

**Wiacek v 3M Co.**

2014 NY Slip Op 30211(U)

January 16, 2014

Sup Ct, New York County

Docket Number: 190096/12

Judge: Sherry Klein Heitler

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER  
*Justice*

PART 30

- Index Number : 190096/2012  
WIACEK, MARIAN  
vs.  
3M COMPANY, ET AL.  
SEQUENCE NUMBER : 009  
SUMMARY JUDGMENT

INDEX NO. 190096/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 009

*(NORTH)*

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the  
memorandum decision dated 1.16.14

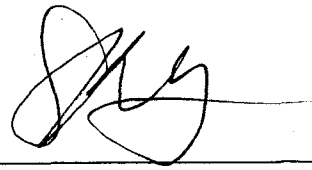
## FILED

JAN 27 2014

NEW YORK  
CLERK OF SUPREME COURT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1.16.14



J.S.C.

**HON. SHERRY KLEIN HEITLER**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

----- X  
MALGORZATA WIACEK, Individually and as Executrix  
of the Estate of MARIAN WIACEK, deceased,

Index No. 190096/12  
Motion Seq. No. 09

Plaintiffs,

**DECISION & ORDER**

-against-

3M Company, et al.,

Defendants.

----- X  
**SHERRY KLEIN HEITLER, J.:**

**FILED**  
JAN 27 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, defendant North City Products LLC (“North” or “Defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the grounds, among others, that plaintiffs have not specifically pled any claims against North and that plaintiffs cannot demonstrate that any North product contributed to plaintiffs’ injuries. For the reasons set forth below, North’s motion is granted in part and denied in part.

**BACKGROUND**

Plaintiffs’ decedent Marian Wiacek, now deceased, was born in Poland in 1952 and emigrated to the United States in 1986. From 1987 until approximately 1992 Mr. Wiacek worked as an asbestos handler abating asbestos and asbestos-containing products from manholes, powerhouses, private apartments, and offices, among other locations. He also worked in and around boilers. In or about 1992 Mr. Wiacek became a supervisor, a position he held until early 2012. While Mr. Wiacek no longer personally performed abatement work as a supervisor, it is undisputed that he continued to work with and around asbestos-containing products on a daily

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basis.

Mr. Wiacek was diagnosed with mesothelioma in October of 2011. He and his wife Malgorzata Wiacek commenced this action on February 24, 2012. With several exceptions<sup>1</sup>, the verified complaint (the “Complaint”) broadly describes the twenty defendants named therein, including North, as having been manufacturers and suppliers of asbestos-containing products. Plaintiffs amended the Complaint on July 23, 2013 to reflect Mr. Wiacek’s death and to add a claim for wrongful death.

Prior to his death Mr. Wiacek was deposed over the course of six days in May, July, August, and October of 2012.<sup>2</sup> He testified that as an asbestos handler he was required to and did take several safety training courses. He also obtained federal, state, and New York City licenses to work as an asbestos handler and supervisor. Most of his training involved the use of personal protective equipment (“PPE”), including special shoes, protective suits, goggles, respirators, gloves, and hoods, all of which he used while working with and around asbestos products.

Mr. Wiacek’s deposition focused heavily on his training to use respirators, which he referred to as masks (Video Deposition pp. 44-45):

Q. Mr. Wiacek, when you would do this work as an asbestos handler from 1987 to 1992, what would you be wearing when you did this work?

A. As protection?

Q. As protection, yes?

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<sup>1</sup> North submits a copy of the verified complaint as exhibit 7. Therein plaintiffs assert New York Labor Law claims (4<sup>th</sup> and 7<sup>th</sup> causes of action), a premises liability claim (8<sup>th</sup> cause of action), and a claim specifically against defendant Metropolitan Life Insurance Co. relating to health benefits (5<sup>th</sup> cause of action). None of such claims are alleged herein to pertain to North.

<sup>2</sup> Mr. Wiacek’s *de bene esse* deposition transcript is submitted as defendant’s exhibit 1 (“Video Deposition”). Copies of his discovery deposition transcripts are submitted as defendant’s exhibit 2 (“Deposition”).

