IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,991

WILLIE J. HIGH and
FLORIDA POWER & LIGHT COMPANY,

Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
et al.

Respondents.

INITIAL BRIEF OF AMICUS CURIAE THOMAS CURTIS, WILLIAM U. PAYNE, FLORA PAYNE and LOWELL PAYNE

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
PURSUANT TO CERTIFICATION OF QUESTION
OF GREAT PUBLIC IMPORTANCE

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ENTITLEMENT TO AMICUS CURIAE STATUS AND QUESTION PRESENTED

Thomas Curtis, William U. Payne, Flora Payne and Lowell Payne (collectively, "Amicus") respectfully submit this amicus curiae brief. Amicus are involved in litigation in the United States District Court for the Southern District of Florida (the "Federal Action") arising from substantially identical facts and circumstances as those at issue in High v. Westinghouse Elec. Corp. Specifically, Amicus are the owners of the real property contaminated by the PCB's as a result of Respondents' (and others') negligence and malfeasance, and are seeking damages from the transformer manufacturers on negligence and strict liability theories. The Southern District of Florida has applied the Third District Court of Appeal's (the "**Third DCA**") decision in High to eviscerate the negligence and strict liability claims of Amicus' co-plaintiffs in the Federal Action, and the Defendants in the Federal Action have argued in pending motions for summary judgment that High applies to the Amicus' claims. Because the ruling of this court may be dispositive in the Federal Action, Amicus have an enormous stake in the outcome of this appeal. Therefore, Amicus submit this brief urging the reversal of the Third DCA's decision.

Petitioner, Willie High ("High"), sought recovery under the theories of negligence and strict liability. The Third DCA affirmed the trial court's order granting summary judgment on both counts. However, the Third DCA based its decision on a clearly erroneous interpretation and extension of Florida law. Furthermore, summary judgment should not have been granted because substantial issues of fact exist.

STATEMENT OF THE CASE

High, an employee of a scrap metal salvage business known as Pepper's Steel & Alloys, Inc. ("Pepper's"), sued Westinghouse Electric Corporation ("Westinghouse"), a transformer manufacturer, for damages for personal injuries under theories of negligence and strict liability in tort. (R. 153-177). High alleged that he had been injured from an occupational exposure to mineral oil contaminated with polychlorinated biphenyls ("PCBs"), a hazardous substance. The contaminated mineral oil was contained in electrical transformers manufactured by Westinghouse and sold to Florida Power & Light Company ("FPL"), which FPL had sold to Pepper's as scrap. (R. 153-177).

The trial court entered summary judgment for Westinghouse, holding as a matter of law that the ultimate disposal of a product was not foreseeable to the manufacturer as a reasonably intended "use" of the product. (R. 1180-1191).

In a 2-1 decision, the Third DCA affirmed, holding:

> As a matter of law, the unsealing, stripping, and dumping of the contents of Westinghouse's product in order to salvage junk components were not reasonably foreseeable "uses" of the product nor was Willie High an intended "user" within the meaning of Section 402A [of the Restatement (Second) of Torts].

High v. Westinghouse Elec. Corp., 559 So.2d 227, 229 (Fla. 3d DCA 1989).

In dissenting, Judge Ferguson stated:

> There is no public policy in this state - nor is there a demonstrated need for one - which insulates a manufacturer of a hazardous product from liability for damages merely because the useful life of the product has ended, where a person, without knowledge of the danger, suffers injury from an otherwise foreseeable use of the product. In fact, the public policy expressed in West v. Caterpillar Tractor Co. is to the contrary.

Id. at 231.

The Third DCA certified "to the Supreme Court of Florida that the within question passes upon one of great public importance within the meaning of Article V, section 3(b)(4), Florida Constitution." Id. at 229, n. 2.

This appeal followed.

