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COURT OF APPEALS

STATE OF NEW YORK

FINERTY,

Respondent,

-against-

No. 1

ABEX CORPORATION AND
FORD MOTOR COMPANY,

Appellant.

20 Eagle Street
Albany, New York 12207
March 22, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 1, Finerty v. Abex Corporation and Ford
3 Motor Company.

4 MR. METLITSKY: Thank you very much, Your
5 Honor. May it please the court. I'm Anton Metlitsky
6 for Ford Motor Company, which the parties have been
7 referring to as Ford U.S. And I would reserve two
8 minutes, if I could.

9 CHIEF JUDGE DIFIORE: Yes, sir.

10 MR. METLITSKY: Thank you.

11 May it please the court. The Appellate Division
12 held that a jury can hold Ford U.S. directly liable for
13 products liability based on products manufactured and
14 sold, not by Ford U.S., but by a subsidiary, Ford U - - -

15 JUDGE STEIN: In your view, are there any
16 circumstances in which you would agree that a parent
17 corporation could be held strictly liable for
18 products liability without the factors necessary to
19 prove - - - to pierce the corporate veil being
20 established?

21 MR. METLITSKY: Yes. If the - - - if the
22 parent had itself either - - -

23 JUDGE STEIN: Direct involvement.

24 MR. METLITSKY: - - - either manufactured
25 or sold - - - manufactured or otherwise sold.

1 JUDGE FAHEY: What about designed?

2 MR. METLITSKY: No.

3 JUDGE FAHEY: Why not?

4 MR. METLITSKY: Because this court, and no
5 New York court, has ever held a designer that is not
6 a manufacturer or seller liable, because the strict
7 liability applies not by designing a product
8 incorrectly, but by selling a product that has a
9 defective design.

10 JUDGE PIGOTT: Let's assume for a minute,
11 instead of brakes, we're talking about airbags.

12 MR. METLITSKY: Uh-huh.

13 JUDGE PIGOTT: And you tell him this is how
14 you want your - - - this is how we want your airbags
15 to be; you tell Ford Ireland that. You're free, you
16 can sit at Ford headquarters in Detroit and say, and
17 by the way, you know, make them exactly the way
18 they've been made by all these other foreign cars
19 because they're cheap. And you escape any liability
20 because you say, well, you know, they made them in
21 Ireland; all we did is design - - - you know, design
22 them.

23 MR. METLITSKY: Well, there are - - - I
24 just want to unpack the question a little bit. First
25 of all, when you say you required them to do a - - -

1 JUDGE PIGOTT: Yeah, you sent them and you
2 said, here are the specs you got to use for your
3 airbags.

4 MR. METLITSKY: But we are assuming that
5 when you say "required", we're not doing anything
6 that would undermine the corporate form; these are
7 still separate corporations. So - - -

8 JUDGE PIGOTT: Right.

9 MR. METLITSKY: Right. And so, in that
10 circumstance, the subsidiary would obviously be
11 liable.

12 JUDGE PIGOTT: Uh-huh.

13 MR. METLITSKY: The parent would be liable
14 indirect - - - not liable, would feel the
15 subsidiary's liability indirectly insofar - - - in
16 its capacity as a shareholder. But it wouldn't be
17 liable on a theory of strict products liability
18 because it can, again, in this state - - - and I
19 think the general rule is that liability for strict
20 products liability derives from placing the part - -
21 - the product into the market, either by
22 manufacturing and selling, or otherwise selling.
23 Otherwise, if designing the product - - - and I think
24 the allegations are about design approval here - - -

25 JUDGE PIGOTT: Uh-huh.

1 MR. METLITSKY: - - - but it doesn't
2 really matter. The designing - - - if designing the
3 product were enough, then - - - or if designing the
4 product were the tort itself, then non-manufacturers
5 like distributors, wholesalers, retailers, wouldn't
6 be held liable, but they are because what they do is
7 put the product out into the market.

8 And the reason that those entities are held
9 liable has nothing to do with designing the product;
10 what it has to do with - - - the basic justification
11 is that a - - - an entity that sells a product puts
12 out the product to the public as though it is safe,
13 as if it is safe, and an entity that sells the
14 product has the ability to price in the cost of
15 injury into the cost of the product itself.

