to Plaintiff John Bully's Opposition.

FACTS

Plaintiff John Bully filed a Complaint against Defendant Hess,¹ alleging that he developed mixed dust pneumoconiosis and other lung damages as a result of occupational exposure to catalyst while working at Defendant Hess Oil Virgin Islands Corporation's (hereinafter, "HOVIC") petroleum refinery on St. Croix, U.S. Virgin Islands. Defendant HOVIC is a wholly-owned subsidiary of Defendant Hess. Plaintiff John Bully alleges that Defendant

¹ Plaintiff John Bully also filed this action against other defendants but Plaintiff John Bully and his co-plaintiffs have reached a settlement with most of the defendants out of court.

Hess controlled and participated in all aspects of safety decisions and policies in effect at Defendant HOVIC's refinery. In his Complaint, Plaintiff John Bully asserts three causes of action: Negligence/Premises Liability, Supply of Dangerous Chattel and Punitive Damages.

DISCUSSION

Defendant Hess claims that Plaintiff John Bully has not produced any evidence illustrating its possession and control over Defendant HOVIC's refinery to a level sufficient to impute liability. Defendant Hess alleges that while it may have offered guidance to Defendant HOVIC, it is Defendant HOVIC that makes the ultimate decisions regarding its safety standards, practices and implementations. Therefore, Defendant Hess argues that the Court should grant its Motion for Summary Judgment as to Plaintiff John Bully's Negligence/Premises Liability claim, Supply of Dangerous Chattel claim and Punitive Damages claim.

Summary Judgment

The Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (FED. R. CIV. P. 56(c)). The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. (*See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once this showing has been made, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." (*See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

A factual dispute is deemed genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” (*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” (*Id.* at 247-48). The Court may not make credibility determinations or weigh evidence. (*Id.* at 255). If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. (*See Matsushita Elec. Indus. Co.*, 475 U.S. at 587). In analyzing this motion for summary judgment, this Court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. (*See Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 680 (3d Cir. 2003); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000)).

Piercing the Corporate Veil

Defendant Hess states that under Virgin Islands law, the court applies the law of the state of incorporation to determine whether to pierce the corporate veil. Restatement § 307. *Josephat Henry v. St. Croix Alumina, LLC, et al.*, 2007 WL 6030275, *8 (D.V.I., 2007). Defendant Hess argues that it is inappropriate to pierce the corporate veil in this case. Therefore, Defendant Hess requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff John Bully's Negligence/Premises Liability claim and Supply of Dangerous Chattel claim. However, as Plaintiff John Bully points out, his claims against Defendant Hess are not vicarious. Plaintiff John Bully asserts that Defendant Hess is directly liable for its negligence in not making Defendant HOVIC's refinery a safer place to work because Defendant Hess had control and participated in all aspects of safety decisions and policies in effect at Defendant HOVIC's refinery. Since Plaintiff John Bully is asserting his claims directly against Defendant Hess, the

Court does not find Defendant Hess' arguments on whether to pierce the corporate veil applicable in this case.

Negligence Claims

The Court is cognizant that there are four elements to a negligence claim: duty, breach of duty, causation and damages. Restatement (Second) of Torts (1965) (hereinafter, "Restatement") § 328A.² Defendant Hess only needs to show that no genuine issue exists in regard to one of the elements to succeed in its Motion for Summary Judgment.

1. Negligence/Premises Liability

a. Duty

Defendant Hess claims that it cannot be held liable pursuant to Plaintiff John Bully's Negligence claim under Restatement § 324A. Restatement § 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Defendant Hess asserts that Plaintiff John Bully's claim that Defendant Hess is directly liable to Plaintiff John Bully for its failure to supply him with appropriate respiratory equipment, failure to provide air monitoring and failure to warn him of the hazards of catalysts exposure warrants summary judgment because "Plaintiff [John Bully] cannot satisfy the threshold requirement of proving that Defendant Hess agreed to an undertaking specifically towards

² Restatement is applicable in the Virgin Islands by I.V.I.C. § 4.

Plaintiff [John Bully].” See Defendant Hess’ Reply to Plaintiff John Bully’s Opposition to its Motion for Summary Judgment at 19.

