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INTRODUCTION

This Amicus Brief is respectfully submitted, pursuant to Fed. R. App. P. 29(a), on behalf of the Product Liability Advisory Council, Inc. ("PLAC"), a non-profit association with nearly 100 corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies, through PLAC, seek to contribute to the improvement and reform of law in the United States and elsewhere, with an emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed more than 925 briefs as Amicus Curiae in both state and federal courts, including this Court.

This appeal presents important questions of law regarding liability for alleged failure of a duty to warn. PLAC submits that a product liability claim for purported failure to warn must be predicated on well-established legal and evidentiary requirements, and these must be met before the plight of a sympathetic injured plaintiff is presented to a jury. Breach of the duty to warn - - whether an

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[1] A list of the current members of PLAC is annexed both as an exhibit to the motion seeking leave to file this Brief, and as an appendix to this Brief. **Pursuant to Fed. R. App. P. 29(c)(5**), we state that no party's counsel authored this brief, in whole or in part; that although American Airlines, a party to this action, is one of nearly 100 corporate members of PLAC, and paid corporate membership dues, no money paid by American Airlines was specifically received for the purpose of funding preparation or submission of this amicus brief; and no one other than amicus paid money to fund preparing or submitting this amicus brief.

asserted need for a relevant warning or an alleged insufficiency of existing warnings - - must be proved with competent and relevant evidence. In the case of complex products, such proof, almost without exception, entails reliable expert testimony. The likely efficacy of the omitted warning must be established and, necessarily, the wording, style, location and placement of the warning plaintiff alleges should have been given must be specified. Further, the proximate causal nexus between the omission of the warning and the plaintiff's injuries must be proven. A duty to warn claim is not some "miscellaneous," "catch-all" product liability claim for injured plaintiffs precluded from proving a manufacturing or design defect. Nor is a failure to warn claim a form of absolute liability, guaranteeing recovery for injured parties who fail to prove its essential elements.

The district court undermined all of the legal and evidentiary mandates underpinning a legitimate failure to warn claim. Precluded by court order from adducing expert testimony in this regard, plaintiff failed in all respects to adduce the legal and evidentiary bases upon which warnings liability may be imposed. Critically, no evidence was presented as to what the allegedly omitted warning would have looked like, what its wording would have been, where it would have been placed and how it more likely than not would have prevented this accident, given the product's deplorable state of disrepair and plaintiff's actual knowledge of the dangers of using the product in that decrepit condition near a jet's backwash.

Instead of dismissing the claim as it should have, the district court itself fashioned, created and embedded the wording of a proposed warning in its charge to the jury. Employing 20-20 hindsight, the district judge so fine-tuned the proposed warning to the particular, bizarre circumstances of this case as to permit the jury to penalize omission of a warning against use of the product when three separate misuses of the product converge (removal of the bolted-on customer-ordered cab, disengagement of all hood fasteners, and placement of the unit in the direct path of a jet backwash). The court's insertion of its conceptualization of what a warning should have been into the charge - - without reliable proof thereof at trial - - rendered the purported failure to warn akin to absolute liability. Allowing liability to rest on a purported failure to provide a warning of such picayune detail of misuse upon misuse would render the duty to warn impossible of compliance with respect to any complex product. The list of potential warnings would be endless and, if issued, the dilution of significant warnings would result.

The corporate members of PLAC often defend claims of failure to warn. They expect the courts to require plaintiffs to prove what they allege, in warnings cases as in any other. When claimants fail to submit competent evidence that a particular warning, placed at a particular location, was required, that the failure to provide that warning rendered the product not reasonably safe for foreseeable uses,

and that the failure to warn proximately caused the injury, courts should dismiss the warnings claim. Failure to do so creates absolute liability.

Because these fundamental but critical issues transcend the interests of these litigants, PLAC submits this friend of the court brief and urges that the judgment be reversed and the complaint dismissed.

STATEMENT OF FACTS

PLAC adopts the statements of fact in the briefs of Appellant American Airlines ("AA") - - who employed the plaintiff and owned the severely damaged baggage tractor in which plaintiff was injured and the airplane whose jet backwash was the immediately precipitating cause of the accident, and Appellants Stewart & Stevenson entities ("S&S"), who originally manufactured and sold the subsequently damaged and bowdlerized baggage tractor involved in the accident. Facts pertinent to the legal issues are discussed in the argument section of this brief.

