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**
RICHARD MAXWELL, Plaintiff v. **HESS OIL VIRGIN ISLANDS CORP., et al.,** Defendants	**Individual Docket No.** **SX-05-CV-846**

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 Richard Maxwell 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 Richard Maxwell's Opposition.

FACTS

Plaintiff Richard Maxwell filed a Complaint against Defendant HOVIC,[1] 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 Richard Maxwell asserts three causes of action: Premises Liability, Supply of Dangerous Chattel and Punitive Damages.

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

DISCUSSION

Defendant HOVIC argues that Plaintiff Richard Maxwell's causes of action are meritless and therefore, Plaintiff Richard Maxwell'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.[2] 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 Richard Maxwell'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
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> (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
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.

Defendant HOVIC asserts that Restatement § 343A[3] provides a complete bar to Plaintiff Richard Maxwell'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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[2] Restatement is applicable in the Virgin Islands by 1 V.I.C. § 4.

[3] 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.[4] 1991 U.S. Dist. LEXIS 21830 (D.V.I., 1991). Defendant HOVIC also cites to California cases, like *Kinsman v. Unocal Corp.*, 37 Cal. 4th 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."[5] 37 Cal. 4th 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."[6] *Id.* at 674.

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[4] The Court notes that, despite citing *Henry* in the Premises Liability section of its Motion for Summary Judgment, Defendant HOVIC dedicated an entire section in its Reply to Plaintiff Richard Maxwell's Opposition arguing why *Henry* does not apply and should not be binding on this Court.

The Court further notes its disagreement with Defendant HOVIC's interpretation that according to *Henry*, Restatement § 343A provides a complete bar to Plaintiff Richard Maxwell'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))."

[5] 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. 4th at 671.

[6] 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. 4th at 674.

Following that reasoning, Defendant HOVIC claims that it cannot be held responsible for Plaintiff Richard Maxwell's employer's failure to take reasonable precautions to protect Plaintiff Richard Maxwell from the dangerous conditions directly related to their contracted work because it did not owe a duty to Plaintiff Richard Maxwell.

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 Richard Maxwell's Premises Liability claim. Once this showing has been made, the burden shifts to Plaintiff Richard Maxwell, 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 Richard Maxwell. If Plaintiff Richard Maxwell 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 Richard Maxwell. 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 Richard Maxwell'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 Richard Maxwell'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).[7] Based on the existing evidence, viewed in favor of Plaintiff Richard Maxwell, a reasonable jury could find that Defendant HOVIC owed a duty to Plaintiff Richard Maxwell

[7] The Court does not find the California cases Defendant HOVIC cited in its Motion for Summary Judgment controlling in this matter.

because it should have anticipated the harm of catalyst despite such knowledge or obviousness. 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 Richard Maxwell 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 Richard Maxwell, (b) Defendant HOVIC should have expected that Plaintiff Richard Maxwell 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 Richard Maxwell 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 Richard Maxwell. Instead, Defendant HOVIC claims that Plaintiff Richard Maxwell carries the *prima facie* burden to prove that Defendant HOVIC breached its duty to Plaintiff Richard Maxwell. 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 Richard Maxwell.[8] The

[8] *See Celotex Corp.*, 477 U.S. at 325.

burden only shifts to Plaintiff Richard Maxwell once this showing has been made by Defendant HOVIC.[9]

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 Richard Maxwell'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."[10] 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 Richard Maxwell, a reasonable jury could find that Defendant HOVIC is liable for Plaintiff Richard Maxwell'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 Richard Maxwell, (2) Defendant HOVIC should have expected that Plaintiff Richard Maxwell 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 Richard Maxwell against the danger. Accordingly, the breach of duty element of Plaintiff Richard Maxwell's Premises Liability claim should be left to the trier of fact to decide at trial.

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[9] *See Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586.

[10] *Williams*, 817 F.2d at 1034.

c. Causation

Defendant HOVIC argues that Plaintiff Richard Maxwell 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 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,[11] "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 Richard Maxwell 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 Richard Maxwell 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 Richard Maxwell is unable to quantify his own exposure. Plaintiff Richard Maxwell worked at Defendant HOVIC's refinery from 1971 to 1991 as a

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[11] 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.

