7-23

IN THE SUPREME COURT OF FLORIDA

Case No. 75,991

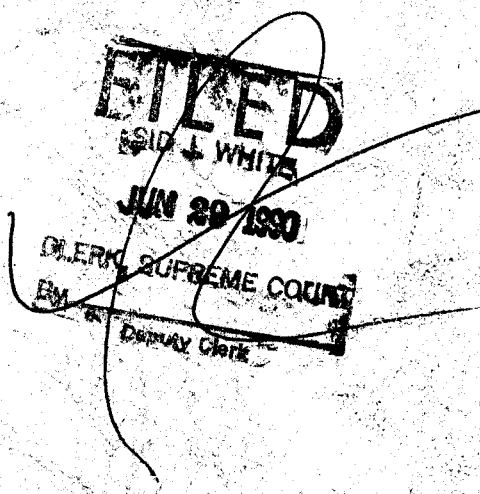
WILLIE J. HIGH and FLORIDA POWER & LIGHT COMPANY,

Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, et al.,

Respondents.



PETITIONER WILLIE HIGH'S INITIAL BRIEF ON THE MERITS

From The Decision of the Third District Court of Appeal of Florida

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PREFACE /1

The Third District's divided decision being reviewed sub judice, has dangerously and erroneously shifted the law in products liability litigation in Florida, and perhaps in the United States, heavily in favor of manufacturers of inherently dangerous products.

In this day and age where society has placed an emphasis, if not a requirement on the recycling of products for both economic and environmental reasons, the majority decision immunizing manufacturers from liability from injuries suffered by persons as a result of the recycling process creates a deadly precedent which places all the risk on the consumer and none on the manufacturer.

By the instant decision a two judge majority has insulated manufacturers of hazardous products from liability for damages to persons which occur after the useful life of the product has ended by determining that "as a matter of law, the unsealing,

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/1 In this brief the Petitioner, Willie High, who is the Plaintiff below will be referred to as "Petitioner High," "Plaintiff," "Willie," "High" and/or "Willie High," and the Respondent, Westinghouse Electric corporation will be referred to as "Respondent Westinghouse," or "Westinghouse." The Defendant Florida Power and Light Company below will be referred to as "FPL," the Defendant Pepper's Steel and Alloys, Inc. below will be referred to as "Pepper's" and the Defendant Norton Bloom below as "Defendant Bloom."

The following abbreviations will be used in this brief:
A Appendix to Brief
R Record on Appeal
All emphasis is ours unless otherwise indicated.

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 (1965). High v. Westinghouse Electric Corp., 559 So.2d 227 (Fla. 3rd DCA 1990); (A65-69).

However, in view of the fact that this case is one of exceptional importance because the impact of the decision is not limited to the counties encompassed by the Third District and the case is one of first impression in this state, the majority certified its holding to this Court, High v. Westinghouse, supra at Footnote 2 of page 229 (A65-69):

> We certify 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.

Petitioner High respectfully submits that an affirmance of the majority decision of the Third District would irrevocably and adversely affect the rights of Florida citizens and residents as to a significant area of products liability actions.

Therefore, based on the applicable law existing in Florida and the uncontradicted facts Petitioner High respectfully urges this Court to reverse the decision of the majority and instead adopt the reasoning of Judge Wilkie Ferguson in his dissent: (R1205)

> 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. Caterpiller Tractor Co., is to the contrary. The remaining arguments made by the defendant as grounds for affirming the summary judgment, i.e., causation in fact, are, on the record in this case, questions for the fact-finder. . .

STATEMENT OF THE CASE AND FACTS /2

From 1967 until the beginning of 1983 FPL sold its junk electrical transformers /3 to a Medley scrap yard known as Pepper's Steel and Alloys, Inc. The transformers FPL sold to Peppers were filled with coolant/dielectric fluid (oil) for insulating and fire retardant purposes. Transformers which contain oil 500 parts per million (ppm) or more of PCBs are considered askarel or PCB transformers. Transformers which contain mineral oil but contaminated with 50 to 500 ppm PCBs

/2 In addition to Defendant Westinghouse, Willie High also joined as Defendants, Florida Power and Light Co., Pepper's Steel and Alloys, Inc., Norton Bloom, Clark Engineers-Scientists, Inc., and 4 other transformer manufacturers: Allis Chalmers; Central Moloney; McGraw Edison and General Electric. As of the time of the filing of this brief, Plaintiff High has settled with Allis Chalmers; Central Moloney; McGraw Edison; General Electric and Clark Engineers-Scientists. Defendant Pepper's Steel and Alloys, Inc., obtained a summary judgment as to all non-intentional torts pursuant to the worker's compensation exclusive remedy statute.

