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 PETITIONER FLORIDA POWER & LIGHT COMPANY

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

THE QUESTION PRESENTED

WHETHER THE MANUFACTURER OF A PRODUCT IS LIABLE IN NEGLIGENCE OR STRICT LIABILITY IN TORT FOR INJURIES TO PERSONS EXPOSED TO LATENT MANUFACTURING DEFECTS IN THE PRODUCT WHILE HANDLING, UNSEALING, REMOVING THE COMPONENTS, OR EMPTYING THE CONTENTS OF THE PRODUCT IN ORDER TO SALVAGE ITS COMPONENT PARTS FOR REUSE.

STATEMENT OF THE CASE

Willie J. High ("High"), an employee of a scrap metal salvage business known as Pepper's Steel and 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 District court of Appeal 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.

559 So. 2d 231.

The Third District Court of Appeal 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." 559 So. 2d 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). 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 got on the ground. (R. 119-120, 139, 154-155).

Willie J. 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. (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 Steel 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 didn't actually handle the transformers directly. (R. 80). In the loading process, he got some of the liquid from the transformers on his clothes, or on him:

> 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 we 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 Steel by another forklift, which High sometimes drove. (R. 315). Mostly, he would work on the truck hooking up the transformers. (R. 315-316). His 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).

Pepper's provided rubber boots for all employees free of charge. High wore his regular shoes because he was a truck driver. (R. 216-217). Although his complaint alleged that he came in contact with transformer oil which had accumulated on the ground (R. 154), High testified to the contrary. (R. 247-248). His shoes and socks were never soaked with oil, because, if he had to work on the ground, he wore rubber boots. (R. 247-248). But most of the time, his job was to stay on the truck, attaching the hook, to unload the transformers at Pepper's. (R. 248).

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 Steel 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.

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 District Court of Appeal 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 District Court of Appeal 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.

In reaching this conclusion, the Third District Court of Appeal 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 District Court of Appeal 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 Willie J. 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 District Court of Appeal relied. Consequently, the decision of the Third District Court of Appeal must be reversed for this reason also.

ARGUMENT

I. **WHETHER THE HANDLING, UNSEALING, REMOVAL OF THE COMPONENTS, OR EMPTYING OF THE CONTENTS OF A PRODUCT IN ORDER TO SALVAGE ITS COMPONENT PARTS ARE REASONABLY FORESEEABLE "USES", AND WHETHER SALVAGE WORKERS ARE FORESEEABLE "USERS" OF THE PRODUCT ARE QUESTIONS OF FACT UNDER FLORIDA LAW.**

INTRODUCTION

PCBs were designed to be used in a certain type of electrical transformer. See Environmental Defense Fund v. EPA, 636 F.2d 1267, 1270 (D.C. Cir. 1980). Only a small percentage of transformers, known as PCB or askarel transformers, were filled with askarel, a dielectric fluid containing PCBs. See United States v. Commonwealth Edison Company, 620 F. Supp. 1404, 1407 (N.D. Ill. 1985). Other transformers, known as mineral oil transformers, were designed to contain only mineral oil as a dielectric fluid. However, in many mineral oil transformers, the mineral oil was permanently contaminated with PCBs during the manufacturing process. Id.; see also Potomac Electric Power Company v. Sachs, 802 F.2d 1527, 1529 (4th Cir. 1989), vacated Potomac Electric Power Co. v. Curran, 108 S.Ct. 743 (1988) (remanded to consider question of mootness).

In 1976, PCBs were deemed to be a "toxic substance" under the Toxic Substance Control Act (TSCA), 15 U.S.C.A. § 2605(e) (West 1982 & Supp. 1989). In 1980, PCBs were defined as a "hazardous substance" under the Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601(14).

After enactment of TSCA in 1976, the contamination of mineral oil transformers with PCBs was found to be so widespread that EPA regulations, promulgated in 1979 under TSCA, required that all untested or unlabelled mineral oil transformers be legally presumed to be PCB contaminated. See 40 C.F.R. § 761.

The transformers involved in the present case were designed to contain only mineral oil. They are alleged to have been contaminated with PCBs during the manufacturing process. During its useful life, a mineral oil transformer may be opened for maintenance or repair, or to add dielectric fluid. Mineral oil transformers found to be unrepairable are sold as scrap to scrap metal dealers, where they were salvaged to recover the various metals contained in them.

