At an IAS Term, Part SCP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of March, 2008.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

----------X

RICHARD YOUNG,
Plaintiff,

- against - Index No. 20857/04

ARA DAGLIAN ET ANO.,
Defendants.

----------X

The following papers numbered 1 to 3 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Richard Young (plaintiff) moves, pursuant to CPLR 2221(d), for an order granting reargument of the motion underlying this court's order, dated July 20, 2007, which awarded summary judgment to defendant Products Finishing Corporation (PFC or defendant), and upon reargument, denying defendant's motion for summary judgment.

Plaintiff commenced the instant action to recover damages for personal injuries allegedly sustained on July 18, 2001 when a bungee cord he was using on a luggage cart struck him in the eye. The facts, as stated in this court's underlying decision and order dated July 20, 2007, are as follows:

> "Sometime in 1999, defendant Ara Daglian (Daglian) purchased a portable folding luggage cart (the cart), which was manufactured by PFC, and sold to [Mr.] Daglian by Staples. PFC, which, according to its president, Richard Esposito (Esposito), began distributing luggage carts in the early 1970's, manufactured and distributed several different models of luggage carts up to the present. Daglian purchased model number 700.
>
> At the time of its purchase, the cart, for the purpose of securing its load, was equipped with its own hookless strapping system. Additionally, it came with packaging which contained instructions, warranty and component replacement information, the company's phone number and web site, and a warning that, in substance, advised that the use of bungee "straps" (also referred to in the papers as bungee cords) could be dangerous, that face and eye injuries could result, and that hooks and other foreign objects should not be attached to bungee straps. This information was printed on 100 weight glossy paper or cardboard, and was secured to the cart by being wrapped around a rod near the wheel guard and stapled to itself.
>
> At his deposition, Daglian testified that a year after purchasing the cart, he replaced the original strap with a bungee cord which he had purchased from Home Depot. He further testified that he did not attempt to contact PFC or ask anyone at Home Depot about what type of strap to use before deciding to use a bungee cord with the cart, nor did he look to see if there were any warnings from PFC regarding attaching hooks or foreign objects thereto. According to his testimony, there were warnings

regarding the use of the bungee cord, which were permanently attached to the bungee cord.[1]

On June 18, 2001, plaintiff went to the apartment that had belonged to the recently-deceased mother of his then girlfriend, Lisa Daglian, in order to help remove furniture and other items. According to plaintiff's deposition testimony,[2] Daglian brought two luggage carts with him to the apartment and placed them near the entrance of the apartment. Both carts were equipped with bungee-type cords with hooks. Daglian did not give plaintiff or his daughter Lisa any instructions on how to use the carts.

Plaintiff testified that he had used similar carts, equipped with similar cords, in the past, and that he had an understanding that a bungee cord would snap back if stretched while not firmly attached to the cart. He commenced the project with one cart, but was forced to use the second after the bungee cord on the first cart broke. According to his testimony, immediately before the accident, one end of the bungee cord was under boxes and the other end was out and lying in front of the cart. Plaintiff added one or two more boxes to the cart and then began to secure the boxes to the cart. He bent down, picked up the end of the bungee cord that was lying in front of the cart, pulled it around and over the middle of the boxes and moved toward the back of the cart with the end of the cord in his hand. He did not check to see if the hook at the end of the bungee cord under the boxes was actually affixed to the cart. Before plaintiff could affix the end of the bungee cord that was in his hand to the cart, the other end of the bungee cord came out from under the boxes and struck him in the eye, causing serious injury. According to his testimony, plaintiff learned that the bungee cord was a replacement for one which would have had one end attached to

---

[1] Plaintiff testified that after the accident, he learned that instructions or warnings were attached to the bungee cord, but that he did not see the tag on the date of the accident.

[2] Plaintiff testified at two depositions–the first took place on March 13, 2003, and the second on August 24, 2005.