/3 Although FPL denies that it sold any capacitors to Pepper's, Willie has alleged that it did. Therefore, whenever reference is made to transformers such reference shall also include capacitors (R153-157).

are called PCB contaminated transformers (R988-1054; A8-23). Willie alleges that during the period of 1967 through 1983, FPL sold both PCB and PCB contaminated transformers to Peppers (R153-177).

Pepper's processed the transformers which it received from FPL in order to recover valuable copper and aluminum and other metals. To accomplish this recovery, Pepper's employees opened the transformers and dumped the enclosed oil onto the open ground on the Pepper property and on adjacent properties. The PCB laden oil accumulated on the properties and also percolated through the oil to the groundwater table which lies two to three feet beneath the surface. The oil super-saturated the soil, and an oil slick one to three inches thick floating on the groundwater was subsequently found when holes were dug down to the water table by federal, state and county regulatory agencies. Significant concentrations of PCBs considered toxic at such levels were found in the soil on the Pepper and adjacent properties and in the groundwater beneath the properties and in water from a well located south of the Bloom property (R905-976; A24-44).

From in or around 1967 until the end of 1977, it is undisputed that FPL did not drain any oil from the junk transformers before they were shipped to Pepper's. Whether FPL drained all the oil from the junk transformers shipped to Pepper's after 1977 is disputed. (R1-152)

Prior to 1977 the transformers were sold without the

benefit of a formal written agreement. Then on 8 December 1977, FPL and Pepper's entered into a written agreement designated "Junk Transformer Agreement" to be effective through 31 December 1980. Upon expiration of this Agreement Pepper's and FPL entered into a second agreement effective through 31 December 1982 (R181-212). James Killingsworth, the director of procurement and materials management for FPL, testified that during the 3 year period of time from 1 January 1978 through 31 December 1980 approximately 27,000 thousand transformers were sold to Pepper's. (R 1201-1213)

Willie High was employed for approximate 17 years (1965-1983) at Pepper's (Willie temporarily left Pepper's to work for Sea-Wheels for one year). Willie's primary duty at Pepper's was hauling the junk transformers from various FPL locations throughout Florida, to Pepper's by truck and to assist in the loading and unloading of the transformers at Pepper's. At various times Willie also assisted in the handling and dismantling of the transformers after they had been delivered to Pepper's (R77-78). Thus, for the approximate 17 years Willie was employed at Pepper's he came into almost daily contact with the oil from the transformers not only through handling of the transformers, but also through contact with the ground at Pepper's which was heavily contaminated with the PCB laden oil (R253-478; 479-519; 520-678).

PCBs cause, among other symptoms, reproductive failures, gastric disorders, skin lesions, emotional and functional

mental disorders and tumors in laboratory animals. Studies of workers exposed to PCBs have shown a number of symptoms and adverse effects including but not limited to, chloracne and other epidermal disorders, digestive disturbances, jaundice, impotence, throat and respiratory irritations, and severe headaches (R902-904; 905-926 and Exhibits). Willie alleges that he suffers from a number of the above adverse effects as a result of his exposure to the PCBs (R153-177; 679-901; A4-6; A22-40).

It is undisputed that Westinghouse was one of the transformer manufacturing companies from whom FPL had purchased the transformers which were eventually sold as junk transformers to Pepper's (R988-1054; R679-901).

It is also undisputed that none of the junk transformers that FPL sold to Pepper's contained any labels, markings or warnings of any kind that the transformers contained PCBs, or that its contents could be hazardous to human health (R1-152).

In the early 1970's, Monsanto the manufacturer of PCBs notified the transformer manufacturers, including Westinghouse, of the dangerous toxic propensities of the PCBs used in electrical transformers and their adverse effect on humans and the environment (A 1-3). Furthermore, specific procedures concerning the disposal of PCBs and PCB contaminated transformers were recommended by Monsanto (R988-1054). Subsequently the utility industry, including FPL, became cognizant of the adverse effects of PCBs in humans and the

environment in connection with their use in electrical transformers.

In or about 1976 Westinghouse by written letter notified their utility customers, including FPL, that a substantial number of mineral oil filled transformers which had previously been sold to the utility companies were contaminated with PCBs in the manufacturing process. In that letter Westinghouse foresaw that the recycling of its transformers would be involved in the future as a reasonable use of the product. The letter stated inter alia (R988-1054; A4):

> As a result of recent investigations, we have determined that some oil-filled transformers may contain varying concentrations of PCBs. . .
>
> Currently there are no nationally established standards for allowable levels of PCBs in oil for closed electrical systems. A number of states have recently enacted legislation providing for special reporting, labeling, and/or disposition of PCBs. Because legislation varies in different states, it is suggested that customers institute any special procedures which may be required for conformance.
>
> In addition, when performing repair, routine maintenance or disposal, oil-filled transformers should be checked for the presence of PCBs. . .