A. THE DECISIONS RELIED UPON BY THE THIRD DISTRICT COURT OF APPEAL ARE FACTUALLY DISTINGUISHABLE.

The Third District Court of Appeal 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. The District Court of Appeal reasoned that there can be no liability for strict liability in tort, or for negligent failure

to warn of a product defect, unless the injury occurs during a "use" of the product reasonably foreseeable to the manufacture.

Whether a plaintiff's use of a product is "reasonably foreseeable" to a manufacturer is ordinarily a question of fact. Kalik v. Allis-Chalmers Corporation, 658 F. Supp. 631, 635 (W.D. Pa. 1987), citing Sheldon v. West Bend Equipment Corp., 718 F.2d 603, 608 (3d Cir. 1983).*/ However, in this case, the District Court of Appeal 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" to the manufacturer. The court also held that a salvage worker was not a foreseeable or intended user of the product. High v. Westinghouse Elec. Corp., 559 So. 2d 227, 229 (Fla. 3d DCA 1990).

The Third District Court of Appeal relied exclusively upon Kalik v. Allis-Chalmers Corporation, 658 F. Supp. 631 (W.D. Pa. 1987), Johnson v. Murph Metals, Inc., 562 F. Supp. 245 (N.D. Texas 1983), and Wingett v. Teledyne Industries, Inc., 479 N.E.2d 51 (Ind. 1985). Each of these cases is factually distinguishable.

In Wingett v. Teledyne Industries, Inc., 479 N.E.2d 51 (Ind. 1985), an employee of an independent contractor hired to

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*/ Whether disposal of a spent or partially used household product in the family trash can constitutes an "intended use" of the product is an issue of fact. Brownlee v. Louisville Varnish Co., 641 F.2d 397 (5th Cir. 1981) (case decided under Alabama law "closely aligned to the theories propounded in the Restatement (Second) of Torts, § 402A." 641 F.2d 400-401).

remove ductwork in a foundry was injured when a connection between two segments of ductwork failed, and a portion of the ductwork fell to the floor as the employee cut the support hangers. The employee sued the foundry owner, and the manufacturer and installer of the ductwork. The employee claimed that the connection between segments of the ductwork which failed, consisting of a sheet metal band, screws, and clamps, instead of an iron collar and bolts found on the other segments, proximately caused his injury. The Indiana Supreme Court affirmed a summary judgment in favor of the manufacturer, holding as a matter of law, that the dismantling and demolishing of the ductwork was not a reasonably foreseeable "use" of the product.

In Johnson v. Murph Metals, Inc., 562 F. Supp. 245 (N.D. Texas 1983), the U.S. District Court in Texas granted summary judgment and held that fumes and particulates from smelting lead from scrap batteries were not created from a "use" of the batteries. In that case, the employees of various lead smelting companies who had sued certain automotive battery manufacturers stipulated that their injuries did not result from working with intact batteries, or from the destruction of batteries to obtain the lead for smelting. 562 F. Supp. at 248. The lead fumes and dust that allegedly injured them were created only after the lead was extracted from the destroyed batteries and used in the smelting process. Id. In determining that the plaintiffs were not "users" of defendants' products, the court held:

> In this case, Defendants' product was necessarily destroyed prior to the alleged injuries. Stip. No. 14. Plaintiffs have stipulated that Defendants' product did not injure them while it was intact or while it was being destroyed. Stip. Nos. 15, 18. Rather, the alleged damage occurred after a portion of the destroyed battery was transformed, through the smelting process, into an allegedly injurious substance. During the time periods in question, Plaintiffs did not even come into contact with Defendants' product; Defendants' product had ceased to exist.

562 F. Supp. 246, 249.

In Kalik v. Allis-Chalmers Corporation, 658 F. Supp. 631 (W.D. Pa. 1987), the owners of a scrap metal business which was contaminated by hazardous substances sued the manufacturers and suppliers of the products containing the hazardous substances to recover clean-up costs and damages under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and state law. The scrap metal business purchased junk electrical components, as scrap. The junk electrical components contained PCBs, a hazardous substance. During the course of storage, handling, and dismantling of the junk electrical components, PCB contaminated oil spilled or leaked onto the site. A furnace used to dismantle and process the junk electrical components caused the combustion of PCBs which allegedly produced dioxins, which polluted the site. On a motion to dismiss plaintiff's damage claims based upon negligent failure to warn and strict liability in tort, the U.S. District Court in Pennsylvania considered whether plaintiff's use of the product

was reasonably foreseeable to the defendant manufacturer. Although it agreed this was ordinarily a question of fact for the jury, it found that Murph Metals and Wingett, respectively, had held as a matter of law, that recycling of a product after it had been destroyed, and destruction of a product, were not uses of the product reasonably foreseeable to the manufacturer. Consequently, the court held that dismantling and processing (as opposed to storage and handling) was not a reasonably foreseeable "use" of the electrical components.

