At an IAS Term, Part 38 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 27th day of April, 2009.

P R E S E N T:

HON. MARTIN M. SOLOMON,
Justice.

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CERENE ROBERTS, AS ADMINISTRATRIX OF THE ESTATE OF DAVID ROBERTS, DECEASED,

Plaintiff,

- against -

Index No. 33071/05

CYBEX INTERNATIONAL, INC.,

Defendant.

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CYBEX INTERNATIONAL, INC.,

Third-Party Plaintiff,

- against -

Third-Party
Index No. 76141/06

212 WOLCOTT STREET PARTNERS, LLC.,

Third-Party Defendant.

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| The following papers numbered 1 to 7 read on this motion: | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 3 |
| Opposing Affidavits (Affirmations) | 4-5 |
| Reply Affidavits (Affirmations) | 6-7 |
| _____Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendant Cybex International, Inc. (Cybex or defendant) moves for an order, pursuant to CPLR 3212, dismissing the amended complaint of plaintiff Cerene Roberts, as administratrix of the estate of David Roberts (Roberts), deceased.

## *FACTUAL AND PROCEDURAL BACKGROUND*

### *The Accident*

On October 30, 2003, Roberts, then a 51-year old NYPD sergeant, was lifting weights at a gym,[1] which had a Smith Press, Model 5341, designed and manufactured by Cybex. A Smith Press is a weight-exercise machine in which the user pushes up or pulls up on a barbell that is attached to and slides along two vertical tracks. Typically, various amounts of weights of metal plates are loaded onto the barbell to provide the user with the desired weight training. By rotating the barbell, the user disengages the hooks, allowing the barbell to move up and down between the guide rods. When the user wants to end his exercise and be relieved of the weight of the barbell, he rotates the barbell so that the two hooks located thereon engage over supporting metal rungs positioned at various levels along the vertical tracks.

The first exercise Roberts did that morning was on the Smith Press and involved a behind-the-neck shoulder press, which he stated he performed by lying down on a declined bench and by pushing the barbell up from behind his neck (Roberts Tr. at 41 and 52). After

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[1] The accident occurred at a federal Alcohol, Tobacco, Firearms & Explosives (ATFE) facility located at 300 Coffey Street in Brooklyn. At that time, Roberts was working with the ATFE (Roberts Tr. at 10-11). Roberts was exercising during his meal break (Roberts Tr. at 132).

completing a set, Roberts rotated the barbell to engage the hooks, took his hands off the barbell, and started to get up from the bench when the barbell came crashing down on him and hit the back of his neck (*id.* at 74-75). As the result of the accident, Roberts sustained fractures of the third and fourth vertebrae (C3-C4) in the cervical spine and became quadriplegic. He died two years later from the complications surrounding his quadriplegia.

Roberts had used the Smith Press "numerous" times in the past and was familiar with its operation (Roberts Tr. at 29), as he exercised at the gym three times per week and typically performed 3-4 sets with 10-12 repetitions in each set. He was familiar with the behind-the-neck shoulder press and performed it every time he worked out at the gym (*id.* at 42-43). Roberts, who weighed 175 pounds at that time, was lifting a weight of approximately 200 pounds (*id.* at 133, 42). He had used that weight since approximately a month prior (*id.* at 43) and had been accustomed to it. He was in "excellent" physical shape and never used a "spotter" (an assistant) (*id.* at 82, 46). Roberts had not received any formal training or instructions on the use of the Smith Press and had learned to use it by watching others (*id.* at 31).

***The Instant Action***

On October 17, 2005, Roberts instituted a products-liability action against Cybex. After Roberts' death, Cerene Roberts, as the administratrix of his estate, filed an amended complaint, dated July 17, 2007, asserting five causes of action: (1) negligence; (2) strict

products liability; (3) breach of an express warranty; (4) breach of an implied warranty; and (5) wrongful death. On September 25, 2007, Cybex answered the amended complaint.

In her supplemental response to defendant's first set of interrogatories, plaintiff articulates her strict products-liability cause of action to be based on: (1) a design defect; (2) a manufacturing defect; and (3) a failure to warn. With respect to the design defect, plaintiff alleges that the subject Smith Press was not designed in a manner to insure that the barbell would remain safely secured and would not strike the user. Specifically, the Smith Press allegedly was not designed in a manner to insure that the hooks that were attached to the barbell would latch fully over the rungs. Plaintiff concludes that defendant should have utilized a design that would have insured, or at least increased the likelihood, that the barbell would remain safely secured and would not strike the user. The second claim of the manufacturing defect claim is a clone of the defective design claim, except that the word "manufacturing" is used in lieu of the word "design." The third and final claim of failure to warn alleges that defendant provided no warnings and that users should have been warned that the barbell may fall down.

