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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION

TERWILLIGER,
Appellant,

NO. 36

-against-

BEAZER EAST, INC., et al. AND
HONEYWELL INTERNATIONAL INC.,
Respondent.

20 Eagle Street
Albany, New York
April 30, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 36, Matter of Eighth
3 Judicial District Asbestos Litigation. Counsel?

4 MR. LIPSITZ: Good afternoon, Your Honors. May
5 it please the court, my name is John Lipsitz, and I appear
6 today for the Estate of Donald Terwilliger.

7 Chief Judge, I'd like to reserve three minutes
8 for rebuttal, if that's all right?

9 CHIEF JUDGE DIFIORE: Did you say three, sir?

10 MR. LIPSITZ: Three, please.

11 CHIEF JUDGE DIFIORE: You may.

12 MR. LIPSITZ: We're here before this court on a
13 motion by respondent Honeywell for summary judgment.
14 Donald Terwilliger developed fatal lung cancer as a result
15 of breathing in toxic coke oven emissions, dust, and fumes
16 from coke ovens - - -

17 JUDGE FEINMAN: So let me ask you this, which is
18 this is a failure to warn claim, right?

19 MR. LIPSITZ: Correct.

20 JUDGE FEINMAN: And so we have to decide whether
21 this whole line of cases, failure to warn, strict product
22 liability, applies in this situation. What's the test that
23 you would use to figure that out?

24 MR. LIPSITZ: Well, Your Honor, I - - - I think
25 you'd have to go and look at a long line of cases,



1 beginning with this court's decision in 1852 in Thomas v.
2 Winchester, where the court said you have to look to the
3 nature of the business and the extent to which that
4 business involves the - - - the sale of things that can
5 cause harm - - - serious physical harm.

6 JUDGE STEIN: What if - - - what if it - - - what
7 if it involves two things, a - - - a product and a service?
8 Then - - - then what's the test? Do we do a weighing or -
9 - - or is it - - - I - - - I guess I - - - I see our
10 jurisprudence as looking more to the policies, the public
11 policy involved in strict product liability.

12 So I - - - I'm not sure exactly how you would - -
13 - how you would frame that.

14 MR. LIPSITZ: Your Honor, in this court's
15 decision in 1977 in the Milau case, you - - - the court
16 discussed the services - - - sale-services continuum. But
17 it did say with respect to cases involving personal injury,
18 that you do have to look to the public policies underlying
19 the application of - - - of product liability for a
20 manufacturer or seller's failure either to warn or because
21 they've sold a product that had a manufacturing defect or
22 design defect.

23 JUDGE STEIN: So here you have the seller is
24 providing something - - - we - - - we won't give it a label
25 right now - - - and the purchaser is a very sophisticated,



1 large producer of steel. Okay?

2 So in terms of our policies about, you know,
3 who's better able to - - - and - - - and as I understand
4 the record, Bethlehem was very involved in actually
5 designing all of this. So - - - so how - - - how do our
6 policies about who's better - - - who's in a better
7 position to - - - to determine and - - - and create a safe
8 thing?

9 MR. LIPSITZ: Two - - - two things, Your Honor -
10 - - at least two things. One is that I - - - I beg to
11 differ with you about the - - - the role played by
12 Bethlehem Steel. Yes, it was a big manufacturer of steel.
13 But every single element of the coke ovens that were sold
14 to Bethlehem Steel were designed, marketed, advertised, and
15 certain component parts actually manufactured, on the - - -
16 on Honeywell's, or rather Wilputte Coke Oven's own site.
17 And it was all sold.

18 And they - - - and there was a knowledge on the
19 part of - - - and this is - - - we're here on a motion for
20 summary judgment. So clearly - - -

21 JUDGE STEIN: So - - - so what did Honeywell's
22 engineers and all those people who approved plans and
23 disapproved plans, what did they do?