POINT I

PLAINTIFF FAILED TO PROVE WITH COMPETENT EVIDENCE THE ESSENTIAL ELEMENTS OF A WARNINGS CLAIM

A. The Legal and Evidentiary Requirements of A Failure-to-Warn Claim.

A products liability claim premised on an alleged failure of a duty to warn must be predicated upon well-established legal and evidentiary requirements (see e.g., Liriano v. Hobart Corp., 92 N.Y.2d 232, 677 N.Y.S.2d 764 [1998]). The need

for a relevant warning and the insufficiency of existing warnings must be shown, through expert testimony when necessary. The feasibility, wording, style and placement of the proposed warning must be established, as well as its likely efficaciousness (see Liriano, supra, 92 N.Y.2d at 239, 242). What is more, the proximate causal nexus between the omission of the warning and the plaintiff's injuries must be proven (see e.g., Lewis v. White, 2010 U.S. Dist. LEXIS 142567 [S.D.N.Y. 2010]). Duty to warn is not a claim to which anyone injured by a product but unable to prove or precluded from proving a manufacturing or design defect, may resort, but it must stand on its own. Nor is it an absolute liability concept.

A "failure to warn" theory differs substantially from a claim of manufacturing or design defect. The latter impugn the product itself with the assertion that it is inherently defective or "not reasonably safe." A claimed failure to warn asserts that a product, which is not inherently defective, nevertheless has risks that require warnings concerning the proper and improper use of the product. See e.g., Cover v. Cohen, 61 N.Y.2d 261, 275, 473 N.Y.S.2d 378, 385 (1984); Robinson v. Reed-Prentice Div. of Package Mach. Corp., 49 N.Y.2d 471, 479, 426 N.Y.S.2d 717, 720 (1980). This is borne out by historical origins of the claims; while products liability for defective design or manufacture is traced to cases permitting liability for negligent issuance of a defective product (see MacPherson

v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 [1916]), "failure to warn" liability traces directly to cases imposing liability for the failure to properly label medications. See cases cited in Wolfgruber v. Upjohn Co., 72 A.D.2d 59, 60, 423 N.Y.S.2d 95, 96 (4th Dept. 1979), affd. 52 N.Y.2d 768, 436 N.Y.S.2d 614 (1980) – i.e., products which are inherently "reasonably safe", but require instructions for their proper use. See e.g., Cover v. Cohen, supra, 61 N.Y.2d 261, 275 ("Although a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn" [citations omitted]).

Thus, a claimed failure to warn is in no way an "umbrella" allegation to be tacked on to every assertion of defect in design or manufacture. It is a claim unto itself, and must stand on its own footing or be dismissed.

The New York Court of Appeals has outlined the requirements for establishing a failure to warn claim in New York. The Court has instructed that "[T]he inquiry in a duty to warn case…focus[es] principally on the foreseeability of the risk and the adequacy and effectiveness of any warning." Liriano, supra, 92 N.Y.2d at 239. The inquiry takes into consideration, among other things, issues such as "feasibility and difficulty of issuing warnings in the circumstances" (Id., at 242). The determination of the nature of a warning and to whom it should be given

is governed by the nature and gravity of the harm that a warning may avoid, the kind of product involved, the burden of discharging the duty and disseminating the warning, the obviousness of the danger or risk, and the knowledge, skill or training of the users for whom it is meant. Cover v. Cohen, supra, 61 N.Y.2d 261. In order to meet his or her burden of proof, plaintiff must provide a proposed warning or alternative warning that would have prevented plaintiff's accident. See e.g., Keir v. State, 188 A.D.2d 918, 591 N.Y.S.2d 621 (3d Dept. 1992); Derienzo v. Trek Bicycle Corp., 376 F. Supp.2d 537, 566 (S.D.N.Y. 2005).

Thus, under New York law, plaintiff here was required to support his failure to warn claim by at least showing that the information known to him or provided with or on the baggage tractor was inadequate, and by providing reliable proof regarding the feasibility, content, form and placement of a proposed warning that would have prevented the accident. However, as a result of the district court's preclusion ruling, plaintiff presented no expert proof, or any proof for that matter, regarding the feasibility, content, form, placement or efficacy of a proposed warning.

