

**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**

**ALEXANDER EMILE,**

Plaintiff

v.

**Individual Docket No.**

**SX-05-CV-806**

**HESS OIL VIRGIN ISLANDS CORP., et al.,**

Defendants

**MEMORANDUM OPINION**

**THIS MATTER** came before the Court on Defendant Hess Oil Virgin Islands Corp.'s (hereinafter "HOVIC") 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 Alexander Emile filed an Opposition to Defendant HOVIC's Motion for Summary Judgment and Statement of Undisputed Facts. On November 20, 2009, Defendant HOVIC filed a Reply to Plaintiff Alexander Emile's Opposition.

**FACTS**

Plaintiff Alexander Emile filed a Complaint against Defendant HOVIC,<sup>1</sup> alleging that he developed mixed dust pneumoconiosis and other lung damages as a result of occupational exposure to catalyst while working at Defendant HOVIC's petroleum refinery on St. Croix, U.S. Virgin Islands. In his Complaint, Plaintiff Alexander Emile asserts three causes of action: Premises Liability, Supply of Dangerous Chattel and Punitive Damages.

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<sup>1</sup> Plaintiff Alexander Emile also filed this action against other defendants but Plaintiff Alexander Emile and his co-plaintiffs have reached a settlement with most of the defendants out of court.

## DISCUSSION

Defendant HOVIC argues that Plaintiff Alexander Emile's causes of action are meritless and therefore, Plaintiff Alexander Emile's Complaint should be dismissed.

### 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).

### 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.<sup>2</sup> Defendant HOVIC 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. Premises Liability

##### a. Duty

Defendant HOVIC claims that Plaintiff Alexander Emile's Premises Liability claim is governed by Restatement § 343, which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Defendant HOVIC asserts that Restatement § 343A<sup>3</sup> provides a complete bar to Plaintiff Alexander Emile's Premises Liability claim because the dangerous conditions that allegedly resulted in his injuries were created by the very work that he was contracted to perform, namely,

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<sup>2</sup> Restatement is applicable in the Virgin Islands by 1 V.I.C. § 4.

<sup>3</sup> Restatement §343A provides,

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

catalyst handling work. In *Henry v. Hess Oil Virgin Islands Corp.*, the landowner had a complete defense against premises liability claims where the landowner retained an independent contractor who is equally knowledgeable of the dangerous conditions at issue or the independent contractor's employees created the dangerous condition while performing their contract work.<sup>4</sup> (1991 U.S. Dist. LEXIS 21830 (D.V.I., 1991). Defendant HOVIC also cites to California cases, like *Kinsman v. Unocal Corp.*, 37 Cal. 4<sup>th</sup> 659 (2005), to support its argument. In *Kinsman*, the California Supreme Court held that the principles of Restatement § 343A are based upon the general practices that "the hirer generally delegates to the contractor responsibilities for supervising the job, including responsibility for looking after the employee's safety."<sup>5</sup> 37 Cal. 4<sup>th</sup> at 673. Accordingly, the California Supreme Court ruled "a hirer has no duty to act to protect the [contractor's] employee when the contractor fails in that task."<sup>6</sup> *Id.* at 674. Following that reasoning, Defendant HOVIC claims that it cannot be held responsible for Plaintiff Alexander Emile's employer's failure to take reasonable precautions to protect Plaintiff

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<sup>4</sup> The Court notes its disagreement with Defendant HOVIC's interpretation that according to *Henry*, Restatement § 343A provides a complete bar to Plaintiff Alexander Emile's Premises Liability claim. The *Henry* Court stated:

"Section 343A of the Restatement permits imposition of liability even for known or obvious dangers when the possessor should anticipate the harm... In *Hood v. Hess Oil Virgin Islands Corp.*, 650 F. Supp. 678 (D. Virgin Islands, 1986), an injured employee of an independent contractor of HOVIC instituted a negligence action. This court found that the exception found in Section 343A extended to situations where the independent contractor and the landowner were equally knowledgeable of the dangerous conditions, or "where the defective conditions are created by the work of the independent contractor or his employees." *Id.* at 682 (citing *Seeney v. Dover Country Club Apartments, Inc.*, 318 A.2d 619, 623 (Del. Sup. 1974); *Crane v. ITE Circuit Breaker Co.*, 443 Pa. 442, 278 A.2d 362, 364 (1971))."

