SHORT FORM ORDER

INDEX No. 99-28002
CAL. No. 05-03007-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-9-06 (#012)
1-30-06 (#013, 014, 015, 016)
ADJ. DATE 4-6-06
Mot. Seq. # 012 - MG
013 - MotD
014 - XMotD
015 - XMD
016 - XMD

PAUL BLACKBURN, Plaintiff, - against - WYSONG & MILES CO., H. WEISS & CO., AT MACHINERY CO. and STEIN INDUSTRIES, INC., Defendants.	SILBERSTEIN, AWAD & MIKLOS Attorneys for the Plaintiff 600 Old Country Road Garden City, New York 11530 JOSEPH C. SCIBILIA & ASSOC. Attorneys for Deft Wysong & Miles 100 N. Centre Avenue, Suite 302 Rockville Centre, New York 11570
WYSONG & MILES COMPANY, Third-Party Plaintiffs, - against - STEIN INDUSTRIES, INC., Third-Party Defendants.	KELLER, O'REILLY & WATSON Attorneys for Deft H. Weiss & Co. 242 Crossways Park West Woodbury, New York 11797 O'CONNOR, O'CONNOR, HINTZ & DEVENEY, LLP Attorney for Deft Stein Industries One Huntington Quadrangle, Suite 3C01 Melville, New York 11747

Upon the following papers numbered 1 to 107 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; 8 - 21; Notice of Cross Motion and supporting papers 22 - 29; 40 - 51; 52 - 63 ; Answering Affidavits and supporting papers 64 - 73; 74 - 76; 77 - 80; 81 - 82; Replying Affidavits and supporting papers 83 - 95; 96 - 97; 98 - 99; 100 - 101; 102 - 105; 106 - 107; Other _____; (~~and after hearing counsel in support and opposed~~

~~to the motion~~) it is,

ORDERED that the renewed motion (#012) by defendant Stein Industries, Inc., seeking an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is granted; and it is further

ORDERED that the motion (#013) by defendant/third-party plaintiff Wysong & Miles Company seeking an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as well as any cross claims against it, is granted as to plaintiff's breach of warranty claim and is otherwise denied; and it is further

ORDERED that the cross motion (#014) by defendant H. Weiss & Co. seeking an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint as well as any cross claims against it, is granted as to plaintiff's breach of warranty claim and is otherwise denied; and it is further

ORDERED that the cross motion (#015) by plaintiff seeking an Order pursuant to CPLR 3212 granting summary judgment as against defendant H. Weiss & Co.; seeking to preclude H. Weiss & Co. from utilizing the limited liability provided by CPLR 1601; and seeking leave to amend the complaint to allege such preclusion, is denied; and it is further

ORDERED that the cross motion (#016) by plaintiff seeking an Order pursuant to CPLR 3212 granting summary judgment as against defendant Wysong & Miles Company; seeking to preclude Wysong & Miles Company from utilizing the limited liability provided by CPLR 1601; and seeking leave to amend the complaint to allege such preclusion, is denied.

Plaintiff commenced this action sounding in negligence, products liability and breach of warranty for injuries he sustained in a work accident on May 21, 1999. At the time of his accident plaintiff was operating a press brake machine at the facility owned by his employer, defendant Stein Industries, Inc. (hereafter Stein). The machine was manufactured by defendant Wysong and Miles Co. (hereafter Wysong) in 1975 and distributed by defendant H. Weiss & Co. (hereafter Weiss). The machine is a general purpose mechanical press brake capable of bending metal into a variety of configurations when placed on the table underneath a ram, which is capable of producing 55 tons of force. The machine was activated via a foot pedal. The place at which the ram compresses the metal into the required shape is called the "point of operation."