laborer, labor foreman, underground pipe worker and loading/offloading catalyst worker. *See* Defendant HOVIC's Statement of Undisputed Facts at 1-2. Plaintiff Richard Maxwell's alleged exposure to catalyst occurred only during his employment with Litwin Corporation from 1967 to 1976, with Litwin Pan American from 1977 to 1986 and with Virgin Islands Industrial Maintenance Corporation from 1986 to 1991. *Id.* However, Plaintiff Richard Maxwell could not quantify his alleged exposure to catalyst during this period in terms of frequency, regularity or proximity. Defendant HOVIC asserts that Plaintiff Richard Maxwell 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 Richard Maxwell cannot present any evidence to satisfy the "frequency, regularity and proximity" test of causation. Assuming *arguendo* that Plaintiff Richard Maxwell 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.[12] Therefore, Defendant HOVIC requests the Court to grant its Motion for Summary Judgment in regard to Plaintiff Richard Maxwell'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 Richard Maxwell's Premises Liability claim. Although Defendant HOVIC relies on *Robertson*'s, the

[12] 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 Richard Maxwell's Premises Liability claim.

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.[13]

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

d. Damages

Defendant HOVIC does not contest the fact that Plaintiff Richard Maxwell 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

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[13] *See Robertson,* 914 F. 2d 360.

respect to any of the elements of Plaintiff Richard Maxwell's Premises Liability claim. Accordingly, Defendant's Motion for Summary Judgment will be denied as to Plaintiff Richard Maxwell's Premises Liability claim.

2. Supply of Dangerous Chattel

a. Duty

Defendant HOVIC claims that Plaintiff Richard Maxwell's Supply of Dangerous Chattel claim is governed by Restatement § 388,[14] § 391,[15] § 392[16] and § 393,[17] which collectively 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

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[14] 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.

[15] 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.

[16] 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.

[17] 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.

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.[18]

Since Defendant HOVIC concedes that it owed Plaintiff Richard Maxwell 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 Richard Maxwell cannot prove Defendant HOVIC breached its duty to warn Plaintiff Richard Maxwell 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.[19] 47 V.I. 215, 259 (2005). Defendant HOVIC argues that Plaintiff Richard Maxwell has not met his burden to prove that catalyst manufacturers informed Defendant HOVIC that catalyst products can result in pulmonary injuries.

Defendant HOVIC also claims that the sophisticated user defense bars Plaintiff Richard Maxwell'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

[18] 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."

[19] 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.

> 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 Richard Maxwell 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 Richard Maxwell with warnings of the condition and the risk involved therein.[20] Defendant HOVIC asserts that it has complied with its obligation towards Plaintiff Richard Maxwell when it provided Policy No. 71[21] to Plaintiff Richard Maxwell's employers, requiring them and their employees to read and comply with this policy. Defendant HOVIC disagrees with Plaintiff Richard Maxwell'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 Richard Maxwell's employer was the one required under the Occupational Safety and Health Administration and their contractual arrangement with Defendant HOVIC to protect Plaintiff Richard Maxwell from the allegedly dangerous conditions

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[20] *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 addition 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.

[21] 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.

related to the work that they are contracted to perform. Consequently, Defendant HOVIC claims that Plaintiff Richard Maxwell 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 Richard Maxwell'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 Richard Maxwell cannot prove Defendant HOVIC breached its duty to Plaintiff Richard Maxwell because "Plaintiff [Richard Maxwell] 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 Richard Maxwell's Supply of Dangerous Chattel first before the burden shifts to Plaintiff Richard Maxwell.[22]

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:

> Duty One: Restatement § 388
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> 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 Richard Maxwell will realize its dangerous condition, then Defendant HOVIC had duty to exercise reasonable care to inform Plaintiff Richard Maxwell of the chattel's dangerous condition or of the facts which make it likely to be dangerous if Defendant HOVIC. *(Emphasis added).*

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[22] *See Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586.

> Duty Two and Duty Three: Restatement § 392:
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> 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 Richard Maxwell. *(Emphasis added).*
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> Duty Four: Restatement § 393
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> 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.[23] 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 Richard Maxwell. Plaintiff Richard Maxwell claims that Defendant HOVIC failed to provide adequate respiratory equipment[24] 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. 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 Richard Maxwell, a reasonable jury could find that Defendant HOVIC breached its duty to exercise reasonable care to make the chattel safe for Plaintiff Richard Maxwell. Since the Court finds that there remains a dispute regarding Defendant HOVIC's duty to Plaintiff Richard Maxwell under Restatement §

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[23] *See Celotex Corp.*, 477 U.S. at 325.

[24] Plaintiff Richard Maxwell said he did not wear a dust mask or respirator, and he does not recall seeing coworkers wearing dust masks. *See* Richard Maxwell Deposition Transcript at 58-59, 69. Plaintiff Richard Maxwell and his coworkers would put a rag over their faces to deal with the dust. *See id.* at 59.