Even though Westinghouse and FPL voiced great concern within their own corporate structures over the PCB problem and their potential liability arising out of PCBs in transformers neither Westinghouse nor FPL ever shared this information with Pepper's, or issued any warnings to Pepper's concerning the possible PCB contamination of the junk transformers Pepper's

received from FPL. Norton Bloom, the president of Pepper's, testified (R45-49):

(Bloom)

Q. Who was it that told you that FPL had been getting letters from the manufacturers warning them?

Mr. Abrams: Object to the form.

A. Nobody told me that.

Q. Are you sure?

A. Yes.

After learning of the growing concern of the effects of PCBs upon humans and the environment, Westinghouse and FPL held numerous internal committee meetings and mandated officer and employee attendance at seminars in regard to the PCB matter and possible exposure to third parties in this area (R679-901).

In 1975 the Dade County Department of Environmental Resource Management (DERM) cited Pepper's for numerous violations of environmental ordinances. (Exhibits attached to Deposition of Anthony Clemente - R905-976). DERM continued to cite Pepper's for these violations through 1982. Page one of a memorandum dated 27 April 1977 from DERM inspector Robert Karafel to Kenneth W. Schang, P.E., the chief of the pollution division of DERM is illustrative of the extent of the contamination of the Pepper site. (Exhibit from Deposition of Anthony Clemente - R905-976; A45-46):

* * *

Pepper Steel and Alloy in Medley was high on

> my list of potential PCB sources since they process old electrical transformers which contain large quantities of PCB oil. Their past record, including a court case in October, 1975 in which they were charged with and found guilty of violating Section 24-11(1) for spilling transformer oil on the ground, shows a lack of proper control of of (sic) Pepper Steel on January 27, 1977 and found no puddles of oil on the site where violations had previously occurred.
>
> On March 28, 1977, the area inspector, Rick Fehr, found a new area at Pepper Steel and Alloy where transformers were being salvaged and puddles of transformer oil were observed on the ground. He notified me of his finding and we made an inspection of the area on March 30, 1977. Sample No. 22273 collected from a puddle on the ground revealed 867,170 mg/1 oil and grease. Pictures showing the oil saturated ground and ponding oil are attached. We collected a second sample from the puddle and I delivered it to Dr. Corcoran of the University of Miami for PCB analysis.
>
> Dr. Cororan analyzed the sample for two PCB formulations called Aroclor 1260 and Aroclor 1242 which are the trade names used by the Monsanto Company, the sole U.S. producer of PCBs. The last two digits of the name denote the percentage of chlorine in the compound. Dr. Corcoran's analysis revealed 250 ppm (ug/ml) of both Aroclor 1260 and 1242 PCB content in the sample which he indicated to me as being very high.

* * *

In the beginning of 1983, the U.S. Environmental Protection Agency also commenced an investigation of the Pepper site and the adjacent properties for contamination by PCBs.

Shortly thereafter, DERM, the State of Florida Environmental Regulation Department and the EPA determined that the Pepper's property was sufficiently contaminated with oil

containing PCBs to justify the commencement of federal, state and county legal actions against FPL, Pepper's, and the owners of the adjacent properties for violating county, state and federal ordinances and laws and to demand a cleanup of the site by FPL (R905-976).

As a result of the substantial coverage by the news media of DERM and EPA actions in 1983 Willie became aware of the fact he had been exposed to the PCBs while employed at Pepper's and that some of his physical and mental problems might be attributed to the PCB exposure. Consequently, on 9 July 1983 Willie filed the instant action.

Several years after commencement of the case sub judice and DERM and the EPA, federal actions, FPL filed a separate suit in the U.S. District Court against eight transformer manufacturers, including Westinghouse for indemnity and damages because of the various lawsuits and claims made against FPL arising out of the contamination of the Pepper site with PCBs: Florida Power and Light Company vs. Allis Chalmers Corporation, et al., U.S. District Court, Southern District of Florida, Case No. 86-1571-CIV-Atkins (R213-222). A memorandum of law filed by FPL in the federal litigation summarizes the culpability of Westinghouse in this case (R988-1054):

> In the present case, discovery will show that the Defendant manufacturers sold transformers to FPL which contained mineral oil contaminated with PCBs; that Defendants sold such transformers containing this hazardous waste rather than incur the expense of modifying, cleaning up and disposing of the

> hazardous waste in their own manufacturing processes. Defendants "arranged for the treatment and disposal" of these PCBs by selling them to FPL, and other utilities, in the mineral oil used by Defendants. Discovery will show (as the Westinghouse and G.E. letters do show) that Defendants knew that the transformers would ultimately need "repair, routine maintenance, or disposal: which would likely result in a "release" as defined by 42 U.S.C. Stat.9601 (22). Discovery will show that Defendants did not request return of any transformers containing mineral oil contaminated with PCBs, and thus Defendants arranged for disposal of these hazardous wastes by allowing the purchases of such transformers to use and ultimately dispose of them.