By letter dated July 28, 1998, OSHA (Occupational Health and Safety Administration of the U.S. Dept. of Labor) notified plaintiff's employer, Stein Industries, Inc., that OSHA had received notice of safety hazards at Stein's worksite. It stated that the machine at issue, among others, was inadequately guarded and OSHA suggested consultation services with the N.Y. OSHA office. OSHA requested that Stein post a copy of the letter where it would be readily accessible to all employees and required the return of a signed certificate of posting. By letter

dated August 3, 1998 Stein responded that the posting would remain until the matter was corrected and that it had requested consultation with the N.Y. OSHA department. By letter dated September 1, 1998 Stein confirmed that the press had been taken out of service and electrically isolated until Stein could decide whether to install light curtains or replace the machine with one that complied with the required safety stipulation. Stein's attorneys, by letters dated October 5th and 25th of 1998, repeated that the machine was taken out of service and would remain so. Despite these representations to OSHA, Stein's chief metal foreman testified at his examination before trial that he asked about use of the machine and was told it was OK to use, and Stein's machine shop supervisor testified that he was never told that the machine was not to be used and did not recall that its monthly maintenance was interrupted.

Plaintiff is a trained and experienced metal worker and came from his native country, England, to New York to work for Stein in April 1999.[1] Plaintiff testified at this examination before trial that he, as well as other employees, were directed to use and did use the press brake before his accident on May 21st. He stated that his supervisor had told him what was needed for this particular piece the night before, and that on the day of his accident, although the press brake machine had many decals on it, there was no sign that it should not be used. He tooled the machine for the specific fabrication he was directed to make, and he held the metal up against the back stop, depressed the pedal, and brought the ram down. He then brought the ram back up and turned the steel around and depressed the pedal again. However, the steel slipped, along with his hands, and the ram came down crushing his hands and injuring and amputating portions of nine of his fingers. The metal piece, three and a quarter inches wide, three to four feet long and very thin, was too small to leave on its own, it wasn't big enough to balance itself, and that is why he had to hold it up against the back stop.

The determination that the partial amputation and injury of nine of plaintiff's fingers did not constitute a "grave injury" for the purposes of the Workers' Compensation Law (Order dated 2-23-03, Underwood, J.) was affirmed by the Appellate Division in ***Blackburn v Wysong,*** 11 AD3d 421, 783 NYS2d 609 (2004). Since plaintiff accepted Workers' Compensation benefits, his remaining cause of action against his employer is based upon a theory of intentional tort. After plaintiff's accident, OSHA accused Stein of, among other things, wilfully violating OSHA's machine-guarding standard by failing to provide point of operation guards on the press brake and also a failure-to-abate. A willful violation is defined by OSHA as one committed with an intentional disregard for, or plain indifference to, the requirements of the OSHA act and regulations. A failure to abate is a notice of additional penalty issued against an employer who has failed to correct a violation which has become a final order of the Occupational Safety and Health Review Commission. The proposed penalties of $152,750 were reduced to $105,650 by

---

[1] Plaintiff testified that at all times while fabricating metal in England the press brake machines he used were equipped with light curtains and/or other guards. It was not until he came to New York and worked for Stein that he was directed to work on a press brake without safety equipment.

settlement dated March 31, 2000. Stein states that the remaining claim against it is one for intentional tort, and now moves for summary judgment dismissing plaintiff's complaint.[2]

"While an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege an intentional or deliberate act by the employer directed at causing harm to this particular employee" (***McNally v Posterloid Corp.,*** 15 AD3d 456, 789 NYS2d 445 [2005] *ln denied* 6 NY3d 701, 810 NYS2d 415 [2995]; ***Fucile v Grand Union Co.***, 270 AD2d 227, 228, 705 NYS2d 377 [2000], quoting ***Mylroie v GAF Corp.***, 81 AD2d 994, 995, 440 NYS2d 67 [1981], *affd* 55 NY2d 893, 449 NYS2d 21 [1982]). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury" (***Acevedo v Consolidated Edison Co. of N.Y.***, 189 AD2d 497, 501, 596 NYS2d 68 [1993], quoting ***Finch v Swingly***, 42 AD2d 1035, 348 NYS2d 266 [1973]). Here, plaintiff alleges that his employer, while knowing that OSHA had determined that the press brake machine was dangerous in the absence of additional safety equipment and should not be used, and while assuring OSHA that the machine was not in service, nevertheless directed plaintiff to use it without adding any safety guards. However, allegations that an employer negligently exposed an employee to a substantial risk of injury have been held insufficient to circumvent the exclusivity of the remedy provided by the Workers Compensation Law (***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88 [2005]; ***Gagliardi v Trapp***, 221 AD2d 315, 316, 633 NYS2d 387 [1995]). Accordingly, the Court finds that plaintiff has not established an intentional tort on the part of defendant Stein Industries, Inc., and the complaint is dismissed as to it.