16 JUDGE PIGOTT: Well, so could you. Your
17 argument is, even a seller who has no notice, has no
18 idea what's in - - - I'll stick with my airbags for a
19 minute - - -

20 MR. METLITSKY: Right.

21 JUDGE PIGOTT: - - - because they're so -
22 - - they're so in the news - - - they're liable.

23 MR. METLITSKY: The seller is liable.

24 JUDGE PIGOTT: You - - - you, who designed
25 it and told your - - - and told your Irish

1 subsidiary, this is what you got to use in your cars,
2 he says, what do we know, all we did is tell him, put
3 the metal in there because it's cheaper than putting
4 something else in. So we can't be held liable
5 because we designed it, but the - - - but the guy
6 that sold you the car, he's in.

7 MR. METLITSKY: Right, because - - -
8 because this is - - - again, this is liability
9 without fault. The question of who is liable - - -

10 JUDGE PIGOTT: Right.

11 MR. METLITSKY: - - - is - - - turns on
12 policy considerations that this court has weighed a
13 long time ago. As a general matter, the
14 considerations always in strict liability cases are
15 on the one hand, trying to afford injured parties a
16 complete remedy, and on the other hand, not having
17 liability stretch forever, because if you do it as a
18 logical matter, if you think design is what counts,
19 then you get patent holders, you get trade
20 associations, you get individual inventors, and no
21 court in New York, certainly, and I don't think
22 anywhere, has ever let liability go that far.

23 JUDGE FAHEY: You did - - - you did address
24 design - - - this is kind of obscure, but in the
25 record, when I was looking into this issue at 843 in

1 your - - - I think it was in your reply brief, it was
2 843 in the record, you said - - - Ford says,
3 "Plaintiff admits that there is no feasible
4 alternative design at the time plaintiff was handling
5 the parts." I don't know if you remember that - - -
6 that part.

7 MR. METLITSKY: No.

8 JUDGE FAHEY: Okay, all right.

9 MR. METLITSKY: And, I mean, that goes to -
10 - - that goes to the merits.

11 JUDGE FAHEY: I don't want to - - - I don't
12 - - - it's a huge record, it's unfair, I don't want
13 to ambush you with the record. But, what that's - -
14 - I don't want to do that to you, but what it says to
15 me is that there was only one design for these parts
16 worldwide. And that design with dictated to everyone
17 in the world by Ford USA. And that what happened
18 after that - - - and to now say, and in your own
19 record, you say that there wasn't even an alternative
20 to that design. Well, that would say to me that - -
21 - that there is no distinction here between design
22 and manufacturing them, in essence.

23 MR. METLITSKY: Well, I'm not sure if there
24 is - - - I'm not sure - - - that may be, but again,
25 the question is whether - - -

1 JUDGE FAHEY: In other words, they weren't
2 choosing from two alternatives; I could design it
3 this way or design it that way. No, we had to make
4 them this way. As it turns out, it was a defective
5 product that hurt people.

6 MR. METLITSKY: Right. But the question
7 whether there is a feasible alternative goes to the
8 underlying merits of a design-defect claim.

9 JUDGE FAHEY: Uh-huh.

10 MR. METLITSKY: The - - - but, the question
11 whether a design-defect claim could be brought
12 against a particular party in the first place depends
13 on whether that party put the design out into market,
14 not whether the party actually created the design.

15 JUDGE STEIN: So - - - so as I look - - -
16 as I read the record, let's just take the tractor
17 business for now. Because it seems to me that there
18 are a lot of allegations that Ford U.S. had its - - -
19 had a hands-on involvement in the manufacture of
20 tractors, tractor parts, whatever, in England. If
21 that was - - - if those allegations were established,
22 would that be enough to impose strict liability on
23 Ford U.S.?

24 MR. METLITSKY: Your Honor, I - - - there
25 is no allegation that I'm aware of, and certainly

1 it's not true, that Ford - - -

2 JUDGE STEIN: But, for - - - as far as
3 truth is concerned - - -

4 MR. METLITSKY: Right, yeah, no - - -

5 JUDGE STEIN: - - - we don't get the right
6 now.

7 MR. METLITSKY: - - - totally understood.
8 But I don't think that there's any dispute that the
9 parts were manufactured and sold by Ford UK, not by
10 Ford U.S.