During the preceding four and one half years of this litigation, Willie filed a substantial number of pleadings directed toward discovery against all the Defendants, including FPL and Westinghouse only to be met with total resistance by both FPL and Westinghouse. It was not until late in this litigation, after Westinghouse filed its motion for summary judgment that Westinghouse finally produced any documents. FPL did not furnish any of the documents Willie had been seeking until 22 December 1987.

On 25 November 1987 Westinghouse filed a motion for summary judgment on the basis that "the destruction and dismantling of the electrical transformers manufactured by Westinghouse were not foreseeable as a matter of law" based upon the holding of Kalik, Johnson and Wingate, supra (R1180-1191).

On 15 December 1987 Willie filed his response to

Westinghouse's motion and memorandum of law and attached thereto copies of documents obtained from Westinghouse (R988-1054).

Willie had previously filed numerous depositions, exhibits and affidavits in connection with the Defendants previous motions for summary judgment (R902-904).

On 6 January 1988 a Final Summary Judgment in favor of Westinghouse was entered by the trial court (R1199-1200). The trial court denied FPL's Petition for Rehearing on 15 January 1988 (R1177). Willie High on 25 January 1988 timely filed his Notice of Appeal to the Third District (R1178).

On 12 December 1989 the Third District in a 2-1 opinion affirmed the Summary Judgment in favor of Westinghouse and on 24 April 1990 filed its corrections to opinion (R1 201-1213); (A 65-69). On 3 May 1990 Petitioner High, pursuant to the certification by the Third District under Article V, Section 3 (b)(4), Florida Constitution, timely filed his notice to invoke the discretionary jurisdiction to review the decision of the Third District Court.

SUMMARY OF ARGUMENT

Willie High, appeals from a final summary judgment for Westinghouse Electric Corporation as affirmed by the Third District Court. The trial court entered the summary judgment for Westinghouse on the basis that the destruction and dismantling of electrical transformers by Pepper's, regardless of the dangerous nature of the transformers' contents, was not

foreseeable as a matter of law so as to impose liability upon Westinghouse. Both the trial court and the Third District cited and relied on Kalik v. Allis-Chalmers Corporation, 658 F.Supp. 631 (W.D. Penn. 1987) Johnson v. Murph Metals, Inc., 562 F.Supp. 246 (N.D. Texas 1983) and Wingett v. Teledyne Industries, Inc., 479 N.E. 2d 51 (Ind. 1985) in support of their decision.

In regard to Kalik supra, Willie submits Kalik is an isolated decision by a U.S. District Court in Pennsylvania, bound to apply Pennsylvania law but ultimately forced to make its own interpretation of Pennsylvania law since it admits that no cases either in Pennsylvania or outside of Pennsylvania have addressed a similar factual situation. Additionally, it is not possible to know what facts or evidence were available to the court at the time it rendered its decision. Therefore, it is submitted that the Kalik case is poor law and should not be followed by Florida Courts or any other jurisdiction. Neither Kalik, supra, nor Wingett and Johnson, supra, comport with the rationale of Florida courts in products liability cases. To hold that as a matter of law it is not foreseeable that the dismantling or destruction of a product for salvage purposes is not an ultimate use of the product is totally inconsistent with the history of products liability law in Florida. It is precisely the opposite reasoning that Florida courts have followed, namely, that such issues are questions of fact to be determined by a jury and not by a summary judgment.

Wingett and Johnson, moreover, are factually distinguishable. Wingett supra, did not involve an inherently dangerous product but an injury sustained during the removal of duct-work. The Plaintiffs in Johnson, supra, were employees of lead smelting companies who alleged that during the lead smelting process they were exposed to harmful lead fumes and lead dust. It was stipulated in the case that the employees did not sustain any harm while the batteries were intact or while the batteries were being destroyed or dismantled. However, while ruling in favor of the Defendants on the basis of the stipulated facts, the Court, did indicate that its ruling might have been different if the Plaintiffs had been injured while the batteries were being destroyed.

In the instant case, Willie specifically alleged that he was injured as the result of the direct contact with Westinghouse's product, not only during the dismantling of the transformers, but also during the process of handling the transformers, both during the loading and off loading of the transformers from his truck.