Plaintiff's Negligence and Strict Products Liability Claims

The gravamen of the plaintiff's claims against defendants Wysong and Weiss is that the press brake, manufactured and placed into the stream of commerce in 1975, was not fitted with any safety devices to protect the operator from coming into contact with the point of operation moving parts even though in 1975 safety devices were available which were designed to protect an operator's hands during operation. Plaintiff's expert states that these safety devices included point of operation barrier guards, presence-sensing devices (electric eye or 'light curtains'), two-hand control devices, interlocked moveable barrier gates, pullback devices, and wrist restraints (which can be utilized irrespective of the shape of metal being worked on). His expert also states that pursuant to 12 NYCRR 19, in effect in 1975, New York required, at §19.8, that press brakes sold in this State have point of operation guards. Also, OSHA, established in 1970, required point of operation guards. Therefore, the machine was not reasonably safe for its usual, customary and normal use, and in May of 1999 the machine was defective and unreasonably

---

[2] Although not nominated as such, Stein's motion seeks renewal of its prior motion for summary judgment which Justice Whelan, by Order dated September 26, 2005, denied with leave to renew upon completion of discovery.

dangerous for its intended use. The presence of any one of the safety devices would have prevented plaintiff's serious and life-altering injuries and the absence thereof was a proximate cause of his injuries.

It is well settled that a manufacturer is under a nondelegable duty to design and produce a product that is not defective (*see*, ***Denny v Ford Motor Co.,*** 87 NY2d 248, 639 NYS2d 250 [1995]; ***Sage v Fairchild-Swearingen Corp.***, 70 NY2d 579, 523 NYS2d 418 [1987]) and that a defectively designed product is one which is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use (*see*, ***Robinson v Reed-Prentice Div. of Package Mach. Co.,*** 49 NY2d 471, 426 NYS2d 717 [1980]). One must balance the possibility of harm against the burden of preventing the harm in order to determine whether a product was defectively designed (***Sage v Fairchild-Swearingen Corp.*** *supra* at 586). In order to prove a prima facie case in strict products liability for design defects, a plaintiff must show that the manufacturer breached a duty to market a safe product when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing the plaintiff's injury (*see*, ***Voss v Black & Decker Mfg. Co.,*** 59 NY2d 102, 107, 463 NYS2d 398 [1983]; ***DeMatteo v Big V Supermarkets***, 204 AD2d 932, 611 NYS2d 970 [1994]). Distributors and retailers of defective products, as well as manufacturers, may be subject to potential strict products liability (*see,* ***Giuffrida v Panasonic Indus. Co.,*** 200 AD2d 713, 607 NYS2d 72 [1994]; ***Bielicki v T.J. Bentey*** 248 AD2d 657, 670 NYS2d 585 [1998]).

To prevail on a cause of action sounding in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect and make a prima facie showing that the balance of certain "risk-utility factors" weighs in his favor (***Giunta v Delta Intl. Mach.***, 300 AD2d 350, 352, 353, 751 NYS2d 512 [2002]); ***Fallon v Clifford B. Hannay & Son***, 153 AD2d 95, 99, 550 NYS2d 135 [1989]). These factors include (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes (***Denny v Ford Motor Co.***, *supra*; ***Scarangella v Thomas Built Buses***, 93 NY2d 655, 659, 695 NYS2d 520 [1999]).