<sup>5</sup> The Court acknowledges that *Kinsman*, even if applicable to this Court, may not be all that helpful to Defendant HOVIC. Defendant HOVIC did not include that the *Kinsman* Court also stated that, "Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort of the employee." 37 Cal. 4<sup>th</sup> at 671.

<sup>6</sup> The Court observes that Defendant HOVIC did not include the complete quote, which clarified that the hirer/landowner has no duty to protect the employee because the hirer had delegated the responsibility of employee safety to the contractor. "Because the *landowner/hirer delegates the responsibility of employee safety to the contractor*, the teaching of the *Privette* line of cases is that a hirer has no duty to act to protect the employee when the contractor fails in that task and therefore no liability..." (*Emphasis added*) *Kinsman*, 37 Cal. 4<sup>th</sup> at 674.

Alexander Emile from the dangerous conditions directly related to their contracted work because it did not owe a duty to Plaintiff Alexander Emile.

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

Here, Defendant HOVIC argues that there is no dispute regarding the fact that it had no duty towards Plaintiff Alexander Emile. The Court finds that Defendant HOVIC did not meet the initial burden of showing that no genuine issue of material fact exists concerning the duty element of Plaintiff Alexander Emile's Premises Liability claim. Contrary to Defendant HOVIC's interpretation of Restatement § 343A, the Court finds that Restatement § 343A does not provide a complete bar to Plaintiff Alexander Emile's Premises Liability claim. Instead, Restatement § 343A permits imposition of liability even for known or obvious dangers when the possessor should anticipate the harm. *Williams v. Martin Marietta, Inc.*, 817 F.2d 1030, 1033 (1987).<sup>7</sup> Based on the existing evidence, viewed in favor of Plaintiff Alexander Emile, a reasonable jury could find that Defendant HOVIC owed a duty to Plaintiff Alexander Emile because it should have anticipated the harm of catalyst despite such knowledge or obviousness.

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<sup>7</sup> The Court does not find the California cases Defendant HOVIC cited in its Motion for Summary Judgment controlling in this matter.

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**

Defendant HOVIC argues that under Restatement § 343, Plaintiff Alexander Emile carries the *prima facie* burden to prove that (1) Defendant HOVIC knew or by the exercise of reasonable care would discover that catalyst poses health risks, and should realize that it involves an unreasonable risk of harm to Plaintiff Alexander Emile, (b) Defendant HOVIC should have expected that Plaintiff Alexander Emile would not discover or realize the danger, or will fail to protect himself against catalyst, and (c) Defendant HOVIC failed to exercise reasonable care to protect Plaintiff Alexander Emile against the danger. Comment d to Restatement § 343 further provides that “[a]n invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.”

Again, Defendant HOVIC has the initial burden of showing that no genuine issue of material fact exists with the breach of duty element. Here, Defendant HOVIC did not argue whether or not it breached its duty to Plaintiff Alexander Emile. Instead, Defendant HOVIC claims that Plaintiff Alexander Emile carries the *prima facie* burden to prove that Defendant HOVIC breached its duty to Plaintiff Alexander Emile. This is clearly incorrect. As stated above, in its Motion for Summary Judgment, Defendant HOVIC has the initial burden of showing that no genuine issue of material fact exists, not Plaintiff Alexander Emile.<sup>8</sup> The burden

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<sup>8</sup> See *Celotex Corp.*, 477 U.S. at 325.

only shifts to Plaintiff Alexander Emile once this showing has been made by Defendant HOVIC.<sup>9</sup>