11 JUDGE STEIN: Yes, but - - -

12 MR. METLITSKY: There is an allegation that
13 there was a - - - that there was like a - - -

14 JUDGE STEIN: But they were kind of working
15 in partnership to do this.

16 MR. METLITSKY: Not to manufacture.

17 JUDGE STEIN: I mean, I'm using that word
18 loosely.

19 MR. METLITSKY: Not to manufacture. There
20 was - - - there was - - - as I understand the
21 allegation, there was a department at Ford U.S. that
22 was sort of a strategic, you know, worldwide
23 department that had a goal of more product
24 standardization, and things like that. And also, for
25 sure, Ford U.S. was policing the quality of its

1 products, as every trademark licensor is required to
2 do under the Lanham Act, without losing its
3 trademark.

4 But again, the - - - the rule in this state
5 has always been to - - - that selling the product or
6 manufacturing and selling, or just selling, is what
7 counts for strict products liability. And to
8 collapse - - -

9 JUDGE STEIN: So you - - - you see the
10 allegations merely as alleging some kind of oversight
11 - - -

12 MR. METLITSKY: Oversi - - -

13 JUDGE STEIN: - - - and collaboration in
14 design; you cut it off at design.

15 MR. METLITSKY: I do. And - - - and not
16 just me - - -

17 JUDGE STEIN: But if we read it
18 differently, if we read it as the actual
19 manufacturer, the actual hands-on, you know, being -
20 - - you know, I don't know exactly what it would
21 entail, but - - -

22 MR. METLITSKY: Right.

23 JUDGE STEIN: - - - that would cross over
24 the line.

25 MR. METLITSKY: Our - - - our rule - - -

1 our rule that we think that this court has already
2 long adopted and should reaffirm, is that if you are
3 a manufacturer yourself - - - not your subsidiary but
4 yourself - - - or a seller, you can be held liable if
5 the other elements of the claim are met. If you are
6 not, you can't. So if that's the rule that the court
7 announces, we will be happy. Certainly, we think the
8 rule announced by the court below has to be wrong
9 because - - -

10 JUDGE STEIN: Because that would apply to
11 every parent - - -

12 MR. METLITSKY: - - - every parent, of
13 course. So that has to be wrong, and I think the
14 right rule is if you're in the chain of distribution,
15 which this court and every New York court to have
16 considered the question has always read to mean
17 manufacturing and selling - - - and just to be clear,
18 we have right now a very clear rule, you always know
19 if you sold the product, and it already affords a
20 complete remedy, if not in every case, in nearly
21 every case; this case is very unique, where the
22 manufacturer can't be sued in New York because there
23 is no personal jurisdiction which makes sense. You
24 have a plaintiff that lived abroad for decades and
25 was injured by products abroad manufactured abroad.

1 But in most cases, you're always going to
2 be able to sue the seller, the wholesaler, or the
3 manufacturer. So it's ve - - - so there is no reason
4 to adopt some kind of rule that is not at all clear,
5 I'm not exactly sure if you can ask them what their
6 rule is, but it has something to do with influence
7 over the distribution chain when you're not a
8 manufacturer or seller yourself.

9 JUDGE ABDUS-SALAAM: So counsel, I don't
10 mean to interrupt, but I'm just trying to - - -
11 because the allegations go to the involvement - - -

12 MR. METLITSKY: Right.

13 JUDGE ABDUS-SALAAM: - - - of Ford U.S., in
14 the subsidiary's businesses - - -

15 MR. METLITSKY: Right.

16 JUDGE ABDUS-SALAAM: - - - without
17 piercing the corporate veil.

18 MR. METLITSKY: Right.

19 JUDGE ABDUS-SALAAM: So your position would
20 be, unless there was some evidence that Ford either,
21 as I think Judge Stein mentioned earlier, partnered
22 with your subsidiaries to sell or manufacture - - -

23 MR. METLITSKY: Right.

24 JUDGE ABDUS-SALAAM: - - - then Ford would
25 not be liable; Ford U.S. would not be liable.

1 MR. METLITSKY: Absent either veil piercing
2 or some other kind of derivative liability principle,
3 maybe agency or something like that, but yes.

4 JUDGE ABDUS-SALAAM: So there is no - - -
5 so - - - I guess, what the defendants are saying - -
6 - what the plaintiffs are saying is that there may be
7 something out there we need to discover about that
8 relationship to show that Ford had a partnership or
9 something else besides just influence design.