The present case does not involve the failure of a product during demolition, as in Wingett. It does not involve the transformation of a part of the product into an injurious substance through reprocessing of component parts, as in Murph Metals and Kalik. Consequently, Wingett, Murph Metals, and Kalik are inapplicable.

B. FLORIDA HAS EXTENDED PRINCIPLES OF NEGLIGENCE AND STRICT LIABILITY IN TORT TO NON-USERS OR NON-CONSUMERS OF PRODUCTS.

Florida adopted the principles of strict liability in tort in Section 402A of the Restatement (Second) of Torts in West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976).

In West, this Court extended the doctrine of strict liability in tort to a bystander injured by a product, holding:

> There would appear to be no logic or reason in denying a right of relief to persons injured by defective merchandise solely on the ground that he was not himself a user of the merchandise. Many products in the hands of the consumer are sophisticated and even

> mysterious articles, frequently a sealed unit with an alluring exterior rather than a visible assembly of component parts. In today's world it is often only the manufacturer who can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose.
>
> . . .
>
> 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 nonusers and nonconsumers should be denied recovery. (Citations omitted).
>
> . . .
>
> 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 a 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.

336 So. 2d 80, 89.

Recently, the duty of a manufacturer has been extended to a person who is neither a consumer nor a user of the product, who was injured while attempting to avoid an unreasonably dangerous defect in the product. In Moffat v. U.S. Foundry & Manufacturing Corp., 551 So. 2d 592 (Fla. 2d DCA 1989), a child was struck by an automobile while riding a bicycle on a bridge which had been constructed with a drainage grate across one portion of a pathway designed for pedestrians and bicyclists.

The grate contained slots, parallel to the pathway, which were large enough to trap bicycle tires and created a hazard for bicyclists. Because the boy was aware of the grate, he chose to ride in the active lanes of automobile traffic on the bridge in order to avoid the danger of the grate, and was thereby struck by an automobile. The parent of the child sued the manufacturer of the grate for both negligence and strict liability in tort. The trial court dismissed the complaint. On appeal, the Second District Court of Appeal reversed, holding:

> On appeal, U.S. Foundry also argues that it owes no duty to this child in either negligence or strict liability because the child was not a consumer or user of its product. It argues that a person who was injured in the vicinity of a product is only owed a duty if the injury is caused by some explosion or other active defect in the product. We do not interpret the duty under strict liability to 'innocent bystanders', established in West v. Caterpillar Tractor Company, 336 So. 2d 80, 89 (Fla. 1976), so narrowly. . . . We perceive no reason to limit the duty owed in negligence or strict liability . . . .

551 So. 2d 592, 593.

C. FLORIDA HAS HELD THAT REPAIR OF A PRODUCT IS A USE REASONABLY FORESEEABLE TO THE MANUFACTURER.

Following West v. Caterpillar Tractor Co., the First District Court of Appeal held that a worker, injured while engaged in repair of a product, could maintain a claim under Section 402A against the manufacturer of the product. In Hethcoat v. Chevron Oil Company, 383 So. 2d 931 (Fla. 1st DCA

1980), on remand from 380 So. 2d 1035 (Fla. 1980), quashing 364 So. 2d 1243 (Fla. 1st DCA 1978), the court held that the manufacturer of a machine for heating asphalt by means of coils circulating hot oil within a storage tank, the intended use of which resulted in both deterioration of the inner liner and the production of combustible vapors, necessitating the inevitable replacement of the inner liner which required it to be burned out with an acetylene flame, could be liable under Section 402A for failure to warn a welder, who was repairing the tank, of the danger of explosion of the vapors. Similarly, in Adobe Building Centers, Inc. v. Reynolds, 403 So. 2d 1033, 1036 (Fla. 4th DCA 1981) (Hurley, J. specially concurring) the Fourth District Court of Appeal recognized that the terms "ultimate user or consumer" in Section 402A, Restatement (Second) of Torts include persons engaged in the preparation of the product for its intended use while lawfully enjoying the benefits of the product, while working on or repairing the product, or while enjoying the status of a bystander.