While there may be occasions where expert testimony regarding warnings is not required, PLAC submits that in cases of this type, involving a complex and sophisticated piece of machinery not within the ken or experience of the ordinary juror, expert testimony regarding the alleged inadequacy of existing warnings and

the feasibility, content, form, placement and efficacy of a proposed alternative warning is mandated. Upon failure to produce such expert proof, plaintiff's failure to warn claim should have been dismissed. Plainly, lay jurors have no meaningful experience with or knowledge regarding baggage tractors designed for and operating exclusively on airport tarmacs. Nor do ordinary jurors have experience in engineering matters, such as determining the feasibility and placement of proposed warnings, or in "human factors" analysis, i.e., the science of determining how people react to warnings and what kinds of warnings are most effective. Indeed, such was precisely the nature of the expert evidence which *was* submitted in Liriano, supra. See Liriano v. Hobart Corp., 949 F.Supp. 171, 176-8 (S.D.N.Y. 1996). As shown infra, expert testimony on the warnings issues is mandated in such cases.

B. Expert Proof Was Required for Plaintiff to Prove a Prima Facie Case.

In Menz v. New Holland N.A., Inc., 507 F.3d 1107 (8th Cir. 2007), a tractor roll-over case, the Court observed that expert testimony is necessary in a strict products liability case "where the lay jury [does] not possess the experience or knowledge of the subject matter sufficient to enable them to reach an intelligent opinion without help" (507 F.3d at 1111; quoting Housman v. Fiddyment, 421 S.W.2d 284, 289 [Mo. 1967]). The Court observed as follows:

> "The necessity of expert testimony in a failure to warn case turns on the complexity of the subject matter…. Here, Menz's strict liability claim alleges the defendants failed to warn him of the tractor's inherent instability and propensity to turn over on relatively level ground, and of the added danger of using a loader. Menz argues `[r]esolution of these issues does not require analysis of any complex machinery.' We disagree. Contrary to Menz's assertion, the products at issue in this case are fairly technical and complex, and are not the type of machinery commonly utilized by the typical lay juror." (citations omitted; 507 F.3d at 1111-1112).

In Laspesa v. Arrow International, Inc., 2009 U.S. Dist. LEXIS 121576 (D. Mass. 2009), the court observed that where a product requires technical knowledge, juries need expert guidance regarding whether a warning may be appropriate. There, defendant manufacturer had provided instructions or manuals regarding the removal of epidural catheters. Plaintiffs did not offer the text of any proposed additional warnings. Since the workings of the catheter were outside the scope of common knowledge, expert guidance as to the necessity and adequacy of the defendant's warnings would be required to assist the jury, and without such expert testimony, the plaintiffs could not prove a failure to warn claim. Were the rule otherwise, "jurors would have to speculate regarding the appropriateness of the warnings provided and any additional dangers that should have been warned against."

See also, Bryant v. Laiko International Co., 2006 U.S. Dist. LEXIS 73682 (E.D. Mo. 2006) (although subject matter of suit, a toy helicopter, was not as

complex as an automobile or farm equipment, plaintiff's failure to provide expert testimony that further warnings would have altered plaintiff's behavior and prevented the injury warranted summary dismissal of his failure to warn claim); Young v. Commonwealth of Pennsylvania Department of Transportation, 560 Pa. 373, 744 A.2d 1276 (Pa. 2000) (expert testimony necessary where subject matter of inquiry involves special skill and training beyond ken of ordinary laymen; plaintiffs' failure to offer expert proof on warnings resulted in summary judgment for defendants).

New York courts similarly state that expert testimony is the norm in failure to warn claims. See e.g., Putnick v. H.M.C. Assocs., 137 A.D.2d 179, 529 N.Y.S.2d 205 (3d Dept. 1988) (use of expert testimony is the rule rather than the exception in a failure to warn case; the need for an expert in each case turns on the technical complexity of the subject matter); Derienzo v. Trek Bicycle Corp., supra, 376 F. Supp.2d 537 (since scientific and technical issues were involved in determination of plaintiff's failure to warn claim, expert proof was required); see also Anaya v. Town Sports International, Inc., 44 A.D.3d 485, 843 N.Y.S.2d 599 (1st Dept. 2007) (expert evidence that warning in manual was inadequate cited as ground for denying summary dismissal of warnings claim); Vail v. Kmart Corp., 25 A.D.3d 549, 807 N.Y.S.2d 399 (2d Dept. 2006)(expert evidence erroneously

excluded would have been sufficient to sustain warnings claim; new trial ordered solely on that ground).