24 MR. LIPSITZ: All - - - all Bethlehem Steel's
25 people did was say we need so many coke ovens to meet our



1 production needs. There's nothing in this record which
2 indicates that Bethlehem Steel had a hand in developing the
3 automatic closing doors of the ovens, the heating elements
4 of the ovens, the pusher mechanism - - -

5 JUDGE RIVERA: But one - - - once - - - once it's
6 purchased, is there anyone else who can build it?

7 MR. LIPSITZ: The only company that - - - you
8 could only get a coke oven by going to one or - - - well,
9 two, really, coke oven sellers in the United States. There
10 was Koppers Company and there was Wilputte Coke Oven
11 Division.

12 So you really had no choice. I mean, that was
13 the market. They advertised. They competed with one
14 another. And Wilputte - - - Willpute Division - - - Coke
15 Oven Division sold lots of coke ovens to Bethlehem Steel.

16 JUDGE RIVERA: I'm saying you couldn't buy it
17 from one and then go to someone else for them to actually
18 put this together so that it functions in the way - - -

19 MR. LIPSITZ: I don't think there's any - - - any
20 evidence - - -

21 JUDGE RIVERA: Anticipating.

22 MR. LIPSITZ: - - - that that ever happened. I
23 mean, all the - - - all the technology was on the side of
24 the Wilputte Coke Oven Division. None of the technology
25 for - - -



1 JUDGE RIVERA: Would they sell it without, then,
2 putting it all together for use?

3 MR. LIPSITZ: No, it was actually proprietary.
4 In fact, in the contracts there's some terms that say look,
5 this is out - - - this is our technology; these are our - -
6 - this is our - - - our thing; this is what we sell. And
7 we don't want anybody infringing on our proprietary
8 information. They even went - - -

9 JUDGE FEINMAN: Well, they actually registered it
10 with the Patent and Trademark Office.

11 But the discussion so far is focusing on - - - on
12 the differences between Bethlehem and - - - and Honeywell
13 and - - - and so on. My concern is what about the third
14 party here who's the decedent and the plaintiff, and - - -
15 and what are the duties to that person?

16 And I guess I don't want that to get lost in this
17 discussion, because this other discussion is really about
18 an allocation, it seems to me, between the defendants and
19 less about whether this defendant had a duty to warn this
20 plaintiff.

21 MR. LIPSITZ: Can we get - - - Your Honor, that
22 brings us back, I think, to a case like Sprung, which was
23 decided in 2003. And in Sprung you had two sophisticated
24 parties. You had this seller of a retractable sheet-metal
25 device used at a - - -



1 JUDGE FEINMAN: Right, the - - - the floor that -
2 - -

3 MR. LIPSITZ: - - - floor and it was sold to, I
4 think General Motors, which was a sophisticated party. And
5 the court said well, even though there was some customized
6 nature of this article which was sold by a company in the
7 business of selling sheet metal, we're not going to decide
8 on this motion for summary judgment that you can't bring a
9 products liability case against - - -

10 JUDGE STEIN: Yes, but in Sprung, the customer
11 had nothing to do with retractable floors. It - - - it was
12 a turbine manufacturer. So it may have been a
13 sophisticated party, but not in the subject of - - - of the
14 injury-producing thing.

15 MR. LIPSITZ: Your Honor, if you search the
16 record, you will not find any indication that - - - other
17 than bald assertions - - - but you'll find no evidence that
18 Bethlehem Steel had any hand in designing any of the
19 constituent parts of the coke oven.

20 JUDGE FAHEY: Okay. Can we go back to the duty
21 to warn for a second, Mr. Lipsitz?

22 MR. LIPSITZ: Sure.

23 JUDGE FAHEY: How long did this - - - did the
24 deceased work there?:

25 MR. LIPSITZ: The deceased worked there beginning



1 in 1954. But in 1966 he was assigned to work as a laborer
2 in the coke oven.

3 JUDGE FAHEY: And how long did he work in the
4 coke ovens?

5 MR. LIPSITZ: Through the '90s.

6 JUDGE FAHEY: Through the '90s. Was there ever a
7 warning given to him that these hazardous emissions could
8 lead to physical damages or cancer?

