NO. 313P10 26TH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHEYENNE SALEENA STARK, a minor, CODY BRANDON STARK, a minor, by their Guardian ad Litem, NICOLE JACOBSEN,

Plaintiffs,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Defendant.

From Mecklenburg County
No. 04 CVS 7636
COA No. 09-286

****

***AMICUS CURIAE* BRIEF OF**

THE PRODUCT LIABILITY ADVISORY COUNCIL

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***AMICUS CURIAE* BRIEF OF**

THE PRODUCT LIABILITY ADVISORY COUNCIL

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting the word "party" in N.C. Gen. Stat. § 99B-3 so narrowly as to render the defense unavailable to product manufacturers unless the modifier of the product is named as a party to the action at the time of trial, when that interpretation: (a) is contrary to the statute's plain language and legislative intent, and (b) would make North Carolina the only state in the nation with such a restricted modification defense?

2. Did the Court of Appeals err when it engrafted child negligence principles into N.C. Gen. Stat. § 99B-3, when doing so is contrary to the plain language of the statute and inconsistent with its intent and purpose?

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council ("PLAC") is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. They support a reliable framework of statutory and common law throughout the states which provides guidance to all and is equally and fairly applicable to all parties to litigation. 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. A list of PLAC's corporate members is attached hereto as **Appendix A**. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 900 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC and its members have a direct and substantial interest in this appeal. A manufacturer or seller should be liable for damage or injury which is determined

to have been caused by the defect in its product which is negligently designed or manufactured. Correspondingly, it is neither fair nor just for a manufacturer or seller to be held liable for an alteration or modification of its product by anyone else, which modification is determined to have caused injury.

Manifestly, the Court of Appeals' Opinion is a substantial departure from North Carolina product liability law, subjecting product manufacturers and sellers to potential liability for products that are altered or modified after leaving their control unless the modifier of the product is a named party to the action. Moreover, the Court of Appeals' decision further limits the N.C. Gen. Stat. § 99B-3 defense by making it unavailable, as a matter of law, in any case where the modifier is a minor and incapable of negligence. Thus, the Court of Appeals' Opinion severely limits the availability and utility of the N.C. Gen. Stat. § 99B-3 defense in cases where a product is modified after it leaves the manufacturer's control.

If left as the law of this State, the Opinion and the common law and statutory interpretations it will spawn will, among other ill effect, deter manufacturers from doing business here by making North Carolina law at odds with every other state in the nation, and needlessly increasing the cost and complexity of products liability actions. The Court of Appeals' ruling, therefore, affects not only PLAC and its members, but also the citizens of this State.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

On February 3, 2011, this Court allowed a Petition for Discretionary Review, pursuant to N.C. Gen. Stat. § 7A-31, from the decision of the North Carolina Court of Appeals on an appeal from a final judgment in the Superior Court of Mecklenburg County.

STATEMENT OF THE CASE AND THE FACCTS

PLAC adopts the Statement of the Case and Statement of the Facts submitted by Defendant-Appellant, Ford Motor Company, in its Opening Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

With the stroke of a pen, and with the express misgivings of a concurring Judge, the Court of Appeals rewrote North Carolina product liability law and transformed its broadly-written statutory defense for altered or modified products to the most restrictive in the nation. *See Stark v. Ford Motor Co.*, 693 S.E.2d 253, 262 (N.C. Ct. App. 2010) (hereinafter the "Opinion"). Indeed, the Opinion eviscerates the broad defense provided to manufacturers and sellers under N.C. Gen. Stat. § 99B-3, making it unavailable in any case where, for any reason, the modifier is not a party to the lawsuit. Moreover, the Opinion further limits the

N.C. Gen. Stat. § 99B-3 defense by making it unavailable, as a matter of law, in any case where the modifier is a minor and incapable of negligence.[1]

The Opinion is erroneous. First, the Court of Appeals wrongly interpreted the word "party" in the statute in a way that contradicts its plain language. Additionally, the Opinion's interpretation is contrary to the purpose and intent of the legislature to provide a broad affirmative defense in cases where a product is modified after it leaves the control of the manufacturer or seller. Moreover, the Opinion makes North Carolina the sole state in the country to limit so drastically the availability of the defense. Furthermore, the Opinion will result in increased litigation complexity and expense by rewarding plaintiffs who, by contrivance or good fortune, succeed in keeping the modifier of the product out of the case, while at the same time mandating that the manufacturer take every possible step to join any possible modifier or risk the loss of the defense as a matter of law.