In or about 1976, Westinghouse by written letter notified their utility customers, including FPL, that a substantial number of mineral oil filled transformers which had previously been sold to the utility companies were contaminated with PCBs in the manufacturing process. In that letter Westinghouse foresaw as a reasonable use the ". . . repair, routine maintenance or disposal. . ." of the transformers (R988-1054).

This Westinghouse letter demonstrates that Westinghouse contemplated "disposal" of its product at which time it "should be checked for the presence of PCBs." At the very minimum this letter creates a genuine issue of material fact with respect to whether "dismantling and processing" were reasonably foreseeable to Westinghouse.

In Florida, it has been firmly established that the manufacturer and/or distributor of a commodity inherently burdened with potential danger has the duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might use the commodity. Tampa Drug Company v. Wait, 103 So.2d 603, 607 (Fla.1958) Advance Chemical Company, 478 So.2d 41 (1st DCA 1985). See also Harrison v. McDough Power Equipment, Inc., 381 F.Supp. 926 (S.D.Fla. 1974).

In the instant case the record is uncontradicted that Westinghouse manufactured and sold to FPL transformers, which by their own admission, were defective and dangerous because they contained PCBs (A3). Furthermore, the record is uncontradicted that the transformers manufactured by Westinghouse bore no markings or labels of any kind which warned that any of the contents of the transformers were dangerous or toxic to human welfare.

Willie respectfully submits that the Third District erred in determining that "the rationale expressed in Kalik, Johnson and Wingett, supra, is consistent with Florida law regarding 402A of the Restatement as adopted in West v. Caterpillar

Contractor Company, 336 So.2d 80 (Fla.1976) and urges that the Third District Court's opinion be reversed and the summary judgment dated 6 January 1988 in favor of Westinghouse be vacated for a trial on the merits.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING A FINAL SUMMARY JUDGMENT IN FAVOR OF WESTINGHOUSE WHERE THERE ARE DISPUTED ISSUES OF LAW AND FACT.

POINT II

A MANUFACTURER OF A HAZARDOUS PRODUCT SHOULD NOT BE INSULATED AS A MATTER OF LAW FROM LIABILITY FOR DAMAGES WHICH RESULT FROM THE SALVAGING OF ITS PRODUCT WHERE NO NOTICE OR WARNING IS GIVEN OF THE INHERENT DANGER OF THE PRODUCT.

The trial court erred in entering a Final Summary Judgment in favor of Westinghouse against Willie High "on all claims" on the basis that the destruction and dismantling of the electrical transformers manufactured by Westinghouse were not foreseeable as a matter of law. In entering the Final Summary Judgment, the trial court cited and relied on Kalik v. Allis-Chalmers Corporation, et al., 658 F.Supp. 631 (W.D.Penn. 1987), Johnson v. Murph Metals, Inc., 562 F.Supp. 246 (N.D. Texas 1983) and Wingett v. Teledyne Industries, Inc., 479 N.E. 2d 51 (Ind.1985). Willie submits that Florida law is contrary to the reasoning in Kalik, Johnson and Wingate, supra, and, moreover, these cases are factually distinguishable from the instant case:

In Kalik v. Allis-Chalmers Corporation, supra, the owners of a scrap metal business which had salvaged junk electrical components containing PCBs sued the manufacturers of those components for damages for clean-up costs incurred in cleaning up the site, removal of oil from the site, injury to the site, and damages to the business. The complaint alleged that during the course of storing, handling, and dismantling the junk electrical components, PCB-contaminated oil spilled or leaked onto the site. The complaint also alleged that a furnace used in dismantling and processing the components caused PCBs in the components to allegedly produce dioxins which also polluted the site. In only partially granting a motion to dismiss by the manufacturers, the Court held:

> In general, whether the plaintiff's use of a product was reasonably foreseeable to the manufacturer raises a question of fact for the jury. See e.g., Sheldon v. Westbend Equipment Corp., 718 F.2d at 608.
>
> Nevertheless, it has been held, as a matter of law, that the recycling of a product, after it has been destroyed, is not a use of the product reasonably foreseeable to the manufacturer. Johnson v. Murph Metals, Inc., 562 F.Supp. 246 (N.D. Tx. 1983).
>
> * * *
>
> It has also been held, as a matter of law, that the destruction of a product is not a use of the product reasonably foreseeable to the manufacturer. Wingett v. Teledyne Industries, Inc., 479 N.E. 2d 51 (Ind. 1985)
>
> In the present case the plaintiffs allege injuries sustained during the course of storage and handling of junk electrical components, and also injuries sustained during

> the course of dismantling and processing junk electric components. The decisions discussed above provide no basis for concluding, as a matter of law that the storage and handling of junk electrical components was not a reasonably foreseeable use of G.E.'s product.
>
> On the other hand, these decisions do provide a persuasive basis for concluding, as a matter of law, that the components was not a reasonably foreseeable use of G.E.'s product, and the Court so finds. Accordingly, the allegations of injury as a result of the dismantling and processing of junk electric components will be dismissed.
>
> 658 F. Supp. 631, 635-636. (Emphasis added).