STATEMENT OF THE FACTS

Westinghouse manufactured electrical transformers and sold them to FPL. (R. 172). From 1967 to 1982, FPL sold worn-out electrical transformers to Pepper's as scrap. (R. 154-172). Pepper's, a scrap metal salvage business, salvaged the transformers for the recovery of the various metals contained in them. (R. 172). Pepper's conducted its scrapping business on the Amicus' property. At Pepper's, the tops of the transformers were taken off, the oil was pumped out into containers and given to a waste oil recycler, and the transformer core was removed to recover the copper, aluminum, iron, or steel. (R. 17, 18, 21, 65, 117). The copper and other metals were not melted down on site. There were no facilities for doing so. (R. 23-24). The metals recovered were sold, in bulk, by the pound to an end user. (R. 22, 26-28).

During the salvaging of the transformers, some of the transformer oil containing PCBs was released on to the ground. (R. 119-120, 139, 154-155).

Willie J. High ("High") was employed as a truck driver for Pepper's from 1967 to 1982. (R. 688, 309). High spent most of his time driving a truck. He was the main truck driver for Pepper's. (R. 77, 610-611). He picked up aluminum wire, cable, and other scrap from around the State of Florida. (R. 78). He also picked up transformers from FPL in Miami and other cities around Florida. (R. 309).

The transformers were loaded on the Pepper's truck with a forklift. The forklift used a boom and cables, and High's job was to hook or unhook the cables. (R. 311-312).

He did not actually handle the transformers directly. (R. 80). In the loading process, some of the liquid from the transformers was spilled on High:

> Q. But on the transformers, on the transformers, when you were loading the transformers, you and Mr. Pepper didn't get the oil from the transformers on you very often at all?
>
> A. Not very often. Every once in a while one would spill over, and it would get on us when was was, you know, loading it.
>
> Q. Get on your clothes?
>
> A. Right.
>
> Q. Get on your shoes?
>
> A. Get on our shoes.
>
> Q. Get on your hands?
>
> A. Every once in a while, if you drop it the wrong way, it might splatter.
>
> Q. Were these transformers full when you were loading them, or were some of them full?
>
> A. Some of them were full, and some were pumped out.

(R. 313-314).

The transformers were unloaded at Pepper's by another forklift, which High sometimes operated. (R. 315). Mostly, High would work on the truck hooking up the transformers. (R. 315-316). High's main job was to stay on the truck and hook up the transformers while they were being unloaded. (R. 348). During unloading, High was also splashed with small amounts of oil from time to time. (R. 347). High described how he came in contact with the transformer oil during the unloading process:

> Q. Would you get transformer oil on you very often when you were hooking up the transformers to unload them?
>
> A. Yes.

Q. Sometimes or often?

A. Well, when you hook them up, sometimes the top wouldn't be on them good, and then, in other words, if you hook, and the thing slips and don't catch it, then it would quite naturally going to spill it.

(R. 316).

High testified that after the transformers were unloaded, the oil was pumped out of the transformers into a tank at Pepper's. (R. 350-351). Although he saw other persons push or kick some of the smaller transformers over to dump the oil out of them, that was not his job. (R. 351-352).

Other than driving the truck, and helping to load and unload transformers on the truck, High did not have any other jobs or duties at Pepper's regarding the transformers. (R. 613-614).

There is no evidence in the record that High was ever involved in unsealing, stripping, or dumping the contents of any transformers. The evidence is uncontradicted that High had nothing to do with the dismantling of the transformers. (R. 79-80).

Unknown to FPL, Pepper's, or High, the mineral oil in the transformers had been contaminated with a hazardous substance, polychlorinated biphenyls ("PCBs"), in the manufacturing process prior to delivery to FPL. (R. 173).

Westinghouse did not disclose the potential existence of PCBs in mineral oil transformers until 1976, when it wrote a letter to its utility customers, including FPL. (R. 1012). The letter stated that since the late 1930's, two types of electrical transformers had been manufactured by the electrical industry. One type, used in installations where a high degree of fire resistance was required, was filled with askarels (which contain PCBs) as a coolant and insulating fluid, and labelled as such. The other

type was supposed to contain only mineral oil. Neither Westinghouse nor FPL ever informed Amicus of the PCB contamination.