> the cart, but that he had no idea that there was any danger involved if a bungee cord was not firmly attached to the cart.
>
> Plaintiff commenced the instant lawsuit by filing a verified complaint dated June 30, 2004. On July 28, 2004, PFC joined issue by serving a verified answer in which it denied all wrongdoing and asserted affirmative defenses.[3]
>
> On or about November 9, 2004, plaintiff served a bill of particulars in which, in substance, he claimed that PFC created a dangerous condition by failing to affix a permanent label to its cart warning consumers against replacing the manufacturer's strapping system with a bungee cord that used plastic or metal hooks.

On or about September 8, 2006, PFC moved for summary judgment dismissing plaintiff's complaint and all cross claims insofar as asserted against it. In support of its motion, PFC argued that: 1) it was not obligated to provide warnings about any alleged danger that was posed by a product manufactured by another company; 2) it had no duty to warn consumers against using a bungee cord with its cart because consumers, including plaintiff, were well aware of how a bungee cord worked and any alleged dangers posed by the bungee cord were open and obvious; and 3) plaintiff had not and could not establish that there was ever a duty for it to warn against using a bungee cord with its cart or that any lack of warning was the proximate cause of his accident.

In opposition to defendant's motion, plaintiff argued that issues of fact existed which warranted denial of summary judgment. Specifically, plaintiff asserted, among other things,

---

[3] On or about November 11, 2004, plaintiff's first action, in which he sued Daglian, was consolidated with that against PFC.

that: 1) the cart which he used on the day of his accident was defective since it lacked warnings of the dangers the cart posed if used with a bungee cord with hooks; 2) that despite PFC's knowledge of the danger posed by the use of its cart with bungee cords, and that purchasers of its carts did not read and even threw out, the packaging information with warnings that came with its carts, PFC sold carts with hookless loop straps that were known to wear out, without warnings on the carts advising not to replace those hookless straps with bungee cords; and 3) that PFC distorted plaintiff's testimony regarding his previous use of similar carts and bungee cords. In his memorandum of law, plaintiff argued that: 1) PFC had a duty to warn of the dangerous character of their luggage cart when used with a bungee cord with hooks, and that it was reasonably foreseeable to PFC that its hookless strap luggage carts would be used with bungee cords with hooks; that PFC had a duty to warn its hookless strap luggage cart users; that plaintiff was entitled to the presumption that he would have heeded product warnings had they been provided; and that it was a question of fact as to whether the danger of using a bungee cord with hooks with the luggage cart was open and obvious to plaintiff.

Plaintiff also submitted his own affidavit in which he disputed defendant's characterization of his deposition testimony. In addition, he stated that it was not until after his accident that he first learned that a bungee cord should always be securely attached to the luggage cart; that he had no knowledge of the dangers associated with the use of the bungee cord with hooks when used on a luggage cart; that while he testified that at the time of the

accident, he presumed the cord, if stretched, would snap if not firmly attached to the cart, he did not testify that he knew the cord would snap back at him; that he had never seen a tag with warnings on it on the bungee cord on the day of the accident or on any other bungee cords he had used on luggage carts before his accident; that had he known he was at risk of permanent eye damage by one of the hooks on the bungee cord, he would never have used the subject cord and cart that day; and that if the cart had a warning on it in a conspicuous place, he would not have used the cart without the bungee cord being securely attached thereto.

Plaintiff also submitted the affidavit of his expert, Mr. Barnett, who opined, among other things, that while the subject cart was made of robust materials, the original elastic strap that came with it was made of a material whose life expectancy was less than the life expectancy of the cart; that as such, it was reasonably foreseeable that the elastic strap would be replaced during the lifetime of the cart; that because of the nature of the danger associated with the use of bungee cords, it was essential that PFC provide a durable label in a highly visible location on the cart, warning of the dangers of using a bungee cord and providing information for obtaining a replacement strap; that the warning on the glossy cardboard label that came with the cart did not adequately substitute for an on-product warning because it was not sufficiently robust to last the anticipated life of the cart and was usually thrown away, and it did not identify the critical nature of the strap attachment and location, the type of strap to be used, or the consequences that arise from the improper location of attachment

of the strap; and that had replacement bungee cords with hooks or a strap been properly tied to the rear lower cross member, the accident would not have occurred because any release of the bungee cord "would have caused the elastic member to be pulled away from the user."[4] Mr. Barnett concluded that the subject cart was defective and unreasonably dangerous for its intended use at the time it was manufactured; that the defective condition proximately caused plaintiff's accident; that plaintiff's use of the subject cart was a common and reasonably foreseeable use; and that had the subject cart come with a durable warning label containing appropriate information, the accident would not have occurred.