In its Motion for Summary Judgment, Defendant Hess has the initial burden of showing that no genuine issue of material fact exists with respect to at least one essential element of Plaintiff John Bully’s Negligence claim. Once this showing has been made, the burden shifts to Plaintiff John Bully, who must put forth sufficient pieces of affirmative evidence that confirm such a dispute remains. Defendant Hess’ evidence will be viewed in the light most favorable to Plaintiff John Bully. If Plaintiff John Bully fails to meet his burden, the Court will award Defendant Hess summary judgment pursuant to Fed. R. Civ. P. 56.

The Court finds that Defendant Hess did not meet the initial burden of showing that no genuine issue of material fact exists concerning the duty element of Plaintiff John Bully’s Negligence claim. The *St. Croix Alumina* Court stated the following in determining whether the defendant assumed a duty of care to plaintiff:

To determine whether [the defendant] assumed a duty of care to [the plaintiffs], this Court must find that there is sufficient evidence to establish that [the defendant] had a duty to protect [the plaintiff]. This duty could be established if [the defendant] had ‘undertaken to inspect the specific instrument causing the injury or to inspect the entire plant of which that instrument was a part...’ [The plaintiffs] can establish this if they can put forth sufficient evidence that [the defendant] undertook safety inspections of the refinery and then negligently failed to see that certain measures were taken. To establish a duty owed by a parent corporation, there must more than mere concern or minimal contact. There must be a positive undertaking by the parent corporation. Under this Restatement section [§ 324A], a parent company may be held liable for negligence if it assumed a duty of care to [the plaintiffs] when it undertook safety inspection tours of the plant and then negligently failed to see that certain measures were implemented. *St. Croix Alumina*, 2007 WL 6030275 at *17.

Defendant Hess argues that Plaintiff John Bully fails to set forth any facts to prove that it owes a duty of care pursuant to Restatement § 324A. On the contrary, Plaintiff John Bully provided several documents supporting his claim that Defendant Hess assumed a duty of care to

him when Defendant Hess conducted safety inspection of Defendant HOVIC's refinery. There is a letter from Defendant Hess' Safety and Fire Protection Department to R. Sagebien (then Defendant HOVIC's Refining Manager) indicating that Defendant Hess' Corporate Safety and Fire Protection Department conducted annual safety inspections of Defendant HOVIC's facility.

The following language is contained in the letter:

Activities proposed for this inspection include the following:...

4. Audits of procedures and practices to control personnel exposure to toxic substances, caustics, acids and petroleum products...
6. Review of HOVIC procedures covering Safety Department participation in Turnaround planning, scheduling and monitoring of Turnaround work.

In 1987, when Rene Sagebien was Vice President of Refining for Defendant Defendant Hess, he confirmed that "Amerada Hess safety policies have been adopted by HOVIC in total." *See* Rene Sagebien Deposition Transcript at 89. Upon elaboration, Rene Sagebien said, "Well, [Hess Safety policies] were sent to HOVIC with the express intent of being not only guidance, but operable to our operations at HOVIC." *Id.* Additionally, Defendant Hess' Manager of Corporate Safety stated that he served as the interim fire chief/safety director at Defendant HOVIC's refinery for a period and dealt with the refinery managers. *See* Paul Bucknam Deposition Transcript at 19-20. There is also a Policy Statement on Safety and Fire Protection from Defendant Hess that provides, "In addition to giving staff assistance to the operating units on safety and loss prevention, the Safety and Fire Protection Department is responsible for auditing safety programs, developing standards of safety performance, and for recommending to management those actions or improvements necessary for safe conditions at all locations." Defendant Hess' Manager of Employee Relations for Refining and Marketing, Richard Vick, admitted that Defendant Hess could and did direct Defendant HOVIC to adopt specific safety

policies. *See* Richard P. Vick Deposition Transcript at 38, 41. Defendant Hess' former Manager of Corporate Safety and Fire Protection, Orville Henderson, also admitted that "whatever Amerada Hess Corporation put out automatically applied to all entities of the corporation." *See* Orville Henderson Deposition Transcript at 60. Orville Henderson further stated that Defendant Hess' safety engineers audited Defendant HOVIC's refinery for compliance with Defendant Hess' safety directives. *Id.* at 64. "[The safety audit] would consist of walkthroughs of the physical plant, looking through recognized or known hazards that might be recognized. It was a review of the existing programs at whatever facility we were at, and some discussion with the people that were involved in the safety effort per se at that facility and with management of the facility." *Id.* Shell executive, Cesar Trevino, stated that Defendant Hess tested catalyst and received Material Safety Data Sheets before deciding whether or not to purchase it for Defendant HOVIC's refinery. *See* Cesar Trevino Deposition Transcript at 18, 22.

