047

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 REPLY BRIEF ON THE MERITS

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

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and

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REPLY BRIEF[1]

REPLY TO WESTINGHOUSE'S POINTS

Unable to effectively challenge Petitioner's arguments, Westinghouse instead asks this Court to accept a false premise, to-wit: that "the uniform rule throughout the country is that the process of recycling or destroying a product for salvage is not a reasonably foreseeable use of the original product as a matter of law." Westinghouse's citation of the facts in the record and applicable case law in support of this argument is patently misleading and factually incorrect.

Based on this false premise as well as other misleading arguments, Westinghouse requests this Court to adopt a struthian approach to the vital issues raised by this appeal and decertify the question presented. Alternatively, Westinghouse seeks to convince this Court to establish as a matter of law that a manufacturer has no liability to a non-intended user who is injured by a component part of the manufactured product during the process of dismantling for salvage and or

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

The following abbreviations will be used in this brief:
A Appendix to High's Initial Brief
All emphasis is ours unless otherwise indicated.

recycling. Westinghouse improperly alleges that numerous jurisdictions have already established this principal notwithstanding the fact that only the Western Pennsylvania District Court in Kalik v. Allis-Chalmers Corporation, et al., 658 F.Supp.631 (W.D. Penn. 1987) has addressed this issue. The Kalik Court however, admitted that it could not find any cases in any jurisdiction, including Pennsylvania, which have specifically addressed this issue. Willie High respectfully submits that Kalik, supra, and the other two cases relied on by Westinghouse, to-wit: 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), are readily distinguishable on their facts as previously elaborated in Willie's Initial Brief.

It is uncontroverted that no Florida case has held or implied that the "dismantling and processing" of products for salvage is not a foreseeable use as a matter of law. It has, however, been firmly established in Florida that the manufacturer and/or distributor of a commodity which is inherently dangerous has the duty to take reasonable precautions to avoid reasonably foreseeable injuries to those who might come into contact with the commodity. Tampa Drug Company v. Wait, 103 So.2d 603, 607 (Fla.1958), Advance Chemical Company, 478 So.2d 41 (Fla. 1st DCA 1985). See also Harrison v. McDough Power Equipment, Inc., 381 F.Supp. 926 (S.D.Fla. 1974).

Section 402A of the Restatement (Second) of Torts (1965)

states that an injured plaintiff may recover damages from a manufacturer under a products liability theory if he proves that his injury resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control. Florida follows Section 402A. West v. Caterpillar Contractor Company, 336 So.2d 80 (Fla. 1976).

The record is uncontradicted that there exists genuine issues of material fact as to whether Willie sustained an injury from the Westinghouse transformers. The record further shows that the transformers contained an inherently toxic component, to-wit: PCBs. Moreover, this dangerous condition existed at the time the transformers left Westinghouse's control.

Westinghouse contends that manufacturers are entitled to blanket immunity in products liability actions for injuries caused by a dangerous component of the product while it is being dismantled because such activity is not foreseeable as a matter of law. In arguing this position Westinghouse would have this Court ignore the existing legal concept of foreseeability in products liability law. One generally accepted definition of foreseeability is as follows: that which is objectively reasonable to expect and is satisfied by showing that a person of ordinary intelligence would have anticipated a danger to others by his negligent act. Skarski v. Ace-Chicago Great Dane Corporation, 485 N.E. 2d 1312 (Ill. App.

1st Dist. 1985); Gulf States Utilities Co. v. Dryden, 735 S.W. 2d 263 (Tex. App. Beamont 1987).

In the Jonescue v. Jewel Home Shopping Service 306 N.E. 2d 312 (1973) an 18-month old baby drank the contents of a bottle of Jetco HD All Purpose Cleaner made and sold by Jewel. The Court held that although the baby was a non-intended user the manufacturer would be liable if it was foreseeable "that at some point in time a child would drink from a bottle of the cleaner. . ." The Court further held that the issue of foreseeability was to be decided by the jury. The Court at page 316 stated:

> . . . **A jury therefore could properly find it foreseeable that at some point in time a child would drink from a bottle of the cleaner so placed** (citations omitted; emphasis added).

In the instant case it is reasonably foreseeable in the instant case that transformers, which have a limited useful life and which contain component parts of substantial value, will eventually be taken apart for access to those valuable parts, i.e. the copper cores. Therefore by any reasonable definition of foreseeability there is no basis in reality for Westinghouse to argue that as a matter of law it is unforeseeable that its transformers would never be dismantled for salvage or recycling. The evidence in the record, specifically the letter dated 22 November 1976 from Westinghouse to Industry Purchasing Agents, contemplates and foresees the dangers of PCB exposure during the disposal of their oil-

filled transformers (A4), and thus, clearly refutes Westinghouse's assertion.

If all of the legalistic terms are distilled from Westinghouse's brief it will be evident that Westinghouse does not deny the established concept of foreseeability. What Westinghouse is really arguing is that unless the salvaging or recycling of a manufactured product is legally deemed to be unforeseeable, the profitability of the manufacturing industry will be adversely affected. Willie respectfully submits that the public policy of Florida should not to be used as a shield to protect manufacturers against economic adversity for their negligent acts and that this Court should reject Westinghouse's argument.

The record is uncontradicted that the transformers manufactured by Westinghouse bore no markings or labels of any kind warning anyone that the contents were dangerous or toxic to human welfare. Westinghouse attempts to minimize the seriousness of its culpability in this case by down playing Willie's exposure with words like Willie "would occasionally be splashed with a tiny drop of the fluid" (APB 5). Simply, the facts reveal otherwise. The record shows without contradiction, as stated in Willie's Initial Brief, that over the approximate 12 year period of time Willie worked at Pepper Steel his clothes and shoes were regularly soaked with transformer oil.

Willie High submits that a clear question of fact exists

for a jury to determine 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. This is particularly true in light of Westinghouse's 22 November 1976 letter in which Westinghouse specifically warned purchasers of its transformers that contact with PCB contaminated oil could occur during ". . . disposal of oil filled transformers. . . " (A4). Moreover, the dismantling and salvaging of its transformers was in fact a known use to Westinghouse and not a misuse of the product as Westinghouse alleges in its brief.

To accept Westinghouse's argument that it owed no duty to any one 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 the existing Florida product liability law.

CONCLUSION

For the reasons set forth above and upon the authorities cited herein and in his Initial Brief, Petitioner Willie High submits that the trial court erred in entering the Summary Judgment in this cause and that this Court should decide this case of first impression in Florida. Accordingly, the Summary

Judgment dated 6 January 1988 must be reversed, with directions to enter an Order denying the Motion For Summary Judgment.

Respectfully submitted,

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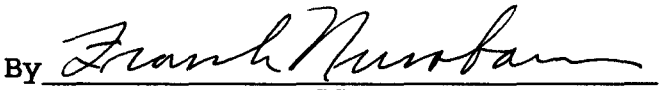
By 
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By 
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by mail to: **NORMAN A. COLL, ESQ.**, Attorney for FPL, 3200 Miami Center, 201 S. Biscayne Boulevard, Miami, Florida 33131-5200; **SETH ABRAMS, ESQ.**, Attorney for Pepper's Steel and Alloys and Norton Bloom, Grove Professional Building, Suite 200, 2950 S.W. 27th Avenue, Coconut Grove, Florida 33133; **JOHN W. WILCOX, ESQ.**, RUDNICK & WOLFE, Attorneys for Amicus Curiae Thomas Curtis, William U. Payne, Flora Payne and Lowell Payne, 101 East Kennedy Boulevard, Suite 2000, Tampa, Florida 33602; and **PAUL T. REID, ESQ.**, Attorney for Westinghouse, 4100 One Centrust Financial Center, 100 S.E. 2nd Street, Miami, Florida 33131, this 27 September 1990.

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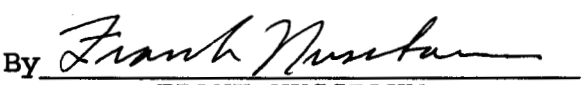
By 
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