A. First of all, we removed all street clothes.

Q. Yes.

A. Hundred percent, and we put one time using, temporary only for the job, official suits, coveralls, different name, and masks, and gloves, sometimes is rubber boots, and some jobs you use helmets, some jobs we use goggles, but suits and masks was most important. We use every job.

Q. What type of masks did you wear?

A. We used only two types of mask, which means half face mask and full face mask.

He consistently identified North as one of only a few manufacturers of respirators that he used throughout his career (Deposition pp. 151, 221-22; Video Deposition p. 45, 47):

Q. Now, you can't tell me . . . which specific masks you wore?

A. I can say first ten years mostly I used MSA, Wilson and 3M, and last ten years mostly North. . . .

\* \* \* \*

Q. And did all the asbestos abatement workers use the same type of mask?

A. Same types, because we used four -- I remember four brands of mask we used last - I worked last 25 years.

\* \* \* \*

Q. Do you recall the brands of the half face masks that you wore?

A. I remember old mask we use it, it was North. We used 3M, we used MSA, and we use Reson. That's the mask we use as half masks or as full masks.

\* \* \* \*

Q. Are you sure that you used masks manufactured by North?

A. Yes.

Mr. Wiacek wore a different respirator on every job, and sometimes several different respirators in one day. He was unable to recall what type, brand, size, or model respirator he wore on any single job, but remembered that most of the respirators were dark in color and had soft pink filters that screwed into the sides. He also testified that he worked with both full and half masks throughout his career and that the half masks did not provide the same protection factor as the full

masks (Video Deposition pp. 47-48, objections omitted):

- Q. I'm just asking for your understanding. Is it your understanding that half face masks provide a hundred percent protection? . . .
- A. All masks have protection for us.
- Q. Right. Is the protection from the half face mask a hundred percent? . . .
- A. Of course it is.
- Q. From the half face?
- A. No, half face doesn't give us protection, half mask. The protection factor was smaller than full face.

Because of the health hazards associated with asbestos exposure, Mr. Wiacek understood the importance of obtaining a good seal between his respirator and his face. Every morning before entering a work site he performed his own fit test.<sup>3</sup> He also obtained annual "fit test" certifications.<sup>4</sup> At the end of each work day Mr. Wiacek went through extensive decontamination procedures which included passing through several rooms with airlocks between them. He then removed all of his PPE, except his respirator, and passed through an area where he would shower and wet down his respirator before removing it. Only after disposing of his respirator and its filters could he enter a clean room and put on his street clothes.<sup>5</sup>

Despite strictly following all of these safety procedures Mr. Wiacek was exposed to asbestos and developed mesothelioma. Plaintiffs assert that he never would have been exposed had North's respirators not been defectively designed.

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<sup>3</sup> Deposition pp. 192-93, 533-34.

<sup>4</sup> Deposition pp. 136-141.

<sup>5</sup> Video Deposition pp. 78-81.

## DISCUSSION

The movant on a summary judgment motion must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law by demonstrating the absence of any material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Should the moving party fail to present a *prima facie* case, the court need not consider the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Should the movant establish its *prima facie* case, the burden shifts to the opposing party to demonstrate that there is a genuine triable issue of fact. *Zuckerman, supra*; see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

North argues that it is entitled to summary judgment because the Complaint fails to state any cognizable cause of action against it and because plaintiffs cannot show "any genuine issue of material fact on any potentially relevant cause of action, *i.e.*, strict liability, negligence, breach of warranty, that would justify a trial."<sup>6</sup> In opposition plaintiffs contend that the Complaint sufficiently pleads design defect and failure to warn claims against North and that there are issues of fact with respect to both claims that preclude summary judgment.