Second, the Court of Appeals erred when it engrafted child negligence principles into the N.C. Gen. Stat. § 99B-3 defense. The Opinion's holding that the defense is not available where the modifier is a minor and incapable of negligence again conflicts with the statute's plain language, purpose, and intent, as well as injecting substantial uncertainty into the State's product liability law.

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[1] The Concurring Opinion acknowledged that the Court of Appeals' holding "appears inconsistent with general principles of negligence, modification defenses in all other states, and *possibly* even the intent of our legislature itself." *Stark v. Ford Motor Co.*, 693 S.E.2d 253, 262 (N.C. Ct. App. 2010) (Wynn, J., concurring).

Indeed, in such cases, the Opinion could result, in practical terms, in the imposition of strict liability, which as this Court is well aware, has been expressly rejected in North Carolina. *See* N.C. Gen. Stat. § 99B-1.1.

Accordingly, the Opinion is erroneous as a matter of law, and misguided as a matter of sound tort policy. For these reasons, this Court should reverse the decision of the Court of Appeals in this matter.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY INTERPRETING THE WORD "PARTY" IN N.C. GEN. STAT. § 99B-3 TO MEAN "PARTY TO THE ACTION," AND THIS FAULTY INTERPRETATION WILL HAVE PROFOUND CONSEQUENCES ON BUSINESSES AND COMMERCE IN NORTH CAROLINA.

A. The Court of Appeals' Interpretation Contradicts the Statute's Plain Language.

N.C. Gen. Stat. § 99B-3 states that "[n]o manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller." Until the Court of Appeals' Opinion, there had been no serious question about the meaning of the plain language of N.C. Gen. Stat. § 99B-3, *i.e.*, that the broad scope of the statute provides manufacturers and sellers with an absolute defense when any person other than the manufacturer altered or modified a product, and that modification was determined to be a cause of injury.

A fundamental canon of statutory interpretation requires that words in a statute should be given their ordinary meaning. *See, e.g., Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) ("Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.") (citations and quotation marks omitted). In construing N.C. Gen. Stat. § 99B-3, the Court of Appeals failed to apply the plain meaning of the word "party" in two ways.

First, the Court of Appeals interpreted the word "party" in a narrow, technical, legal sense to mean "party to the action." This definition conflicts with the ordinary use of the term to refer to a "person." Indeed, demonstrating the unduly narrow definition adopted by the Court of Appeals, Ford has marshaled the repeated use in the General Statutes of the word "party" as meaning simply a "person." (*Compare* Brief of Defendant-Appellant, Addendum C, showing use of "party" to mean a person, *with* Brief of Defendant-Appellant, Addendum D, showing use of "party to the action" to mean a litigant named in a lawsuit.) The Legislature made the choice to use the word "party" in § 99B-3, not the more narrow phrase "party to the action." Thus, contrary to the holding of the Court of Appeals' Opinion, the word "party" in § 99B-3 should be given its ordinary meaning of "person."

Moreover, the plain language interpretation of "party" as used in the statute is embodied in North Carolina's Pattern Jury Instruction for the § 99B-3 defense, instructing jurors that the defense is available when the modification is made by "someone other than the defendant." N.C.P.I. Civ. 744.07 (2009) (emphasis added) . Likewise, the leading treatises on North Carolina tort law recognize the statute's plain meaning. *See,* David A. Logan & Wayne A. Logan, *North Carolina Torts* 453 (2d ed. 2004) (analyzing the "extremely broad alteration defense" provided by N.C. Gen. Stat. § 99B-3 and concluding that "[i]t is clear that this section provides a defense against a plaintiff regardless of whether the modification was made by the plaintiff or by some other intervening party."); Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 26.44, at 564 (2d ed. 1999) ("*There can be no liability* if an alteration or modification of the product, made after it has left the control of the manufacturer or seller, was a proximate cause of the claimant's injuries . . . .") (emphasis added).