In her second supplemental response to defendant's first set of interrogatories, plaintiff elaborates on the design defect, as follows:

> "The defendant should have utilized a design that allowed the user, while exercising, to see the bar hooks latch over the pins [the rungs], that designated the locations of the pins, that properly alerted the user, by decal, label, or otherwise, to the potential risks of not latching the hooks fully over the pins, of not using the adjustable bar stops, and of not checking to insure that the pins were not excessively worn" (¶ 8 [f]).

After completion of discovery, plaintiff filed her note of issue on June 26, 2008. In accordance with the court's short-form order of August 11, 2008, defendant timely served its motion for summary judgment on September 26, 2008.

## *THE PARTIES' CONTENTIONS*

### *Defendant Cybex*

In support of its motion for summary judgment, defendant makes two principal points. First, plaintiff's defective design claim has no merit because: (1) the subject Smith Press was not defectively designed; (2) plaintiff fails to present a safer alternative design; (3) plaintiff's failure to use the adjustable stops was the sole proximate cause of the accident; and (4) any alleged design defect was not the proximate cause of the accident.

Defendant's second point is that plaintiff's failure to warn claim lacks merit for the following reasons: (1) defendant had no duty to warn Roberts because the risk of injury was open and obvious; (2) the warnings and instructions posted on the Smith Press were adequate; and (3) the alleged lack or inadequacy of warnings was not the proximate cause of the accident.[2]

Defendant's motion is based upon the September 26, 2008 affidavit of its expert, Roch J. Shipley, PhD, FASM, PE, a consulting professional engineer licensed in the State of New York and five other states, specializing in the product-failure analysis and accident

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[2] Defendant's additional contentions that there is no evidence of a manufacturing defect and that plaintiff's breach of warranty claims are barred by the statute of limitations are not contested by plaintiff and, therefore, are not discussed herein.

reconstruction involving aircraft, automobiles, trucks, railroad, industrial equipment, fire-damaged artifacts, electrical and gas appliances, and utility equipment.

***Plaintiff***

In opposition, plaintiff advances four points. First, plaintiff contends that the summary judgment motion should be denied because it is based exclusively on the affidavit of Mr. Shipley for whom defendant never made a CPLR 3101 (d) (1) (i) exchange. Second, plaintiff argues, there is overwhelming evidence that the Smith Press was defectively designed. Third, according to plaintiff, the evidence of defendant's failure to adequately warn of the known dangers of the Smith Press provides an additional basis for the denial of summary judgment. Fourth, plaintiff contends, the unexplained absence of an affidavit from the engineer who first inspected the Smith Press on defendant's behalf should be viewed by the court as further evidence of its defective nature.

Plaintiff's opposition is based on the affidavit of Frank J. Smith (no relation to the inventor of the Smith Press), a fitness equipment, program, and facility designer, and a fitness/athletics consultant, whose nearly 40 years of experience in the fitness and sports equipment industry includes personal development, design, and manufacture of a Smith Press that subsequently was distributed throughout the country. Mr. Smith states that he has inspected, tested, analyzed, and worked out on dozens of Smith Presses, including defendant's Smith Press, Model 5341. Mr. Smith opines that the Cybex Smith Press,

Model 5341, has a design defect that renders it unsafe for its intended use and is "the most dangerous" Smith Press that he has ever encountered.

## *DISCUSSION*

### *I. Admissibility of the Affidavit of Defendant's Expert*

CPLR 3101 (d) (1) (i) provides that, upon demand, a party must "identify each person whom the party expects to call as an expert witness at trial" and "disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

On January 6, 2006, plaintiff served defendant with its Consolidated Discovery Demands, which included an expert demand pursuant to CPLR 3101 (d) (1) (i). On July 19, 2006, Dennis B. Brickman, PE, on behalf of defendant, inspected the subject Smith Press. On September 8, 2006, defendant identified Mr. Brickman as its expert, but did not set forth any of the opinions arrived at by him. Thereafter, defendant did not supplement its response to plaintiff's expert demand with respect to Mr. Brickman or any other proposed expert, and on June 26, 2008, plaintiff served and filed her note of issue and certificate of readiness.

Nearly three years after plaintiff served defendant with a CPLR 3101 (d) (1) (i) demand, defendant moves for summary judgment based on the strength of the opinion offered not by Mr. Brickman, but by another expert, Roch Shipley, for whom defendant has never made a required disclosure.