The purpose of the letter was to inform customers who had purchased transformers that "some oil-filled transformers may contain varying concentrations of PCBs." Id. In the letter, Westinghouse assured buyers, such as FPL, that the electrical characteristics and operating performance of mineral oil transformers would not be affected by this contaminant. However, the letter made it clear that " . . . when performing repair, routine maintenance or disposal, oil filled transformers should be checked for the presence of PCBs . . .". (R. 1012).

SUMMARY OF ARGUMENT

This is a case of first impression in Florida.

The Third DCA held, as a matter of law, that the manufacturer of a product can never be liable in negligence or strict liability in tort for injuries resulting from a latent manufacturing defect which causes personal injury during recycling of the product to reclaim its component parts for reuse. The Third DCA held, as a matter of law, that the unsealing, stripping, and dumping of the contents of a product, in order to salvage its component parts for reuse, were not reasonably foreseeable "uses", and further held that a worker engaged in such salvage activity was not a foreseeable "user" of the product.

The Third DCA impermissibly merged the elements of negligence and strict liability. This error, alone, is sufficient to overturn the Third DCA's decision on High's negligence claim.

In reaching its conclusion, the Third DCA relied solely upon three isolated cases from other jurisdictions. Those cases, however, are distinguishable on their facts. Those cases are also contrary to Florida law.

Florida has not limited the protection of persons injured by products to "users" or "consumers". It has extended protection to a bystander injured during use of a product by others, and to a person injured while avoiding a dangerous product which was not being "used" at all. Under Florida law, the repair of a product is a "use" which is reasonably foreseeable to the manufacturer. In the present case, the tasks used in salvaging the transformers - unsealing, removal of the components, and emptying of the fluid - were the same as those used to repair the transformers. Under the circumstances, whether such "uses" of the product are reasonably foreseeable to the manufacturer are issues of fact, and cannot be determined as a matter of law.

The record reflects that Westinghouse ultimately told its customers "when performing repair, routine maintenance, or disposal, oil-filled transformers should be checked for the presence of PCBs". This evidence creates a genuine issue of material fact as to whether Westinghouse did foresee disposal and salvage of its product as a reasonably intended use. This genuine issue of material fact precludes any determination that disposal and salvage of the product was not foreseeable as a matter of law.

The Third DCA erroneously concluded that the product involved in this case had been destroyed and ceased to exist, prior to the alleged injuries. It also decided that the defect in the product had been created by a substantial change in the product after it left the manufacturer's control. The record does not support these conclusions. The PCB contamination allegedly occurred during manufacturing of the transformers, not during the salvage process. The transformers had not been altered, changed, or destroyed at the time they were handled by High. High was not involved in dismantling, unsealing, stripping or dumping the contents of the transformers. High was allegedly exposed to the hazardous substance, PCBs, when transformer oil splashed or spilled from intact transformers as they were being loaded or unloaded from his truck.

Whether such handling is a reasonably foreseeable "use" of the product to the manufacturer is an issue of fact, even under those cases from other jurisdictions upon which the Third DCA relied. Consequently, the decision of the Third DCA must be reversed for this reason also.

ARGUMENT

A. THE THIRD DISTRICT COURT OF APPEAL IMPERMISSIBLY MERGED THE ELEMENTS OF NEGLIGENCE AND STRICT LIABILITY.

The Third DCA erred when it failed to distinguish between High's negligence and strict liability claims. Indeed, both the trial court and the Third DCA failed to analyze or even facially consider Mr. High's claim of negligence. Strict liability and negligence are distinct causes of action, and the Third DCA committed reversible error by failing to recognize this distinction.