Second, the Opinion erroneously incorporates a temporal component into the statute's use of the word "party," holding that not only must the modifier of a product be "a party to the action," the modifier must also be a party to the action *at the time of trial.* Such an interpretation finds no textual support in N.C. Gen. Stat. § 99B-3, nor in standard dictionaries, nor in *Black's Law Dictionary* which was relied upon by the Court of Appeals in its Opinion. *See Black's Law Dictionary*

1231-32 (9th ed. 2009) (defining "party"). Notwithstanding the lack of a proper basis to read this temporal requirement into the definition of the word "party," this requirement can only lead to increased litigation costs and complexity, as discussed more fully in Part I.D, *infra*.[2]

Because the Opinion interprets the word "party" in N.C. Gen. Stat. § 99B-3 in a way that is inconsistent with its ordinary meaning, this Court should grant review and reverse the decision.

B. The Court Of Appeals' Interpretation Is Contrary To The Intent Of The General Assembly To Provide A Broad Defense to Manufacturers and Sellers.

The Opinion's attribution of a technical, legal meaning to the term "party" in § 99B-3 is also contrary to the purpose and intent of the legislature to provide a broad affirmative defense when a product is modified after it leaves the control of the manufacturer or seller. As recognized by the Concurring Opinion, which reviews the legislative history of the statute, the draft bills of the statute

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[2] The Opinion concedes that Gordon Stark was "originally a named plaintiff" in the underlying lawsuit. *Stark*, 693 S.E.2d at 259. However, the Court of Appeals found that his personal injury claims had been dismissed prior to trial. *Id.* Therefore, because he was not a party "[a]t the time of trial" according to the Opinion, he was "not a party to the action in this case." *Id.* at 260. PLAC notes that Ford, in its Opening Brief, has cited to compelling record evidence that the Court of Appeals was factually wrong on this point, and that Gordon Stark was, in fact, still a named party in this case at the time of trial. (*See* Brief of Defendant-Appellant, pp. 42-47.) If so, then the Court of Appeals made an outcome-determinative error on a fact essential to its reasoning in deciding this issue of first impression.

demonstrate that the legislation that became § 99B-3 was conceived with the intent to provide a broad modification defense, no matter who modified the product. As recounted in the Concurring Opinion, only the last version of the bill that became § 99B-3 included the word "party" at issue before the Court. The Concurring Opinion observed as follows:

> This is disconcerting in light of the fact that all of the previous versions of the modification defense seem to envision broad protection for modifiers whose products were modified, regardless of whether the modifier was a party to the suit, as long as the modification occurred after the product left the manufacturer's control.

Stark 693 S.E.2d at 265 (Wynn, J., concurring).[3]

Thus, the plain language of the statute and its legislative history evidence the legislative intent to provide a broad modification defense to manufacturers in North Carolina. The Concurring Opinion expressly acknowledged as much, stating that the Court of Appeals' holding "appears inconsistent with general principles of negligence, modification defenses in all other states, and *possibly* even the intent of our legislature itself." *Stark*, 693 S.E.2d at 262 (Wynn, J., concurring).

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[3] The Concurring Opinion appears, from the context, to have intended to use the word "manufacturers" instead of "modifiers" in this quote, such that it would state "broad protection for *manufacturers* whose products were modified."

Because the Opinion interprets the word "party" in N.C. Gen. Stat. § 99B-3 in a way that is contrary to the purpose and intent of the General Assembly, this Court should reverse the decision.

C. Unless Reversed, The Court Of Appeals' Opinion Will Make North Carolina The Only State With Such An Extensive Limitation On The Modification Defense In Product Liability Actions.

The Product Liability Advisory Council is particularly concerned for the fact that the Court of Appeals' Opinion renders North Carolina a national outlier with the most restrictive limits in the nation on the modification defense. Simply put, no other state explicitly requires that the modifier of a product be a named party in the lawsuit in order for the defense to be available to the manufacturer or seller. This fact is demonstrated beyond any dispute in Addendum H to Ford's Brief, which contains a thorough and well-researched 50-state survey of laws on the product modification defense. Only North Carolina would mandate, under the Opinion, that the modifier be a party to the lawsuit in order for a manufacturer to be able to assert the defense. In every other state (except Montana which has no statutory or common law on point), when a modification is a cause of injury, the manufacturer cannot be liable if any person or entity has modified the product after it left the manufacturer's control—regardless of whether the modifier is a party to the lawsuit or not.