Plaintiff correctly states that several decisions of the Appellate Division, Second Department have precluded experts' submissions where disclosure violations have occurred (*see Colon v Chelsea Piers Mgt., Inc.*, 50 AD3d 616, 617 [2008]; *DeLeon v State of New York*, 22 AD3d 786, 787 [2005], *lv denied* 7 NY3d 701 [2006]; *Mankowski v Two Park Co.*, 225 AD2d 673 [1996]).[3]

However, the Appellate Division, Second Department has also held that "preclusion for failure to comply with CPLR 3101 (d) is improper 'unless there is evidence of intentional or willful failure to disclose and a showing of prejudice'" (*Johnson v Greenberg*, 35 AD3d 380, 380 [2006], quoting *Shopsin v Siben & Siben*, 289 AD2d 220, 221 [2001]; *see also Simpson v Tenore & Galileo*, 287 AD2d 613 [2001]; *McCluskey v Shapiro*, 273 AD2d 284, 285 [2001]). Moreover, in the latest decision on this issue, the Appellate Division, Second Department has deferred to the trial court's discretion to consider the affirmation of a party's expert solely for the purposes of summary judgment, despite the party's alleged failure to comply with CPLR 3101 (d) (1) (*see Howard v Kennedy*, 60 AD3d 905 [Mar. 24, 2009], citing *Simpson v Tenore & Galileo*, 287 AD2d 613, 613 [2001], and distinguishing one of the decisions to the contrary, *Construction by Singletree, Inc. v Lowe*, 55 AD3d 861, 863 [2008])

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[3] Other Second Department decisions upholding the exclusion of expert affidavits by trial courts include *Vereczkey v Sheik*, 57 AD3d 527, 528 [2008]; *Construction by Singletree, Inc. v Lowe*, 55 AD3d 861, 863 [2008]; *Gerry v Commack Union Free School Dist.*, 52 AD3d 467, 469 [2008]; *Soldano v Bayport-Blue Point Union Free School District*, 29 AD3d 891 [2006]; *Mayer v Mahopac Central School Dist.*, 29 AD3d 653, 655 [2006]).

Here, as there is no proof that defendant's failure to provide expert disclosure pursuant to CPLR 3101 (d) (1) (i) was willful and prejudicial to plaintiff, the affidavit of defendant's expert will be considered for the purposes of its summary judgment motion (*see Howard*, 60 AD3d at 905). Nevertheless, to alleviate any potential prejudice to plaintiff, the court directs defendant, within thirty (30) days from the date of service of this decision and order with notice of entry, to serve proper responses to the plaintiff's expert demands, in accordance with the mandates of CPLR 3101 (d), or defendant will be precluded from offering expert testimony at the trial of this action. Each response shall be tailored to disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which he is expected to testify, his qualifications, and the summary of the grounds for his opinion.

***II. Defective Design***

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that he or she is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 494 [2d Dept

1989]; *see also Zuckerman*, 49 NY2d at 562). However, "summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 224, 231 [1978] [internal quotation marks and citation omitted]). To be entitled to summary judgment, the movant must establish its cause of action or defense "'sufficiently to warrant the court as a matter of law in directing judgment' in his favor" (*Zuckerman*, 49 NY2d at 562, quoting CPLR 3212 [b]). In determining such a motion, the court is concerned with "issue finding, as opposed to issue determination" (*see Frutatrom, Ltd. v Flavormatic Indus., Inc.*, 237 AD2d 487, 487 [2d Dept 1997]).

"'To establish a prima facie case in a strict products liability action predicated on a design defect, a plaintiff must show that the manufacturer marketed a product which was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury'" (*Magadan v Interlake Packaging Corp.*, 45 AD3d 650, 652 [2d Dept 2007], quoting *Gonzalez v Delta Intl. Mach. Corp.*, 307 AD2d 1020, 1021 [2d Dept 2003]).

Further:

> "'the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used . . . for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.'"

(*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107 [1983] [quoting *Codling v Paglia*, 32 NY2d 330, 342 [1973]).

"Liability attaches when the product, as designed, presents an unreasonable risk of harm to the user" (*Voss*, 59 NY2d at 107). The question whether a product was not reasonably safe is for the jury to decide in light of all the evidence presented by both the plaintiff and defendant (*id.* at 108). The Court of Appeals further explained in *Voss* (at page 108) that:

> "The plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product – that is, one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost. The question for the jury, then, is whether after weighing the evidence and balancing the product's risks against its utility and cost, it can be concluded that the product as designed is not reasonably safe" (internal citations omitted).

As is also relevant herein:

> "Where . . . 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."

(*Milazzo v Premium Tech. Servs. Corp.*, 7 AD3d 586, 587-588 [2d Dept 2004] [internal citations omitted]).

Defendant's expert opines that the Smith Press was properly designed and was reasonably safe for its intended use (Shipley Aff., ¶ 6).[4] His conclusion is based on: (1) the alleged visibility of the hooks and the rungs; (2) the presence of the adjustable stops, or "bumpers," protecting a user from a falling barbell; and (3) the absence of an alternative hooking design in the industry when the subject press was manufactured in 1994 (¶¶ 8-24). He further states that any alleged defect was not the proximate cause of the accident and that, in any event, Roberts' failure to utilize the adjustable stops was the sole proximate cause (¶¶ 31-32).