To prevail on a negligence claim, the plaintiff must prove that the defendant breached a duty of reasonable care, and that the breach was both the cause-in-fact and proximate cause of the plaintiff's injury.[1] Instead of applying this analysis, the Third DCA based its entire opinion upon the statement that, "liability exists under section 402(a) for a negligent failure to warn only if there is a use of the product reasonably foreseeable to the manufacturer." High v. Westinghouse Elec. Corp., 559 So.2d 227, 228 (Fla. 3d DCA 1989).[2] Then, the Third DCA applied this purely strict liability inquiry to

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1 The elements of causation and damages are issues of fact for the jury and are not addressed in this brief.

2 This is a quote from Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631 (W.D. Pa. 1987), which fails to include the word "or" which in Kalik was placed between 402(a) and the words for a "negligent failure to warn". Technically, based on the sentence in High, the Third DCA failed to discuss negligence entirely. However, the remainder of this argument will proceed as if the court intended to use the Kalik court's statement in its entirety. The Kalik court cites the Restatement (Second) of Torts as its sole authority on this point.

summarily dismiss High's negligence claim. The remainder of the Third DCA's opinion analyzes whether salvaging of transformers was a reasonably foreseeable "use" for strict liability purposes. The court concluded that salvaging was not reasonably foreseeable, and mysteriously held that Mr. High could not, as a matter of law, recover under the legal theories of both negligence and strict liability.

The Third DCA's analysis completely confuses the foreseeability test employed to determine proximate cause in negligence with the test of who is a "user" for purposes of strict liability. Under a negligence theory, the determination of whether a given defendant is negligent is not contingent upon ascertaining the identity of the actual plaintiff. Whether a plaintiff is a "user" is irrelevant to negligence theory. In strict liability, however, the identity of the plaintiff serves as a limitation on the applicability of this theory. The Third DCA used the term "foreseeable" to determine if given conduct can be classified as a "use", because in its estimation, a remedy under strict liability is limited to users. The Third DCA's error is obvious. That is, use of the term "foreseeable use" should not be confused with the concept of foreseeability in negligence which requires only that **some** harm be foreseeable as a result of the defendant's action. Because the High court intermixed these distinct legal concepts, its analysis applies, if at all, only to the High's strict liability claim. Therefore, the Third DCA's opinion is entirely irrelevant to Mr. High's negligence claim.

B. THE RESPONDENTS BREACHED THEIR DUTY TO EXERCISE REASONABLE CARE UNDER THE CIRCUMSTANCES, THEREFORE THE THIRD DISTRICT COURT OF APPEAL IMPROPERLY AFFIRMED THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT ON HIGH'S NEGLIGENCE COUNT.

Even assuming the Third DCA considered High's negligence claim, the Court erred in affirming summary judgment because an issue of fact exists regarding whether Respondents breached their duty of reasonable care. The law of negligence does not

impose upon a person an obligation to insure all the consequences of his actions, rather it imposes a duty to act with that degree of reasonable care which would be expected of a reasonably careful person under similar circumstances. Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958), receded from in part on other grounds, Felix v. Hoffman - La Roche, Inc., 540 So.2d 102 (Fla. 1989); Jacksonville Journal Co. v. Gilreath, 104 So.2d 865 (Fla. 1st DCA 1958); Florida Standard Jury Instructions, §4.1 (1989). See also Simon v. Tampa Electric Co., 202 So.2d 209 (Fla. 2d DCA 1967) (duty of care is in proportion to peril involved). Stated another way, if a person knows, or with the exercise of reasonable diligence should know, that his conduct will likely result in harm to another then that person has a duty implied at law to take reasonable actions to prevent such injury. Advance Chemical Co. v. Harter, 478 So.2d 444 (Fla. 1st DCA 1985); Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958); Woodbury v. Tampa Waterworks Co., 49 So. 556 (Fla. 1909).