In the instant case, the product is technical and complex. Engineering issues such as the feasibility of issuing proposed alternative or additional warnings and their placement are beyond the ken of the typical jury. A warnings expert knowledgeable about industry standards and familiar with airport ground services support equipment and related practices was needed to prove whether it was feasible, necessary and appropriate for defendants to provide a warning that an unlatched hood on a tractor missing its bolted-on cab could blow back and injure the tractor's occupants when the tractor is directly exposed to a jetwash. See e.g., Liriano, supra, 92 N.Y.2d at 243 (failure to warn liability must include a determination as to the "feasibility of issuing warnings in the circumstances…").

Of course, warnings may take various forms or media including instruction manuals, on-product stickers or labels. A particular warning may be written, nonverbal symbols, or pictorial. Was a warning needed under the circumstances here? What would an appropriate, useful, effective alternative or additional warning have looked like in this case? The answers manifestly require engineering and human factors expertise beyond the experience of the typical juror. Thus, minimally, testimony from a qualified expert who has researched or conducted field tests or studies on baggage tractors or similar vehicles, and who

has tested a variety of warnings to determine what kind of warning is feasible and most effective, was required.

Plaintiff, however, was precluded, by reason of its eve-of-trial introduction, from offering expert proof on these issues, and proffered nothing in lieu thereof, a failing which in and of itself warranted dismissal of his claim. See e.g., Junk v. Terminix International Co. L.P., 2008 U.S. Dist. LEXIS 103176 (S.D. Iowa 2008) (in determining adequacy of instructions or warnings, content and comprehensibility, intensity of expression, and characteristics of expected user groups must be considered; plaintiff needed expert testimony to support warnings claim; plaintiff failed to generate a jury issue for trial; claim dismissed on summary judgment). For that same reason, where plaintiffs offer reliable expert testimony on warnings, courts have discretion to admit it. See Cole v. Goodyear Tire & Rubber Co., 967 S.W.2d 176, 185 (Mo. Ct. App. 1998); Housman v. Fiddyment, supra, 421 S.W.2d at 289.

It should be noted that instructions were provided by the manufacturer regarding safe use of the baggage tractor, including a dashboard sticker which read, "YOU ARE RESPONSIBLE FOR THE SAFE OPERATION OF THE VEHICLE" (Tr. 493-4). What is more, a manual supplied by S&S recited the need to daily inspect for obvious deficiencies (Exh. D-1, p. 2-1-2). Without expert testimony, plaintiff cannot prove that the existing instructions were insufficient,

and that a proposed alternative or additional warning would have changed his behavior. It has been held that expert testimony is particularly appropriate when the manufacturer does provide some warning, in order to determine the adequacy of that warning. See e.g., Laspesa v. Arrow International, Inc., supra, 2009 U.S. Dist. LEXIS 121576; Nolley v. Greenlee Textron, Inc., 2007 U.S. Dist LEXIS 97402 (N.D. Ga. 2007) (plaintiff's expert precluded; jurors not presented with alternative warnings have no means by which to adjudge whether the existing warnings were adequate; action dismissed); Wyeth Laboratories, Inc. v. Fortenberry, 530 So.2d 688, 691 (Miss. 1988).

C. Even Assuming, Solely for the Sake of Argument, that Expert Testimony was not Required, the Proof Adduced by Plaintiff Failed to Establish a Prima Facie Case.

Even assuming that a lay jury was capable of evaluating plaintiff's failure to warn claim without expert proof, plaintiff still failed to establish a prima facie case, since there was no proof regarding a specific proposed warning. Without proof that a specific proposed warning was feasible, necessary and appropriate, there was no basis upon which the jury could decide whether an additional or alternate warning would have changed plaintiff's conduct and prevented his injury.

Indeed, even had plaintiff offered an expert, a failure to provide proof of a proposed warning would be fatal. For example, in Bourelle v. Crown Equipment Corp., 220 F.3d 532 (7th Cir. 2000), the plaintiff's expert, Pacheco, opined that the

warning labels on a forklift truck were inadequate, but admitted that he had not designed a warning that would ameliorate the unsafe condition he believed existed, asserting that "common sense" was sufficient. The Seventh Circuit affirmed summary judgment in favor of defendant on plaintiff's strict liability claim, stating:

> "…Pacheco's failure to even draft a proposed alternative warning for [the forklift's] operation manual renders his opinion regarding the alleged inadequacy of Crown's existing warning…unreliable….
>
> "The fact that Pacheco never even drafted a proposed warning renders his opinion akin to `talking off the cuff' and not acceptable methodology" (citations omitted; 220 F.3d at 539).