***A. Alleged Lack of Sufficient Visibility as a Design Defect***

Defendant's expert, Mr. Shipley, contends that: (1) the ladder with the rungs provides reasonable visibility to the users to latch the hooks onto; (2) the hooks with the triangular cut-outs provide further visible and tactile assistance to the users to determine whether the hooks are fully latched or fully unlatched; and (3) visibility of the hook protrusion into the ladder further assist the users (¶¶ 8-15). Mr. Shipley points out that hooks are made out of the dark metal while the heads of the pins are light colored, thus creating a contrast for the user to observe (¶¶ 9-10). Moreover, according to Mr. Shipley, the hooks of the Smith Press are designed with a triangular shape cut-out above the barbell in which a fixed rung is visible. This rung is welded onto the bar guiding assembly and is fixed. When the user turns the barbell to either a latched or an unlatched position, the triangular shaped cut-out will

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[4] All references are to Mr. Shipley's September 26, 2008 affidavit, unless otherwise indicated.

travel over this fixed rung from one end to another, with each end representing the end of the travel range, which corresponds to the latched and unlatched positions of the hooks (¶ 11). Thus, if the barbell is turned to one extreme or the other, the hooks will either be fully latched or fully unlatched. If, however, the barbell is not turned all the way to the extreme, that may not result in full latching or unlatching (¶ 12). As such, Mr. Shipley states, the design of the hooking mechanism with the fixed rung and the distinct triangular cut-out provides visible and tactile assistance to the user to determine whether the hooks are either fully latched or fully unlatched over the rungs (¶ 13). Moreover, the hooks are visible on the Smith Press and the user is able to determine while using the press whether the hooks protrude inside the ladder to fully latch over the rungs (¶ 14). Therefore, Mr. Shipley concludes, a reasonable user using his or her senses is able to see and feel the hooks engage fully over the rungs before letting go of the barbell (¶ 15).

Mr. Shipley's affidavit on this point, however, is directly contradicted by the affidavit of plaintiff's expert, Mr. Smith. With respect to visibility, Mr. Smith states that since the rungs (or pins) are recessed inside a three-sided metal housing of the press, the rungs are visible only from one side. During certain exercises, Mr. Smith opines, the user cannot see the rungs. In particular, while performing the behind-the-neck shoulder press, the user sits on a bench directly below the barbell and then leans forward so that he can bring the barbell behind his neck during the exercise. From this position, Mr. Smith notes, the user's vision of the rungs is obstructed by the side panels of the metal housing (¶¶ 6-7).

Mr. Smith states that he examined on May 2, 2006 the Smith Press that was involved in Roberts' accident on October 30, 2003 in an attempt to reconstruct the accident (¶ 8). Mr. Smith rotated the barbell of the Smith Press so that the hooks perched on top of the rungs, as opposed to securely over the rungs, and then determined that its user could not see this precarious interface between the hooks and rungs during the behind-the-neck shoulder press (*id.*). Mr. Smith then "jostled" the machine to simulate the force that might be exerted when the user removed his grip from the bar and attempted to exit the machine. When Mr. Smith did so, the hooks slipped off and the barbell came crashing down (*id.*).

Mr. Smith further disagrees with Mr. Shipley's position that the hooks and the rungs are visible to the user (¶ 9). Mr. Smith opines that the color of the rung heads and the triangular cut-outs on the hooks of the machine do not provide an ordinary user with any guidance as to whether the hooks are fully latched over the rungs (¶ 10). Nor are there any instructions on the machine or in the accompanying owner's manual, Mr. Smith states, alerting the user to look to these factors to determine whether the bar is properly racked (¶ 10). Rather, when doing the behind-the-neck shoulder press, the user is not much better off than a blind man who can only guess whether the hooks are fully latched by feeling the weight of the barbell and/or by listening for what he believes to be the sound of the hooks latching over the rungs (¶ 9). Mr. Smith states that the hooks that "actually latch over the pins [rungs] were completely obstructed by the same metal housing that encased the pins" (¶ 9). Mr. Smith concludes that "[g]iven the inability of the user of . . . Model 5341 [*i.e.*, the

subject Smith Press] to [visually] determine whether the bar is properly racked, . . . Model 5341 is not reasonably safe for its intended use. In fact, the user of . . . Model 5341 risks serious injury or even death when doing a behind-the-neck shoulder press, which is an exercise commonly performed by weightlifters" (¶ 11).