392, the Court will not address whether Defendant HOVIC's breached its other duties under the Restatement. The breach of duty element of Plaintiff Richard Maxwell'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 Richard Maxwell 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 Richard Maxwell'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 Richard Maxwell 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 Richard Maxwell's Supply of Dangerous Chattel claim. Accordingly, Defendant's Motion for Summary Judgment will be denied as to Plaintiff Richard Maxwell'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 [Richard Maxwell] 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 Richard Maxwell'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 Richard Maxwell 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 Richard Maxwell cannot provide any evidence to support his claim that Defendant acted outrageously and with reckless disregard for Plaintiff Richard Maxwell'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 Richard Maxwell's claim for punitive damages as a matter of law.

According to Restatement § 908(1),[25] 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 Richard Maxwell 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 Richard Maxwell's Punitive Damages claim.

Statutory Immunity

Defendant HOVIC argues that Partial Summary Judgment should be granted with respect to Plaintiff Richard Maxwell's claims during the years (1977 to 1986) that he worked as a laborer and labor foreman at Defendant HOVIC's refinery on loan from Litwin PanAmerican (hereinafter "Litwin").[26] As its basis, Defendant HOVIC points out that an employment contract existed between Defendant HOVIC and Litwin (hereinafter, the "Contract"), which established

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[25] 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 accessing 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 case and the wealth of the defendant.

[26] *See* Defendant HOVIC's Statement of Undisputed Facts at 1-2.

that Plaintiff Richard Maxwell's only available remedy for injuries as a loanee to Defendant HOVIC was under the worker's compensation statute. The Contract was created in 1976.[27]

Defendant HOVIC argues that the Court should not apply 24 V.I.C. § 284[28] retroactively to this case because it would unconstitutionally impact the Contract controlling Plaintiff Richard Maxwell's employment with Defendant HOVIC and thereby violate the Contract Clause of the U. S. Constitution (hereinafter, the "Contract Clause"). The Contract Clause states that no state shall pass any law impairing the obligation of Contracts. Article I, § 10, cl. 1. On October 19, 1984, the Virgin Islands legislature added a section to 24 V.I.C. § 284 abrogating the borrowed employee doctrine. Then on January 23, 1986, 24 V.I.C. § 284 was amended to apply to (1) claims filed after the effective date of this act; and (2) claims pending as of the effective date of this act; regardless of when the accident which gave rise to the claim occurred. Act Feb. 27, 1986, No. 5145, 1(b), Sess. L. 1986, p. 26.

Defendant HOVIC cites to *Nieves v. Hess Oil Virgin Islands Corporation*, where Defendant HOVIC claims that the plaintiffs were its loanees at the refinery bound to the allegedly same implied contract terms as Plaintiff Richard Maxwell in this case.[29] In *Nieves*, the

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[27] Although Plaintiff Richard Maxwell worked at Defendant HOVIC's refinery on loan from Litwin from 1977 to 1986, the statutory immunity defense is only applicable from 1976, when Defendant HOVIC and Litwin entered into the Contract, to 1984, when the borrowed employee doctrine is abrogated. Therefore, the Court will discuss this section only concerning the years from 1977, when Plaintiff Richard Maxwell first began working at Defendant HOVIC's refinery on loan from Litwin, to 1984.

[28] 24 V.I.C. § 284 provides,

(a) When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.

(b) For the purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to comply with the provisions of this chapter with respect to being an insured employer. The statutory employer and borrowed servant doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under section 272 of this title.

[29] *See Nieves*, 812 F.2d 1237, 1244 (3d Cir. 1987).

Third Circuit found the 1986 amendment to 24 V.I.C. § 284 unconsitutional because it violated the defendant's contractual expectations according to the Contracts Clause. (819 F.2d at 1252). Consequently, it was held in *Nieves* that an implied term of the contract between HOVIC and Litwin, which stated that HOVIC would have the benefit of statutory immunity from suits by the loanees, is binding.[30] *Id.* at 1244. The *Nieves* Court found that HOVIC expected this statutory immunity from tort liability and paid contributions in reliance upon it. *Id.* at 1245. Defendant HOVIC argues that the Court should reach the same conclusion as the *Nieves* Court and grant its Motion for Summary Judgment with respect to Plaintiff Richard Maxwell's claims during the years he worked at Defendant HOVIC's refinery as a loanee.