See also, Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076, 1084 (8th Cir. 1999); Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998).

There was no evidence, let alone expert evidence, of a proposed alternative or additional warning that would have prevented plaintiff's injuries. The failure to warn claim should have been dismissed.

D. The Absence of Warning Evidence was Especially Significant Here, Where the Hazards and Risks of Injury Were Open, Obvious and Actually Known to Plaintiff.

New York courts have consistently held that manufacturers owe no duty to warn of product-related risks that are obvious to, or widely known by, reasonable users or consumers, or known in fact to the plaintiff. See, e.g., Grossman v. Target Corp., 2011 N.Y. Slip Op. 4418, 2011 N.Y. App. Div. LEXIS 4318 (2d Dept.

2011) (landowner has no duty to warn of an open and obvious danger; defendant had no duty to warn plaintiff of risks of boarding a moving escalator with a pushcart); Payne v. Quality Nozzle Co., 227 A.D.2d 603, 643 N.Y.S.2d 623 (2d Dept. 1996) ("It is well settled that 'there is no necessity to warn a consumer already aware--through common knowledge or learning--of a specific hazard'"); Schiller v. Nat'l Presto Ind., Inc., 225 A.D.2d 1053, 639 N.Y.S.2d 217 (4th Dept. 1996); see also Kerr v. Koemm, 557 F. Supp. 283, 288, n.2 (S.D.N.Y. 1983) ("[If warnings were required for obvious risks, the] list of foolish practices warned against would be so long, it would fill a volume.")

The standard for analyzing whether a danger is open and obvious is objective, employing the reasonable person standard. Rypkema v. Time Mfg. Co., 263 F. Supp.2d 687 (S.D.N.Y. 2003).

Here, it was perfectly obvious from even a cursory examination of the baggage tractor that the cab had been removed, a side panel was missing and the hood latches were disengaged. Plaintiff admitted that the condition of the latches was readily observable as they were in full view and there was nothing hidden about them (Tr. 549-550).

Both the driver of the tractor (plaintiff's co-employee Snow) and plaintiff were fully aware that, if the tractor were driven in close proximity to a running jet engine, an unlatched hood could blow back and injure someone. In this respect,

Snow admitted that he was aware of the dangers of driving with an unlatched hood, and he knew that unlatched hoods could blow open, by either a "gust of wind or a jet engine" (Tr. 318). He had been trained to stay away from the jet engines of airplanes in the gate area (Tr. 339; Tr. 556-557). Snow knew at the time of the accident that the tractor he was operating did not have hood latches, fenders, a center hood latch, and that a side-hood panel was missing (Tr. 347-348). Snow knew that instead of using the vehicle he should have placed it out of service, but he chose to use it anyway (Tr. 348-350).

Plaintiff testified that he used baggage tractors for at least half of every work day for the nine years prior to his accident (Tr. 520, 474). He received training regarding the safe use of baggage tractors, including the importance of keeping them away from running jet engines and the importance of securing the hood latches (Tr. 474-477; 479-481; 525). Plaintiff knew that there was a risk that the hood would not be kept down if the latches were not functional (Tr. 481-482). He could distinguish between functional and non-functional latches, yet had intentionally used tractors with missing or broken latches over his nine years with AA (Tr. 441-442).

Plaintiff testifies that he had been trained to keep away from running jet engines (Tr. 477, 525). He admitted that he knew that the force of jet wash "could move objects around" (Tr. 483), and that it could cause the unlatched hood of a

baggage tractor to open and blow back towards the operator or to blow off entirely, causing injury (Tr. 484-486, 489, 513-514, 540). According to Snow, plaintiff had warned Snow just before the accident, "[b]e careful, don't drive too fast because the hood could come up" (Tr. 350).

Plaintiff was aware of the warnings on baggage tractors, including the warning that he was responsible for the safe operation of the vehicle (Tr. 494). Plaintiff knew that the user of a baggage tractor was supposed to conduct a "walk-around" check prior to using the vehicle to ensure that it was not in an unsafe condition, such as having inoperative or missing side hood latches (Tr. 495-505).