Moreover, the Kalik, supra, trial court admitted that it could not find any cases in any jurisdiction, including Pennsylvania, which have addressed a similar factual situation and, therefore, was required to make its own interpretation of Pennsylvania law. However, it is not possible to know what facts or evidence were available to the Kalik, supra, trial court in reaching its decision. Consequently, Willie submits that the Kalik, supra, case should not be considered by Florida court, as a binding interpretation of Florida product liability law.

In Johnson v. Murph Metals, Inc., supra, the defendant battery manufacturer was sued by employees of a lead smelting company, who alleged that during the lead smelting process they were exposed to harmful lead fumes and lead dust. It was stipulated that the employees did not sustain any harm while the batteries were intact or while the batteries were being destroyed. The Court held that the injuries allegedly sustained

during the creation of dangerous gases as part of lead smelting process, occurring while the lead was being recycled after the batteries had been destroyed, were not reasonably foreseeable to the manufacturer as a matter of law. Although ruling in favor of the Defendants on the basis of the stipulated facts, the Court, however, seemed to indicate that its ruling might have been different if the Plaintiffs had been injured while the batteries were being destroyed.

Wingett v. Teledyne Industries, Inc., supra, did not involve an inherently dangerous product but an injury sustained during the removal of duct-work. In reaching its decision the Court held that as a matter of law where the removal of duct-work by a demolition crew resulted in injury to a member of the crew when a connection between two segments of duct-work gave way, the dismantling or demolishing of the duct-work was not a reasonably foreseeable use of the product, and the manufacturer owed no duty to the injured worker to warn of any risks related to his work as part of the demolition crew.

In the instant case, factual issues exist as to whether Westinghouse sold PCB transformers to FPL which were either improperly labeled or marked and also sold transformers to FPL containing mineral oil which was contaminated in the manufacturing process with polychlorinated biphenyls also not labeled or marked.

The record is undisputed that FPL sold transformers manufactured by Westinghouse as scrap to Pepper's, where they

were handled, stored, dismantled, and processed. Willie testified at deposition that he came in contact with the oil during handling and storage (High, pp. 60-63; 64-65) and also during dismantling and processing of the transformers (High, pages 125-133, 345-361; See also, Willie J. High Answers to Interrogatories 1, 2, 3 dated October 5, 1984). Willie specifically alleged that he was injured as the result of the direct contact with Westinghouse's product, not only during the dismantling of the transformers but also during the process of handling the transformers at the premises of FPL and continuing thereafter until the transformers had been dismantled. Therefore it is incorrect to say or imply that Willie's alleged injuries were caused solely from the dismantling of a manufactured product.

Although extensive research has not disclosed any other cases which are factually similar to the instant case, other courts faced with somewhat similar issues have reached contrary results. In Johnson v. United States, 568 F.Supp. 351 (D.Kansas 1983), the Kansas District Court denied a motion for summary judgment where the employees of a business engaged in repair and overhaul of aircraft instruments brought an action against the manufacturers of the instruments. The employees alleged that the their cancer was caused by exposure to ionizing radiation that originated in luminous radioactive compounds on the faces of the instruments sent for overhaul. The District Court distinguished the duties of a manufacturer

of a non-inherently dangerous product in reaching its conclusion, "that the risks to instrument overhaul workers, including those at AID would be both foreseeable and unreasonable in the absence of warnings."

It is hard to believe that the Kansas court would have come to a different conclusion if the radiation contamination had resulted from dismantling of the instruments for salvage rather than from repair.

In Whitehead v. St. Joe Lead Co., Inc., 729 F.2d 238 (3rd Cir. U.S. Ct. of Appeals 1984), the Third Circuit reversed a summary judgment in a products liability action involving an employee's contamination by lead particles caused by her exposure to lead during the course of her employment where the Defendants had argued that a supplier is not liable for the failure to warn of dangers caused by substantial changes in a product. The Third Circuit held at page 250:

> In this case it was objectively foreseeable that lead particles would be generated by Alpha's use of lead ingot. The fact that defendants supplied lead in ingot form, rather than in the form of airborne particles or metal fines, is of no consequence. The law of torts does not turn on such nice distinctions of physical chemistry. See States Steamship Co v. Stone Manganese Marine, Ltd., 371 F.Supp. at 505 (change of shape not a "substantial change"). The relevant question is whether the production of airborne and particulate lead was a foreseeable consequence of Alpha's operations. We have held that there is record evidence that it was. Thus we cannot affirm the summary judgment on the ground that lead supplied by defendants underwent a "substantial change."