The Court finds that Defendant HOVIC did not meet the initial burden of showing that no dispute exists concerning the breach of duty element of Plaintiff Alexander Emile's Premises Liability claim. In *Williams*, the Third Circuit stated that, "[a]s applied to an employee of an independent contractor, [Restatement] § 343 is referred to as the "'safe workplace' doctrine, under which one who contracts with an independent contractor has a duty to provide a safe workplace for the employees of the independent contractor."<sup>10</sup> Whether Defendant HOVIC 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 Alexander Emile, a reasonable jury could find that Defendant HOVIC is liable for Plaintiff Alexander Emile's injury because (1) Defendant HOVIC knew or by the exercise of reasonable would have discovered the condition and realized that it involves an unreasonable risk of harm to Plaintiff Alexander Emile, (2) Defendant HOVIC should have expected that Plaintiff Alexander Emile would not discover or realize the danger, or would fail to protect himself against it, and (3) Defendant HOVIC failed to exercise reasonable care to protect Plaintiff Alexander Emile against the danger. Accordingly, the breach of duty element of Plaintiff Alexander Emile's Premises Liability claim should be left to the trier of fact to decide at trial.

#### c. Causation

Defendant HOVIC argues that Plaintiff Alexander Emile cannot offer evidence that he was exposed to catalyst on "a regular basis," "over some extended period of time" or "in

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<sup>9</sup> See *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586.

<sup>10</sup> *Williams*, 817 F.2d at 1034.

proximity to where [he] actually worked” to show that working at Defendant HOVIC’s refinery caused his alleged mixed dust pneumoconiosis. Defendant HOVIC 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,<sup>11</sup> “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 HOVIC 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 HOVIC alleges that, in order to show causation in this case, Plaintiff Alexander Emile has to show that he worked sufficiently close to the source of exposure, on a regular basis and with frequency and sufficient intensity.

Defendant HOVIC claims that Plaintiff Alexander Emile has not met his burden to prove that working at Defendant HOVIC’s refinery caused him to develop mixed dust pneumoconiosis. Defendant HOVIC asserts that Plaintiff Alexander Emile is unable to quantify his own exposure. Plaintiff Alexander Emile worked at Defendant HOVIC’s refinery from 1971 to 1994. *See* Defendant HOVIC’s Statement of Undisputed Facts at 1-2. Plaintiff Alexander Emile’s alleged exposure to catalyst occurred only during the his following employment: (1) Riggers & Erectors, from 1971, 1981 to 1982, doing boat work at sea; (2) Litwin Corporation, from 1973 to

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<sup>11</sup> 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.



1975, doing insulation work, steel work, maintenance work and cleaning work; and (3) Virgin Islands Industrial Maintenance Corporation (hereinafter, "IMC"), from 1989 to 1994, doing insulation work.<sup>12</sup> *Id.* However, Plaintiff Alexander Emile could not quantify his alleged exposure to catalyst during this period in terms of frequency, regularity or proximity. Defendant HOVIC asserts that Plaintiff Alexander Emile worked on many 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 HOVIC argues that, pursuant to *Robertson*, there is no genuine issue here because Plaintiff Alexander Emile cannot present any evidence to satisfy the "frequency, regularity and proximity" test of causation. Assuming *arguendo* that Plaintiff Alexander Emile 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.<sup>13</sup> Therefore, Defendant HOVIC requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff Alexander Emile's Premises Liability claim.

The Court finds that Defendant HOVIC did not meet its initial burden of showing that no genuine issue of material fact exists concerning the causation element of Plaintiff Alexander

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<sup>12</sup> Defendant HOVIC's Statement of Undisputed Material Facts stated, "Alexander Emile's alleged exposure to catalyst occurred only during his employment with Riggers & Erectors in 1971, 1973 to 1975, 1981, 1982..." Upon reviewing Plaintiff Alexander Emile's Deposition Transcript, the Court finds Defendant HOVIC's statement's to be incorrect. The correct years of employment for Plaintiff Alexander Emile should be: (1) Riggers & Erectors, from 1971, 1981 to 1982, doing boat work at sea; (2) Litwin Corporation, from 1973 to 1975, doing insulation work, steel work, maintenance work and cleaning work; and (3) IMC, from 1989 to 1994, doing insulation work.