D. THE TASKS INVOLVED IN RECYCLING OR SALVAGE OF A PRODUCT ARE THE SAME AS THOSE FOR ROUTINE MAINTENANCE OR REPAIR OF THE PRODUCT.

In the present case, the Third District Court of Appeal concluded that the alleged injuries to High were caused by his exposure to transformer oil contaminated with PCBs during unsealing, stripping, and dumping the contents of scrap transformers during salvage operations. Such tasks are no

different from those required for routine maintenance or repair of the transformers. In its letter to FPL, Westinghouse made no distinction between "repair, routine maintenance or disposal". Under Florida law, the repair of a product is a reasonably foreseeable "use" to the manufacturer. Accordingly, whether such "uses" in the context of recycling or salvage of the product are reasonably foreseeable to the manufacturer are issues of fact.

Recycling of products is not new. For many years, products have been recycled to salvage economically valuable component parts. Recently, Florida has enacted legislation which will ultimately require its residents to recycle items in order to dispose of them. See, e.g., Florida Statutes § 403.702, et seq. "Resources Recovery and Management" (1988). Where products contain various metals, such as batteries which contain lead, or electrical transformers or equipment which contains copper, it is not uncommon to sell them for scrap to salvage yards who will process and recycle the products in order to recover the economically valuable components for reuse. In Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631 (W.D. Pa. 1987), Westinghouse is identified as a defendant which not only manufactured electrical components containing PCBs, but also sold scrap electrical components containing PCBs to the scrap metal business involved in that litigation. 658 F. Supp. at 634, 636. Surely, if Westinghouse itself disposed of such equipment by selling it for salvage, there is a genuine issue of material fact as to whether it could reasonably foresee that its customers

would also dispose of similar products at the end of their useful lives in a similar way.

E. THE RECORD DEMONSTRATES THAT WESTINGHOUSE ANTICIPATED THE RISK OF INJURY FROM MINERAL OIL TRANSFORMERS CONTAMINATED WITH PCBS DURING REPAIR, ROUTINE MAINTENANCE, OR DISPOSAL.

In the present case, Westinghouse notified FPL by letter that "some oil filled transformers may contain varying concentrations of PCBs . . ." and that "when performing repair, routine maintenance or disposal, oil filled transformers should be checked for the presence of PCBs . . .". (R. 1012). The Third District Court of Appeal ignored this evidence, preferring to characterize it as Westinghouse "acting in a responsible corporate fashion to inform its ultimate consumer, FP&L, of potentially important product information." 559 So. 2d at 229. There is no support in the record for such a characterization. The motivation for, timing of, and adequacy of the information contained in the Westinghouse letter involve factual issues which cannot be determined on summary judgment. The letter, though, creates genuine issues of material fact as to whether disposal of the transformers for salvage of component parts was a "use" reasonably foreseeable to Westinghouse.

II. THE RECORD REFLECTS THAT PLAINTIFF'S ALLEGED INJURIES WERE SUSTAINED FROM HANDLING DEFECTIVE PRODUCTS PRIOR TO DISMANTLING OR PROCESSING OF THE PRODUCTS FOR SALVAGE, WHICH IS A USE OF THE PRODUCTS REASONABLY FORESEEABLE TO THE MANUFACTURER.

The Third District Court of Appeal concluded:

> Westinghouse's transformers were destroyed prior to the alleged injuries. While the transformers were sealed and intact there was no harm. Rather, the alleged damage occurred after the contents of the devices were exposed through the dismantling process. Westinghouse's product as it had originally been sold to FP&L, for practical purposes, had ceased to exist at the time the alleged injuries occurred.
>
> Here, the determination of no liability is based upon a substantial change in the product from the time it left the manufacturer's control to the time of the subject incident; this change negates the manufacturer's liability for any alleged defect under 402A.

559 So. 2d at 228.

None of these conclusions find any support in the record. The record reflects that the product defect, PCB contaminated mineral oil, is alleged to have been caused during the manufacturing of the transformers. The character or composition of the oil containing PCBs was not changed during salvage. Moreover, it is uncontradicted that High did not dismantle, or destroy, or process transformers at Pepper's.

High was a truck driver. He handled intact scrap transformers when they were loaded on his truck at FPL, or unloaded from his truck at Pepper's Steel. High's alleged

exposure to PCBs came from transformer oil which splashed or spilled from transformers during loading or unloading. High's alleged exposure occurred before any dismantling, stripping, or emptying of the contents of the transformers took place. Contrary to the assertions of the Third District Court of Appeal, at the time of High's alleged exposure, there had been no alteration or change in transformers, and the transformers surely had not ceased to exist.