In or about 1976, Westinghouse by written letter notified their utility customers, including FPL, that a substantial number of mineral oil filled transformers which had previously been sold to the utility companies were contaminated with PCBs in the manufacturing process. In that letter Westinghouse foresaw as a reasonable use the ". . . repair, routine maintenance or disposal. . ." of the transformers (R988-1054).

The majority opinion sanitizes the almost conclusive admission by Westinghouse in the 1976 letter that the contents of the transformers it manufactured were toxic (perhaps deadly) and that it foresaw the effect of its deadly product on persons coming into contact with it during the disposal, repair and dismantling of the transformers by stating that the letter reflected that "Westinghouse was acting in a responsible corporate fashion to inform its ultimate consumer, FPL, of potentially important product information."

Under this logic Judge Nesbitt would also characterize the recall by an automobile manufacturer of a defective automobile, as merely important product information.

In categorizing the contents of the letter in the fashion that it did the majority panel has substituted its opinion for that of a jury since the Westinghouse letter could just as easily be read to mean that Westinghouse clearly foresaw the eventual dismantling of its transformers during their disposal and was warning its customers of a dangerous condition that could arise upon such disposal. Moreover, there exists no

factual basis in the record for the majority for its interpretation of the Westinghouse letter.

In Florida, it has been firmly established that the manufacturer and/or distributor of a commodity inherently burdened with potential danger has the duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might use the commodity. Tampa Drug Company v. Wait, 103 So.2d 603, 607 (Fla.1958). See also Harrison v. McDough Power Equipment, Inc., 381 F.Supp. 926 (S.D.Fla. 1974). In Advance Chemical Company, 478 So.2d 441 (1st DCA 1985) the First District held:

> . . . Questions of whether a product is inherently dangerous or has dangerous propensities and whether a manufacturer or distributor has a duty to warn under the circumstances are usually questions of fact for the jury. Harless v. Boyle-Midway, Division of American Home Products, 594 F.2d 1051 (5th Cir.1979); Mathis v. National Laboratories, 355 So.2d 117 (Fla. 3d DCA 1978); Dayton Tire and Rubber Company v. Wait, supra.

Willie respectfully submits that the trial court erred in determining that "the rationale expressed in Kalik, Johnson and Wingett, supra, is consistent with Florida law regarding 402A of the Restatement as adopted in West v. Caterpillar Contractor Company, 336 So.2d 80 (Fla.1976). Careful review of West v. Caterpillar, supra, reveals just the opposite.

The Florida Supreme Court in West, supra, specifically held at page 89:

> The framers of the Restatement did not

express an opinion on whether the doctrine should apply where harm befalls persons other than users or consumers. A majority of the courts have said that there is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery. See Am. Jur.2d Products Liability Sec. 144; and Darryl v. Ford Motor Co., 440 S.W.2d 630, 633 (Tex.1969), where the court said:

> 'We hold that recovery under the strict liability doctrine is not limited to users and consumers. . . There is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product. The reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize risks of personal injury and/or property damage. A manufacturer who places in commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition.'
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> * * *
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> The public policy which protects the user and the consumer of a manufactured article should also protect the innocent bystander. Of course, the duty of a manufacturer for breach of which liability will attach runs only to those who suffer personal injury or property damage as the result of using or being within the vicinity of the use of the dangerous instrumentality furnished by a manufacturer which fails to give notice of the danger. . .

The record is uncontradicted that Westinghouse manufactured and sold to FPL transformers, which by their own admission, were defective and dangerous because they contained PCBs. Furthermore, the record is uncontradicted that the transformers manufactured by Westinghouse bore no markings or

labels of any kind which warned that any of the contents of the transformers were dangerous or toxic to human welfare. Therefore, the rationale expressed in Kalik, Johnson, Wingate and by the trial court are totally inconsistent with Florida law regarding 402 A of the Restatement as adopted in West v. Caterpillar, supra.