At the court's direction, plaintiff submitted a supplemental affidavit concerning what he meant when he testified at his deposition that at the time of the accident, he presumed the bungee cord would "snap" if it was not firmly attached to the cart and it was stretched. In this affidavit, plaintiff stated, among other things, that "[a]lthough I knew before my accident that a bungee cord could snap like a rubber band, unfortunately, I had no idea before my accident that there was a danger of bodily or eye injury if I used the bungee cord with the hooks on a luggage cart. I also did not know that if a bungee cord with hooks was used on a luggage cart, that it must be attached in a specific way to the cart . . . Prior to my accident I had no idea that bungee cords with hooks should be attached so they would snap down if unfastened . . ."

---

[4]Stated otherwise, Mr. Barnett said that tying the bungee cord to the rear lower cross member of the cart would have insured that had the cord become dislodged, it would have fallen away from plaintiff's body, rather than being propelled into his body.

Decision and Order

The court granted defendant's motion for summary judgment. The court first found that defendant had met its burden of demonstrating that defendant had provided ample warnings on the face of its packaging literature, and that based upon plaintiff's own testimony, the accident was caused by plaintiff's own misuse of the bungee cord and/or the luggage cart because he failed to insure that one end of the bungee cord was secured to the luggage cart before he attempted to secure the other end. The court then held that the burden shifted to plaintiff to establish the existence of a triable issue of fact on the question of whether defendant breached its duty to provide adequate and durable warnings regarding the use of its product, and that such breach was the proximate cause of plaintiff's injury. In this regard, the court stated that while plaintiff, as a secondary but reasonably foreseeable user of the cart, lacked an opportunity to read any warnings, foreseeability of misuse alone was insufficient to make out a cause of action. Further, the court stated that a manufacturer was not required to insure that subsequent owners and users would not adapt the product to their own unique uses, and although "manufacturer liability can exist under a failure-to-warn theory in cases in which [substantial modification of the product] might otherwise preclude a design defect claim . . . where the injured party was fully aware of the hazard through general knowledge, observation or common sense, or participated in the removal of the safety device whose purpose is obvious, lack of a warning about that danger may well obviate the

failure to warn as a legal cause of an injury resulting from that danger" (citations omitted).

Thus, the court found that where:

> "plaintiff testified that he had used luggage carts with bungee cords similar to the one involved in the accident on numerous occasions prior to the accident . . . that he did not ask for instructions, warnings, or a manual before using the cart and bungee cord on the date of his accident because he did not feel that he needed instructions, and his testimony amply demonstrates his awareness of the elastic properties of bungee cords . . . It is thus clear that a warning, even if affixed to the cart, would have added nothing to plaintiff's knowledge or appreciation of the alleged danger posed by the bungee cord" (citations omitted).

Arguments

On the present motion, plaintiff argues that the court did not reach the issue of whether plaintiff met his burden of raising a triable issue of fact as to whether the warning on the glossy cardboard label that came with the subject cart constituted an adequate warning, but instead determined that even if the warnings had been affixed to the cart they would have been superfluous since plaintiff was aware of the danger of using the bungee cord with the luggage cart. Plaintiff argues that the court overlooked and misapprehended the evidence and the law, which led the court to incorrectly conclude as a matter of law that plaintiff was aware of the danger that caused his injury, and that plaintiff's failure to insure that the bungee cord was secure was the sole proximate cause of plaintiff's accident. In this regard, referring to his deposition testimony that he had used carts similar to the subject cart in the past, plaintiff contends that he did not testify that he had previously used luggage carts with bungee cords similar to the subject cord. Rather, he states that he could not describe the

straps or cords on the carts he used in the past except to testify that they were all stretchable.