### **I. Sufficiency of the Complaint**

Pursuant to the New York City Asbestos Litigation ("NYCAL") Case Management Order ("CMO"), plaintiffs' counsel has filed a set of standard complaints under the global index number for all NYCAL cases (040000/1988) which contain standard allegations generally applicable to all asbestos personal injury actions filed in this court. Generally, these standard complaints allege that

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<sup>6</sup> See Defendant's Memorandum of Law, p. 13-14. Plaintiffs do not oppose that branch of North's motion which seeks dismissal of plaintiffs' breach of warranty claim. Accordingly, North's motion is granted in that respect.

the defendants manufactured, sold, or distributed asbestos-containing products to which the plaintiff was exposed. North points out that it manufactures asbestos-free respiratory protection equipment, not asbestos-containing products, and that the Complaint incorrectly identifies it as having manufactured and sold asbestos-containing materials. North further points out that the Complaint only expressly identifies 3M masks as having been defectively designed.<sup>7</sup> On these grounds North argues that plaintiffs have failed to plead a cause of action against it and that it would be prejudiced should the court now afford plaintiffs an opportunity to cure. Plaintiffs tacitly acknowledge that the Complaint may have been inartfully drafted with respect to North, but argue that under New York's liberal pleading requirements of CPLR 3026<sup>8</sup> it is sufficient to maintain defective design and failure to warn claims against North.

Bearing CPLR 3026 in mind, I find that any purported defects in the Complaint do not prejudice North. *See Busler v Corbett*, 259 AD2d 13 (4th Dept 1999) (a showing of prejudice requires the demonstration of an impairment of a party's ability to defend on the merits). It is evident that North knew or should have known that plaintiffs were pursuing design defect and failure to warn claims against all of the defendants in this case that manufactured respiratory protection no later than the first day of Mr. Wiacek's deposition.<sup>9</sup> Thus, North was on constructive

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<sup>7</sup> Complaint ¶ 40.

<sup>8</sup> CPLR 3026 provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

<sup>9</sup> See Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3026, at 297 (If a defect prejudices no one, it must be ignored. . . . In considering whether prejudice is avoidable, it is permissible today to consider other sources within the litigation from which the party may derive, or indeed may have already obtained, whatever is now sought from the other side's pleading. Frequently, the bill of particulars and the disclosure devices can avoid any prejudice."

notice of the basis for plaintiffs' claims against it at the very latest in May of 2012, over one year prior to filing this motion. At this stage of the proceeding, with discovery in full swing and plaintiffs having requested that this matter be assigned to a trial judge, North's claim of prejudice is untenable.

## II. Design Defect Claim

"A party injured as a result of a defective product may seek relief against the product manufacturer . . . if the defect was a substantial factor in causing the injury." *Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 (2003); *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 110 (1983). "A strict products liability cause of action may be premised on a defect in the manufacturing process, a defect in the design or a failure by the manufacturer to provide adequate warning or instructions." *Perazone v Sears, Roebuck & Co.*, 128 AD2d 15, 17-18 (3d Dept 1987) (citing *Voss, supra*, at 106-107); *see also Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998). "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." *Gonzalez v Delta Int'l Mach. Corp.*, 307 AD2d 1020, 1021 (2d Dept 2003). The plaintiff "must use an expert to show a feasible alternative design and to meet its *prima facie* case." *Bruno v Thermo King Corp.*, 2008 NY Misc. LEXIS 7718, at \*11 (Sup. Ct. Queens Co. Jan. 30, 2008), *aff'd* 66 AD3d 727 (2d Dept 2009); *see also Lessard v Caterpillar, Inc.*, 291 AD2d 825, 826 (4th Dept 2002); *Rypkema v Time Mfg. Co.*, 263 F. Supp. 2d 687, 692 (SDNY 2003).

In support of its position that North's respirators were defectively designed, plaintiffs

submit an attorney's affirmation which states in a conclusory manner that North's respirators must have been defective because Mr. Wiacek contracted mesothelioma despite using them. Plaintiffs also submit excerpts of an August 26, 1986 deposition of a North corporate representative in an unrelated case who testified that certain masks manufactured by North were discontinued because they did not meet certain criteria established by the National Institute for Occupational Safety and Health ("NIOSH"), which develops recommendations on workplace safety practices to prevent injuries. Plaintiffs have not designated a single expert witness to opine on the issues surrounding the design of, and regulations applicable to, respirators used for asbestos abatement. In the absence of such expert opinion, plaintiffs' proofs are insufficient to raise a triable issue of fact whether North's respirators were defectively designed, and plaintiffs design defect claims cannot survive summary judgment. *Bruno, supra*.