Plaintiff John Bully contends that these documents create a genuine issue of material fact as to whether Defendant Hess assumed a duty of care by undertaking to ensure the safety of the operations at the refinery. Based on the existing evidence, viewed in favor of Plaintiff John Bully, a reasonable jury could find that Defendant Hess assumed a duty of care to Plaintiff John Bully for the safety operations at Defendant HOVIC's refinery. The Court finds that there are genuine issues of material facts regarding the element of duty that should be left to the trier of fact to decide at trial.

b. Breach of Duty

Assuming *arguendo* that a duty exist. Defendant Hess argues that Plaintiff John Bully still cannot support a claim under Restatement § 324A because "(1) Hess did not increase the alleged risk of harm, (2) Hess did not supplant any alleged duty owed by HOVIC to Plaintiff

[John Bully] and (3) Plaintiff [John Bully] or HOVIC did not rely on Hess and due to this reliance, elected not to apply other precautionary measures against the alleged risk of harm.” See Defendant Hess’ Reply to Plaintiff John Bully’s Opposition to its Motion for Summary Judgment at 19.

Again, Defendant Hess has the initial burden of showing that no genuine issue of material fact exists with the breach of duty element. Defendant Hess claims that Plaintiff John Bully “fails to support his *prima facie* obligation under § 324A(b) because Plaintiff [John Bully] cannot prove that HOVIC owed a duty of care towards Plaintiff [John Bully], let alone that Hess supplanted HOVIC’s alleged duty.” See Defendant Hess’ Reply to Plaintiff John Bully’s Opposition at 28. This is clearly incorrect. The burden only shifts to Plaintiff John Bully once this showing has been made by Defendant Hess.³ The Court finds that Defendant Hess did not meet the initial burden of showing that no dispute exists concerning the breach of duty element of Plaintiff John Bully’s Negligence claim.

Whether Defendant Hess conformed to the standard of conduct required of it is a question of fact. Restatement § 328A, cmt. d. As illustrated in the Duty section previously, there are many documents that suggest Defendant Hess had control over the safety protocols and catalyst at Defendant HOVIC’s refinery. Based on the existing evidence, viewed in favor of Plaintiff John Bully, a reasonable jury could find that Defendant Hess is liable for Plaintiff John Bully’s injury because Defendant Hess has undertaken to perform a duty owed by Defendant HOVIC to Plaintiff John Bully. Accordingly, the breach of duty element of Plaintiff John Bully’s Negligence claim should be left to the trier of fact to decide at trial. Since the Court finds that there remains a dispute regarding Defendant Hess’ breach of duty to Plaintiff John Bully under

³ See *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586.

Restatement § 324A(b), the Court will not address whether Plaintiff John Bully satisfied the other subsections of Restatement § 324A.

c. Causation

Defendant Hess argues that Plaintiff John Bully cannot offer evidence that he was exposed to catalyst on “a regular basis,” “over some extended period of time” or “in proximity to where [he] actually worked” to show that working at Defendant HOVIC’s refinery caused his alleged mixed dust pneumoconiosis. Defendant Hess cites to Restatement § 431, which provides:

The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

According to the REFERENCE MANUAL ON SCIENTIFIC EVIDENCE,⁴ “Evidence of exposure is essential in determining the effects of harmful substances.” Federal Judicial Center, REFERENCE MANUAL ON SCI. EVID. (2d ed., 2000), 424. Moreover, Defendant Hess argues that the courts have adopted the “frequency, regularity and proximity” test of causation to aid the jury in making the determination of causation in the context of a toxic tort case. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990). All three elements of the test must be established to show causation. *Id.* at 383. Accordingly Defendant Hess alleges that, in order to show causation in this case, Plaintiff John Bully has to show that he worked sufficiently close to the source of exposure, on a regular basis and with frequency and sufficient intensity.

Defendant Hess claims that Plaintiff John Bully has not met his burden to prove that working at Defendant HOVIC’s refinery caused him to develop mixed dust pneumoconiosis.

⁴ The REFERENCE MANUAL ON SCIENTIFIC EVIDENCE was prepared in response to the recommendation of the Federal Courts Studying Committee, through the combined efforts of the Federal Judicial Center and the Carnegie Corporation of New York to help judges deal with scientific evidence.