Plaintiff also notes that while he knew that a bungee cord would have to be attached at both ends of the luggage cart, he testified that on prior occasions, he only needed to attach one end of the cord to the cart. Plaintiff further notes that the bungee cord on the first luggage cart he used just prior to the accident (which broke while he was attempting to use it), had been tied at the bottom of the cart so that he did not have to attach it. Plaintiff argues that this testimony permits a jury to find that he did not know that he needed to check whether the subject cord was affixed to the bottom of the cart and that he did not apprehend the danger. He also asserts that there was no evidence that he knew that the end of the cord under the subject cart was not tied to the cart and that it had a hook on it. In this regard, he states that no one told him the cord was not the original cord attached to the cart by the manufacturer, that no one told him that the cord was not tied to the cart, and that he could not see the other end of the cord because boxes covered the entire base of the cart. He also suggests that his response in failing to take the cord off the second cart when the cord on the first cart broke shows that he thought the subject cord was tied to the second cart. Plaintiff concludes that since the evidence establishes that it was not reasonably apparent to him that the cord on the second cart was not tied to the cart on one end, the court should not have concluded as a matter of law that the danger was open and obvious to him.

Plaintiff next argues that while he testified to general questions regarding his experience with bungee cords - namely that he had used bungee cords with hooks that were

of similar shape to the hooks on the subject cord, that he knew that the bungee cords stretched, that he did not know their stretch limits, and that he knew both ends of a bungee cord needed to be hooked in order to secure a load - he did not testify that he had prior experience securing a load on a luggage cart with one of these loose, separately-purchased bungee cords, which was not tied to the cart like all the others he had used, that he knew he was using a replacement cord, or that he knew a bungee cord must be tied down to the bottom of the luggage cart to prevent the cord from springing toward his face in the event it was released. Thus, plaintiff argues that his testimony regarding his experience with bungee cords in general must not be confused with his critically different experience with bungee cords on luggage carts.

Based on the foregoing, plaintiff asserts that the court's misapprehension of the facts led it to incorrectly determine, as a matter of law, that the sole proximate cause of the accident was his failure to check that the end of the cord was securely attached to the bottom of the cart. Plaintiff argues that if defendant had permanently affixed warnings to the cart apprising him that: 1) the hooked cord was not original to the cart and posed a danger; 2) the replacement strap needed to be tied to the bottom of the cart to prevent rebound toward his face; and that 3) he risked serious injury to his eyes and face if he disregarded the warnings, he would have insured that the end of the cord under the cart was tied to the bottom of the cart. Plaintiff concludes, therefore, that the failure to check the end of the cord was the result of the absence of warnings on the cart and that the evidence raises a question of fact as to

whether defendant's failure to place permanent warnings on the cart was a proximate cause of the accident.

Plaintiff adds that even had he known that he needed to check whether the cord was hooked to the bottom of the cart, defendant failed to establish that doing so would have removed the risk of injury since the cord was not tied to the bottom of the cart and "could never be secured to the bottom of the cart until tension was supplied and the hook at the other end was fastened to the top or middle of the cart . . . [b]ut the only way to supply tension is to pull on the cord [which would] cause the hook to rebound toward the user's face." Plaintiff also argues that even if he had checked to see that the cord was hooked on the bottom, "the very act of setting the cart back down or putting boxes back on the cart could dislodge the hook before plaintiff were able to pull on the cord and attach the other end to the top of the cart [and thus he] would be right back where he started - needing to check the bottom [of the cord] end to see if it was hooked. Plaintiff goes on to argue that "[a]ny misstep or wobble [or] slight shifting of the boxes . . . could be enough to reduce the necessary tension and dislodge the hook from the bottom of the cart, sending it flying into [his] face." Thus, plaintiff states that the cart was not safe because the cord was not tied to the bottom of the cart and had hooks and no permanent warnings on the cart. As such, plaintiff concludes that there is ample evidence that defendant's failure to warn against the danger of using a bungee cord with hooks that was not tied to the bottom of the cart was a proximate cause of the accident, and whether his failure to check under the cart was

negligence and if so whether it was also a proximate cause of the accident is, at most, a question of fact for the jury.