In the instant case there exist, inter alia, the following issues of fact: (i) whether a transformer containing PCBs is inherently dangerous or has dangerous propensities thereby requiring Westinghouse to place significant warnings on such transformers, (ii) whether storage and dismantling of such transformers was reasonably a foreseeable use of Westinghouse's product and (iii) whether Willie as an employee of Pepper's may be considered to be a user or a bystander of the product manufactured by Westinghouse. Willie respectfully submits that under Florida law and in particular under the language contained in West v. Caterpillar Tractor Company, Inc. and Advance Chemical, supra, these issues are questions of fact for the jury to decide.

It is apparent that in the early 1970's Westinghouse became aware of the toxic propensities of PCBs. Documents obtained from Westinghouse and FPL clearly show that from in or about 1970 Westinghouse was fully aware of the PCB problem in regard to electrical transformers and both Westinghouse and FPL participated in discussions concerning the handling and disposal of PCB contaminated transformers, i.e.:

(A.) Letter dated 19 November 1970 from the National Electrical Manufacturers Association.

(B.) Letter and Indemnity Agreement dated 15 January 1972 between Monsanto and Westinghouse.

(C.) Memorandum dated 24 April 1972 from the EPA.

(D.) Memorandum dated 22 November 1976 from Westinghouse to Industry Purchasing Executives.

(E.) Letter dated 23 May 1978 from EPA to Westinghouse.

(F.) Report on PCBs dated 27 September 1978 from Miclke Electric Works and received by Westinghouse.

(G.) Overview Report dated March 1981 prepared by the Electric Power Research Institute.

It is not reasonable to assume as a matter of law that Westinghouse, being in constant contact with its major client, i.e., the utility industry, was not fully aware of their practices regarding the ultimate disposal of electrical transformers. To the contrary it is reasonably foreseeable that the transformers sold by Westinghouse to FPL would eventually be dismantled for salvage thereby causing the PCB-contaminated oil to come in contact with the persons dismantling the transformers. Therefore, a question of fact exists for a jury as to whether Westinghouse had a duty to adequately label or mark its transformers regarding their contents, and in particular of the dangers of PCBs in order to avoid reasonably foreseeable injuries to those who might come

in contact with the transformer contents during the dismantling process. On the other hand to accept Westinghouse's argument that it owed no duty to anyone dismantling its transformers because it was not reasonably foreseeable that the transformers would be dismantled is inconsistent with sound legal reasoning and in particular with Florida product liability law. For example, assuming a transformer manufacturer had placed radioactive materials in the transformers which it manufactured instead of PCBs and sold the transformers without properly labeling them with a warning that upon the transformers being dismantled or destroyed the radioactive material content would be dangerous and harmful. It does not seem logical that Florida courts would grant such manufacturer immunity from liability to the party dismantling the transformers because it was not foreseeable that the transformers would never be opened. Respectfully, Willie submits that such a result diametrically contradicts well established principals of Florida product liability law.

CONCLUSION

The existence of a legal duty on the part of a manufacturer of a hazardous product to anticipate that a person could be injured during a dismantling or disposal of the product should not be determined as a matter of law but should be a question of fact to be resolved by a jury.

Public policy in this state mandates that manufacturers of hazardous products should not receive a blanket insulation from

liability by the courts just because a person, without knowledge of the danger, suffers injury during the disposal or salvaging stage of such product. It is unreasonable for Florida Courts to establish that as a matter of law a manufacturer cannot foresee that a product which it manufactures that contains valuable component parts will not at the time that its useful life has ended, be dismantled for access to such valuable component part.

In the instant case it is clear that Westinghouse knew and foresaw that its transformers even after their useful life had ended were valued for their component parts, i.e., the copper core.

The 1976 Westinghouse letter demonstrates that Westinghouse contemplated "disposal" of its product at which time it "should be checked for the presence of PCBs." This letter clearly raises genuine issues of material fact with respect to whether "dismantling and processing" were reasonably foreseeable to Westinghouse.

Florida law should not sanction a public policy which insulates a manufacturer from liability for damages merely because the initial useful life of the product it has put into the stream of commerce has ended, where a person, without knowledge of the danger sustains an injury from the handling of the product.

Accordingly, Petitioner High respectfully submits that for the reasons set forth above and upon the authorities cited

herein the decision of the Third District summary judgment for Westinghouse must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing initial brief on the merits was furnished by mail to: NORMAN COLL, ESQ., Attorney for FPL, 3200 Miami Center, 201 S. Biscayne Blvd., Miami, Florida 33131-5200; SETH ABRAMS, ESQ., Attorneys for Pepper's and Bloom, Grove Professional Bldg., Suite 200, 2950 S.W. 27th Avenue, Coconut Grove, Florida 33133 and PAUL T. REID, ESQ., Attorneys for Westinghouse, 4100 One Centrust Financial Center, 100 S.E. Second Street, Miami, Florida 33131, this 28th day of June, 1990.

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