The statements in Mr. Smith's affidavit are corroborated by Roberts' testimony. Roberts testified (at pages 75-76 of his deposition) that he believed that the hooks were set over the rungs and that the bar was in place because "you would hear the clank and you would feel the relie[f] of the weight." He reiterated (at page 76 of his deposition) that "[w]hen you turn the grip you hear a clanking to the pin and you feel the weight off your arms." He had never experienced any kind of difficulty in turning the grip of the barbell (*id.* at 76), nor did he feel that the barbell slipped (*id.* at 123). He thus confirmed Mr. Smith's opinion that the user would be able to use his sense of hearing and touch (*i.e.*, act as a blindman) to ensure that the hooks were fully engaged over the rungs.[5]

Furthermore, defendant's director of engineering, Stephen Wendt, testified (at page 23 of his deposition) that it is important for the user of a Smith Press to be able to visualize if the hooks are fully engaged over the rungs:

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[5] An eyewitness Ms. Adrian Gyuro testified (at page 25 of her deposition) that she did not feel secure using the locking mechanism on the Smith Press because "you personally have to push it up and lock it in." She elaborated (at page 34 of her deposition):

> "When I used the machine, I felt that I didn't like the machine 'cause it was unsafe[,] because every time I would try to hook it, it didn't properly engage right to my liking."

> "In a Smith Press you generally can use some fairly heavy weights, . . . so we are concerned about the safety of the user. We like to make sure that they understand what is going on with the mechanism, so they can be assured that they have either hooked it and it's safe to walk away from or it's unhooked and not safe to walk away from."

Mr. Wendt admitted (at pages 47-48 of his deposition) that with some exercises, including the behind-the-neck shoulder press, the user of the Smith Press is unable to see the rungs because they are obstructed by a metal panel that forms one side of the frame in which the rungs are housed. Mr. Wendt also admitted (at pages 108-110 and 132-133 of his deposition) that he knew of at least one case in which a Smith Press user mistakenly thought that he had latched the hooks over the rungs, only to have the bar come off and injure the user.[6]

Based on the foregoing, a triable issue of fact exists as to whether the subject Smith Press suffers from a design defect, in that the design might not provide sufficient visibility to the user to determine when the barbell hooks are engaged. Defendant, therefore, is not entitled to summary judgment on this issue (*see Hutchinson v Crown Equip. Corp.*, 48 AD3d 421, 422 [2d Dept 2008]; *Milazzo*, 7 AD3d at 588).

In the alternative, defendant contends that even if there was a design defect, the same was not the proximate cause of the accident because Roberts had never attempted to look or

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[6] The court's research has uncovered one reported decision, *Ebuzoeme v City Univ. of New York* (10 Misc 3d 1079 [A], 814 NYS2d 890, 2005 WL 3734348, 2005 NY Slip Op 52256 [U] [Ct Cl, 2005]), in which the claimant was allegedly injured after using a Cybex Smith Press machine. The Court of Claims found, without any analysis, that the Cybex machine at issue was not defective (at page 6).

otherwise visually confirm that the hooks were fully and properly latched over the rungs. Defendant relies on Roberts' testimony (at pages 74-75 of his deposition) that when he was attempting to hook the bar he looked "[u]p at the bar" and did not look at the rungs or the hooks to see if they were properly engaged. Defendant's expert states that when Roberts finished performing the behind-the-neck shoulder press, he had no obstructions or any limitations that would have prevented him from visually confirming that the hooks fully engaged over the rungs, by turning his head to both sides of the machine where the hooks and the rungs were located to determine if the hooks fully latched over the rungs (Shipley Aff., ¶¶ 33, 36). The issue of causation is inextricably intertwined with the issue of a design defect in this case. If Roberts was unable to visualize the rungs of the Smith Press after completing a behind-the-neck shoulder press because the allegedly defectively designed metal frame obstructed the rungs, then he could not be faulted for not looking at them. Hence, the issue of causation is also one for the jury to decide (*see Craft v Mid Island Dept. Stores, Inc.*, 112 AD2d 969, 971 [2d Dept 1985]).[7]

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[7] The court notes that the subject Smith Press was nine years old at the time of the accident and, according to defendant's expert who examined it, "several of the pins [rungs] . . . were worn out due to excessive use and improper maintenance. However, . . . not all pins were worn excessively. Certain pins had more wear, others had less wear" (Shipley Aff., dated Feb. 3, 2009, ¶ 5). Thus, whether some wear and tear of the Smith Press contributed to or solely caused the accident will also need to be determined by the jury (*see Argentina v Emery World Wide Delivery*, 93 NY2d 554, 560, n 2 [1999] [an accident may have more than one proximate cause]; *see also* PJI 2:71).

### *B. The Adjustable Stops*

The next point of contention is whether the adjustable stops or "bumpers" on the Smith Press compensated for its allegedly defective design. It is undisputed that the Smith Press, at the time of the accident, was equipped with two adjustable, non-removable safety stops (one on each side) that latched onto the rungs located in the ladder and enabled the user to adjust/set the height in two-inch increments (Shipley Aff., ¶16). The purpose of these "bumpers" is to ensure that the barbell does not fall if a user fails to properly lock it in place.