The Concurring Opinion below acknowledges the "troubling" ramifications of the Court of Appeals' Opinion:

> Nonetheless, it is troubling that strict adherence to the statutory language regarding modification defense represents so dramatic a departure from the view held in all other states regarding the legal effect of product modification on the liability of manufacturers. While a number of other states recognize a defense to such liability when the product has been modified, none limit the defense to apply only when modification was performed by a party to the litigation.

Stark, 693 S.E.2d at 263 (Wynn, J., concurring).

As recognized uniformly across the nation, it is neither fair nor just for a manufacturer or seller to be held liable for an alteration or modification of its product by someone else, which modification is determined to have caused injury. Because the Opinion interprets the word "party" in N.C. Gen. Stat. § 99B-3 in a way that makes North Carolina an outlier with the most restrictive limits in the nation on the modification defense—without any clear statement of legislative intent to do so—this Court should reverse the decision.

D. Unless Reversed, The Court Of Appeals' Opinion Will Disadvantage Manufacturers In North Carolina And Increase The Cost And Complexity Of Product Liability Litigation.

The Court of Appeals' Opinion will result in increased litigation complexity and costs by motivating plaintiffs to keep the modifier of the product out of the litigation, while at the same time mandating that the manufacturer take every possible step to join any possible modifier as a party to the action, or risk the loss

of the defense as a matter of law. This result will negatively impact claimants, manufacturers, sellers, and the efficient administration of justice.

First, the Court of Appeals' ruling will necessarily make product liability actions more complex and expensive to litigate, and require more judicial resources. After all, under the Opinion's ruling, if the modifier is not a party to the action at the time of trial, then the § 99B-3 defense is not available to the manufacturer or seller *as a matter of law*. For this reason, the following consequences are easily foreseeable: (1) plaintiffs and defendants will engage in competing litigation efforts, discovery, and motion practice to join, or avoid the joinder of, potential modifiers; (2) manufacturers and sellers will be forced to identify and join any *potential* modifier to the lawsuit—and keep them in the lawsuit through trial—or have the § 99B-3 defense foreclosed *as a matter of law*; (3) manufacturers will be encouraged to join as parties any and all prior owners and/or users of the product at issue in cases where the identity of the modifier is not clear; (4) early settlements and mediated settlements involving modifiers of products will be discouraged (and, indeed, foreclosed in cases that must be tried, unless the manufacturer or seller wishes to waive the modification defense); and (5) manufacturers will lose otherwise meritorious modification defenses as a matter of law in cases where the modifier is unknown, deceased, cannot be located, or is otherwise outside of the Court's jurisdiction.

Plainly, these competing efforts by plaintiffs and defendants will increase the complexity of cases by multiplying the proceedings with additional parties, claims, discovery, and motion practice. At the same time, the streamlining of cases and early resolutions of claims will be impeded. These facts will necessarily increase the costs of litigation, insurance costs, and the time and resources that must be devoted by the litigants, third parties, and the Courts. In sum, the fair and efficient administration of justice in product liability actions will be significantly impaired.

Manufacturers and sellers doing business in North Carolina will be unfairly and adversely impacted. Not only is the uniformly-recognized modification defense in § 99B-3 transformed into the most restrictive in the nation, it is subject to being rendered unavailable entirely in cases where the modifier is not, or cannot be made, a party to the action at the time of trial. Moreover, product liability actions will cost more in terms of defense fees and costs, time, and resources as a result of the multiplied proceedings. As is self-evident, these increased costs will negatively impact businesses in this State.

Because the Opinion interprets the word "party" in N.C. Gen. Stat. § 99B-3 in a way that, contrary to its plain language and legislative intent, makes North Carolina a national outlier with the most restrictive modification defense in the

country, and which increases litigation costs and complexity, this Court should reverse the decision.