Defendant Wysong states that the press brake, manufactured by it in 1975, being a general purpose machine, was not sold with any particular tooling, and was not equipped with point of operation guards. However, Wysong recognized that the machine needed to be guarded and instruction manuals and subsequent literature acknowledged same, and various stickers were placed on the machine, including a warning that the operator should make sure that no part of his body was underneath the ram. The machine was sold to its end-user through a distributor, here co-defendant H. Weiss & Sons, Inc. (Weiss). This particular machine was not sold directly to

Stein, Stein purchased it sometime in the late 70's or early 80's from a non-party. "Just as the end-user would separately purchase the various dies to be attached to the ram to form the metal to whatever purpose the user required, the user also was required to purchase guards to effectively guard the machine and put the machine to the use the user intended." Beginning in 1973, Wysong was aware of various optional safety features such a light curtains or mechanical safety guards. However, it argues that "ANSI"[3] did not mandate a safety feature concerning the point of operation which the manufacturer was to install because the manufacturer could not know how the machine was to be used and, under certain conditions a point of operation guards of any kind would not work.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). To meet their initial burden on their motions, defendants were required to present evidence in admissible form demonstrating that plaintiff's injuries were not caused by a defect in the press brake (***Wojcik v Empire Forklift***, 14 AD3d 63, 65, 783 NYS2d 698 [2004]; ***Graham v Walter S. Pratt & Sons,*** 271 AD2d 854, 854, 706 NYS2d 242 [2000]; ***Peris v Western Regional Off-Track Betting Corp.***, 255 AD2d 899, 899-900, 680 NYS2d 346 [1998]). Here, the thrust of Wysong's motion for summary judgment is that the press, as manufactured in 1975 was "state of the art" and responsibility for installing guards or light curtains belonged with the end-user, plaintiff's employer. However, where, as here, a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that is it feasible to do so, it is usually for the jury to make the required risk-utility analysis (***Wengenroth v Formula Equip. Leasing***, 11 AD3d 677, 679-680, 784 NYS2d 123 [2004]; ***Milazzo v Premium Tech. Servs. Corp.,*** 7 AD3d 586, 777 NYS2d 167 [2004]; ***Chien Hoang v ICM Corp.***, 285 AD2d 971, 727 NYS2d 840 [2001]). While the finder of fact may ultimately agree with defendant's assessment, this risk-utility analysis is inappropriate for determination on summary judgment (***Brooks v Outboard Marine Corp.,*** 234 F3d 89 [2000]; ***Wengenroth v Formula Equip. Leasing***, *supra*; ***Milazzo v Premium Tech. Servs. Corp.,*** *supra*; ***Chien Hoang v ICM Corp,*** *supra*).

In a case remarkably similar to the instant scenario, ***Sawyer v Dreis & Krump Mfg. Co.,*** 67 NY2d 328, 502 NYS2d 696 (1986) the defendant manufactured a general use press used to bend and shape metal. The press did not come equipped with "point of operation" guards and the manufacturer argued that it would be impractical to equip the machine with such guards because

---

[3] The American National Standards Institute is an industry-funded organization which publishes standards which have been used to establish custom and use in the industry but are not conclusive as to whether the manufacturer's conduct was negligent (***Kahn v Bangla Motor & Body Shop,*** __ AD3d __, 813 NYS2d 126 [2006]; ***Church v Trippe Mfg.,*** 2005 U.S. Dist. LEXIS 33363 [SDNY]; ***Sawyer v Dreis & Krump Mfg.. Co.,*** *infra*).

the press could perform many functions, a number of which would require different guards. Hence, the obligation to purchase guards, the manufacturer argued, was the purchaser's because it knew what function the press would be performing. As here, that defendant manufacturer offered proof that the custom in the press manufacturing industry, as indicated by "ANSI" standards adopted by private industry members, was to rely on purchasers to install such guards. However, in ***Sawyer*** the Court of Appeals held that such evidence does not establish a lack of liability as a matter of law. Rather, with a proper foundation such proof may be admissible and considered by the jury but it was not conclusive as to whether there was any negligence on the manufacturer's part in relying on purchasers to install safety guards. A similar finding was had by the Second Circuit in ***Jiminez v Dreis & Krump Mfg. Co.,***736 F2d 51 (1984), which, in applying New York law, held that the decision to rely on the press purchaser to install point of operation guards may be sound under a given set of facts, however such determination was a jury question precluding summary judgment (*see also,* 1 Weinberger, New York Products Liability § 21:18 Failure to Purchase Safety Devices).