Plaintiff next argues that if the court grants his motion to reargue and, upon reargument, determines that there are triable issues of fact as to whether he had actual knowledge of the specific hazard that caused his injury, the court should also find, based upon the affidavit of his expert, Mr. Barnett, that a question of fact exists as to whether the warning on the glossy cardboard label that came with the subject cart satisfied defendant's duty to warn. In this regard, plaintiff notes that Mr. Barnett stated that proper warnings should have advised, among other things, that if the user could not wait for replacement straps, the middle of any strap or bungee cord must be tied to the bottom of the cart to prevent the cord from rebounding toward the user's face, that the warning on the glossy cardboard label did not provide this warning, and that it was not conspicuous or durable.

Finally, plaintiff maintains that he raised a question of fact as to whether the absence of permanently-affixed, adequate and conspicuous warnings on the cart was a proximate cause of the accident. In this regard, plaintiff asserts that the court overlooked that this question is generally one for the jury, that there is a presumption that a user of a product would have heeded product warnings had they been provided, and that the injury would not have occurred had warnings been affixed to the cart. Plaintiff further asserts that since Mr. Barnett said that tying the bungee cord with hooks to the lower rear portion of the luggage cart would have insured that had the hooks dislodged, they would have fallen down and away

from plaintiff rather than being propelled toward him, and since he (plaintiff) averred in his affidavit that he would have heeded such warnings had they been provided, the evidence requires that a jury decide whether plaintiff would have heeded the warnings on the cart had they existed.

In opposition to plaintiff's motion, defendant argues that the court did not overlook or misapprehend any facts regarding whether plaintiff was aware of the danger that caused his injury. First, defendant asserts that plaintiff's contention that he testified that the only similarity between previous bungee cords he had used and the subject cord was that they were both stretchable is misleading. In this regard, defendant cites plaintiff's testimony that while he could not recall if the hooks were metal or plastic, he agreed that "in [his] previous experience of attaching bungee cords" he had "used bungee cords with similarly shaped hooks on the end," which demonstrates that plaintiff's testimony regarding his previous use of bungee cords with hooks was in response to questions concerning attaching bungee cords to luggage carts, and not to bungee cords in general, as plaintiff incorrectly contends. Thus, defendant concludes that the court properly observed that plaintiff had testified that he had previously used luggage carts with bungee cords similar to the subject cord, such that plaintiff knew the alleged dangers posed by the subject cord.

Defendant also points out that the court based its determination that plaintiff appreciated the danger posed by the subject cord on the additional grounds that: 1) plaintiff testified that he had used luggage carts with bungee cords similar to the one involved in this

accident on numerous occasions before the accident, and did not ask for instructions, warnings, or a manual before using the cart and cord because he felt he did not need them, 2) that his testimony demonstrated that he was aware of the elastic properties of bungee cords, and that any warning, even if affixed to the cart, would not have added to plaintiff's appreciation of the danger posed by the bungee cord. Thus, defendant argues that even if the court had misunderstood plaintiff's testimony that he had used similar bungee cords in the past, plaintiff's argument must still be rejected because this purported misunderstanding was only one of numerous reasons why the court reached the conclusion that any warning would not have added to plaintiff's appreciation of the danger posed by the cord.

As to plaintiff's argument that the danger was not open and obvious and that the cart required a warning because his previous experience with carts was that one end had always been attached to the cart, and therefore he did not know that he needed to check whether the subject cord was affixed to the bottom of the cart, defendant notes, as an initial matter, that plaintiff did not testify that one end of the bungee cord had always been tied to the cart on previous occasions. Rather, he testified that he did not believe he had ever attached both ends of the bungee cord to the cart. In any event, defendant counters that plaintiff testified that he knew that bungee cord hooks needed to be attached to the cart at both ends. Moreover, defendant notes the plaintiff admitted that he failed to check that the bungee cord was properly affixed to the cart, but merely assumed it was, and that he was aware that if the cord was not affixed to the cart, it could snap if pulled. Therefore, defendant asserts that the

alleged danger posed by the cord was open and obvious, that plaintiff's failure to check that the cord was affixed to the cart was the proximate cause of the accident, and that the absence of any label warning against the use of bungee cords manufactured by another company would not have prevented plaintiff's misuse of the cord.