Defendant Hess asserts that Plaintiff John Bully is unable to quantify his own exposure. Plaintiff John Bully first worked at Defendant HOVIC's refinery from 1974 to 1975 as a rigger and claims catalyst exposure from working on two units. See John Bully's Deposition Transcript at 33-39. However, Plaintiff John Bully could not quantify his alleged exposure to catalyst during this period in terms of frequency, regularity or proximity. Plaintiff John Bully left for some time and returned to work at Defendant HOVIC's refinery from 1979 to 1991 as a pipefitter, working in or around catalyst containing units. See *id.* at 57-65. Again, Plaintiff John Bully could not quantify his alleged exposure to catalyst during this period in terms of frequency, regularity or proximity. In summary, Defendant Hess asserts that Plaintiff John Bully worked on approximately fifty turnarounds with catalyst-containing units but he could not say: (1) when he was first exposed to catalyst, (2) how frequently he was exposed to catalyst when he was at work and (3) how intense the exposure was each time. Defendant Hess argues that, pursuant to *Robertson*, there is no genuine issue here because Plaintiff John Bully cannot present any evidence to satisfy the "frequency, regularity and proximity" test of causation. Assuming *arguendo* that Plaintiff John Bully met his burden to prove causation, Defendants argue that its Motion for Summary Judgment should still be granted due to the exclusion of the expert testimony of Dr. Barrie and Dr. Teitlebaum on the issue of causation.⁵ Therefore, Defendant Hess requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff John Bully's Negligence/Premises Liability claim.

⁵ Defendant Hess filed its Motion for Summary Judgment on the premature assumption that the Court will grant Defendant HOVIC and Defendant Hess' *Daubert In Limine* Motions to exclude the testimony of Dr. Barrie and Dr. Teitlebaum. The Court has not issued its opinions on the *Daubert In Limine* Motions at this time. However, even if the *Daubert In Limine* Motions are granted, the Court still finds that Defendant Hess did not meet its initial burden of showing that no dispute exists in regard to the causation element of Plaintiff John Bully's Negligence/Premises Liability claim.

The Court finds that Defendant Hess did not meet its initial burden of showing that no genuine issue of material fact exists concerning the causation element of Plaintiff John Bully's Negligence/Premises Liability claim. Although Defendant Hess relies on *Robertson's*, the Court does not find that case to be controlling here. In *Robertson*, the "frequency, regularity and proximity" test that the Third Circuit applied was a local Pennsylvania law.⁶

Restatement § 465 explains what constitutes a legal cause, "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." In this case, the record shows that Plaintiff John Bully worked with catalyst while working at Defendant HOVIC's refinery over a number of years, and now Plaintiff John Bully was told by his doctor that there are catalyst deposits inside of Plaintiff John Bully's system and Plaintiff John Bully has developed mixed dust pneumoconiosis. Additionally, Dr. Barrie and Dr. Teitelbaum, Plaintiff John Bully's expert witnesses, argue that catalyst dust can, and in Plaintiff John Bully's case did, cause mixed dust pneumoconiosis. Based on the existing evidence, viewed in favor of Plaintiff John Bully, a reasonable jury could find that working at Defendant HOVIC's refinery caused Plaintiff John Bully to develop mixed dust pneumoconiosis. Furthermore, under to the Restatement § 434(2), "It is the function of the jury to determine. in any case in which it may reasonably differ on the issue, (a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff..." Here, there are genuine issues of material facts regarding causation that should be left to the trier of fact to decide at trial.

⁶ See *Robertson*, 914 F. 2d 360.

d. Damages

Defendant Hess does not contest the fact that Plaintiff John Bully suffered a harm in the form of contracting mixed dust pneumoconiosis and other lung damages. Defendant Hess failed to satisfy its burden to establish the absence of genuine issues of material fact with respect to any of the elements of Plaintiff John Bully's Negligence/Premises Liability claim. Accordingly, Defendant's Motion for Summary Judgment will be denied as to Plaintiff John Bully's Negligence/Premises Liability claim.