It appears undeniable that plaintiff knew or should have known of the risks of driving a tractor with its hood latches disengaged into the backwash emitted from a running jet engine. That plaintiff claimed lack of knowledge that the hood would be blown back 180° so as to strike him is irrelevant, in light of his knowledge that an unlatched hood subjected to a jetwash could be blown off altogether. Plaintiff need not have known the precise mechanism of injury to eliminate failure to warn as a cause of an accident. See, e.g., Stewart v. Honeywell International Inc., 65 A.D.3d 864, 884 N.Y.S.2d 743 (1st Dept. 2009) (warning of danger of placing hands under machine's die eliminates warnings claim, despite lack of warning that machine might, as here occurred, unexpectedly double-cycle); Conn v. Sears, Roebuck & Co., 262 A.D.2d 954, 692 N.Y.S.2d 543 (4th Dept.

1999) (general knowledge of dangers of operating saw without guard eliminates warning claim where plaintiff, struck by wood kicked-back from saw, placed hand near saw to keep from falling).

In light of plaintiff's actual knowledge and the instructions given by the manufacturer and AA, a warnings claim could only be premised upon concrete evidence to demonstrate that plaintiff's actual knowledge coupled with the information provided was insufficient. Plaintiff had to prove that additional, specified warnings were needed and would have made the difference. Clearly, plaintiff had to show what exactly those additional warnings should have been.

Opinions of plaintiff's counsel during summation that the manufacturer should have placed a warning sticker on the cab or a warning in the owner's manual do not constitute evidentiary proof. Furthermore, since the cab had been removed prior to the accident, and plaintiff had never seen the manual, such warnings would never have reached plaintiff. See, e.g., Reis v. Volvo Cars of N.A., 73 A.D.3d 420, 901 N.Y.S.2d 10 (1st Dept. 2010) (plaintiff must adduce proof that he would have read and heeded a warning had one been given; plaintiff's failure to read owner's manual fatal); Estrada v. Berkel, Inc., 14 A.D.3d 529, 530, 789 N.Y.S.2d 172 (2d Dept. 2005) (infant plaintiff could not have read proposed warning; no proximate causation due to its absence).

As plaintiff did not meet his burden of proof at trial of showing by expert or other proof that, in light of his knowledge of and experience with the obvious dangers, the warnings existing on the tractor were inadequate, the failure to warn claim should have been dismissed.

POINT II

THE DISTRICT COURT'S DRAMATIC EXPANSION OF FAILURE-TO-WARN LIABILITY IMPOSES AN UNWORKABLE BURDEN UPON PRODUCT MANUFACTURERS

Although plaintiff never proffered evidence regarding the wording or content of any proposed warning, the district court, on its own volition and with the benefit of 20-20 hindsight, fashioned its own proposed warning and charged the jury as follows:

> "[P]laintiffs claim that the defendant failed to warn Mr. Saladino that the hood's ability to rotate backwards into the passenger compartment posed dangers to the operator and passenger of the tractor if it was driven in areas of high winds without operable hood latches or without a cab."

The trial judge, in essence, created the alleged warning that she thought the jury should consider. That is not a substitute for proof that such a warning was necessary or appropriate.

The district court's conception of a proposed warning would require defendants to foresee a bizarre confluence of events. The district court's

"warning" would require defendants to anticipate, and warn against, the combination of three separate misuses of the tractor which caused plaintiff's accident, i.e., the tractor was driven with (1) inoperable and disengaged hood latches, and (2) with its bolted-on customer-ordered cab removed, and (3) was purposefully driven into high winds caused by a jetwash. Each of these hazards, risks and misuses were obvious or fully known to both the operator of the vehicle and plaintiff.

Perhaps a district court, with the advantage of hindsight, can fine-tune a post-hoc warning to the bizarre circumstances of a case. But such conceptualized warning cannot substitute for plaintiff's failure of proof. As the Restatement notes:

> "Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate."

Restatement of the Law, Third, Torts: Products Liability, §2, ch. 1, comment i.

Certainly, trial courts should not fill in the blanks in plaintiffs' cases by fashioning a warning inclusive of picayune detail of the accident sued upon. That would be to imposing absolute warnings liability. The duty to warn regarding any complex product would be limitless, as the combination of ways in which machines can be misused is virtually limitless. Endless laundry lists of warnings would be required, undermining the effectiveness of each warning. Imposition of

such a duty would undermine the goal of promoting manufacture of safer products, since the array of needless warnings would dilute the impact of truly necessary warnings.