As to plaintiff's suggestion that a permanent warning affixed to the cart advising against the danger of using a bungee cord with hooks manufactured by a different company would have apprised plaintiff that the subject cord was not the original, defendant asserts that such a warning could not have in any way have been the proximate cause of the accident. Similarly, as to plaintiff's assertion that a warning would have apprised him that he risked serious injury to his eye and face if he disregarded the warnings, defendant notes that plaintiff has failed to explain why the warning label affixed to the cord failed to apprise him of this danger. Defendant asserts that if plaintiff was not apprised by a warning on the very product that caused the injury, it is ludicrous to suggest that he would have been apprised of a similar permanent warning on the cart, which did not cause his injury.

Finally, as to plaintiff's argument, based upon his expert's affidavit, that the warning should have also advised the user to tie the bungee cord to the bottom of the cart, defendant notes that plaintiff did not make this allegation in his bill of particulars, but only argued that defendant was negligent for failing to attach a permanent label to the cart warning against replacing the strapping system with a bungee cord with plastic or metal hooks. In any event,

defendant notes that the court rejected the expert's affidavit as conclusory and unsupported by competent evidence.

Discussion

CPLR 2221(d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d]; *Foley v Roche*, 68 AD2d 558 [1979]). Upon a review of the controlling principles of law and facts in this case, the court, in its discretion, grants the motion for reargument, and upon reargument, denies defendant's motion for summary judgment.

Despite the foregoing, as an initial matter, the court rejects plaintiff's argument that he did not testify that he had previously used luggage carts with bungee cords similar to the subject cord. As defendant asserts, the record reveals that plaintiff testified that when attaching bungee cords to luggage carts in the past, he had used bungee cords with end hooks that were similarly shaped to those that came with the bungee cord that caused his injury, although he could not remember the material they were made of. In addition, plaintiff testified that prior to his accident, he had used luggage carts with bungee cords similar to the subject cord in terms of the cord being stretchable. Thus, plaintiff's assertions that he could not describe the straps or the cords he used before the accident, that the only similarity he could recall was that they were all stretchable, and that his testimony regarding his

experience with cords was about his knowledge of bungee cords in general, as opposed to bungee cords on luggage carts, are rejected.

As to plaintiff's argument that he did not know, based upon his previous experience with bungee cords, that he had to check whether the subject cord was affixed to the bottom of the cart, and that therefore the danger was not open and obvious, part of this argument is rejected and part of it has merit. In this regard, plaintiff did not testify that in his past experience, one end of the bungee cord had always been tied to the cart. Rather, he testified that he did not believe that he had ever attached both ends of the bungee cord to the luggage cart. In any event, plaintiff testified that he knew prior to the accident that both ends of a bungee cord needed to be attached to the luggage cart. Thus, plaintiff cannot persuasively argue, that based upon his past experience, "a jury could reasonably determine that [he] did not know that he should check to make sure [that] the cord was hooked at the bottom of the cart."

On the other hand, upon reconsideration of the affidavit of Mr. Barnett, plaintiff's expert, as well as the statements made by plaintiff during his deposition and in his affidavits, the court finds that plaintiff has raised an issue of fact as to whether he had actual knowledge of the specific hazard that caused his injury, namely the failure to tie the bungee cord with hooks to the bottom of the luggage cart; whether the warning on the glossy cardboard label which came with the subject luggage cart was adequate; and whether defendant's failure to

place permanent warnings against using a bungee cord with hooks that was not tied to the bottom of the cart was a proximate cause of his accident.

As noted in the underlying decision and order, no duty to warn arises where the injured party had actual knowledge of the hazard or where the hazard was patently dangerous or posed open an obvious risk (*Liriano v Hobart*, 92 NY2d 232, 241 [1998]). "Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question" (*id*). However, [w]here only one conclusion can be drawn from the established facts . . . the issue of whether the risk was open and obvious may be decided by the court as a matter of law" (*id*. at 242 [citation omitted]).