The parties dispute whether Roberts could have used the adjustable stops while performing the behind-the-neck shoulder press. Defendant's expert, Mr. Shipley, opines that Roberts "could have used them [the adjustable stops] on the date of the accident to safely perform the behind the neck press exercise" (¶ 19). On the other hand, plaintiff's expert, Mr. Smith, explains that the bar stops on the subject press do not protect the user's cervical spine during a behind-the-neck shoulder press because bar stops are set at a level just at or below the lowest point in the range of motion of the particular exercise and do not protect any portion of the user's body above that level. Thus, according to Mr. Smith:

> "if one is doing a behind-the-neck shoulder press, which involves *sitting on a bench* located under the bar, gripping the bar with both hands, fully extending one's arms above the head, and then bringing the bar back down behind the neck approximately to the level of the shoulders, the bar stops would be set no higher than the level of the shoulders. Setting the bar stops any higher would not allow the user to bring the bar through the entire range of motion involved in a behind-the-neck shoulder press. Accordingly, even had Roberts used the adjustable bar stops and set them at the appropriate height (*i.e.* shoulder level), this would not have prevented the falling barbell from striking his neck at the

> level of C3, which is located several inches above the shoulders" (¶ 14 [emphasis added]).

Aside from the obvious point of contention as to whether Roberts should have utilized the bar stops, there are two additional factual issues left unresolved by the present record. First, it is unclear whether Roberts was sitting on a flat bench, as Mr. Smith assumes in his affidavit, or lying on a (declined) bench, as Roberts consistently testified (at pages 41 and 52 of his deposition). Mr. Smith's assumption that Roberts was sitting up on a bench is corroborated by the deposition testimony of an eyewitness to the accident, Ms. Gyuro, who stated (at page 10 of her deposition):

> "I observed Dave [Roberts] on a – what I believe to be a Smith [P]ress machine. *He was sitting up*, doing behind-the-neck bench presses. He was finishing up his sets of exercis[es] and as he tried to lock the machine into place, and thinking the machine was locked into place, the bar, it came crashing down on his neck. He fell down on his right side, face down on the floor" (emphasis added).[8]

If Roberts was sitting up while performing the behind-the-neck bench press as Ms. Gyuro testified, then Mr. Smith's analysis would be correct. If, however, Roberts was lying down on a declined bench during the exercise as he testified, then the correctness of Mr. Smith's analysis is suspect. In any event, defendant fails to notice this lack of clarity in Roberts' exercise position, and Mr. Shipley's affidavit that Roberts could have safely used the adjustable bar stops is conclusory.

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[8] Another individual who was present at the time, but did not eyewitness the accident, also stated that Roberts was "sitting down on a bench . . . and was doing military presses behind his head" (Van Casteren Tr. at 11).

Second, the record is unclear whether Roberts used the adjustable bar stops as part of his exercise routine. He testified (at pages 56-57 of his deposition) that he was unaware of the existence of the safety stops and never used them. He later explained (at page 62 of his deposition) that he did not need to use the adjustable stops because they were located at a level that was lower than his. His later testimony suggests, as does Mr. Smith's affidavit, that he did not use the bar stops because they would not have protected him from injury. On the other hand, two other individuals who worked out with Roberts at the gym, Ms. Gyuro and Mr. Sal Van Casteren, testified (at pages 36 and 22 of their depositions, respectively) that plaintiff typically used the adjustable stops while performing the behind-the-neck shoulder press. This again presents an issue of fact for a jury to determine, both in terms of the existence of a design defect (*i.e.*, the alleged inadequacy of the adjustable stops for behind-the-neck shoulder press) and in terms of causation. The jury will need to determine whether Roberts set, or could have set, the adjustable bar stops to perform the behind-the-neck shoulder press and if he was able, but failed, to do so, whether such failure was the sole proximate cause of his injuries.

C. ***The Alternative Design***

Defendant's expert contends that plaintiff fails to identify a safer alternative design to the Smith Press (Shipley Aff., ¶ 22). In response, plaintiff's expert states that he has identified approximately 40 different designs of Smith Presses manufactured by approximately 30 different companies and that all Smith Presses have been designed, with

the exception of those manufactured by Cybex, so that the rungs on which the hooks are engaged are visible to the user (Smith Aff., ¶ 5). Plaintiff annexes as Exhibit 3 to her opposition papers a sampling of the brochures and catalogues of other Smith Presses which her expert collected over the years. The court counted 11 different models of Smith Presses in Exhibit 3, but was unable to determine which of these 11 models were manufactured in or before 1994 when defendant made the subject Smith Press. The affidavit of plaintiff's expert is not helpful in that regard, as it states that "several" of the 11 models pre-date the subject Smith Press, but fails to identify them. Thus, plaintiff has failed to prove that a safer alternative design existed in 1994.