When Respondents manufactured unlabeled, PCB-laden transformers they created a serious risk of harm and ignored their duty of reasonable care. The potential risk associated with Respondents' conduct involved the wide-spread contamination of the environment as well as hazards to human health. In fact, based on evidence presented to the Environmental Protection Agency ("EPA")[3] in connection with their promulgation of regulations under the Toxic Substance Control Act ("TSCA"),[4] there can be little doubt that PCBs are inherently dangerous.[5] Accordingly, Respondents' conduct should

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3 Polychlorinated Biphenyls (PCBs) Manufacturing Processing, Distribution in Commerce, and Use Prohibitions, 44 Fed. Reg. 31,542 (1979).

4 40 CFR Part 761.

5 See also Dickerson Inc. v. U.S., 875 F.2d 1577 (11th Cir. 1989) (in which the 11th Circuit found PCBs to be highly toxic and to pose a "well documented human

Footnote continued on next page.

be measured by the higher standard of care required for inherently dangerous activities or products. Simon v. Tampa Electric Co., 202 So.2d 209 (Fla. 2d DCA 1967); Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958)

This court set the standard for inherently dangerous products in Tampa Drug Co., 103 So.2d 603 (Fla. 1958). The Tampa Drug Co. court held that "When a distributor of an inherently dangerous commodity places it in the channels of trade . . . he assumes the duty of conveying to those who might use the product . . . fair and adequate notice of the possible consequences of use or even misuse." Id. at 607 (emphasis supplied). This notice or duty to warn arises in connection with any product that is inherently dangerous, has inherently dangerous propensities, or is fraught with unexpected inherent danger. It also includes the duty to warn of the dangerous consequences of any foreseeable misuse of the product. Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958); Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984); Cohen v. General Motors Corp., Cadillac Div., 427 So.2d 389 (Fla. 4th DCA 1983). Essentially the Court's holding in Tampa Drug Co. and related cases means that the failure of Respondents to place labels on the transformers, and to warn of the possible consequences of improper disposal, constitutes negligence as a matter of law.

Because the Third DCA failed to analyze High's claim in terms of negligence, it gave no consideration to the appropriate standard of care, or whether the standard was met. Upholding the Third DCA's decision on the negligence claim would ignore controlling Florida law. The result of such a holding would be to deny Amicus and others the

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Footnote continued from previous page.

health and environmental hazard"); Environmental Defense Fund v. Environmental Protection Agency, 636 F.2d 1267 (D.C. Cir. 1980) (in which the Court concluded that as a practical matter there is no safe level of exposure to PCBs).

right to present evidence establishing a standard of care and its breach in all cases where parties are injured by a product at the end of its useful life. Summary judgment on High's negligence claim should be vacated, and the case remanded for proper consideration on the merits.

C. THE THIRD DISTRICT COURT OF APPEAL ERRED WHEN IT DETERMINED THAT AS A MATTER OF LAW, EXPOSURE TO POLYCHLORINATED BIPHENYLS DURING THE SALVAGE OF TRANSFORMERS DID NOT CONSTITUTE A RECOVERABLE INJURY UNDER THE RESTATEMENT (SECOND) OF TORTS SECTION 402(A).

The Third DCA reached two incorrect determinations which led it to conclude that injuries stemming from exposure to PCB's during the salvage of transformers was not recoverable under the Restatement (Second) of Torts Section 402(a). First, the Third DCA incorrectly determined that the defect in the transformers was created by a "substantial change in the product from the time it left the manufacturer's control . . . ." High at 228. Second, based on this finding, the Third DCA concluded that, "As a matter of law, the unsealing, stripping, and dumping of the contents of Westinghouse's product in order to salvage junk components were not reasonably foreseeable 'uses' of the product nor was Willie High an intended 'user' within the meaning of Section 402(a)." High at 229. The court mistakenly analogized the injuries occurring during the salvage of the transformers with injuries stemming from an unforeseeable product alteration.

The Third DCA's analysis is entirely incorrect. The transformers were defective when they left the manufacturer with the PCB laden mineral oil. The salvaging process did not create the defect because it did not change the product at least at the stage that the PCB's were released. The defect did not arise out of a physical or chemical alteration of the components. All that was done during salvage was the opening of the

transformers, an action which was also performed during the repair and routine maintenance of the transformers.