Wysong also argues that even if questions of fact remain concerning whether or not this particular product was defective when designed, the willful action of plaintiff's employer, Stein, in either putting the machine back in operation or never removing it from operation, in contravention of its representation to OSHA, severs any causal nexus between the alleged product defect in 1975 and plaintiff's accident in 1999. Had Stein abided by its own representations to OSHA, the machine would not have been used by any employee and plaintiff would not have had the opportunity to place his hands into the point of operation. Plaintiff, as an experienced metal worker, knew and understood not to place to place his hand into the point of operation. Therefore, Wysong argues that the superceding intervening and unforeseeable actions of Stein, as well as the actions of plaintiff himself, "break any casual nexus that plaintiff might otherwise establish between the design and manufacture of the machine in 1975, and the injuries sustained by plaintiff in 1999."

Defendant H. Weiss & Co. (Weiss), the distributor for Wysong's machine cross-moves for summary judgment dismissing the complaint on essentially identical arguments as Wysong. In addition it argues that it is inconceivable, unforeseeable, outrageous, and extraordinary that Stein would intentionally disregard OSHA's directives and continue to have its employees use the subject brake press without proper guarding, especially in light of Stein's representations to OSHA that the machine was taken out of service.

"An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (***Kush v City of Buffalo***, 59 NY2d 26, 32-33, 465 NYS2d 831 [1983]; ***Gordon v Eastern Ry. Supply,*** 82 NY2d 555, 562, 606 NYS2d 127 [1993]; ***Rosenbaum v Camps Rov Tov***, 285 AD2d 894, 895, 727 NYS2d 553 [2001]; ***Holloway v Willette Corp. of***

N.J., 280 AD2d 876, 878, 720 NYS2d 646 [2001]). Foreseeability is the touchstone of this analysis (***Kriz v Schum***, 75 NY2d 25, 34, 550 NYS2d 584 [1989]; ***Rapp v Zandri Constr. Corp.***, 165 AD2d 639, 643, 569 NYS2d 994 [1991]) and, "because questions concerning what is foreseeable . . . may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 314-315, 434 NYS2d 166 [1980]; ***Litts v Best Kingston Gen. Rental***, 7 AD3d 949, 951, 777 NYS2d 556 [2004]).

The inquiry here is whether Stein's conduct constituted an intervening cause, and if so, whether it speaks to apportionment of liability or to a potential finding of no liability. Following the general rule, the nature of such intervening conduct, unless Stein's conduct was, as a matter of law, extraordinary under the circumstances, not foreseeable in the normal course of event, or independent or far removed for the original negligence, is a question of fact to be resolved by the jury (***Grant v Westinghouse Elec. Corp.,*** 877 F. Supp 806 [1995]; ***Schafer v Standard Railway Fusee Corp.,*** 200 AD2d 564,565, 606 NYS2d 332 [1994]; ***Nutting v Ford Motor Co.,*** 180 AD2d 122, 131, 584 NYS2d 653 [1992]).

For example, in ***Lavoie v Pacific Press & Shear Co.,*** 975 F2d 48 [1992], the Second Circuit (interpreting Vermont products liability law which appears to be similar to New York law on this issue), held that the intervening cause presented was a jury question. Those facts, also somewhat similar to the instant scenario, were that the press brake manufacturer did not equip it with a safety light curtain or other safety equipment and that, although the employer had installed the light curtain after purchasing the machine, a fellow employee had disengaged it, making the accident possible. The nature of the intervening cause was left to the jury. The Court upheld the jury's determination that the manufacturer's original negligence was not merely a contribution to the accident but was the proximate cause of plaintiff's injuries, and the failure of the employer to retrofit the press brake and the failure of the plaintiff's coworkers to turn on the light curtain were not sufficient intervening proximate causes.