II. THE COURT OF APPEALS ERRED BY ENGRAFTING CHILD NEGLIGENCE PRINCIPLES INTO § 99B-3.

The Court of Appeals erred when it incorporated child negligence principles into the N.C. Gen. Stat. § 99B-3 defense. *See Stark*, 693 S.E.2d at 257-58. The Opinion's holding that the defense is not available, *as a matter of law*, where the modifier is a minor and incapable of negligence is in conflict with the statute's plain language, purpose, and intent. Indeed, in such cases involving the modification of products by minors, the Opinion would result, in practical terms, in the imposition of strict liability, which has been expressly rejected in North Carolina. *See* N.C. Gen. Stat. § 99B-1.1 (stating that "[t]here shall be no strict liability in tort in product liability actions").

First, the plain language of § 99B-3 does not provide for an exception based upon either the age or the negligence of the modifier of the product. The statute is concerned only with whether "a proximate cause of the personal injury, death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller." N.C. Gen. Stat. § 99B-3. The statute makes clear that "for the purposes of [§ 99B-3], alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer." N.C. Gen. Stat. § 99B-3(b).

Thus, contrary to the reasoning of the Court of Appeals, the negligence or age of the modifier of the product is simply not relevant to the § 99B-3 analysis.

Indeed, a leading treatise on North Carolina tort law discusses the irrelevance of the negligence and age of the modifier to the § 99B-3 analysis. The Court of Appeals relied upon the case *Hastings for Pratt v. Seegars Fence Co.,* 128 N.C. App. 166, 493 S.E.2d 782 (1997) to read a "forseeability" requirement into § 99B-3 based upon the statute's "proximate cause" language. In discussing *Hastings*, the treatise correctly states that a minor's ability to foresee danger "would seem to be irrelevant to determining whether the plaintiff's [age 8] failure to use the fence in a manner intended by the defendant." David A. Logan & Wayne A. Logan, *North Carolina Torts* 454 (2d ed. 2004). The treatise notes that "[t]his opinion suggests that judges, like legislators, are not careful to distinguish cause-in-fact from legal cause." *Id.* at n. 282.

Second, incorporating child negligence principles into the modification defense can result in imposing, in practical terms, strict liability on a manufacturer or seller when the product is modified by a minor who is incapable of negligence. That outcome is evidenced in the case at hand, where the Court of Appeals ruled that the manufacturer could not avail itself of the modification defense as a matter of law because the injured claimant was a minor and incapable of negligence. *See*

Stark, 263 S.E.2d at 260. This result is contrary to the plain language of the statute and North Carolina's rejection of strict liability in tort.

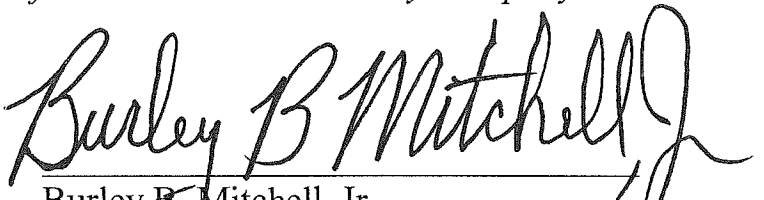
Because the Opinion erred by incorporating child negligence principles into § 99B-3, contrary to its plain language and legislative intent, this Court should reverse the decision.

CONCLUSION

For the reasons set forth herein, this Court should reverse the Court of Appeals' decision.

This the 7th day of March, 2011.

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company

By: 

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CERTIFICATE OF SERVICE

This is to certify that pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure I have this the 7th day of March, 2011, served all parties to this action with a copy of the foregoing ***Amicus Curiae*** **Brief of the Product Liability Advisory Council** by depositing a copy in the care and custody of the United States Postal Service in an adequate wrapper with adequate postage affixed thereon prepaid and addressed to the parties as follows:

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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 2/17/2011

Total: 100

3M
Altec Industries
Altria Client Services Inc.
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation

Corporate Members of the
Product Liability Advisory Council

as of 2/17/2011

PACCAR Inc.

Panasonic

Pella Corporation

Pfizer Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Remington Arms Company, Inc.

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Segway Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Techtronic Industries North America, Inc.

Terex Corporation

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.