A. The District Court's Approach is Inconsistent With New York Law.

For years, attention and concern in products liability focused on problems associated with liability for defective designs. See, e.g., Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531 (1973). More recently, writers have suggested that failure-to-warn claims also present significant difficulties. See generally, Hoenig, The Ills of Open-Ended Warnings Litigation, Products Liability, N.Y.L.J. (February 14, 2011); Henderson & Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265 (1990).

Some may perceive that, in contrast with complex design claims, failure-to-warn claims are simple and require nothing more than a jury's application of common sense and collective intuition. Such perceptions are flawed. Warnings claims, like design claims, require proof, almost invariably from an expert. The complexities of the issues were well stated in the Restatement, supra:

> "It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, where

> as less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices. In some contexts, products intended for special categories of users, such as children, may require more vivid and unambiguous warnings. In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users. Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate."

Professors Henderson and Twerski, Co-Reporters of the Restatement, explain in their N.Y.U. Law Review article that courts, from a position of hindsight, confront difficulties in assessing not only the foreseeability and obviousness of product-related risks, but also the social costs and limited helpfulness of warnings. The authors warn against the failure to apply principled standards in warnings cases, which fosters "an atmosphere of lawlessness". Makeshift "standards" too often employed in such claims are "so inadequate as to be virtually nonexistent" and "too frequently rely on unavailable data and unverifiable facts" (65 N.Y.U. L. Rev. at 267, 289-310 [1990]).

PLAC submits that, this case exemplifies a warnings verdict without foundation in necessary evidence in derogation of principled standards of New York law.

B. The District Court's Decision, in Effect, Imposes an Endless Duty to Provide Countless Warnings that Will Do Little if Anything to Reduce Product-Related Injuries

Liability for an alleged failure to warn was not intended to cover every conceivable mishap, no matter how or by whom it was caused. See e.g., Hood v. Ryobi North America, Inc., 17 F. Supp.2d 448 [D. Md. 1998] [manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product]). Rather, warnings law, traditionally premised on criteria consonant with negligence theory, has focused upon hidden dangers or those likely to remain undetected by the consumer. See e.g., Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 297, 582 N.Y.S.2d 373, 376 (1992); Cover v. Cohen, supra, 61 N.Y.2d at 274-275. Neither circumstance is present here. The dangers inherent in riding on the tractor with its bolted-on, customer-ordered cab removed, with its side hood fasteners disengaged, and in the direct path of a jet's backwash, were all open and obvious and were in fact known to plaintiff and to the driver.

The district court's imposition of a duty to warn against hazards posed by the remote contingency of the confluence of the three known misuses described above, reflect an open-ended duty to provide countless warnings that ultimately will be utterly useless. Indeed, countervailing dangers may result. The net effect of the proliferation of useless warnings will be that even serious and important warnings will come to be disregarded. Warnings will be treated with disdain by

readers who will be over-warned. The analogy to the "boy who cried wolf" is very much apposite. In reality, when one warns of everything, one warns of nothing. For warnings to be effective, they must be selective. See Schwartz & Driver, Warnings in the Workplace: The Need for Synthesis of Law and Communication Theory, 52 U. Cin. L. Rev. 38, 58-60 (1983).

Indeed, the New York Court of Appeals recognized this principle in Liriano v. Hobart Corp., supra, 92 N.Y.2d at 242, in which it stated:

> "If a manufacturer must warn against even obvious dangers, `the list of foolish practices warned against would be so long, it would fill a volume' (*Kerr v Koemm*, 557 F Supp 283, 288 [SDNY 1983]). Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers."

Issuing a myriad of warnings premised upon countless numbers of potential combinations of product misuses, would decrease the effectiveness of all warnings given. See e.g., Hoenig, More on Warnings, Products Liability, N.Y.L.J. (June 13, 1994) ("Courts need to be sensitized that hierarchies of risks may exist, and elevation of one risk above others may not promote safety….").