However, plaintiff points out that, prior to 1994, defendant rejected its own alternative designs which could have obviated the alleged visibility defect. Prior to the subject Model 5341, defendant produced Model 5340 that contained a warning or "flagging" mechanism that alerted the user when the hooks of the barbell were properly latched over the rungs. A Cybex designer, Gary Lurken, explained (at page 41 of his deposition) the reasoning behind the flagging mechanism, as follows:

> "Q. I want to talk generally for a minute about the Smith [P]ress 5340 and how it works. Can you describe the basic technology or mechanism of the 5340, particularly, as it relates to the weight lifting bar and how it goes on the track and hooks on and so forth[?]
>
> A. Okay. The bar itself is narrow and it goes onto a housing. It's bolted onto a housing. The housing is ran on an inch rod from the top to the bottom. It has a ladder with rungs on the inside that the hooks actually hook on to. It has a flag mechanism, whereby, when you rotate the bar forward, the flag disappears and it[']s in a locked position. When you

> rotate the bar back, the flags appear and that means you are in an unlocked position."

Mr. Lurken stated (at pages 46, 62-65, and 76 of his deposition) that defendant eliminated the flagging mechanism from Model 5340 and re-designed the Smith Press by re-positioning the rungs "external" to the ladder mechanism where they could be seen by the user. Mr. Lurken testified (at page 65 of his deposition) that this design change was consistent with the then-prevalent industry standards:

> "Q. What, if anything, did you ascertain about the state of the art of the latching mechanism and the industry standards with respect to other Smith [P]resses?
>
> A. The idea is that we came up with the outside one. That's very similar to others, to other people who had Smith [P]resses at that time.
>
> Q. Did you implement the change that we spoke about; moving the rungs to the external portion of the housing?
>
> A. Correct."

Mr. Lurken also acknowledged (at page 76 of his deposition) that this design change "sufficiently address[ed] the concern that Cybex had about the user not being able to see the hooks go over the rungs." Mr. Lurken then testified (at pages 78-79 of his deposition) that when Cybex subsequently designed Model 5341, the successor to Model 5340, Cybex re-positioned the rungs back inside the housing unit where the user performing the behind-the-neck shoulder press could not see the rungs. Mr. Lurken admitted (at pages 79-80 of his deposition) that this relocation of the rungs once again "obstructs the user's vision of the pin [*i.e.*, the rung]." Mr. Lurken stated (at page 80 of his deposition) that he did not know the

reason for this change. According to Mr. Lurken (at page 63 of his deposition), the flagging device, which was present on Model 5340, was eliminated on Model 5341 because the flags were "a maintenance problem," as they were "broken off, no longer being there."

The two prior alternative designs, one with the flagging device, the other with the rungs re-positioned externally to the ladder mechanism, further raise an issue of fact as to whether the subject Smith Press suffered from a design defect.

***D. The Absence of the Affidavit from Defendant's Initial Engineer***

Plaintiff points out to the court that defendant has failed to submit with its moving papers an affidavit from Dennis B. Brickman, PE, who was retained by defendant at the inception of this action and who in July 2006 examined and tested the subject Smith Press. Plaintiff asserts that the court should view an unexplained absence of an affidavit from Mr. Brickman as an additional evidence of its defective nature and draw a negative inference, in the form of a "missing witness" charge, against defendant.

The "missing witness" charge is applicable to trials and "allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events" (PJI 1:75). The "missing witness" charge cannot apply to summary judgments because, at this juncture of the case, the motion court cannot act as a fact finder. Accordingly, plaintiff's request for a missing witness charge against defendant is denied.

### *III. Failure to Warn Claim*

As stated, a product may be defective as a result of inadequate warnings relating to the product (*see Voss*, 59 NY2d at 107). In this case, the Smith Press was equipped with two "Caution" decals and an instruction decal on the inner frame of the machine. The caution decals warn that the hooks must be fully latched onto the rungs at the completion of the exercise to avoid injury. Also, the instructions state that the user must set the adjustable safety stops in order to use the machine. Defendant later re-designed one of the decals by replacing the word "Caution" with the word "Warning."

With respect to her failure to warn claim, plaintiff alleges that the caution issued by Cybex, "LATCH HOOK FULLY OVER PIN UPON COMPLETING EXERCISE TO AVOID INJURY," did not adequately address unique risk associated with using the Smith Press. According to plaintiff, anyone familiar with a Smith Press knows that to end the exercise one has to rotate the barbell until the hooks fully latch over the rungs. What Roberts did not know, plaintiff asserts, but what Cybex did know, was that by virtue of his inability to see the rungs during the behind-the-neck shoulder press, Roberts might have mistakenly believed that the hooks were fully latched over the rungs when, in fact, they were only precariously perched on top of the rungs. Plaintiff further asserts that even had the Cybex label described the risk that was unique to its Smith Press, the label still would not have been adequate since it did not contain the word, "WARNING" or "DANGER" (rather than the word, "CAUTION" that was then used by Cybex) and lacked the orange or red background

as required by ANSI Z535.4 (eff. 1991). Defendant, however, argues that, as a matter of law, it owed no duty to Roberts who was a knowledgeable and experienced user, and even if such a duty existed, the breach of such duty was not the proximate cause of the accident.