9 MR. LIPSITZ: Yes, in - - - in the late - - -

10 JUDGE FAHEY: When was it?

11 MR. LIPSITZ: - - - '70s, pursuant to a
12 regulatory regime imposed by OSHA - - -

13 JUDGE FAHEY: Um-hum.

14 MR. LIPSITZ: - - - placards were put on the tops
15 of the ovens saying "cancer hazard".

16 JUDGE FAHEY: I see.

17 MR. LIPSITZ: And it could have been done - - -

18 JUDGE FAHEY: Were there respirators ever given
19 out there?

20 MR. LIPSITZ: Right, yes.

21 JUDGE FAHEY: Were there respirators?

22 MR. LIPSITZ: At a - - - at a certain point,
23 respirators were mandatory.

24 JUDGE FAHEY: I see. So - - - so it's about ten,
25 twelve years?



1 MR. LIPSITZ: Yes, around those - - - in that
2 neighborhood.

3 JUDGE FAHEY: He worked in the ovens without any
4 warning?

5 MR. LIPSITZ: That's correct.

6 JUDGE WILSON: Your fourth cause of action says
7 strict liability on its face, but the second one reads to
8 me like a neg - - - just a straight negligence claim. Am I
9 reading that correctly, or no?

10 MR. LIPSITZ: Your Honor, you're reading it
11 correctly. But the way the complaint was drafted, the
12 second cause of action and the fourth cause of action are
13 both really negligence-based product liability claims for
14 failure to warn. It was drafted so as to make sure there
15 was no question about it, so the word "strict" products
16 liability is used in the fourth.

17 But functionally speaking, in terms of the
18 policies underlying the - - - the imposition of a duty to
19 warn, they're the same.

20 JUDGE WILSON: Um-hum.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. LIPSITZ: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MS. GRAFFEO: Good afternoon. I'm Victoria
25 Graffeo, and along with my colleague Svetlana Ivy, we are



1 representing Honeywell, which was the predecessor to
2 Wilputte, that designed and built this coke oven battery in
3 Lackawanna.

4 JUDGE FAHEY: So let me ask this, counselor, is
5 there a difference between a coke oven and a coke oven
6 battery, for the purposes of this case? Does it make a
7 difference?

8 MS. GRAFFEO: I think for this case it doesn't,
9 Your Honor.

10 JUDGE FAHEY: Why is that?

11 MS. GRAFFEO: The coke - - - the coke oven itself
12 is not a functional object. It was - - -

13 JUDGE FAHEY: Well, the idea of a - - -

14 MS. GRAFFEO: - - - it was - - -

15 JUDGE FAHEY: - - - coke oven is - - -

16 MS. GRAFFEO: - - - it was brick walls that were
17 integral - - -

18 JUDGE FAHEY: Excuse me. The idea of a coke oven
19 is almost 6-, 700 years old. They - - - they forged steel
20 out of coke ovens in the 15/1400s, they were doing that.
21 So it's a machine that converts a product into a hardened
22 steel-type product.

23 So the battery itself is a combination of those
24 machines. I spent my life driving by Lackawanna Steel. So
25 that to me seems a difference in terms of the building



1 itself. And one seems to be either a process, you could
2 call it, or a machine for converting one thing into
3 another, or - - - and the second thing seems to be a
4 building that contains all of those things.

5 MS. GRAFFEO: The - - - if you look at page 9,
6 the illustration in our original brief, the coke ovens
7 don't contain any of the machinery. The machinery, which
8 is the piping and the heating units, are in the battery.
9 They're - - - the lower level is the underjet, and then the
10 piping is on the external to the actual coke ovens. The
11 coke oven itself - - - and there are seventy-six of them -
12 - - has no machinery in it at all.