10 MR. METLITSKY: They've already had
11 discovery; we were on the eve of trial - - -

12 JUDGE ABDUS-SALAAM: Right.

13 MR. METLITSKY: - - - before there was a
14 stay. So I'm not sure what else they would need to
15 discover. But - - - one other point, if I may, just
16 - - - if the court wants to extend the rule beyond
17 manufacturers and sellers, at the very least we would
18 say that the level of involvement of the parent in
19 the subsidiary has to be something extraordinary,
20 something more than what is normally the case. And
21 two courts have looked at - - - one court, the
22 Pennsylvania Courts have looked at literally this
23 production, and has said this is just the normal
24 subsidiary - - -

25 JUDGE PIGOTT: Design defect doesn't enter

1 into this at all?

2 MR. METLITSKY: Excuse me?

3 JUDGE PIGOTT: A design defect, isn't that
4 part of this case?

5 MR. METLITSKY: The design defect isn't
6 part of the - - -

7 JUDGE PIGOTT: Yeah, if you negligently
8 designed the brakes that we're talking about here,
9 isn't that a cause of action?

10 MR. METLITSKY: Well, so - - - so this
11 court has recently suggested or maybe even held that
12 design - - - negligent design, and strict products
13 liability design defect claims are the same. Now,
14 again, it's not that it doesn't enter into it, it's
15 that you have to sue the right party. And I don't -
16 - - I don't want to put a percentage on the cases,
17 but in almost every single case, you're going to be
18 able to sue somebody - - - the - - - an injured party
19 is going to be able to sue somebody that either sold
20 it, wholesaled the product, or manufactured it. The
21 only reason that they can't here is because of a
22 personal jurisdiction problem.

23 JUDGE PIGOTT: Right. But isn't there a
24 design defect cause of action; I mean, can't you do
25 that?

1 MR. METLITSKY: There is a design-defect
2 strict liability cause of action.

3 JUDGE PIGOTT: Right.

4 MR. METLITSKY: Yes, right. But, as - - -
5 as I - - -

6 JUDGE PIGOTT: Aren't they saying you
7 designed this?

8 MR. METLITSKY: Right. But again, so the
9 tort of strict liability design defect is not
10 designing the product; it's putting a product that is
11 defectively designed into the market. Just as a
12 failure to warn; you know - - -

13 JUDGE PIGOTT: Oh, I see. So - - - I won't
14 use my airbag anymore; let's use seatbelts. So if
15 you have a negative - - - if Ford USA designed the
16 seatbelts - - -

17 MR. METLITSKY: Right.

18 JUDGE PIGOTT: - - - that go into Ford
19 Ireland's cars, you're saying it's Ford Ireland's - -
20 - they are the ones that are going to have to respond
21 in that, not Ford USA.

22 MR. METLITSKY: In a product's liability
23 case.

24 JUDGE PIGOTT: Right.

25 MR. METLITSKY: There may be some other

1 theory that wasn't pled here where - - - right, where
2 Ford - - - where the designer could be held liable to
3 somebody. But the question is whether the designer
4 is held liable to the end user. That depends - - -

5 JUDGE PIGOTT: Right.

6 MR. METLITSKY: - - - not on
7 foreseeability, as this court held in the Sukljian
8 case, but on how far the duty runs. And the duty is
9 determined by policy considerations, which this court
10 has repeatedly weighed and made clear they turn on
11 whether the seller put out the product as safe,
12 whether the seller was able to price the cost of
13 injury as a cost of business. Not whether the
14 designer, not whether the trademark licensor, or and
15 - - - you know, you could go as far as you want once
16 you get past the seller, right. And that's the whole
17 - - - that's the whole problem with strict liability
18 cases and why the court has long ago cut the line off
19 at sellers. Because if you try to use logic, you'll
20 go forever.

21 And there is - - - and again, there is no
22 reason to, because you have - - - plaintiffs, in the
23 overwhelming number of cases - - - including, I
24 think, this case, they could have sued in the UK or
25 somewhere else where there was personal jurisdiction

1 - - - will have a complete remedy already. So
2 there's no point of getting rid of the clear rule
3 that New York already has. Thank you.

4 CHIEF JUDGE DIFIORE: Thank you.

5 Counsel.

6 MR. KRAMER: Good afternoon, Your Honors.

7 May it please the court. Jim Kramer and Robert
8 Komitor from the Levy Konigsberg, on behalf of
9 respondents, the Finerty family.

10 We just heard appellant speak in terms of
11 extension of existing law, when in fact, the fact pattern
12 of this case falls squarely within this state's public
13 policy, as well as within its case law; something that the
14 First Department duly noted.