Plaintiff Richard Maxwell disagrees with Defendant HOVIC's interpretation of *Nieves*, arguing that the Third Circuit found the 1986 amendment to 24 V.I.C. § 284 not applicable retroactively to the then pending cases but did not strike down its applicability to future claims. Plaintiff Richard Maxwell cites to *Henry v. HOVIC*, where the court recognized that "[t]he Third Circuit in *Nieves* has instead allowed by implication the abrogation of the borrowed servant doctrine for all claims filed after the effective date of the October 19, 1984 legislation."[31] Plaintiff Richard Maxwell argues that because this action was instituted on December 28, 2005, after the 1986 amendment, Plaintiff Richard Maxwell cannot be considered a borrowed servant of Defendant HOVIC under the Virgin Islands law. Accordingly, Plaintiff Richard Maxwell requests the Court to deny Defendant HOVIC's Motion for Partial Summary Judgment.

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[30] Nieves was a Type I employee who was injured at work while on loan to HOVIC on September 28, 1983. He filed his complaint against HOVIC on December 3, 1984. On November 1, 1985, the District Court granted HOVIC's summary judgment on the ground that Nieves was "the borrowed employee of HOVIC. HOVIC is therefore immune from Nieves' suit."

[31] 1991 U.S. Dist. LEXIS 21830, *24 (D.V.I., Feb 7, 1991) (citing *Nieves*, 819 F.2d at 1241).

In its Reply to Plaintiff Richard Maxwell's Opposition, Defendant HOVIC reiterates the fact that under *Nieves*, the borrowed servant doctrine remains applicable to cases involving contracts created before October 19, 1984. (812 F.2d 1237). Therefore, Defendant HOVIC asserts that the borrowed servant doctrine is an applicable defense in this case, and thereby bestowing Defendant HOVIC statutory immunity. Defendant HOVIC also argues that, unlike what Plaintiff Richard Maxwell contends, the Court should not follow *Henry* because (1) *Henry* is a district court opinion that is not binding on this Court and (2) directly contradicts the findings in *Nieves*. Accordingly, Defendant HOVIC claims that *Nieves* is the controlling case this Court should follow and grant its Motion for Summary Judgment with respect to Plaintiff Richard Maxwell's claims during the years he worked at Defendant HOVIC's refinery as a loanee.

As stated above, Defendant HOVIC, as the moving party for summary judgment, has the initial burden of showing that no genuine issue of material fact exists with respect to its statutory immunity defense.[32] Once this showing has been made, the burden shifts to Plaintiff Richard Maxwell, who must put forth sufficient pieces of affirmative evidence that confirm such a dispute remains. Again, Defendant HOVIC's evidence will be viewed in the light most favorable to Plaintiff Richard Maxwell. If Plaintiff Richard Maxwell fails to meet his burden, the Court will award Defendant HOVIC summary judgment pursuant to Fed. R. Civ. P. 56.

In this case, Defendant HOVIC claims that it is statutorily immune from all tort liabilities from Plaintiff Richard Maxwell when he worked as a loanee due to an implied contract that existed between them before the borrowed servant doctrine was abrogated in 1984. The Court

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[32] *See Celotex Corp.*, 477 U.S. 325.

finds that Defendant HOVIC did not meet its initial burden of showing that no genuine issue of material fact exists concerning its statutory immunity defense.

In its Motion for Summary Judgment, Defendant HOVIC failed to provide any evidence indicating that Plaintiff Richard Maxwell was a loanee from Litwin while working at Defendant HOVIC's refinery or that Plaintiff Richard Maxwell falls under the status of borrowed employees from 1977 to 1984. Defendant HOVIC merely states that "During some or all of this period, [Mr. Maxwell] was a HOVIC loanee and retained the title 'labor foreman'"[33] According to Plaintiff Richard Maxwell's Deposition, Plaintiff Richard Maxwell also worked as a laborer before becoming foreman.[34] While the Court can conclude that, under the Contract, Plaintiff Richard Maxwell was a Type I personnel when working as a labor foreman, the Court cannot conclude from the records whether Plaintiff Richard Maxwell's job as laborer falls under Type I work or Type II work. Defendant HOVIC provided the Court with a copy of the said Contract between Defendant HOVIC and Litwin, dated June 5, 1976. Upon examining the Contract, Part VI(A) provides that "This Agreement shall remain in full force and effect from June 30, 1976 through March 15, 1977." Defendant HOVIC did not provide the Court with any evidence indicating that the Contract was in force after 1977. Consequently, if Defendant HOVIC did not provide any evidence of such Contract in force between Defendant HOVIC and Litwin after 1977, then the Court cannot conclude an implied contract existed between Defendant HOVIC and Plaintiff Richard Maxwell after 1977.

Furthermore, in its Motion for Summary Judgment, Defendants HOVIC states that "[T]he language of Litwin and HOVIC's contract states that workmen's compensation contributions

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[33] According to *Nieves*, "When hiring employees to serve as Type-I employees on loan to [HOVIC], it was Litwin's practice to have them sign a [HOVIC] loanee form." 819 F.2d at 1240.