Moreover, the cases relied on by the Third DCA in reaching its conclusion highlight the fundamental distinction between usage and alteration. Johnson v. Murph Metals, Inc., 562 F. Supp. 246 (N.D. Tx. 1983), concerned a product, which unlike the PCB contaminated transformers, was not inherently dangerous. The product in Johnson was a battery which only became dangerous after its composition was altered in a smelting process. Although the smelting occurred during salvage, it was the substantial chemical alteration in the product, not the fact of salvage, which absolved the manufacturer of liability.

Wingett v. Teledyne Industries, Inc., 479 N.E.2d 51 (Ind. 1985) also involved a product which was not inherently dangerous. The plaintiff in Wingett was injured during the dismantling of duct work (he was sitting on it while taking it apart). The Wingett court held that the dismantling of the product was not a foreseeable use. However, the injury in Wingett came from the dismantling process, not from the product itself. High was not injured by the dismantling process; he was inured by the content of the product (PCB's).

In Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631 (W.D. Pa. 1987) the plaintiffs alleged that PCBs contaminated their property and caused injury when they leaked during the storing, handling, and dismantling of electrical components. The Kalik court dismissed the counts involving the dismantling of the components, relying on Murph Metals and Wingett as precedent. The Kalik court stated that its holding was based on those cases, as well as its interpretation of Pennsylvania law. Id. at 635. However, the law used by the Kalik court to reach its decision is not provided in the Kalik opinion. Kalik is not binding on the Florida Supreme Court, and has little precedential value in

absence of further detail of the applicable facts and law. Further, and of critical importance, the contamination in Kalik occurred as a result of burning the "junk components", thereby creating "dioxins [which] polluted the site". Id. at 634.

After erroneously finding that the transformers became defective during salvage, the High court then took it upon itself to declare as a matter of law that salvage was not foreseeable.

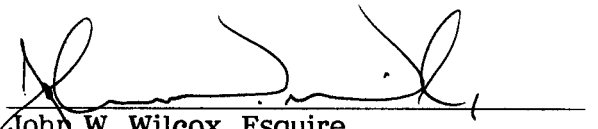
The problem with this view is twofold. First, it confuses alteration of the product which occurred during scrap and salvage, with contamination existing from the time of manufacture. In the instant case, opening the transformer merely exposed the contamination without altering the existing properties of the transformer in any way.

Second, a court cannot determine as a matter of law that a use is not reasonably foreseeable when in fact it was actually foreseen. Although the concept of a foreseeable use in strict liability differs from the negligence concept of foreseeability in certain respects, they are alike with regard to this point. A use, or harm, which is in fact foreseen, must as a matter of law be foreseeable. See 38 Fla. Jur. 2d Negligence §19. High adduced testimony which indicates that the Respondents actually knew that their transformers would be recycled. Moreover, the dissent in High points out that Respondents actually foresaw the scrapping of transformers. Accordingly, a jury should be permitted to examine the full panoply of evidence and could readily conclude that scrap and salvage of the transformers was actually foreseen by Respondents.

CONCLUSION

Under a correct analysis of the facts in this case, as a matter of law, Mr. High is not precluded from recovery under Section 402A. Furthermore, the Third DCA entirely failed to consider the distinction between strict liability and negligence. Accordingly,

the decision of the Third DCA should be reversed and the case remanded for a trial on the merits.



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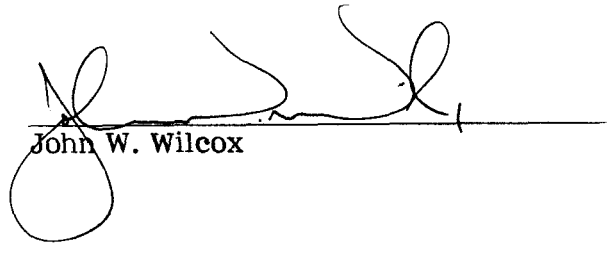

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