13 But I don't think whether - - - I don't think
14 it's the size or whether this battery or coke oven is a
15 machine is the issue. I think that this court should
16 uphold the dichotomy that - - - for forty years that has
17 applied as to whether we're dealing with a sale or are we
18 dealing with a service.

19 JUDGE FAHEY: I see.

20 MS. GRAFFEO: Here - - -

21 JUDGE RIVERA: But what do you - - -

22 MS. GRAFFEO: - - - here - - -

23 JUDGE RIVERA: - - - what do you do - - -

24 MS. GRAFFEO: - - - we don't have - - -

25 JUDGE RIVERA: - - - but what do you do when the



1 commercial transaction is to purchase a - - - let's just
2 say a machine for purposes of this moment, for this
3 question, that can only be supplied by one particular
4 manufacturer, can only be installed by one particular
5 manufacturer?

6 MS. GRAFFEO: Well, it's really no different than
7 any other kind of specialized construction project. What
8 you had - - -

9 JUDGE RIVERA: Yeah, but at some point isn't
10 someone responsible - - - if, in fact, there has been a
11 breach of a duty to warn, who carries that duty?

12 MS. GRAFFEO: Well, in order to have a - - - a
13 failure to warn is just one - - -

14 JUDGE RIVERA: Yes.

15 MS. GRAFFEO: - - - of the three grounds for
16 product liability. You still need to have a manufactured
17 product. And our basic contention is that Wilputte was not
18 a manufacturer. They did not produce anything at a
19 Wilputte factory. This was a - - - this - - -

20 JUDGE RIVERA: Well, because it couldn't - - -

21 MS. GRAFFEO: - - - this - - -

22 JUDGE RIVERA: - - - have, but it - - -

23 MS. GRAFFEO: - - - this facility was completely
24 built on site.

25 JUDGE RIVERA: No, I understand, but because it



1 cannot be built at a factory and then brought over. You
2 have to build it on site. There's - - - it is unique, and
3 so these are case-by-case determinations.

4 MS. GRAFFEO: Well, I don't know if it's unique.
5 We have many commercial and industrial - - -

6 JUDGE FAHEY: But isn't the analogy in the case
7 laws to things like elevators, gas turbines? It's - - -
8 those are products that may be built on site as part of a
9 larger complex.

10 MS. GRAFFEO: Well, in the GE Turbine cases and
11 the elevator case, those were actually built at a
12 manufacturing facility - - -

13 JUDGE FAHEY: Well, some parts were - - -

14 MS. GRAFFEO: - - - and delivered.

15 JUDGE FAHEY: - - - and some parts weren't,
16 right?

17 MS. GRAFFEO: But I - - - I think the real issue
18 here is that the court has applied the test of whether it's
19 a predominantly service contract. And certainly when you
20 have these kinds of industrial facilities, the build - - -
21 the designers and builders acknowledge that the plaintiff
22 may have a remedy under - - -

23 JUDGE FEINMAN: Well - - -

24 MS. GRAFFEO: - - - professional - - -

25 JUDGE RIVERA: But under your rule - - -



1 MS. GRAFFEO: - - - malpractice.

2 JUDGE RIVERA: - - - under your rule, who, if
3 anyone, would have had a duty to alert the people who work
4 there of the carcinogens and the dangers?

5 MS. GRAFFEO: It would have been the em - - - the
6 employer. It would have been - - - it would have been
7 Bethlehem Steel.

8 JUDGE FEINMAN: So - - -

9 MS. GRAFFEO: Also they - - - they could have had
10 a negligence cause of action here.

11 JUDGE FEINMAN: If I may? Assuming for the
12 moment - - - and I'm not saying this is where it's going to
13 end up obviously - - - that it is a product, and if it is a
14 product, and - - - how do you then sort of fashion a rule
15 that doesn't allow this to be sort of applied in a broader
16 sense to like general contractors who may be building a
17 home or something of that nature?