It is well established that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998]). "The nature of the warning and to whom it should be given depend upon a number of factors, including the harm that may result from use of the product without the warnings, the reliability and adverse interest of the person to whom notice is given, the kind of product involved and the burden in disseminating the warning" (*Frederick v Niagara Mach. & Tool Works*, 107 AD2d 1063, 1064 [4th Dept 1985], citing *Cover v Cohen*, 61 NY2d 261, 276 [1984]). As a defendant's liability will not arise from a breach of duty alone, plaintiff must show, in addition, that the failure to warn was "a substantial cause of the events which produced the injury" (*Billsborrow v Dow Chem., U.S.A.*, 177 AD2d 7, 16 [2d Dept 1992]). Where the injured party was fully aware of the hazards through general knowledge, observation or common sense, 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 (*see Liriano*, 92 NY2d at 241; *see also Smith v Stark*, 67 NY2d 693, 694 [1986]). Thus, it may well be the case that a given risk is not "obvious," in the sense of precluding any duty to warn, but that nevertheless, because the risk was well understood by the plaintiff, a warning would have made no difference.

The court finds that this is such a case. Defendant's submissions established as a matter of law that Roberts was aware of the danger inherent in exercising with a 200-pound weight. Roberts used the Smith Press "numerous" times in the past and was familiar with its operation. He exercised at the gym three times per week and typically performed 3-4 sets with 10-12 repetitions in each set. He progressively increased the weight to be lifted by 5-pound increments and reached the weight of 200 pounds in mid-September 2003, or approximately a month and a half before the accident. He was so dedicated to weight training that he used his meal break at work to lift weights and, on the day of the accident, he started his work-out with the Smith Press. He adhered to a weight-lifting routine which he established "so long ago" (Roberts Tr. at 47). He did not use a spotter (Roberts Tr. at 46). Moreover, he was aware of the need to hook up the barbell by turning it to relieve the weight off his arms (Roberts Tr. at 76, 80).

Under these circumstances, Roberts was or should have been aware of the hazard of being struck by the barbell and, thus, a warning that the hooks might not have been fully locked onto the rungs would not have added anything to the appreciation of this hazard. Therefore, the need to fully hook the barbell onto the rungs to prevent such an occurrence was open and obvious. It is well settled that there is no duty to warn a user who is already aware, through common knowledge or learning, of a specific hazard (*see Smith*, 67 NY2d at 694 [finding no causation because plaintiff must have known based on his general knowledge of pools, his prior observations and common sense that the area into which he

dove contained shallow water]; *McMurry v Inmont Corp.*, 264 AD2d 470, 472 [2d Dept 1999] [in light of plaintiff's experience, "a warning would not have added anything to the appreciation of the hazard"]).

Moreover, Roberts testified (at pages 59-60 of his deposition) that he did not recall reading the labels on the Smith Press. He further testified (at page 60 of his deposition) that he had never read any labels on any weight-training equipment. Accordingly, defendant is entitled to summary judgment dismissing plaintiff's negligence and strict products liability causes of action to the extent they are grounded on defendant's alleged failure to warn.

***CONCLUSION***

In sum, the court rules, as follows:

1) Defendant shall, within thirty (30) days from the date of service of this decision and order with notice of entry, serve proper responses to the plaintiff's expert demands, in accordance with the mandates of CPLR 3101 (d), or defendant will be precluded from offering expert testimony at the trial of this action. Each response shall be tailored to disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which he is expected to testify, his qualifications, and the summary of the grounds for his opinion.

2) Defendant's motion for summary judgment is granted only to extent of dismissing those causes of action premised upon the failure to warn, a manufacturing defect,

and the breach of an express or implied warranty. The remaining causes of action are severed and shall continue.

3) Pursuant to CPLR 2001, the caption of the case is amended to remove all references to the third-party action, which has been discontinued by stipulation dated October 17, 2008, as follows:

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CERENE ROBERTS, AS ADMINISTRATRIX OF THE ESTATE OF DAVID ROBERTS, DECEASED,

Plaintiff,

- against - Index No. 33071/05

CYBEX INTERNATIONAL, INC.,

Defendant.

----------X

The foregoing constitutes the decision and order of the court.

ENTER,

J. S. C.

Hon. Martin M. Solomon S.C.J.