15 JUDGE GARCIA: But can you cite us a case
16 where a parent has been held - - - most of the cases,
17 I think, as I read your papers, are downstream, let's
18 say - - - from the manufacturer down. What is the
19 case that's gone up the chain without piercing the
20 corporate veil?

21 MR. KRAMER: To - - - directly to the
22 parent and under New York law? There may not be a
23 direct case on point, and I think there is a reason
24 for that, which is because, as our public policy
25 states, every member within the chain of distribution

1 that puts out a defective product may be held
2 accountable. And that's exactly what the Brumbaugh
3 case is saying, that the Third Department ruled on.
4 What Brumbaugh notes is, that since this court's
5 decision in *Codling v. Paglia*, the judiciary has
6 extended the liabilities beyond just market or
7 sellers or distributors, to include, importantly,
8 anyone involved with putting that product into the
9 chain of distribution.

10 JUDGE GARCIA: But again, that goes
11 downstream in the cases I've seen. So where is the
12 case that we have gone upstream?

13 MR. KRAMER: The *Godoy* case, which is
14 exactly what the First Department relied on, where,
15 as that case - - - as the Second Department noted,
16 that case dealt with innocent conduits in the sale,
17 intermediary - - - intermediate distributors who just
18 had a hand on the product to tap it along down the
19 stream. They, however, were entitled to seek
20 indemnification from those upstream, which makes
21 sense under our public policy because, as New York
22 acknowledges, we want to put pressure on those who
23 have the most control over putting the product into
24 the stream of commerce.

25 JUDGE PIGOTT: Are you suggesting that you

1 had a choice, you could have sued in Ireland or you
2 can have sued here, and you chose to sue here?

3 MR. KRAMER: We believe that we sued both
4 here. The First Department disagreed, but that
5 wouldn't have changed the analysis under strict
6 liability, Your Honor. If we had succeeded in the
7 First Department in holding Ford Ireland liable here
8 - - -

9 JUDGE PIGOTT: But you need him here; you
10 want to - - - you want to sue him in New York.

11 MR. KRAMER: That's correct, Your Honor.

12 JUDGE PIGOTT: Right.

13 MR. KRAMER: We brought suit here, Mr.
14 Finerty was alive at the time in New York, as well as
15 his family, and he was - - -

16 JUDGE PIGOTT: But I mean, if you flipped
17 it, you know, Ford is a big company and we know
18 what's going on, but let's assume for a minute that
19 the - - - that instead of Ford, you want to sue some
20 German manufacturer of something; are we going to
21 find that our plaintiffs that are citizens in New
22 York are going to be required to sue in Germany
23 rather than here because we have now got
24 jurisprudence that said you sue the designer and not
25 the manufacturer?

1 MR. KRAMER: Well, if it - - - if the case
2 were along similar lines as here, where there was an
3 instance where a New York resident was exposed to
4 something, and due to latency period of that injury,
5 ended up here, and it was foreseeable to the company
6 than an injury would have manifested itself here, I
7 believe that, under Your Honor's scenario, there
8 would have been jurisdiction and they would've been
9 held liable here. Especially if, under the facts we
10 have here, there was direct involvement, and actually
11 going beyond design, but actually manufacturing and
12 having a hand on the product.

13 And to get back to one of my original
14 points, Your Honor, I think looking at the facts is
15 very key here, which is exactly what the First
16 Department did, it's exactly what the trial court
17 did, and it's exactly what other courts dealing with
18 these issues have done.

19 We're dealing with two products here, the
20 tractors that Mr. Finerty worked on as well as
21 vehicle parts, such as brakes. What the record
22 demonstrates is that Ford had a hand in
23 manufacturing; they were a manufacturer of the
24 tractors.

25 JUDGE STEIN: What did they do?

1 MR. KRAMER: They determined in the 1960s
2 that they were in essence competing with themselves
3 with their UK counterparts - - -

4 JUDGE STEIN: No, no, no, but what did they
5 actually do aside from acting as a parent acts?

6 MR. KRAMER: Certainly, Your Honor. They
7 actually went into a joint development with UK as the
8 engineers and the manufacturers of tractors and
9 tractor components. So much so, that worldwide
10 tractor manufacture occurred under the umbrella of
11 Ford U.S. So the facts plainly create a question of
12 fact as to whether or not Ford was the manufacturer
13 of the tractors. That leads us to the vehicle parts
14 that Mr. Finerty also dealt with.