18 MS. GRAFFEO: I don't think there should be a - -
19 - a different rule. I think the rule should be the
20 construction of a building or a commercial structure is not
21 subject to product liability where the designer or the
22 builder is performing under the terms - - -

23 JUDGE FEINMAN: So - - - so your rule is
24 dependent, then, on - - - on this product being deemed a
25 building or a structure?



1 MS. GRAFFEO: Yes. If - - - if you look at page
2 - - -

3 JUDGE WILSON: So are - - - are you - - -

4 MS. GRAFFEO: - - - if you look at the title of
5 the cover of the advertising material that the plaintiff
6 relies upon - - - it's in the record at 445 - - - Wilputte
7 immediately on the cover page says "designer and builder of
8 coal" whatever.

9 JUDGE WILSON: So how - - - how do you deal with
10 our decision in Inman v. Binghamton Housing Authority in
11 which we approvingly quote the Pennsylvania Supreme Court
12 for the proposition that "the principle inherent in the
13 McPherson v. Buick Motor Co. case and those that have
14 followed it cannot be made to depend upon the merely
15 technical distinction between a chattel and a structure
16 built upon the land"?

17 MS. GRAFFEO: If I could mention first, Inman is
18 1957.

19 JUDGE WILSON: Yes, it is.

20 MS. GRAFFEO: And so it's decades before Codling,
21 and in Codling was where we first - - - the court first
22 applied strict liability. So Inman was - - - they hadn't
23 even promulgated strict liability yet here at the Court of
24 Appeals.

25 So I think Inman is - - - is not really relevant



1 to the extent that it didn't contemplate strict liability.

2 I think - - - I think you have to look at the
3 fact that, as you see in Milau, as you see in Sprung, as
4 this court more recently indicated in Dummitt, there's very
5 distinct policy considerations between a manufacturer who
6 launches a product in the stream of commerce and
7 architects, engineering firms, and builders who construct
8 buildings.

9 JUDGE FAHEY: Right. So I understand your
10 distinction. It's a - - - it's a fair distinction to draw
11 - - - to draw. The problem with it is what you're asking
12 us to say is that coke ovens, when combined together,
13 constitute real property. That's the effect of your
14 ruling. That's the effect of the argument that you're
15 making.

16 And that argument itself seems to be undermined
17 by the real property law where in the real property law we
18 take things like - - - we classify boilers, heaters,
19 elevators, plumbing, a variety of objects that are all
20 considered part of real property, yet nonetheless, under
21 products liability law, they also constitute a definition
22 of product.

23 And so if I understand your argument correctly,
24 then, whenever property can be considered subsu - - -
25 subsumed within real proper - - - a product can be subsumed



1 within real property, it's no longer a product; it becomes
2 part of real property and therefore subject to that
3 sales/service distinction.

4 MS. GRAFFEO: I don't - - - I don't think the
5 Lackawanna case necessarily directs the result here. We're
6 not saying that it becomes real property.

7 JUDGE FAHEY: Um-hum.

8 MS. GRAFFEO: We're saying that this was the
9 performance of design and construction services to build a
10 building.

11 JUDGE FAHEY: Well, I - - - I understood your
12 ordinary-negligence argument to essentially be that, that
13 this was - - - this was designed that way and covered that
14 way, and it could be considered, perhaps, an action for
15 professional negligence, in some form, by an architect or
16 someone else.

17 MS. GRAFFEO: Yes.

18 JUDGE FAHEY: And that, to me, would constitute a
19 building. That - - - that's why I asked the question.

20 MS. GRAFFEO: Well, I think you also have to look
21 at the ramifications. I think that it's a very slippery
22 slope for this court to begin to say certain buildings
23 constitute a machine or a product and certain buildings
24 don't.