### III. Failure to Warn Claim<sup>10</sup>

Employers are required to provide their employees with specific types of NIOSH-certified respirators when they are exposed to certain contaminants, including asbestos. See, e.g., 29 CFR 1910.134.<sup>11</sup> NIOSH closely monitors a respirator's proposed design specifications; performance inspection, and testing results, as well as proposed user instructions, manuals, packaging, and labeling. See 42 CFR §§ 84.11, 84.12, 84.40, 84.41.

In this regard, North submits the affidavit of its Respiratory Product Line Leader Lynn

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<sup>10</sup> Where liability is predicated on a failure to warn, New York views negligence and strict liability claims as equivalent. See *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 62 (4th Dept 1979), *aff'd* 52 NY2d 768 (1980).

<sup>11</sup> Respirators are also regulated by the Occupational Health and Safety Administration ("OSHA"), which requires that persons "entering a regulated area shall be supplied with and required to use a respirator" (29 CFR 1910.1001(e)(4)) and that the respirator must be a "tight-fitting, powered, air-purifying respirator." (29 CFR 1910.1001(g)(2)(ii)).

Feiner<sup>12</sup> who states that all of North's respirators were reviewed, approved, and certified by NIOSH, including their warnings and labeling requirements<sup>13</sup>, and that North performed all of NIOSH's required tests internally to assure itself that its respirators satisfied NIOSH's regulatory performance requirements.<sup>14</sup> Annexed to Ms. Feiner's affidavit are documents which, according to Ms. Feiner, show that North's 7600 and 7700 series respirators, which were available throughout Mr. Wiacek's exposure period, were "certified by NIOSH . . . for use with dust, mist and vapors including asbestos when used with the appropriate filter."<sup>15</sup>

Relying on *Vannucci v Raymond Corp.*, 258 AD2d 198 (3d Dept 1999) and *Jemmott v Rockwell Mfg. Co., Power Tools Div.*, 216 AD2d 444 (2d Dept 1995), North argues that its compliance with NIOSH's labeling requirements precludes plaintiffs' failure to warn claim. However, these cases focused on whether the products at issue therein were improperly designed, not whether the manufacturers failed to provide adequate warnings. In *Vannucci*, the plaintiff was injured in a forklift accident allegedly because the forklift he was operating was not equipped with permanent rear safety posts. The court granted the defendant manufacturer summary judgment on the ground that the forklift, with or without the safety posts, fully complied with all industry standards and was reasonably safe for its intended use when sold. The evidence established that the relevant standard in effect at the time of sale did not require rear posts or guards but only suggested that such guards could be provided at the option of the user. Furthermore, the initial

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<sup>12</sup> Ms. Feiner's affidavit, sworn to July 29, 2013, is submitted as defendant's exhibit 8.

<sup>13</sup> The court here notes that no labels or warnings by North have been made part of the record on this motion, nor have the alleged government approvals thereof been submitted.

<sup>14</sup> Defendant's exhibit 8 at ¶ 7, 9.

<sup>15</sup> *Id.* at 9.

design of the forklift contemplated the incorporation of rear posts should the customer opt for their inclusion. In *Jemmott*, the plaintiff injured her finger when it was caught in a drill press machine. The plaintiff claimed that a component part of the drill press was improperly designed because it did not contain a guard in violation of OSHA regulations and American National Standards Institute (“ANSI”) standards. The trial court dismissed the complaint insofar as the plaintiff failed to indicate how the manufacturer violated either OSHA’s regulations or ANSI’s standards. The Second Department affirmed, holding that plaintiff’s expert’s conclusory affidavit failed to raise a triable issue of fact in this regard. In addition, and significant for purposes of this motion, the court opined that while such regulations and standards “may be indicative of what may constitute negligence, neither is dispositive.” *Jemmott, supra*, at 444-45.