<sup>13</sup> Defendant HOVIC 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 HOVIC did not meet its initial burden of showing that no dispute exists in regard to the causation element of Plaintiff Alexander Emile's Premises Liability claim.

Emile's Premises Liability claim. Although Defendant HOVIC 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.<sup>14</sup>

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 Alexander Emile worked with catalyst while working at Defendant HOVIC's refinery over a number of years, and now Plaintiff Alexander Emile was told by his doctor that there are catalyst deposits inside of Plaintiff Alexander Emile's system and Plaintiff Alexander Emile has developed mixed dust pneumoconiosis. Additionally, Dr. Barrie and Dr. Teitelbaum, Plaintiff Alexander Emile's expert witnesses, argue that catalyst dust can, and in Plaintiff Alexander Emile's case did, cause mixed dust pneumoconiosis. Based on the existing evidence, viewed in favor of Plaintiff Alexander Emile, a reasonable jury could find that working at Defendant HOVIC's refinery caused Plaintiff Alexander Emile 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.

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<sup>14</sup> See *Robertson*, 914 F. 2d 360.

**d. Damages**

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

**2. Supply of Dangerous Chattel**

**a. Duty**

Defendant HOVIC claims that Plaintiff Alexander Emile's Supply of Dangerous Chattel claim is governed by Restatement § 388,<sup>15</sup> § 391,<sup>16</sup> § 392<sup>17</sup> and § 393.<sup>18</sup> which collectively

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<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

impose two duties on Defendant HOVIC: (1) duty to inspect the catalyst products to discover any defective conditions making the product unreasonably dangerous and (2) to give warning to the users of dangers which it knows are involved in the use of the article, or which, from facts within his knowledge, he knows are likely to be so involved.<sup>19</sup>

Since Defendant HOVIC concedes that it owed Plaintiff Alexander Emile a duty under the Restatement as a supplier of dangerous chattel, the Court will move on to the next element.

**b. Breach of Duty**

Defendant HOVIC claims that Plaintiff Alexander Emile cannot prove Defendant HOVIC breached its duty to warn Plaintiff Alexander Emile because Defendant HOVIC's knowledge of the dangers associated with catalyst was limited to the catalyst manufacturers' knowledge. Defendant cite *Manbodh v. Hess Oil Virgin Islands Corporation*, where the Superior Court of the Virgin Islands held that the defendant cannot be expected to warn catalyst claimants about a health hazard associated with catalyst that the defendant did not receive from the catalyst manufacturers.<sup>20</sup> 47 V.I. 215, 259 (2005). Defendant HOVIC argues that Plaintiff Alexander Emile has not met his burden to prove that catalyst manufacturers informed Defendant HOVIC that catalyst products can result in pulmonary injuries.

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<sup>18</sup> 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.

<sup>19</sup> The Court disagrees with Defendant HOVIC's interpretation of its duty under Restatement §§ 388, 391, 392. The Court will address these duties in more details in the following section under "Breach of Duty."

<sup>20</sup> The Court notes that the part Defendant HOVIC cited to in *Manbodh*, the *Manbodh* Court was actually discussing a manufacturer's duty to warn the defendant and duty to warn end users of the dangers associated with catalyst. "...the burden of [the manufacturer] supplying defendant with adequate warnings would have been significantly less than the burden of supplying all refinery works with direct warnings." 47 V.I. at 260.

Defendant HOVIC also claims that the sophisticated user defense bars Plaintiff Alexander Emile'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 HOVIC argues that it had reason to expect that Plaintiff Alexander Emile will discover the danger involved with catalyst, since handling catalyst was what they were contracted to perform.