15 JUDGE PIGOTT: But you need that, right;
16 you need the manufacturer part?

17 MR. KRAMER: An actual manufacturer?

18 JUDGE PIGOTT: Uh-huh.

19 MR. KRAMER: Rather than a distributor,
20 seller, or designer?

21 JUDGE PIGOTT: Does that - - - yeah.

22 MR. KRAMER: I don't believe so, Your
23 Honor.

24 JUDGE PIGOTT: If you sued this in Ireland,
25 would the standard of proof or anything be different?

1 MR. KRAMER: I'm not sure about Irish law,
2 but I could say that if it were under New York law,
3 both actors would have been part of the chain of
4 distribution, which is what strict liability is
5 developed for.

6 And to go back to what I was mentioning
7 about the actual vehicle parts. What Ford was doing
8 was instrumental in the design of their brake
9 systems. They put forward a brake system - - - and
10 that's what they called it - - - that could not have
11 used anything else but asbestos, which they knew, as
12 we will prove, was harmful at the time.

13 As late as 1987, Ford was one of the last
14 to remove asbestos from their braking systems, and
15 they note, and it's in the record, that they could
16 not do it under their design specifications, and
17 importantly, these design specifications were not
18 unique to American cars, but went into UK variants as
19 well, such as the Cortina, which is one of the cars
20 that Mr. Finerty mentions that he worked on.

21 Beyond even the design - - -

22 JUDGE ABDUS-SALAAM: But assuming all that
23 is true though, if it's a question of design
24 specifications, which is what your adversary claims
25 it is, then they are not manufacturing according to

1 MR. KRAMER: Indeed they did. That is
2 correct, Your Honor. They said that it had - - -

3 JUDGE STEIN: Where is that in the record?

4 MR. KRAMER: I believe it's 636; I will
5 confirm. It is a memo beginning on page - - - on the
6 record page 634, extending through to 639.

7 JUDGE STEIN: Okay, thank you.

8 MR. KRAMER: Wherein Ford specifies how
9 their brakes or how their parts are going to be
10 packaged, the labeling to be used, and they even go
11 so far as to say, look, if they are manufactured in
12 somewhere regional where there might be different
13 types of specifications - - - and they used the
14 example Mexico - - - then you have to say in small
15 letters, "Made in Mexico". But for everything else,
16 were there was uniform, common types of products - -
17 - and they used the example, Ford UK, in that very
18 memo - - - you don't have to specify it; you just
19 have to include the Ford logo, which Mr. Finerty had
20 recognized, and Ford genuine parts, which he also
21 recognized.

22 JUDGE PIGOTT: How far do you go with that?
23 If these same - - - you know, these same brakes are
24 used in a different - - - different manufacturer of
25 tractors, can you get Ford?

1 MR. KRAMER: If these same types of brakes
2 were specified as having to be used in Ford?

3 JUDGE PIGOTT: No, they just designed that
4 and said, this is the, you know, this is the A1 best
5 brake you can have for tractors, and so, some other
6 factor manufacture, Farmall or John Deere or
7 something say, hey, that's pretty good, let's use the
8 Ford design, is Ford then responsible if there is a
9 problem with John Deere?

10 MR. KRAMER: Absolutely, Your Honor. Under
11 our state's strict liability laws and products
12 liability, as long as they're a part of the chain of
13 distribution, putting a defective product into the
14 chain of commerce, then yes, they are on the hook.

15 JUDGE PIGOTT: I'm just talking design; I'm
16 wondering if, you know, you're in a car accident in a
17 Ford, can you sue Lincoln? I'm saying, you know they
18 are all the same and, you know, they use the same
19 brakes and they're - - - obviously Lincoln must have
20 had something to do with the design of the Ford, so I
21 want to sue Lincoln and Ford.

22 MR. KRAMER: Well, you raise an interesting
23 question, Your Honor, because as we've heard, the
24 appellant is saying that because the incident
25 occurred in the UK, it's really the UK's actions that

1 over them, but if that had happened, and if Ford UK
2 had decided, hey, look, we need to seek
3 indemnification from those higher up the chain who
4 actually had control, I believe under our law, as
5 Godoy puts out - - - points out, they would have had
6 the ability to do so.

7 JUDGE PIGOTT: Right. Okay.

8 MR. KRAMER: Which - - -

9 JUDGE STEIN: But is that the same as
10 strict lia - - - strict products liability from the
11 consumer, the indemnification cases?