25 So if you're - - -



1 JUDGE FAHEY: Well, it's - - -

2 MS. GRAFFEO: - - - an engineering firm, and
3 you're designing a water treatment or a waste water plant,
4 I mean, these are single-function facilities that are built
5 on site. Does that engineering firm say we can't do - - -

6 JUDGE FAHEY: No, I think that's a good point.

7 MS. GRAFFEO: - - - this business anymore, we're
8 going to be - - -

9 JUDGE FAHEY: I think you make - - -

10 MS. GRAFFEO: - - - subjected - - -

11 JUDGE FAHEY: - - - a good point. But the
12 components themselves that make up that plant may, in and
13 of themselves, constitute a product. And that's what we're
14 talking about here. We're not talking about the battery;
15 we're talking about the oven. And - - -

16 MS. GRAFFEO: And I com - - -

17 JUDGE FAHEY: - - - it seems to be a clear
18 distinction and a logical one for us to look at.

19 MS. GRAFFEO: I completely agree with you, if the
20 plaintiff had designated any defective component.

21 JUDGE FAHEY: Um-hum.

22 MS. GRAFFEO: Because then, you're clearly within
23 your case law - - -

24 JUDGE FAHEY: The way I understand their argument
25 is - - -



1 MS. GRAFFEO: - - - for - - - for a defective
2 component.

3 JUDGE FAHEY: The way - - - the way I understand
4 their argument is the emissions from the component are - -
5 - are the source of the problem.

6 MS. GRAFFEO: But they still - - -

7 JUDGE FEINMAN: And it's a failure to warn - - -

8 MS. GRAFFEO: - - - the product lia - - -

9 JUDGE FEINMAN: - - - about that. It's not a
10 defective product design. It's not a defective design
11 claim, as I understood it.

12 MS. GRAFFEO: No, but even if - - - even failure
13 to warn requires, first of all, that you have a
14 manufacturer, and we're claiming - - -

15 JUDGE FEINMAN: You have the three - - -

16 MS. GRAFFEO: - - - Wilputte is an engineering -
17 - - a construction oversight company. But secondly, you
18 still need to identify a defective product component, and
19 they did not - - -

20 JUDGE WILSON: So if it had said, for example, if
21 they had said - - -

22 MS. GRAFFEO: - - - do that.

23 JUDGE WILSON: - - - the door was defective
24 because it allowed release, you'd be satisfied?

25 MS. GRAFFEO: That - - - that would have been



1 perfectly acceptable, yes. And that's what - - - that's
2 what the case law of this - - - of this court stands for.

3 And I think if you look at the best example of
4 this dichotomy and how it works, are the Trustees of
5 Columbia University case. In the Mitchell case, they said
6 yes, you've got - - - you have alleged a defective product,
7 that the panels on the building were defectively
8 manufactured.

9 But when the - - - when the same - - - I think
10 it's the same building - - - when the Siegel case came up,
11 they said there's no allegation of a defective component,
12 therefore it falls in the service category.

13 And I think that - - - you know, this is a clear
14 rule. This kind of bright-line rule is much easier for the
15 courts apply than a very ephemeral rule about whether or
16 not it's a process, is it a single-use building, is it a
17 machine, is it not a machine. It puts the courts at a - -
18 - at a real disadvantage - - - at a real disadvantage.

19 And I direct your attention to the amicus brief,
20 because I think - - - and it - - - you know, it was
21 submitted by various interests in the construction
22 industry, including a trade union. And it does create a
23 great deal of difficulty for them. It certainly undermines
24 what they expect they're getting into when they agree to
25 provide these - - - these services.



1 And the policy is so distinct - - - I'm sorry, my
2 red light is on.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 Counsel, what are you arguing are the defective
5 components?

6 MR. LIPSITZ: Your Honor, if you go to page 446
7 of the record, you'll see a description in a paragraph
8 written by Wilputte in its advertising brochure describing
9 the coke oven. And it has numerous constituent parts,
10 including doors, heating elements that are contained within
11 it, a pusher mechanism. The pusher mechanism, by the way,
12 it was actually manufactured on site at Wilputte's offices.

13 JUDGE WILSON: But why - - - but why shouldn't
14 you have to identify the part or parts that are causing the
15 injury?