North’s reliance on *Fitzpatrick v Currie*, 52 AD3d 1089 (3d Dept 2008) and *Donovan v All-Weld Products Corp.*, 38 AD3d 227 (1st Dept 2006) is equally misplaced. In *Fitzpatrick*, the plaintiff was injured when his vehicle’s air bag deployed in a collision. In response to the assertion that the air bag was unreasonably powerful, the car manufacturer’s expert explained that it had no choice but to make the air bag inflation system very quick and forceful in deploying because the applicable government regulations at the time mandated such a design. Similarly, in *Donovan*, the plaintiff alleged that the defendant’s air respirator was improperly designed because it did not come with a two-way communication device or gas detector monitor. The defendant moved for summary judgment and submitted evidence which consisted of a NIOSH certification, OSHA citations, and OSHA reports, all of which established, *prima facie*, that the respirator was reasonably safe for its intended use. In short, neither *Vannucci*, *Jemmott*, *Fitzpatrick* nor *Donovan* stand for the proposition that compliance with NIOSH’s design and labeling standards would

entitle North to summary judgment in this state tort action.<sup>16</sup>

North further contends that the prominence and adequacy of its warnings are immaterial because Mr. Wiacek knew how to use its respirators and was fully aware of the risks associated with his trade. *See Liriano, supra*, at 241 (“courts could as a matter of law decide that a manufacturer’s warning would have been superfluous given an injured party’s actual knowledge of the specific hazard that caused the injury.”); *Reis v Volvo Cars of No. Am., Inc.*, 73 AD3d 420, 423 (1st Dept 2010) (“it is immaterial how prominent or conspicuous any warning in the owner’s manual might have been because it is undisputed that [the plaintiff] did not read the manual and would not have been likely to read it because he was familiar with how cars operated.”)

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<sup>16</sup> The court has not come across any New York authorities to support North’s position. The New Jersey Supreme Court’s decision in *Feldman v Lederle Lab.*, 125 NJ 117 (1991), however, is informative. In *Feldman* the plaintiff argued at trial that Declomycin, an antibiotic, had permanently turned her teeth gray, and that the drug was defective because it lacked a warning that its ingestion by young children might result in tooth staining. The defendant-manufacturer attempted to show that relevant federal statutes and regulations had precluded it from performing its state-law duty to warn. The jury found in favor of the plaintiff and awarded her \$300,000. A New Jersey appellate court reversed the trial court’s verdict on the ground that the plaintiff’s claim was preempted by federal law under the Supremacy Clause of the United State Constitution. The New Jersey Supreme Court reversed and remanded, holding that the plaintiff’s cause of action was not preempted because there was no direct conflict with federal law. Among other things, the court highlighted that compliance with FDA regulations and liability under a state tort regime are not mutually exclusive (*Id.* at 141): “[M]ere compliance with an FDA suggestion, or for that matter, regulation or order, does not mean that state tort law becomes irrelevant. First, compliance with an FDA regulation may establish that the manufacturer met the appropriate minimum standards of due care, but compliance does not necessarily absolve the manufacturer of all liability . . . . Manufacturers must meet state safety requirements, whether codified or embodied in the common law, in addition to satisfying the initial FDA requirements. Second, federal regulation serves a very different purpose [from] state tort law. Essentially, federal regulation serves a deterrent purpose by limiting the manufacture of inherently dangerous products to those applicants who meet certain stringent safety standards, while state tort law serves the equally important purpose of compensating individuals injured by those very same products. [Because] compliance with FDA regulations will not ensure that a manufacturer’s products will not cause injury, compliance will not necessarily exempt a manufacturer from liability. When those products do cause injuries, the state tort system provides a means of compensation. State tort law is intended to supplement federal regulation by providing a vehicle for compensation of vaccine-related injuries. . . .” (emphasis omitted)