Here, in opposition to defendant's prima facie showing that it provided an adequate warning, Mr. Barnett opined in his affidavit that based upon his review of, among other things, patents of luggage carts, accident statistics associated with luggage carts and bungee cords, literature regarding eye injuries from released bungee cords, inspection of PFC luggage carts, replacement straps and bungee cords, and depositions of PFC representatives in prior litigation against PFC, that the elastic strap which came with defendant's cart was not anticipated to last as long as the cart; that luggage cart manufacturers, aware of the hazards of using bungee cords with luggage carts, switched to selling carts with other strapping mechanisms, including the use of elastic straps with their carts; and that since the elastic straps used by defendant wore out before their carts, "it [was] essential that PFC offer replacement straps for its luggage carts so that bungee cords with hooks [were] not purchased

and used by PFC's customers as replacements for the original hookless strap." Mr. Barnett also stated that research performed Triodyne, Inc., his safety firm specializing in mechanical products, "demonstrated that improperly attached bungee cords with hooks recoil and travel at . . . speeds calculated as being between 46.4 and 50.5 miles per hour." Because of the nature of the danger associated with the use of bungee cords, Mr. Barnett further opined that it was "essential that PFC have a proper label on its luggage cart in a highly visible location, warning cart owners not only of the dangers of using a bungee cord with hooks but also advising luggage cart owners to contact PFC for a replacement strap if their strap wears out or breaks." He also stated that the label "must also advise the proper location on the cart to attach the strap and must be made of robust durable material to last the lifetime of the luggage cart," and that it should include the following:

> "A) Identification of the impact or missile hazard,
>
> B) Use of a signal word to identify the degree or level of hazard seriousness;
>
> C) Communication of the probable consequences of involvement with the hazard (eye injury or loss of eyesight);
>
> D) Description of how the hazard can be avoided (proper rigging, latching, grasping, abuse control, and personal protective equipment)."

In addition to foregoing, plaintiff testified that he had no idea before his accident that there was a danger involved if the bungee cord was not firmly attached to the cart. He also testified that after the accident, someone told him that "all cords coming [on] luggage carts

usually have the cords attached to the luggage cart on one end so this type of accident couldn't happen," and stated the same in his affidavit ("all luggage carts usually have the cord attached to the cart on one end . . ."). In addition, he averred in his affidavit that "it was not until after my accident that I first learned that a bungee cord should always be securely attached to the luggage cart." While the court initially found the last statement noted immediately above disingenuous based upon plaintiff's testimony, a review of this statement in conjunction with additional assertions made by plaintiff regarding the need to attach the bungee cord to the bottom of the luggage cart, as well as the affidavit of Mr. Barnett, raises a question of fact as to plaintiff's "actual knowledge of the specific hazard that caused the injury" (*id.* at 241). In this regard, plaintiff also averred in his supplemental affidavit that he learned after his accident that "the middle of the bungee cord with hooks should always be tied to the rear lower bar of the luggage cart, so that both sides of the straps of the bungee cord with hooks could be looped underneath the cart, and attached from that direction upward to the cart, to permit the cord and hooks to fall away from the cart and cart user if the hooks became loose." Further, plaintiff stated in his affidavit that at the time of the accident, he presumed the cord, if stretched, would snap if not firmly attached to the cart, but that he did not testify that he knew the cord would snap back at him. In his supplemental affidavit, he also stated that although he knew before his accident that a bungee cord could snap like a rubber band, he did not know there was a danger of bodily or eye injury involved if he used

a cord with hooks on a cart, and did not know that if a bungee cord with hooks was used on a luggage cart, it had to be attached a specific way to the cart.

Finally, while defendant contends that plaintiff only argued that defendant was negligent for failing to attach a permanent label to the cart warning against replacing the strapping system with a bungee cord with plastic or metal hooks, and did not allege that the warning should have also advised the user to tie the bungee cord to the bottom of the cart, plaintiff raised this argument in opposition to defendant's motion for summary judgment. In sum, plaintiff's averments, when read in conjunction with Mr. Barnett's affidavit, raise an issue of fact as to whether plaintiff was actually aware of the danger created by failing to tie the bungee cord to the bottom of the luggage cart (*Lichtenstein v Fantastic Mdse. Corp.*, 46 AD3d 762, 764-765 [2007] [plaintiffs raised triable issue of fact as to her knowledge of hazard of household cleaner]).