2. Supply of Dangerous Chattel

a. Duty

Defendant Hess claims that Plaintiff John Bully's Supply of Dangerous Chattel claim under Restatement § 388,⁷ § 391,⁸ § 392⁹ and § 393,¹⁰ is not applicable here because Defendant

⁷ Restatement § 388 provides,

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

⁸ Restatement § 391 provides,

One who supplies directly or through a third person a chattel for another to use for the supplier's business purposes, knowing or having reason to know that it is or is likely to be dangerous for the use for which it is supplied, is subject to liability as stated in §§ 388-390.

⁹ Restatement § 392 provides,

One who supplies to another, directly or through third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by person for whose use the chattel is supplied

(a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or

(b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

Hess is not a supplier.¹¹ Defendant Hess cites to Restatement (Third) of Torts: Products Liability (hereinafter, "Restatement (Third)") § 20, cmt. g, that Restatement (Third) expressly exempts liability from "product distribution facilitators" such as "sales personnel, sales representatives, and other sales facilitators." Defendant Hess claims that the comment to Restatement (Third) is likewise applicable to Restatement § 392. Defendant Hess argues that "it cannot be disputed that Hess used its own funds to obtain catalyst, never owned it or retained control over it. It is further indisputable that Hess was not a seller, lessor, donor, or lender of catalyst." See Defendant Hess's Reply to Plaintiff John Bully's Opposition at 3. More specifically, Defendant Hess contends that "Plaintiff [John Bully] has not produced any evidence that Hess' role in HOVIC's supply of catalysts to the refinery went beyond mere facilitation."¹² Accordingly, Defendant Hess claims that Plaintiff John Bully's broad definition of supplier is incorrect and that it does not owe a duty of care to Plaintiff John Bully.¹³

The Court disagrees with Defendant Hess that comment g of Restatement (Third) § 20 is applicable to Restatement § 392. Comment g of Restatement (Third) § 20 provides,

Other means of commercial distribution: product distribution facilitators. Person assisting or providing services to product distributors, while indirectly facilitating

¹⁰ Restatement § 393 provides,

One who supplies through a third person a chattel to be used for the supplier's business purposes is subject to liability under the rules stated in §§ 391 and 392 although the dangerous character or condition of the chattel is discoverable by an inspection which the third person is under a duty to the person injured to make.

¹¹ The Court does not find Restatement § 389 applicable here because Plaintiff John Bully did not plead that the chattel is unlikely to be made safe for use. Restatement § 389 provides,

One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for for whose use the chattel is supplied of its dangerous character.

¹² See Defendant Hess' Motion for Summary Judgment at 10.

¹³ Defendant Hess also cites to a Tennessee case to support its case, but the Court does not find it controlling in this case.

the commercial distribution of products, are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. Sales personnel and commercial auctioneers are also outside the rules of this Restatement. (*Emphasis added*).

Comment g of Restatement (Third) § 20 specifically refers to "the rules of this Restatement (Third)." There are no mentions of its applicability to the previous Restatement. The Court finds that Defendant Hess did not meet the initial burden of showing that no dispute exists regarding the issue of whether Defendant Hess' was a supplier of catalyst. Plaintiff John Bully provided several documents supporting his claim that Defendant Hess was a supplier of catalyst. In responding to Plaintiff John Bully's First Set of Interrogatories, Defendant Hess stated that it "facilitated the purchased catalyst on behalf of HOVIC from 1969 to 1998." Moreover, as mentioned above, Shell executive, Cesar Trevino, stated that Defendant Hess tested catalyst and received Material Safety Data Sheets before deciding whether or not to purchase it for Defendant HOVIC's refinery. *See* Cesar Trevino Deposition Transcript at 18, 22. Cesar Trevino also stated that Defendant Hess' employee, Mr. Ron Stanco, was purchasing catalyst for both Defendant Hess and Defendant HOVIC. *See id.* at 18. Additionally, there is a letter from Akzo Nobel Chemicals Inc. to an employee of Defendant Hess, Ken Wittenmeyer, stating that "[E]nclosed please find the requested quotation for catalyst for the HOVIC Refinery. Also enclosed are the corresponding MSDS Sheets, as well as the Typical Data Sheets for the catalysts quoted. Production Lead Time, Shipping Terms, and Alternatives are described below." There is also a document between Defendant Hess and Acreon Catalysts demonstrating that bids for catalyst were negotiated with Defendant Hess. In said document, Acreon Catalysts further agreed to provide technical service to Defendant Hess in regard to the catalysts provided.