It is equally axiomatic, however, “that in all but the most unusual circumstances, the adequacy of a warning is a question of fact. . . .” *Polimeni v Minolta Corp.*, 227 AD2d 64, 67 (3d Dept 1997); *see also Morrow v Mackler Prods.*, 240 AD2d 175, 176 (1st Dept 1997); *Nagel v Brothers Intl. Food, Inc.*, 34 AD3d 545, 547-48 (2d Dept 2006). In this case, and notwithstanding the fact that Mr. Wiacek was highly trained in respirator safety protocols, he testified that he saw no warnings on the masks themselves (as opposed to the packaging), that he would not have used half masks had he known they did not offer 100% protection, and that he occasionally found the need to tighten his mask while on the job (Video Deposition pp. 48-50, 103-06, objections omitted):

Q. On the half masks, and I want you to listen to my question carefully, on the half masks, on the mask itself, okay, did you see any writing that stated that the mask did not give you a hundred percent protection? . . .

A. The mask had no signs on this.

Q. No signs on the masks?

A. Masks had signs only size mask, and approval, by whom approval.

Q. If you had read on the mask that it did not give you a hundred percent protection, would you have used the mask?

A. No. . . .

Q. Your answer to that question was no?

A. My answer is no.

Q. Mr. Wiacek, when you did you find out that the masks didn't give you a hundred percent protection? . . .

A. Last year when doctor says I have mesothelioma. After five years on job.

\* \* \* \*

Q. Are you ready Mr. Wiacek?

A. Okay.

Q. Good. When you would be working as an asbestos handler, wearing the half mask, okay, would you be standing perfectly still when you were doing your work or would you be moving around?

- A. Could you repeat, please?
- Q. When you were doing your job as an asbestos handler would you be standing still or would you be moving around?
- A. No, it's not standing job. Asbestos handler, he is using by hand, hanging above his head, asbestos. Let's say from say, back, from ceiling, and he has to move, if he say, on a ladder, but mostly on scaffold. It's some spaces is easy access, it's entire deck, but some spaces like between there it's like small spaces, especially on side, and around the walls, where you have to -- where you don't have access with his head, you can put only in hands, you have to move head. So you move your head left, right, up, down. Is situation where I'm not sure mask -- that mask we are using is enough for that kind of job. I think it's better if you have mask, including -- when I go to equipment mask, from top to bottom, inside of mask and gloves, it gives us more protection.
- Q. Is that because when you are moving your head from side to side that you were describing --
- A. Yes.
- Q. -- that the seal that the lawyers for the mask companies just asked you about doesn't stay on your face the same way it does when you are trying it out without doing work?
- A. It feels okay, but if I am working or moving I have to . . . tighten it. . . .
- Q. Did you ever raise that issue, this moving around issue, with your employer?
- A. I don't understand. . . .
- Q. Did you ever raise an issue about your mask not sealing with your employer?
- A. I didn't say mask not sealing. I didn't say like this, but I said the mask does like trap dust. If I moving head, left, right, up, down. So, sometimes the straps makes loose. The reason why we have to control workers, supposed to have control of the mask, and check and see, just make stronger straps.

In light of the foregoing, this court cannot find as a matter of law that Mr. Wiacek would not have heeded the Defendants' warnings were they to be given, or that any such warning was adequate in the circumstances. As such there remains a triable issue of fact concerning the adequacy of the warnings provided by North in respect of its respirators designed to be used for asbestos abatement.

CONCLUSION

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that North Safety Products, LLC's motion for summary judgment is granted in part and denied in part; and it is further

ORDERED that the branch of North Safety Products, LLC's motion which seeks to dismiss the Complaint for failure to state a cause of action is denied; and it is further

ORDERED that plaintiffs' second cause of action for breach of warranty as against North Safety Products, LLC is hereby severed and dismissed in its entirety; and it is further

ORDERED that to the extent that plaintiffs allege a manufacturing or design defect claim against North Safety Products, LLC such claim is dismissed for failure of proof; and it is further

ORDERED that to the extent that plaintiffs allege a failure to warn claim against North Safety Products, LLC this motion for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 1.16.14

**FILED**

JAN 27 2014 ENTER:

NEW YORK  
COUNTY CLERK'S OFFICE

  
SHERRY KLEIN HEITLER, J.S.C.