The dangers of an open-ended warnings requirement were also clearly articulated in a much cited opinion, Cotton v. Buckeye Gas Products Co., 840 F.2d

935 (D.C. Cir. 1988), in which plaintiff was injured when a fire broke out due to mishandled gas cylinders. Plaintiff claimed that defendant should have provided more adequate warnings of the risks associated with leaving the open valves on used, but not empty, cylinders. At trial, the court granted defendant's motion for J.N.O.V. after a verdict was returned for the plaintiff. The Circuit Court held that additional warnings were not required because the warnings given were adequate as a matter of law. The employer had sufficient knowledge of the relevant risks, and the plaintiff would not have heeded warnings anyway. The Court's opinion minces no words:

> "Failure-to-warn cases have the curious property that when the episode is examined in hindsight, it appears as though addition of warnings keyed to a particular accident would be virtually cost free. What could be simpler than for the manufacturer to add the few simple items noted above [what the plaintiff claimed should have been said in addition to what was said]. The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print….
>
> "Plaintiff's analysis completely disregards the problem of information costs. He asserts that `it would have been neither difficult nor costly for Buckeye to have purchased or created for attachment to its propane cylinders a clearer, more explicit label, such as the alternatives introduced at trial, warning of propane's dangers and instructing how to avoid them.' But he offers no reason to suppose that any alternative package of warnings was preferable. He discounts altogether the warnings in the

> pamphlet, without even considering what the canister warning would have looked like if Buckeye had supplemented it not only with the special items he is personally interested in -- in hindsight -- but also with all other equally valuable items (i.e., `equally' in terms of the scope and probability of the danger likely to be averted and the incremental impact of the information on user conduct). If every foreseeable possibility must be covered, `the list of foolish practices warned against would be so long, it would fill a volume.' [citation omitted] Unlike plaintiff, we must review the record in light of these obvious information costs."

Id., 840 F.2d at 937-38.

Broussard v. Continental Oil Co., 433 So.2d 354 (La. App. Ct. 1983), likewise recognized the manufacturer's dilemma and the need for legal safeguards and parameters to warnings claims. In that case, plaintiff was badly burned in an explosion of natural gas sparked by a Black & Decker hand drill. Plaintiff's expert insisted that warnings placed in the manual were not sufficient; defendant should have listed at least ten warnings on a decal on the face of the drill handle. The Court gave short shrift to the argument that defendant had a duty to provide such an on-product decal:

> "Defendant considers that more than ten warnings should be given. Nevertheless, if only ten are selected, deficiencies in any scheme for putting them all on the drill become apparent. As a practical matter, the effect of putting at least ten warnings on the drill would decrease the effectiveness of all of the warnings. A consumer would have a tendency to read none of the warnings if the surface of the drill became cluttered with the warnings. Unless we should elevate the one hazard of

> sparking to premier importance above all others, we fear that an effort to tell all about each hazard is not practical either from the point of view of availability of space or of effectiveness. We decline to say that one risk is more worthy of warning than another."

Id., 433 So.2d at 358. New York law, as expressed in Liriano, supra, is in accord.

The district court's erroneously expansive reading of failure to warn doctrine requires correction by this Court. The trial court allowed a warnings claim to go to the jury without requisite proofs of a proposed alternative warning, its necessity, text, location, efficacy and connection to the cause of the accident. Indeed, the trial court in effect "authored" its own conception of what a warning should have addressed, creating "proof" where none existed. In doing so, the court merged three misuses of the product - - all of them hazards fully known to plaintiff and the driver - - to formulate a post-hoc finely-tuned warning unique to this case, but oblivious to the needs of users of this product to effective instructions without dilution through over-inclusion of warnings against bizarre multiple misuses.

CONCLUSION

Plaintiff's proofs on his failure to warn claim failed to meet even minimal sufficiency standards. Even viewed in the light most favorable to the plaintiff, the evidence necessary to maintain a warnings case simply was not there. The danger for which plaintiff claimed need for a warning was open and obvious and was, in fact, known to plaintiff and to the driver. Plaintiff adduced no proof, expert or

otherwise, to demonstrate the reasonable necessity, feasibility, wording, content or placement of a proposed alternate or additional warning that he claims would have prevented his accident.

What happened to the plaintiff was tragic. But occurrence of an accident does not justify imposition of liability upon defendants. Neither the manufacturer nor the machine sold by it, in fairness, may be blamed for what happened. The district court's 20-20 hindsight in fashioning a warning fine-tuned to the extraordinary circumstances of this case retrospectively imposes a duty which is incapable of performance by product manufacturers, and indeed is countervailing to safety because it would promote over-warning, informational clutter, dilution of key warnings and disregard of warnings generally.

For these reasons, the district court's determination should be reversed and the claim dismissed.

Respectfully submitted,

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