Whether such "handling" is a reasonably foreseeable "use" to Westinghouse is a genuine issue of material fact which precludes the entry of summary judgment. Even in Kalik, the court concluded that the rationale of Wingett and Murph Metals was not applicable to a negligence or strict liability in tort claim which involved injuries sustained from the "handling" (as opposed to dismantling and processing) of scrap products during recycling, and it expressed refused to dismiss the "handling" claims:

> 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 electrical components. The decisions discussed above [Murph Metals; Wingett] 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 GE's product.

658 F. Supp. 635. Both the trial court and the Third District Court of Appeal clearly misread the record on this important

point. In fact, the District Court of Appeal expressly omitted "handling" from its list of "uses" which are not foreseeable to the manufacturer as a matter of law. ("unsealing, stripping, and dumping of the contents of Westinghouse's product", 559 So. 2d 229). Accordingly, genuine issues of material fact exist which require reversal of the decision of the Third District Court of Appeal for this reason also.

CONCLUSION

The decision of the Third District Court of Appeal is a case of first impression, not only in Florida, but in the United States. The decision holds, 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. The rationale of the District Court of Appeal is that recycling - "unsealing, stripping, and dumping of the contents" of a product - in order to recover valuable component parts for reuse, is not a reasonably foreseeable "use" of the product to the manufacturer.

Until now, the development of products liability law in Florida has broadly construed the definitions of reasonably intended "use", and the "user or consumer" of a product. Protection from unreasonably dangerous defective products has been extended to bystanders and other non-users. Repair of a product has been held to be a reasonably foreseeable use.

In this case, it is readily apparent that the tasks involved in salvage or recycling - "unsealing, stripping, and dumping of the contents" of a product - are no different from the tasks involved in routine maintenance or repair. There is no logical distinction between a worker injured while opening, removing the components, or emptying the contents of a defective product for repair, or for salvage, and the Third District Court of Appeal suggests none. Indeed, in its letter to FPL, Westinghouse made no such distinction when it anticipated that exposure to PCBs could result "when performing repair, routine maintenance or disposal" of mineral oil transformers.

Moreover, the decision under review does not hold that mere handling of a product is an unforeseeable use of the product to the manufacturer. Even the cases from other jurisdictions on which the Third District Court of Appeal relied have refused to hold, as a matter of law, that handling is an unforeseeable use. And yet, on this record, that is all that occurred here. Willie J. High was not engaged in the destruction, dismantling, unsealing, stripping or dumping of the contents of the transformers. He was a truck driver, who was exposed to PCBs in transformer oil which splashed from intact transformers loaded or unloaded from his truck, prior to any salvage operations. Whether this "handling" was foreseeable to Westinghouse is clearly an issue of fact which requires reversal.

Neither the facts, nor the law, nor public policy support the result reached by the Third District Court of Appeal

in this case. Whether salvage or recycling of a product is a use of the product reasonably foreseeable to the manufacturer must be determined as an issue of fact, based upon all of the facts of the case. The decision must be reversed.

Respectfully submitted,

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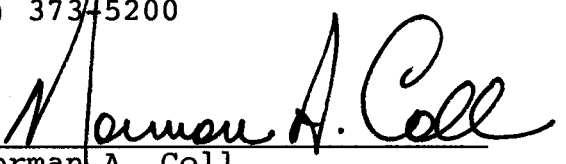
By 
Norman A. Coll
Florida Bar No. 091514

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 28th day of June, 1990 to Frank Nussbaum, Esq., SINCLAIR, LOUIS, SIEGEL, HEATH, NUSSBAUM & ZAVERTNIK, P.A., 1125 Alfred I. DuPont Building, 169 East Flagler Street, Miami, FL 33131; Paul T. Reid, Esq., POPHAM HAIK SCHNOBRICH & KAUFMAN, LTD., 4100 One Centrust Financial Center, 100 S.E. Second Street, Miami, FL 33131; Seth Abrams, Esq., MARLOW, SHOFI, CONNELL, VALERIUS, ABRAMS, LOWE & ADLER, Grove Professional Building, Suite 200, 2950 S.W. 27th Avenue, Miami, FL 33133; and John W. Wilcox, Esq., RUDNICK & WOLFE, Suite 2000, 101 E. Kennedy Boulevard, Tampa, FL 33602-2133.

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