[34] *See* Richard Maxwell's Deposition Transcript at 70-73.

would be paid by HOVIC to Litwin on behalf of HOVIC loanees." However, Defendant HOVIC did not provide any evidence of such alleged arrangement between Defendant HOVIC and Litwin. Defendant HOVIC did not provide an affidavit by the comptroller, like it did in *Nieves*. Here, Defendant HOVIC merely quotes to the comptroller's affidavit included in *Nieves*:

> "[HOVIC] reimburses Litwin for all payroll expenses for Type I personnel, including workmen's compensation contributions, to the Government insurance fund, and that the expense of workmen's compensation contributions is one of the factors in the time and materials rate paid to Litwin for the services of Type I personnel while working for [HOVIC]." *Nieves*, 819 F.2d at 1246 (*quoting* Weinman's Affidavit).

According to the Contract, Litwin was in charge of maintaining Workmen's Compensation Insurance. The Contract provides:

> IV. INSURANCE AND INDEMNITY
>
> A. Insurance Furnished by Contractor[35]
>
> CONTRACTOR shall maintain the following insurance at all times while performing work hereunder, whether such work be classified as Type I or II.
>
> 1. Workmen's Compensation Insurance
>
> a. Workmen's Compensation Insurance covering the statutory obligations of the Workmen's Compensation Laws of the U. S. Virgin Islands.
>
> b. In addition, CONTRACTOR shall provide such Workmen's Compensation Insurance as is necessary to protect HOVIC and CONTRACTOR against any claim made by an employee by virtue of the extraterritorial provision of any Workmen's Compensation Act of any state of the U.S. or any foreign country.
>
> ...
>
> C. Insurance Furnished by HOVIC
>
> HOVIC shall either produce and keep in effect during all times of performance hereunder the usual and standard form of All Risk Builders Risk Insurance, Fire and Extended Coverage Insurance covering any and all materials, equipment, machinery and supplies to be used in or incidental to the work covered by this Agreement while on the job site and all of HOVIC's refinery facilities on which such job

[35] Litwin is the Contractor under the Contract.

> site is located, or hold CONTRACTOR harmless against all risks which would have been covered under such a policy. The policies, if any, to the fullest extent as permitted by law, shall include the interest of CONTRACTOR as an additional insured. In any and all of such insurance, if any, all rights of subrogation against CONTRACTOR shall be waived.

The Court cannot conclude from the evidence provided that the alleged arrangement of Defendant HOVIC reimbursing Litwin for all payroll expenses for Type I personnel, including workmen's compensation contributions, was in effect during Plaintiff Richard Maxwell's employment. Additionally, as mentioned above, Defendant HOVIC never proved that Plaintiff Richard Maxwell was a Type I personnel during his entire time of employment.

Based on the existing evidence, viewed in favor of Plaintiff Richard Maxwell, a reasonable jury could find that (1) Plaintiff Richard Maxwell was not a loanee and/or borrowed servant to Defendant HOVIC, (2) Plaintiff Richard Maxwell was not a Type I personnel during his entire time of employment from 1977 to 1984, (3) no such Contract existed between Defendant HOVIC and Litwin after 1977, (4) no such implied contract existed between Defendant HOVIC and Plaintiff Richard Maxwell after 1977, and/or (5) Defendant HOVIC did not reimburse Litwin for all payroll expenses, including worker's compensation, for Type I personnel during Plaintiff Richard Maxwell's employment. There are genuine issues of material facts regarding Defendant HOVIC's statutory immunity defense that should be left to the trier of fact to decide at trial. At this time, the Court will not address whether *Nieves* or *Henry* is the controlling case since Defendant HOVIC failed to provide sufficient evidence to prove that statutory immunity applies to Defendant HOVIC in this case.

CONCLUSION

At this stage, viewing the facts and evidence in the light most favorable to Plaintiff Richard Maxwell, the Court finds that there are genuine issues of material facts in regard to Plaintiff Richard Maxwell's Premises Liability claim, Supply of Dangerous Chattel claim and Punitive Damages claim. The Court further finds that genuine issues of material facts also exist in regard to Defendant HOVIC's statutory immunity defense. Accordingly, the Court will deny Defendant HOVIC's Motion for Summary Judgment.

DONE and so ORDERED this 29th day of June, 2010.

ATTEST:
Venetia Harvey-Velasquez
Clerk of the Court

By: _____
Deputy Clerk

Dated: 6/29/10

Harold W. L. Willocks
HAROLD W. L. WILLOCKS
Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY
This 8th day of July 20 10
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By _____ Court Clerk II