Here, the Court finds that the instant scenario is not one in which "only one conclusion may be drawn from the established facts" and " the question of legal cause may be decided as a matter of law" (***Derdiarian v Felix Contr. Corp.***, *supra* at 315; ***Billsborrow v Dow Chemical, U.S.A.,*** 177 AD2d 7, 17-18, 579 NYS2d 728 [1992]).[4] Accordingly, so much of defendants'

---

[4] The Court has considered the holding in ***Beninati v Yamaha Motor Co.,*** 178 Misc2d 941, 680 NYS2d 793 [1998], relied upon by defendants, and finds it unavailing. In ***Beninati,*** the manufacturer entered into a consent decree with the US Dept. of Justice which required it to use its best efforts to ensure that the particular ATV engine be used *only* by those aged 16 and over. To that end, the manufacturer directed its dealers to comply and had specific written warnings accompany each sale, to be read and initialed by the purchaser. However, when the subject ATV was purchased, the injured plaintiff was 12 years old, and 13 years old when he was injured. There, the Supreme Court Nassau County (Bucaria, J.) found that the reckless conduct of the dealer, in selling the ATV and the plaintiff's (injured plaintiff's mother) act in purchasing the ATV, both with full knowledge that it should not be

motions which seek to dismiss plaintiff's strict products liability cause of action, is denied, and so much of plaintiff's motions which also seek summary judgment is correspondingly denied.

As to plaintiff's claim for breach of warranty, such cause of action is clearly barred by the four-year statute of limitations (*see,* UCC §2-725; ***Heller v U.S. Suzuki Motor Corp.,*** 64 NY2d 407, 411-412, 488 NYS2d 132 [1985]; ***Koss v Leach Co.,*** 6 AD3d 655, 776 NYS2d 590 [2004]). Further, plaintiff has not opposed dismissal of this cause of action. Accordingly, plaintiff's second cause of action sounding in breach of warranty is dismissed as to all defendants.

Finally, plaintiff's requests relative to CPLR Article 16 (1602[4]) appear to misconstrue the statute. Since the Appellate Division has affirmed that plaintiff has not suffered a grave injury, and in the absence of any pre-accident agreement to indemnify, the co-defendants are unable to seek indemnification or contribution from plaintiff's employer, Stein, notwithstanding its conduct (Worker's Compensation Law §11; ***Majewski v Broadalbin-Perth Cent. Sch. Dist.,*** 91 NY2d 577, 673 NYS2d 966 [1998]). "In other words, no apportionment is to be made with respect to the employer's conduct" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §1601:4, Shares of Nonparties: Workers' Compensation Cases p 608). Further, plaintiff has offered no statutory or case law authority to support the inapplicability of CPLR 1604 as to the two remaining defendants. Accordingly, plaintiff's motions are denied.

Dated: JUN 07 2006

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

---

operated by a minor who cannot reach the controls properly, was an intervening act sufficient to break any causal nexus attributable to the manufacturer. Here however, the foreseeability issue cannot be decided as a matter of law. Whether the manufacturer is able to pass all responsibility for safety devices to the end-user remains a function of the risk-utility analysis for the jury, as does the foreseeability that an end-user would simply choose to install no safety devices at all, notwithstanding it's representations to the contrary to OSHA. Further, in ***Beninati*** the plaintiff's conduct in misusing the ATV was also culpable, no such claim of misuse can be made here. Also unavailing is defendants' reliance on the holding in ***Broadie v General Motors Corp.,*** 216 AD2d 507, 628 NYS2d 403 [1995], where the decedent, an experienced auto mechanic, was not using the subject car jack as intended. Here, there is no question that plaintiff was using the press brake as intended.