16 MR. LIPSITZ: I - - - you know, that's a good
17 question, because I think our complaint is so clear. If
18 you look at the second and fourth causes of action, we're
19 not complaining about shoddy workmanship. We're not
20 complaining that they didn't build the bricks in a way that
21 a professional brick-builder would build them.

22 We're complaining about the fact that they knew
23 that if you - - - if you operate a coke oven, which is a -
24 - - a unit that is used to - - - to subject coal to very
25 high heat in an oxygen-deprived atmosphere, with mechanical



1 components that seal the doors and - - - and heat the - - -
2 and heat the internal - - - heat the inside, you're going
3 to emit cancer-causing fumes and dusts. It's called coke
4 oven emissions.

5 JUDGE FEINMAN: So in other words, it wasn't safe
6 when used as designed.

7 MR. LIPSITZ: When used as intended, it - - - it
8 caused death. That's the problem.

9 JUDGE WILSON: But one of - - - I mean, I'm
10 quoting from your - - - Count II - - - did not take
11 reasonable precautions in the design and manufacture.

12 MR. LIPSITZ: That's correct.

13 JUDGE WILSON: So what element - - - why not
14 specify the element - - - why shouldn't there be a rule
15 that you specify the elements of the design that cause the
16 injury?

17 MR. LIPSITZ: We have specified, Your Honor. As
18 - - - as - - - as humanly - - - close as humanly possible.
19 And again, we're on a motion for summary judgment. What
20 we're complaining about is the functioning coke oven. The
21 coke oven is a product.

22 JUDGE WILSON: Um-hum.

23 MR. LIPSITZ: It's sold in - - - seventy-six of
24 them at one time for a battery to Bethlehem Steel. If you
25 work on top of the - - - if you work - - - if you operate



1 these coke ovens, and you're not properly warned, and you
2 don't have the proper respiratory equipment, you're going
3 to breathe in fumes and - - - and dust, that this company,
4 which was the designer and did everything about it - - -
5 had all the proprietary equipment, had trademarks and
6 patents, they knew - - - they were in the best position to
7 warn.

8 Yes, Bethlehem Steel was a steel making company.
9 But you couldn't - - - Bethlehem Steel couldn't build coke
10 ovens or buy coke ovens. They had to go to an outside
11 vendor.

12 JUDGE RIVERA: Your - - - your case is not that
13 they could have built it in a way that's safe. This
14 industry is inherently dangerous. It's like the
15 cigarettes, right?

16 MR. LIPSITZ: You - - -

17 JUDGE RIVERA: Cigarettes, you want the warning
18 on the package so people know that if they indeed go down
19 this road this may result in cancer or some other disease,
20 but there's not a way - - - right - - - to - - - to make
21 that cigarette safe.

22 MR. LIPSITZ: The only way to safely operate a
23 coke oven, before the OSHA started a very sort of
24 comprehensive regulatory regime - - -

25 JUDGE RIVERA: Yes.



1 MR. LIPSITZ: - - - was if you were informed that
2 the dust and fumes were carcinogenic, and you must use
3 adequate respiratory protection. They never did that.

4 JUDGE RIVERA: Yes, to reduce the danger. But
5 the point is that you're in an environment that is effused
6 with carcinogens.

7 MR. LIPSITZ: Yes, but you could have protected
8 yourself. He could have protected himself.

9 JUDGE RIVERA: Which is - - - which is - - - but
10 that's my point. Your case is not anything other than they
11 should have told someone so that they could take those
12 precautions.

13 MR. LIPSITZ: Correct.

14 JUDGE RIVERA: As opposed to you have another way
15 that you could have built it that would not have put
16 carcinogens into the air?

17 MR. LIPSITZ: It's not a design defect. It's not
18 a manufacturing defect. We're not saying that they - - -
19 that they used poor workmanship to build the walls. They
20 knew what they were doing, and they didn't warn.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. LIPSITZ: Thank you.

23 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Eighth Judicial District Asbestors Litigation; Terwilliger v. Beazer East, Inc., et al. and Honeywell International, Inc., No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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