Moreover, Defendant HOVIC argues that, under Restatement § 343 and § 392, it only had to provide Plaintiff Alexander Emile with warnings of the condition and the risk involved therein.<sup>21</sup> Defendant HOVIC asserts that it has complied with its obligation towards Plaintiff Alexander Emile when it provided Policy No. 71<sup>22</sup> to Plaintiff Alexander Emile's employers, requiring them and their employees to read and comply with this policy. Defendant HOVIC

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<sup>21</sup> See Restatement § 343, cmt. d and Restatement § 392, cmt. a.

Restatement § 343, cmt. d provides,

An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein...

Restatement § 392, cmt. a provides,

...A person so supplying goods is required not only to give warning of dangers which he knows are involved in the use of the article, or which, from facts within his knowledge, he knows are likely to be so involved, but also to subject the article to such an inspection as the danger of using it in a defective condition makes it reasonable to require of him. The additional duty of inspection thrown upon the person so supplying chattels for a use in which he has a business interest, as compared with the absence of any such duty when he has no business interest in the use for which the chattel is supplied, is analogous to the duty of inspection imposed upon one who permits another to come upon his land for his business purpose.

<sup>22</sup> According to Defendant HOVIC, Policy No. 71 was based up on the safety and health hazard information that the catalyst manufacturers provided to Defendant HOVIC through Material Safety Data Sheets. Defendant HOVIC attached a copy of Policy No. 71 to its Motion for Summary Judgment. The first date appearing on Policy No. 71 was May 1, 1980.

disagrees with Plaintiff Alexander Emile's contention that Defendant HOVIC needed to arrange for appropriate medical examinations and the retention of records relating thereto. Instead, Defendant HOVIC argues that Plaintiff Alexander Emile's employer was the one required under the Occupational Safety and Health Administration and their contractual arrangement with Defendant HOVIC to protect Plaintiff Alexander Emile from the allegedly dangerous conditions related to the work that they are contracted to perform. Consequently, Defendant HOVIC claims that Plaintiff Alexander Emile failed to meet his burden to prove that Defendant HOVIC breached its duty of care towards him. Accordingly, Defendant HOVIC requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff Alexander Emile's Supply of Dangerous Chattel claim.

Again, in a Motion for Summary Judgment, the initial burden is on the moving party Defendant HOVIC to show that no genuine issue of material fact exists. Defendant HOVIC incorrectly stated that Plaintiff Alexander Emile cannot prove Defendant HOVIC breached its duty to Plaintiff Alexander Emile because "Plaintiff [Alexander Emile] has not met his burden to prove that catalyst manufacturers informed Defendant HOVIC that catalyst products can result in pulmonary injuries." Defendant HOVIC has to prove that there are no disputes regarding the breach of duty element of Plaintiff Alexander Emile's Supply of Dangerous Chattel first before the burden shifts to Plaintiff Alexander Emile.<sup>23</sup>

The Court disagrees with Defendant HOVIC's interpretation of its duties under Restatement. Instead, the Court finds that Restatement §§ 388, 391, 392 and 393 collectively impose the following duties upon Defendant HOVIC:

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<sup>23</sup> See *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586.

Duty One: Restatement § 388

If Defendant HOVIC 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 HOVIC had no reason to believe that Plaintiff Alexander Emile will realize its dangerous condition, then Defendant HOVIC had duty to exercise reasonable care to inform Plaintiff Alexander Emile of the chattel's dangerous condition or of the facts which make it likely to be dangerous if Defendant HOVIC. (*Emphasis added*).

Duty Two and Duty Three: Restatement § 392:

Defendant HOVIC, 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 Alexander Emile. (*Emphasis added*).

Duty Four: Restatement § 393

Defendant HOVIC, 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*).