12 MR. KRAMER: The indemnification, the
13 public policy behind it is, Your Honor. Because - -
14 -

15 JUDGE STEIN: Okay. But that's not
16 necessarily the same concept.

17 MR. KRAMER: Not necessarily the same, but
18 it goes to the same fact which is that at the end of
19 the day, our state wants to be able to change a
20 manufacturer's behavior in putting out harmful
21 products. And sometimes, the way to do that is
22 economically, which is why those lower on the chain
23 can go higher up in the chain to look for
24 indemnification.

25 JUDGE STEIN: Would you clarify for me - -

1 - going back to the package design, are you saying
2 that merely designing the package and telling Ford
3 UK, you must use one of these three or four packages,
4 that's part of - - - that's being in the chain of
5 distribution?

6 MR. KRAMER: Under the facts we have here,
7 Your Honor, that is one aspect of many facts showing
8 there are - - -

9 JUDGE STEIN: But would that be enough by
10 itself?

11 MR. KRAMER: I believe it would be, Your
12 Honor. That marketers, specifically, have been held
13 in the chain in the past, like in the Brumbaugh
14 decision, where the marketer was up a - - - a persona
15 named El, I believe, it was the E-L, who marketed the
16 faulty trash compactor that killed the gentleman who
17 was injured. But they were just the marketer and
18 they said, you know what, we were just the marketer,
19 we shouldn't be in the chain at all.

20 But the court there, I believe it was the
21 Third Department, said, no, as long as you had an
22 intimate hand, you are involved. Which also advances
23 our public policy, because what the courts in New
24 York are actually saying is, we will hold those in
25 the chain responsible as long as they're not

1 peripheral members.

2 Which goes exactly to what this court has
3 held in cases like Semenetz and Sukljian, where they
4 look at the facts and they determined that, you know
5 what, in certain instances, we're going to determine
6 that those actors are maybe a little outside the
7 chain. So in specific instances, they will be
8 outside, when it looked - - - when the facts
9 demonstrate an intimate involvement or a substantial
10 involvement, which is the language that the First
11 Department and Justice Heitler used, then yes, they
12 will be in the chain.

13 Which is entirely consistent with how
14 courts look at this around the country, specifically
15 the Promaulayko case, the Supreme Court of New
16 Jersey; the Torres case, which was the supreme Court
17 of Arizona, which dealt with almost an exactly
18 identical factual scenario where Goodyear U.S. was
19 claiming, as the parent of Goodyear UK, that they
20 should not be on the hook for defective tires. But
21 what the Supreme Court of Arizona determined there
22 was that based on the facts, once they delved in, it
23 was very apparent that Goodyear U.S. had an intimate
24 involvement with the design and how those tires were
25 manufactured.

1 JUDGE STEIN: Did they have the same strict
2 products liability law we have in New York?

3 MR. KRAMER: I believe they are relying on
4 402-a, I don't want to be quoted on that, but that's
5 my memory of the case.

6 Your Honors, I see my time is running out;
7 I believe that what the First Department found here
8 strongly adheres to both the case law in state and
9 our public policy; they're not in any way extending
10 or trying to develop any sort of aberration of our
11 products liability law. Therefore, the First
12 Department's decision should be upheld.

13 Thank you.

14 CHIEF JUDGE DIFIORE: Thank you.

15 Counselor.

16 MR. METLITSKY: Thank you, Your Honor.

17 Just a few points. First, the answer to the question
18 whether anybody has ever been held upstream from the
19 manufacturer in the state is no. In Godoy, as my
20 friend admitted, that was a distributor; they were
21 able to sue the manufacturer for indemnification up
22 the stream, but if the suggestion is that a parent
23 corporation is going to sue the manufacturer that's
24 also its subsidiary, that seems a little bit absurd.

25 Second, they're saying that Ford U.S.

1 itself was actually the manufacturer in this case.
2 We don't want to have a fight on the facts about
3 that. We agreed that that is required. If the court
4 wants to announce the rule that you have to be a
5 manufacturer and let the lower courts sort it out,
6 that's fine. But just to be clear, the whole premise
7 of the decision below is that Ford U.S. was not the
8 manufacturer; otherwise the best position to exert
9 pressure standard makes no sense. The whole idea is
10 that you're not exerting pressure on yourself; you're
11 exerting pressure on the party that is manufacturing
12 the products. Third - - -

13 JUDGE PIGOTT: How does that work, then, as
14 you say, you can - - - they could - - - they could
15 sue - - - Ford Ireland can sue Ford USA for
16 indemnification, but if you so dominate Ford Ireland,
17 they're never going to - - - they're not going to sue
18 you.