Based on the existing evidence, viewed in favor of Plaintiff John Bully, a reasonable jury could find that Defendant Hess is a supplier of catalyst and thereby owed a duty to Plaintiff John Bully. The Court finds that there are genuine issues of material facts regarding the element of duty that should be left to the trier of fact to decide at trial.

b. Breach of Duty

Assuming *arguendo* that it is a supplier, Defendant Hess argues that it is still entitled to summary judgment because (1) the sophisticated user defense is applicable here and (2) Plaintiff John Bully fails to set forth any facts to prove that Defendant Hess was aware that catalyst could cause mixed dust pneumoconiosis.

Defendant Hess claims that the sophisticated user defense bars Plaintiff John Bully's Supply of Dangerous Chattel claim against it. Comment k of Restatement § 388 provides,

When warning of defects unnecessary. One who supplies a chattel to other to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. (*Emphasis added*).

Defendant Hess argues that it had reason to expect that Plaintiff John Bully will discover the danger involved with catalyst, since handling catalyst was what they were contracted to perform. Defendant Hess also claims that Plaintiff John Bully fails to provide any evidence to prove that either before or during Plaintiff John Bully's alleged years of exposure, Defendant Hess knew or had reason to know that catalyst dust could cause mixed dust pneumoconiosis. Accordingly, Defendant Hess requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff John Bully's Supply of Dangerous Chattel claim.

Again, in a Motion for Summary Judgment, the initial burden is on the moving party Defendant Hess to show that no genuine issue of material fact exists. Defendant Hess has to

prove that there are no disputes regarding the breach of duty element of Plaintiff John Bully's Supply of Dangerous Chattel first before the burden shifts to Plaintiff John Bully. The Court finds that Restatement §§ 388, 391, 392 and 393 collectively impose the following duties upon Defendant Hess:

Duty One: Restatement § 388

If Defendant Hess knew or had reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied and Defendant Hess had no reason to believe that Plaintiff John Bully will realize its dangerous condition, then Defendant Hess had duty to exercise reasonable care to inform Plaintiff John Bully of the chattel's dangerous condition or of the facts which make it likely to be dangerous if Defendant Hess. (*Emphasis added*).

Duty Two and Duty Three: Restatement § 392:

Defendant Hess, as a supplier to another of a chattel to be used for its business purposes, had duty to exercise reasonable care to make the chattel safe for the use for which it is supplied, and duty to exercise reasonable care to discover the chattel's dangerous condition or character and to inform Plaintiff John Bully. (*Emphasis added*).

Duty Four: Restatement § 393

Defendant Hess, as a supplier through a third person a chattel to be used for its business purposes has a duty to inspect the chattel (analogous to the duty of inspection imposed upon one who permits another to come upon his land for his business purpose, Restatement § 392, cmt. a). (*Emphasis added*).

The Court finds that Defendant Hess did not meet its initial burden to show that no genuine issues exist concerning its compliance with all of its duties here. According to Restatement § 392, Defendant Hess had a duty to exercise reasonable care to make the chattel safe for Plaintiff John Bully. Plaintiff John Bully claims that Defendant Hess failed to provide adequate respiratory equipment¹⁴ for catalyst workers and did not take steps such as air

¹⁴ Plaintiff John Bully said that catalyst workers like him were not provided with full protection. See John Bully Deposition Transcript at 150. Sometimes Defendant HOVIC provided them with a dust mask. See *id.* at 71. When Defendant HOVIC did not provide them with a dust mask, they had to resort to using rags. See *id.*

monitoring and testing to learn the extent of the hazard. The sophisticated user defense does not relieve Defendant Hess' duty to make the chattel safe for Plaintiff John Bully.

Whether Defendant Hess conformed to the standard of conduct required of it is a question of fact. Restatement § 328A, cmt. d. Based on the existing evidence, viewed in favor of Plaintiff John Bully, a reasonable jury could find that Defendant Hess breached its duty to exercise reasonable care to make the chattel safe for Plaintiff John Bully. Since the Court finds that there remains a dispute regarding Defendant Hess' duty to Plaintiff John Bully under Restatement § 392, the Court will not address whether Defendant Hess' breached its other duties under the Restatement. The breach of duty element of Plaintiff John Bully's Supply of Dangerous Chattel claim should be left to the trier of fact to decide at trial.

c. Causation

This is the same causation issue as the Negligence/Premises Liability claim. Defendant Hess makes the same arguments claiming that Plaintiff John Bully has not met his burden to prove that working at Defendant HOVIC's refinery caused him to develop mixed dust pneumoconiosis. The Court makes the same finding that Defendant Hess did not meet its initial burden of showing that no genuine issue of material fact exists concerning the causation element of Plaintiff John Bully's Supply of Dangerous Chattel claim. There are genuine issues of material facts regarding causation that should be left to the trier of fact to decide at trial.

d. Damages

Again, Defendant Hess does not contest the fact that Plaintiff John Bully suffered a harm in the form of contracting mixed dust pneumoconiosis and other lung damages. Defendant Hess failed to satisfy its burden to establish the absence of genuine issues of material fact with respect to any of the elements of Plaintiff John Bully's Supply of Dangerous Chattel claim.

Accordingly, Defendant's Motion for Summary Judgment will be denied as to Plaintiff John Bully's Supply of Dangerous Chattel claim.

Emotional Distress Claims

Defendant Hess' Motion for Summary Judgment is improperly filed in regard to Parasitic Emotional Distress, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress because these are not separate causes of action. "Plaintiff [John Bully] chose not to plead the causes of action of Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress under § § 46 and 313 of the Restatement respectively. Rather, "he alleges that the emotional distress is a component of the damages that he has suffered as a result of his injuries." (See Plaintiff John Bully's Opposition to Defendant Hess' Motion for Summary Judgment at 11-12). Accordingly, the Court will not address Defendant Hess' arguments concerning Parasitic Emotional Distress, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress.

Defendant Hess and Defendant HOVIC had raised similar arguments in their Motion *In Limine* to Exclude Evidence of Parasitic Emotional Distress, Intentional Infliction of Emotional Distress and/or Negligent Infliction of Emotional Distress. Plaintiff John Bully and his co-plaintiffs again responded that they "neither asserted nor intend to assert independent causes of action for emotional distress." The Court ruled that any evidence relating to or suggesting the existence of Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress will be excluded at trial, but the jury will be permitted to consider parasitic emotional distress evidence for the purpose of determining compensatory damages. (See the Court's June 22, 2010 Memorandum Opinion and Order in regard to Defendant Hess and Defendant Hess

Corporation's Motion *In Limine* to Exclude Evidence of Parasitic Emotional Distress, Intentional Infliction of Emotional Distress and/or Negligent Infliction of Emotional Distress).

Punitive Damages Claim

Defendant Hess asserts that Plaintiff John Bully cannot provide any evidence to support his claim that Defendant acted outrageously and with reckless disregard for Plaintiff John Bully's rights. Additionally, Defendant Hess argues that punitive damages claim cannot exist in the absence of a separate, underlying theory of liability. *Berroyer v. Hertz*, 672 F.2d 334, 340 (3d Cir. 1982). Accordingly, Defendant Hess requests the Court to dismiss Plaintiff John Bully's claim for punitive damages as a matter of law.

According to Restatement § 908(1),¹⁵ punitive damages are awarded at the jury's discretion to "punish defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future." Outrageous conduct due to defendant's evil motive or his/her reckless indifference to the rights of others can trigger a jury's consideration of awarding punitive damages. Restatement § 908(2). In this case, although punitive damages cannot be a stand alone claim, a jury may find that Plaintiff John Bully is entitled to such damages with respect to his negligence claims. Therefore, at this juncture, the Court will not grant Defendant Hess' Motion for Summary Judgment in regard to Plaintiff John Bully's Punitive Damages claim.

¹⁵ Restatement § 908 provides,


- (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
- (2) Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of facts can properly consider the character of defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

CONCLUSION

At this stage, viewing the facts and evidence in the light most favorable to Plaintiff John Bully, the Court finds that there are genuine issues of material facts in regard to Plaintiff John Bully's Negligence/Premises Liability claim, Supply of Dangerous Chattel claim and Punitive Damages claim. Accordingly, the Court will deny Defendant Hess' Motion for Summary Judgment.


DONE and so ORDERED this 3rd day of June, 2010.

ATTEST:
Venetia Harvey-Velasquez
Clerk of the Court


HAROLD W. L. WILLOCKS
Judge of the Superior Court

By: 
Deputy Clerk

Dated: 6/30/10

CERTIFIED TO BE A TRUE COPY
This 3rd day of July 20 10
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By  Court Clerk TT