In a Motion for Summary Judgment, it is the moving party's burden to show that no genuine issues exist concerning its compliance with all of its duties.<sup>24</sup> The Court finds that Defendant HOVIC did not meet its initial burden here. According to Restatement § 392, Defendant HOVIC had a duty to exercise reasonable care to make the chattel safe for Plaintiff Alexander Emile. Plaintiff Alexander Emile claims that Defendant HOVIC failed to provide adequate respiratory equipment<sup>25</sup> for catalyst workers and did not take steps such as air monitoring and testing to learn the extent of the hazard. The sophisticated user defense does not relieve Defendant HOVIC's duty to make the chattel safe for Plaintiff Alexander Emile.

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<sup>24</sup> See *Celotex Corp.*, 477 U.S. at 325.

<sup>25</sup> Plaintiff Alexander Emile said that he did not use any dust masks or respirators before Hurricane Hugo. See Alexander Emile Deposition Transcript at 47. After Hurricane Hugo, Plaintiff Alexander Emile said he started using dust masks but not respirators. See *id.* at 48. When Defendant HOVIC did not provide them with a dust mask, they had to resort to using rags. See *id.*

Whether Defendant HOVIC 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 Alexander Emile, a reasonable jury could find that Defendant HOVIC breached its duty to exercise reasonable care to make the chattel safe for Plaintiff Alexander Emile. Since the Court finds that there remains a dispute regarding Defendant HOVIC's duty to Plaintiff Alexander Emile under Restatement § 392, the Court will not address whether Defendant HOVIC's breached its other duties under the Restatement. The breach of duty element of Plaintiff Alexander Emile'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 Premises Liability claim. Defendant HOVIC makes the same arguments claiming that Plaintiff Alexander Emile 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 HOVIC did not meet its initial burden of showing that no genuine issue of material fact exists concerning the causation element of Plaintiff Alexander Emile'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 HOVIC does not contest the fact that Plaintiff Alexander Emile suffered a harm in the form of contracting mixed dust pneumoconiosis and other lung damage. Defendant HOVIC failed to satisfy its burden to establish the absence of genuine issues of material fact with respect to any of the elements of Plaintiff Alexander Emile's Supply of



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

**Emotional Distress Claims**

Defendant HOVIC's 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 [Alexander Emile] did not plead Intentional Infliction of Emotional Distress or Negligent Infliction of Emotional Distress. 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 Alexander Emile's Opposition to Defendant HOVIC's Motion for Summary Judgment at 11). Accordingly, the Court will not address Defendant HOVIC's arguments concerning Parasitic Emotional Distress, Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress.

Defendant HOVIC and Defendant Hess Corporation 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 Alexander Emile 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 HOVIC 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 HOVIC asserts that Plaintiff Alexander Emile cannot provide any evidence to support his claim that Defendant acted outrageously and with reckless disregard for Plaintiff Alexander Emile's rights. Additionally, Defendant HOVIC 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 HOVIC requests the Court to dismiss Plaintiff Alexander Emile's claim for punitive damages as a matter of law.

According to Restatement § 908(1),<sup>26</sup> 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 Alexander Emile is entitled to such damages with respect to his negligence claims. Therefore, at this juncture, the Court will not grant Defendant HOVIC's Motion for Summary Judgment in regard to Plaintiff Alexander Emile's Punitive Damages claim.

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<sup>26</sup> 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 Alexander Emile, the Court finds that there are genuine issues of material facts in regard to Plaintiff Alexander Emile's Premises Liability claim, Supply of Dangerous Chattel claim and Punitive Damages claim. Accordingly, the Court will deny Defendant HOVIC's Motion for Summary Judgment.

DONE and so ORDERED this 27<sup>th</sup> day of June, 2010.

ATTEST:

Venetia Harvey-Velasquez  
Clerk of the Court

By: [Signature]  
Deputy Clerk

Dated: 6/29/10

[Signature]  
HAROLD W. L. WILLOCKS  
Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY  
This 27<sup>th</sup> day of July 20 10  
VENETIA H. VELAZQUEZ, ESQ.  
CLERK OF THE COURT

By: [Signature] Court Clerk II