19 MR. METLITSKY: Well, if you so dominate
20 Ford Ireland, there is no distinction between the two
21 and you just hold the parent liable for the acts of
22 the subsidiary.

23 JUDGE PIGOTT: And isn't that what the
24 Appellate Division found?

25 MR. METLITSKY: No, the Appellate Division

1 expressively found that there was no veil piercing
2 here.

3 JUDGE PIGOTT: No what?

4 MR. METLITSKY: That was the whole - - -
5 That's - - - no veil piercing, that was the whole - -
6 -

7 JUDGE PIGOTT: No, no, no, I understand
8 that. But the question of how much influence Ford
9 USA had over Ford Ireland.

10 MR. METLITSKY: No, I don't think - - - I
11 don't think the court actually found anything about
12 the level of influence. What it - - - what it held
13 was that there was enough facts for a jury to
14 conclude - - -

15 JUDGE PIGOTT: Okay, all right.

16 MR. METLITSKY: - - - that Ford was in the
17 best position to exert pressure.

18 JUDGE PIGOTT: That's - - -

19 MR. METLITSKY: And our position is, that
20 is legally irrelevant because every parent
21 corporation - - -

22 CHIEF JUDGE DIFIORE: What's the purpose of
23 the requirements that Ford USA put oin the sub, with
24 respect to packaging, and labeling, and - - - what
25 was their end game there?

1 MR. METLITSKY: Oh, right, so that was
2 going to be my next point. If you look at the pages
3 in the record that my colleague is citing, those are
4 - - - this is a - - - Ford is - - - Ford U.S. is the
5 licensor of the trademark; this is a trademark
6 program. All it's saying is, here is what the, you
7 know, the label is supposed to look like. There is
8 not a word in there about anything else on the
9 package like the warnings, nor could there be.

10 Everybody that's been in a Duty-Free shop
11 knows that different jurisdictions require different
12 warnings. So there is no way that Ford U.S. is going
13 to say, your warnings have to look like this and they
14 can't have anything to do with asbestos or anything
15 else. All this is about is what the FOMOCO trademark
16 is supposed to look like.

17 And one further point. They say that if
18 this is a foreign manufactured product, it's not
19 supposed to have - - - you know, say, you know, where
20 it is manufactured. But if it's a - - - if it's - -
21 - on page 637, if it's a domestic manufactured
22 product, it says, product of Ford Motor Company; Ford
23 U.S. If it's manufactured something else, it doesn't
24 say anything, but as the Pennsylvania courts made
25 clear, Ford is not synonymous with Ford Motor

1 Company, the U.S. company. Fork UK is a huge
2 corporation that sells - - - you know, it was nine
3 billion pounds in revenue in 2011.

4 CHIEF JUDGE DIFIORE: Those requirements
5 aren't geared towards sales and - - -

6 MR. METLITSKY: Oh no, they are - - - just
7 like any trademark licensor is going to be able to
8 tell people how they can use their trademark, and not
9 just that, to police their operations; that's the
10 Lanham Act requirement, to make sure that the
11 products they're selling are the quality that the
12 trademark licensor is requiring. But no - - - every
13 court in this state to have considered the question
14 has made clear that trademark licensors that don't
15 sell the product are not liable because they don't
16 sell the product.

17 And just on one more - - - the last point,
18 this - - - the Torres case in Arizona. The question
19 was whether that case is consistent with this state's
20 law. The first thing that the court did, obviously,
21 was reject the rule in the restatement that products
22 liability only applies to manufacturers and sellers.

23 Here is what else it said. It said,
24 "Certainly the brain that so competently and
25 thoroughly directs the entire enterprise" - - - this

1 is the parent company, after holding there was no
2 veil piercing, "must be liable for the acts of its
3 appendages." That's the whole point, for the acts of
4 its subsidiaries.

5 In this case, they have already admitted
6 that they are not seeking to hold Ford U.S. liable
7 for the acts of Ford UK. And that admission, in our
8 view, should end the case, because the only acts that
9 were committed that could hold an entity subject to
10 product's liability are manufacturing and sale, which
11 Ford U.S. did not do.

12 CHIEF JUDGE DIFIORE: Thank you.

13 MR. METLITSKY: Thank you, Your Honor.

14 CHIEF JUDGE DIFIORE: Thank you.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Finerty v. Abex Corporation and Ford Motor Company, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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