As to the adequacy of the warning on the cart, Mr. Barnett asserted that the luggage cart did not provide the proper warnings, as set forth above; that the warning on the glossy cardboard label that came with the cart did not provide this information; and that defendant's warning label was not durable enough to last the anticipated life of the cart, because it was merely stapled to the cart, and which users would tear off and throw away. As such, the court finds that plaintiff raised an issue of fact as to whether the warning on the glossy cardboard label which came with the subject luggage cart was adequate (*see Anaya v Town Sports Intl.,Inc.,* 44 AD3d 485, 487 [2007] [expert evidence raised issue of fact whether

warnings on sports harness were inadequate]; *DiMura v City of Albany*, 239 AD2d 828, 830-831 [1997] [expert evidence raised issue of fact as to whether warnings on golf cart were adequate and whether additional warning could have prevented plaintiff's accident]).

Finally, plaintiff has raised a question of fact as to whether defendant's failure to place permanent warnings advising of the danger of using a bungee cord with hooks that are not tied to the bottom of the cart was a proximate cause of plaintiff's accident. Ordinarily, "[i]n all but the most unusual circumstances, the adequacy of a warning is a question of fact" (*Nagel v Brothers International Food, Inc.* 34 AD3d 545, 547 [2006] [internal citations omitted]). "For there to be recovery for damages stemming from a product defective because of the inadequacy or absence of warnings, the failure to warn must have been a substantial cause of the events which produced the injury" (*id.* at 548). "Generally, proximate cause is a question to be decided by the trier of the facts" (*id.*).

Here, according to Mr. Barnett, tying the bungee cords with hooks to the lower rear portion of the luggage cart would have insured that had the hooks dislodged, they would have fallen down and away from plaintiff rather than being propelled into his body. Further, plaintiff stated in his affidavit that "had the luggage cart had a warning on it in a conspicuous place, such as on the handle or the bracket in the middle of the cart, I would not have used [the cart] that day without the bungee cords being securely attached thereto." He said instead, he "would have tried to properly attach the bungee cord to the luggage cart and if that failed, [he] would have carried the boxes down to the car." Thus, plaintiff has raised a

question of fact as to whether the failure to affix warnings to, among other things, tie the bungee cord to the bottom of the cart was the proximate cause of plaintiff's injuries (*Lichtenstein,* 46 AD3d at 765 [plaintiff mother testified at her deposition that additional or more conspicuous warnings would have alerted her to the potential for contact burns from the subject product, thus raising an issue of fact as to whether the alleged lack of adequate warnings on the subject bottle was the proximate cause of the infant plaintiff's injuries"]; *Anaya* , 44 AD3d at 488 [triable issues of fact exist regarding whether the alleged inadequate warnings of sports harness was a substantial factor in causing plaintiff's injuries]).

It is true, as defendant asserts, that plaintiff did not ask for instructions on how to use the cart or the bungee cord because he did not believe he needed them. However, the court rejects defendant's arguments that "even had permanent warnings been affixed to the cart advising against replacing the strapping system with a bungee cord with hooks, that there "is no indication in the record that [plaintiff] would have heeded any warning," and that the subject cord would still have been misused. In this regard, plaintiff's testimony that he did not ask for instructions fails to establish that plaintiff would not have heeded a conspicuous warning had it been on the luggage cart (*La Paglia v Sears Roebuck & Co.*, 143 AD2d 173, 178 [1988], appeal dismissed, appeal denied, 74 NY2d 624 [1989] [it cannot be assumed from plaintiff's failure to have heeded certain of the warnings contained in the lawn mower's owner's manual, that he would have similarly ignored a prominent warning on the machine itself. The jury was entitled to find that in light of the contrast between the nature of the

warnings provided and those negligently omitted, the consumer likely would have heeded the latter, prominently displayed, ever-present cautionary instructions]). As to defendant's argument that even had plaintiff heeded such warnings, the accident would still have occurred since plaintiff failed to check that the bungee cord was properly affixed, this argument is rejected since had plaintiff (or plaintiff's girlfriend) seen and heeded the warnings to tie the cord to the bottom of the cart, the accident may not have occurred.

In view of the foregoing, the motion for reargument is granted, and upon reargument, the motion of defendant for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT