Reece v J.D. Posillico, Inc.
2015 NY Slip Op 31242(U)
July 16, 2015
Supreme Court, Suffolk County
Docket Number: 24476/2010
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX NO. 24476/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ERNEST REECE, as Administrator of the Estate of ARTHUR WILLIAM REECE, Deceased, on Behalf of Infants, and as Conservator of JEZOAR REECE and ZAHYR REECE,

Plaintiffs,

-against-

J.D. POSILLICO, INC., JOHNSON ELECTRICAL CONSTRUCTION CO., WILEY ENGINEERING, P.C., ATHENA LIGHT & POWER, TOPINKA & DANGELO, INC. and HAPCO,

Defendants.

TOPINKA ASSOCIATES INC. d/b/a TOPINKA & DANGELO INC. and KEARNEY-NATIONAL INC. d/b/a HAPCO,

Third-Party Plaintiffs,

- against -

AKRON FOUNDRY COMPANY,

Third-Party Defendant.

ORIG. RETURN DATE: FEBRUARY 14, 2014
FINAL SUBMISSION DATE: FEBRUARY 20, 2014
MTN. SEQ. #: 015
MOTION: MG

ORIG. RETURN DATE: DECEMBER 4, 2014
FINAL SUBMISSION DATE: APRIL 30, 2015
MTN. SEQ. #: 016
MOTION: MOT D

ORIG. RETURN DATE: JANUARY 29, 2015
FINAL SUBMISSION DATE: APRIL 30, 2015
MTN. SEQ. #: 017
CROSS-MOTION: XMOT D

ORIG. RETURN DATE: MARCH 5, 2015
FINAL SUBMISSION DATE: APRIL 30, 2015
MTN. SEQ. #: 018
CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:
KRENTSEL & GUZMAN, LLP
17 BATTERY PLACE - SUITE 604
NEW YORK, NEW YORK 10004
212-227-2900

ATTORNEY FOR DEFENDANT J.D. POSILLICO, INC.:
SINNREICH KOSAKOFF & MESSINA LLP
267 CARLETON AVENUE - SUITE 301
CENTRAL ISLIP, NEW YORK 11722
631-650-1200

ATTORNEY FOR DEFENDANT JOHNSON ELECTRICAL CONSTRUCTION CO.:
BELLO & LARKIN
150 MOTOR PARKWAY - SUITE 405
HAUPPAUGE, NEW YORK 11788
631-300-4960

ATTORNEY FOR DEFENDANT
WILEY ENGINEERING, P.C.:
GOLDBERG SEGALLA
100 GARDEN CITY PLAZA - SUITE 225
GARDEN CITY, NEW YORK 11530
516-281-9800

ATTORNEY FOR DEFENDANT
ATHENA LIGHT & POWER:
MILBER, MAKRIS, PLOUSADIS & SEIDEN, LLP
1000 WOODBURY ROAD - SUITE 402
WOODBURY, NEW YORK 11797
516-712-4000

ATTORNEY FOR DEFENDANTS
TOPINKA & DANGELO INC
AND HAPCO:
CARROLL, MCNULTY & KULL, LLC
570 LEXINGTON AVENUE - 8TH FLOOR
NEW YORK, NEW YORK 10022
646-625-4000

ATTORNEY FOR THIRD-PARTY DEFENDANT
AKRON FOUNDRY COMPANY:
CALLAN, KOSTER, BRADY & BRENNAN
ONE WHITEHALL STREET, 10TH FLOOR
NEW YORK, NEW YORK 10004

Upon the following papers numbered 1 to 21 read on these motions and cross-motions FOR CONSOLIDATION AND SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Affirmation in Support and in Limited Opposition and supporting papers 4, 5; Notice of Motion and supporting papers 6-8; Memorandum of Law in Support 9; Affirmation in Opposition and supporting papers 10, 11; Reply Memorandum of Law in Further Support 12; Notice of Cross-motion and supporting papers 13-15; Affirmation in Partial Opposition 16; Reply Affirmation 17; Notice of Cross-motion and supporting papers 18-20; Reply Affirmation 21; it is,

Defendants KEARNEY-NATIONAL, INC. d/b/a HAPCO (hereinafter "HAPCO") and TOPINKA ASSOCIATES, INC. d/b/a TOPINKA & D'ANGELO INC. (hereinafter "T&D") move for an Order, pursuant to CPLR 602 (a), granting consolidation of the instant action under Index No. 24476/2010 for the purpose of joint discovery and joint trial with the matter of *Kendra Anderson, administratrix of the goods, chattels and estate of Delano Miguel Anderson, Kendra Anderson as administratrix of the goods, chattels and estate of Laurissa Seige Reece and Kendra Anderson v. County of Suffolk and Ernest N. Reece, Administrator of the goods, chattels and estate of Arthur W. Reece, Jr.*, pending in Supreme Court, Suffolk County under Index No. 2306/11 (Gazzillo, J.).

CPLR 602 provides in pertinent part:

> (a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated,

> and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

CPLR 602 (a).

This Court is aware of the pending and disposed actions involving this single car accident that occurred on January 26, 2009. This action sounds in negligence and professional negligence in the form of professional engineering malpractice against the various contractors and the engineering firm, which action is itself now a consolidated action including causes of action against the suppliers and distributors, as well as the impleaded manufacturer of the base and light pole. The action sought to be joined here is brought by the mother of the two minor passengers who perished in the accident against the County of Suffolk and the representative of the estate of the driver of the vehicle.[1]

Neither the plaintiff nor any party submits opposition to HAPCO's motion to consolidate, which seeks only joint trial and joint discovery not a true merger of the actions. Defendant J.D. POSILLICO (hereinafter "POSILLICO") does not oppose the consolidation of these two actions and no party has demonstrated any prejudice as a result of the consolidation for the purpose of a joint trial. Therefore, the Court finds that consolidation for the purpose of a joint trial is warranted herein in the interests of judicial economy (*see e.g. Skelly v Sachem Cent. Sch. Dist.*, 309 AD2d 917 [2003]; *Nikolaidis v Makita Corp.*, 242 AD2d 322 [1997]; *Berman v Greenwood Village Community Dev., Inc.*, 156 AD2d 326 [1989]).

By Notice of Motion dated October 30, 2014, HAPCO and T&D seek an Order of the Court, pursuant to CPLR 3212, dismissing the complaint, and for an Order, pursuant to CPLR 3212, granting common law indemnification as

---

[1] An action commenced by Anderson as against the engineering and contractor defendants in Supreme Court, New York County, under New York County Index No. 150735/2013 was removed to Supreme Court, Suffolk County and assigned Suffolk County Index No. 4044/2014. By decision of even date, that action was dismissed pursuant to CPLR 3211 (a) (5), on Statute of Limitations grounds. The plaintiff's motion to consolidate Index No. 4044/2014 with Index No. 24476/2010 and Index No. 2306/2011 was denied for the reasons set forth in that decision.

against the impleaded manufacturer of the base and pole in question, AKRON FOUNDRY COMPANY (hereinafter "AKRON"). Plaintiff's own expert has concluded in two separate affidavits that the base and pole suffered no defect in either design or manufacture. As this is a complaint sounding in strict products liability, the only other avenue of recovery against the suppliers, distributors and manufacturer of the base and pole would emanate from a duty to warn and insufficient warnings.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

HAPCO and T&D contend that warnings were not required in that it is common knowledge among contractors that the base and pole must function as a unit and that the removal of the pole while allowing the base to remain in place would negate completely the breakaway feature of the combined elements of the base and an installed pole. The contract for the installation of the bases and poles called for a breakaway feature.

The clear zone is now asserted as a defense to the failure to warn component of the product liability claim. The contract called for the breakaway feature for all bases and poles. Some of the base and pole installation sites may

have been within the clear zone, and at least the site in question where the accident occurred was outside of the clear zone. While defendants claim that the clear zone is a "firmly entrenched engineering principal [sic] relied upon by civil engineers," its significance in this instance is a question of fact. This was not the only base and pole contracted for and it is unknown if the other completed base and pole assemblies from which the poles were removed for the installation of dampeners to alleviate the oscillation issue were either inside or outside of the clear zone. The definition of the "clear zone" and its significance for highway engineering and construction purposes is a question of fact.

The defendants claim that the plaintiff's engineer, Nicholas Belizzi, not only absolved the supply chain defendants of liability for design and manufacturing defects, but that his affidavits clearly state that and there can be no question of fact in that regard. The plaintiff further claims that Mr. Belizzi absolved the manufacturer and all in the supply chain of any duty to warn or failure to warn claims. The Court does not draw that same conclusion from the Belizzi affidavits as to the duty to warn or failure to warn components of a product liability cause of action. Mr. Belizzi avers that POSILLICO and JOHNSON were experienced contractors who both knew and should have known of the danger of leaving a transformer base in place, attached to a cement platform without an attached light standard.

The plaintiff's Bill of Particulars as recited by the defendants in their motion contains a provision which states, "[f]ailure to warn private entities and the public at large of the defects and/or hazards associated with said product." The defendants allege their expert Scott Derector concluded,

> "that there are no known applicable codes, standards or ordinances that required a manufacturer or authorized sales representative to protect and/or provide a warning of the presence of a metal breakaway base, with or without a pole, that was located outside of the clear zone."

The existence or non-existence of codes, standards or ordinances are not determinative of the ultimate legal questions concerning the duty to warn and/or the failure to warn in the context of a strict product liability cause of action.

Detective O'Dea, then of the Suffolk County Police Department 4th Squad, was assigned as the lead detective on the criminal investigation of this triple fatality accident. There was a conclusion reached by Detective O'Dea that the transformer base had been damaged prior to the date of this accident. The detective observed damage to the base but no pieces or fragments of the base were present during her inspection of the scene. There was some question whether the vehicle had been moved or any debris affected by the fire department activities prior to her inspection. While Detective O'Dea's testimony of the likely scenario is obviously her sincere opinion, it is not determinative of the facts of this case.

The Court is also aware of the pre-trial testimony of Cary Leuschner concerning the need for a break away feature for any fixture or structure within the clear zone or some other shielding mechanism to guard against collision with objects in the clear zone. Mr. Leuschner admits he, together with Gary Moller, had agreed to direct the contractors to remove the poles. He does not recall any discussions about the removal of the bases or whether removal of the poles alone would undermine the breakaway feature of the pole and base combination. It is not clear to the Court if in the actual field application the engineers or the contractors knew or should have known that removing the pole from the base and allowing the base to stand alone rendered it a hazard. The plaintiff's expert, Mr. Belizzi, asserts that the contractors knew and/or should have known of the inherent danger. This will be a question of fact for the jury to determine. Defendants' assertion that if the base was outside the clear zone this would not have been a consideration is of no moment, the discussion and decision-making process concerned bases both inside and outside of the clear zone. There is no indication from any testimony or document that there was a differentiation made between bases located inside the clear zone and bases located outside the clear zone at the time the decision was made to remove the poles and allow the bases to remain in place affixed to the concrete slabs.

Mr. Moller's testimony concerning the clear zone indicates a smaller zone of 25 feet versus the 30 foot consensus of the other parties and witnesses. The breakaway feature requirement within the clear zone is an after the fact assertion of these defendants. There is nothing in this record from any source to indicate that the clear zone considerations were discussed or contemplated at the time the light standards were removed from the transformer bases.

The testimony of Donald Leslie, vice-president of JOHNSON, and Ian Shea, an apprentice/journeyman electrician employed by JOHNSON, did little to address the question of who actually exercised discretion on behalf of JOHNSON as to when a base should be removed after the removal of a pole. Mr. Leslie's testimony was of the theoretical, and Mr. Shea's testimony indicated that the foreman would determine when to remove both the pole and the base and when to remove the pole and leave the base in place without the pole.

In response to the plaintiff's assertion of a product liability claim based upon a theory of both a duty to warn and a failure to warn defendant, HAPCO contends that:

1. There is no duty to warn of a hazard of which the user is aware.

HAPCO contends that plaintiff's expert Mr. Belizzi claims the users herein were aware of the hazards based upon their knowledge and experience.

2. There is no duty to warn since the base was installed outside the clear zone.

There were 21 base and pole combinations some located within the clear zone and some located outside the clear zone. The base and pole model in question was approved and tested for use within the clear zone even if it was installed outside of the clear zone. All the bases and poles ordered were approved for installation within the clear zone. The base involved in this accident was less than one foot outside the clear zone. The clear zone is measured from the edge of the roadway pavement closest to the right shoulder. In this accident the vehicle did not leave the roadway and travel the 31 feet to the base; the vehicle apparently climbed a hill to the right of the base, hit a tree, and then rolled on its tires over the base perpendicular to the expressway. The path of the vehicle when it left the eastbound roadway to the left of the Exit 57 ramp, where it traveled, what it hit and where it came to rest are questions of fact to be determined at trial.

3. There is no duty to warn where a warning is superfluous.

HAPCO argues that warnings would be superfluous because there were safety review safeguards and protocols in place that were available to address any safety concerns. Given the testimony of Leslie Johnson, Ian Shea and Frank Scudder, it is questionable whether those protocols were sufficient to render any warning superfluous.

4. No duty to warn under the knowledgeable user exception.

HAPCO asserts there is a difference between a knowledgeable user and a user who is actually aware of a particular hazard or danger. A knowledgeable user is charged with the obligation of knowing of the hazard or danger whether he has particular knowledge of it or not.

Each of these assumptions is fact specific and *sui generis*. There were twenty-one base and post assemblies, some of which were constructed and placed inside the clear zone and some of which were outside the clear zone. There is no evidence proffered that any consideration was given to which were inside and which were outside and whether any or all of them were treated differently at the time it was decided to remove the poles from their bases due to oscillation. Were extra precautions taken with respect to those inside the clear zone? Was the clear zone ever discussed prior to the removal of the poles from the bases? Nothing in this record would indicate any definitive answer to these questions. There has been no proof of the awareness or ignorance of the engineering or contractor defendants at the time of the removal of the poles from the bases as to the effect of the removal. The plaintiff's engineering expert opines the contractor was aware of the dangers of the construction. The basis for that assertion is unknown, the assertion itself is contradicted by the deposition testimony of the representatives and employees of POSILLICO and JOHNSON. Other than the statement of the plaintiff's expert Mr. Belizzi, there is nothing else in the record to indicate that those who actually performed the work were aware of the danger. These are certainly questions of fact to be resolved by a jury.

The clear zone argument is likewise fact dependent. At the time the items were supplied, these defendants had no knowledge as to which of the poles, if any, would be installed inside or outside the clear zone. Advancing the clear zone argument without a representation that these defendants were aware that this base and pole would be installed outside the clear zone and without

asserting knowledge with respect to the locations of the other twenty poles relative to the clear zone undermines the argument. The supply chain defendants had no prior knowledge which poles would be installed outside the clear zone. There is no indication of any differentiation between and among the twenty-one poles and bases in question. In the absence of proof that the clear zone location was actually considered at the time the poles were removed from the bases, there are questions of fact which remain to be determined.

The assertion that the warnings would have been superfluous has no basis in this record. If a warning was affixed to the pole or base, or both, that the base without a pole has no breakaway feature that certainly would have caused consideration of the effects of separation of the one from the other at the time of the removal of the pole.

The knowledgeable user exception asserted by defendants herein is distinguishable from the facts of *Travelers Ins. Co. v. Federal Pac. Elec. Co.*, 211 AD2d 40 (1st Dept 1995), where the plant manager, a licensed electrician and an electrical technician should have known that re-energizing a circuit breaker that had previously been wet could cause a problem. Here there is no testimony other than that of the apprentice that he does what the foreman tells him to do. There is no testimony from the foreman and the other defendants continue to rely on the clear zone argument without commenting on their knowledge of the breakaway feature and whether there was ever any discussion of it.

As to the breach of warranty claim, the defendants herein are correct in their assertion that all concerned including the plaintiff's expert agree that there was no defect in design or manufacture and had the poles been left attached the breakaway feature as designed and intended to be used would have performed in accordance with prior testing and experience. The Court finds that there is no viable breach of warranty claim.

As to common law right of indemnity, all suppliers and distributor defendants who are liable by imputation of law are entitled to indemnity. It has been held that:

> One who is liable for an injury "by imputation of law may seek common-law indemnity from a person primarily liable for the injury" (23 NY Jur 2d, Contributions,

> Indemnity and Subrogation § 90; *see Bellevue S. Assocs. v HRH Constr. Corp.*, 78 NY2d 282, 574 NYS2d 165, 579 NE2d 195; *Mas v Two Bridges Assocs.*, *supra*). Where an entity "has discharged a duty which is owed by [it] but which as between [it] and another should have been discharged by the other" a contract to reimburse or indemnify is implied by law (*McDermott v City of New York*, 50 NY2d 211, 217, 428 NYS2d 643, 406 NE2d 460, quoting Restatement of Restitution § 76). Thus, it is well settled that a seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product (*see McDermott v City of New York*, *supra*; *Nutting v Ford Motor Co.*, 180 AD2d 122, 132, 584 NYS2d 653; *Spector v K-Mart Corp.*, 99 AD2d 605, 471 NYS2d 711; *Infante v Montgomery Ward & Co.*, 49 AD2d 72, 75, 371 NYS2d 500; *Mead v Warner Pruyn Div., Finch Pruyn Sales*, *supra*). In the instant case, both Carfel and Abamaster have the benefit of the implied right of indemnification as against the manufacturer of the defectively-designed meat grinder

(*Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 62 [2d Dept 2003]).

Defendant ATHENA LIGHT AND POWER (hereinafter "ATHENA"), by notice of cross-motion, seeks an Order of the Court, pursuant to CPLR 3212, dismissing the complaint in its entirety as against ATHENA. In the event the CPLR 3212 application is unsuccessful, ATHENA seeks common law indemnity as against all upstream supply-chain defendants.

The relief prayed for by ATHENA is similar if not identical to the relief sought by defendants HAPCO and T&D. The affidavit of Donna Rainey, president of ATHENA, establishes the supply-chain chronology necessary for a common law indemnity claim as against the upstream manufacturer and distributors.

Third-Party Defendant AKRON FOUNDRY COMPANY (hereinafter "AKRON"), by notice of cross-motion, seeks dismissal of the HAPCO and T&D complaint, as well as the cross-claims of ATHENA pursuant to CPLR 3212.

The third-party action as against AKRON sounds in strict products liability. There is no question that the plaintiff's expert, Mr. Belizzi, not only concedes but affirmatively states that there was no design or manufacturing defect and that there is no question of breach of warranty. Mr. Belizzi states that if the base and pole were assembled in combination they would have worked together as intended. If the transformer base and the light standard had been assembled as designed and intended, the plaintiff's expert agrees that the combination of the pole and base would have performed as designed and broken away. The difficulty arises with the separation of the pole from the base after the base has been mounted on the slab. The base alone has no breakaway capability in the absence of an attached pole.

ATHENA, HAPCO and T&D are in the same legal position *vis-à-vis* AKRON. The law is clear that it is the manufacturer who bears the ultimate burden of a design, manufacturing or warning deficiency, as well as a breach of warranty. In these circumstances, there is no viable claim for any design defect, manufacturing defect, or breach of warranty of fitness for a particular and intended use. The only possible cause of action which would survive summary judgment is the duty and failure to warn, wherein there exist questions of fact concerning the actions of the state, engineering and contractor defendants, as well as their knowledge before and at the time of the removal of the poles from the bases.

A manufacturer, seller, dealer and distributor in the normal course of business has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew of should have known. A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable (*see Liriano v Hobart Corp*, 92 NY2d 232 [1998]).

Plaintiff's expert has already opined that the design and manufacture were not defective and had they been used as intended there was no breach of warranty. Plaintiff's expert also opined that POSILLICO and JOHNSON were experienced and sophisticated contractors who would have known of the dangers

involved with a base without a pole. That assertion is contradicted by the testimony of Leslie Johnson, vice-president, Ian Shea, apprentice/journeyman electrician of JOHNSON, and James Scudder, project manager for POSILLICO. All three were, according to their deposition testimony, unaware of the danger of removing the pole from the base and allowing the base to remain.

This directly contradicts the assertion of the plaintiff's expert who opines with a reasonable degree of engineering certainty. The plaintiff is in the unenviable position of contradicting his own expert as to an affirmative representation in his affidavit for the purpose of opposing certain asserted defenses. The third affidavit of Mr. Belizzi attempts to retreat from his prior affirmative statements, which could serve as defenses to claims of a duty to warn and failure to warn. This third affidavit is tailored to mitigate the previous assertions. Clearly questions of fact exist concerning knowledge and the appreciation of the shortcomings of partial assembly. Here, we have the unusual circumstance of the plaintiff's expert taking a position concerning what the contractor defendants knew or should have known with a reasonable degree of engineering certainty. The supply-chain defendants and the manufacturer seek to adopt the affidavits of the plaintiff's expert as to the knowledge and awareness of the construction defendants because it supports their defense to a duty to warn action based upon the end user's actual awareness of the hazard and danger, as well as characterizing the end user as a knowledgeable user.

In its reply, AKRON insists that there was no duty to warn of any potential dangers related to leaving the transformer base without pole attached. The base without the pole serves no purpose and performs no independent function. The base is part of a multiple component assembly. AKRON claims that the third affidavit of plaintiff's expert was tailored to create an issue of fact and to avoid the consequences of the prior affidavit. The third affidavit did not contradict the prior affidavits; it merely asserts that there was a duty on the part of the manufacturer and the supply-chain defendants to warn those erecting the base and pole assembly of the dangers and shortcomings of erecting the base without simultaneously installing the pole. The third affidavit does not contradict the prior affidavit; it merely clarifies the theory of liability against the manufacturer, distributors and suppliers based upon a duty to warn and failure to warn.

COMMON LAW INDEMNIFICATION

While a legal framework exists for a finding of indemnification, at this juncture a finding is premature. The record itself at trial will determine the facts and circumstances surrounding the involvement of the manufacturer and distributors of the base and pole assemblies. Unless and until there is a finding of liability on a theory of a duty to warn and a failure to warn, the issues concerning indemnification are more appropriately referred to the trial of this action for determination.

HAPCO and T&D seek, and are entitled to, summary judgment on the issue of product liability as to design and manufacture. They are likewise entitled to summary judgment dismissing plaintiff's breach of warranty claim. Plaintiff's own expert concedes these issues in the content of his three affidavits. The only viable remaining product liability theory concerns a duty to warn and a failure to warn. However, the content of the plaintiff's expert's affidavits, all three in fact, alleges that the contractors, specifically defendants POSILLICO and JOHNSON were experienced professional road building and heavy construction contractors who knew of the dangers of the partial assembly of the transformer base and light standard units. This in and of itself supports a defense against a warning requirement, in that the plaintiff claims those who installed the assembly were, in fact, knowledgeable users. However, the affidavit is contradicted by the depositions of the defendants' representatives, Mr. Leslie and Mr. Shea of JOHNSON, and Mr. Scudder of POSILLICO. Based upon their deposition testimony, there are questions of fact as to whether or not they or others involved with the installation were knowledgeable users.

In sum, the plaintiff provided the basis for the defense through plaintiff's expert's affidavits, and the defendants contradicted that defense by the testimony of an officer and their employees. At this procedural juncture, a question of fact now exists. Under the circumstances, the defendants' motions for summary judgment seeking to dismiss plaintiff's claim of duty to warn and failure to warn are **DENIED**.

HAPCO's claims as to judicial estoppel based upon plaintiff's previously taken legal positions in earlier motion practice is well-founded as to the product liability design and manufacture causes of action. However, as to the duty to warn and failure to warn cause of action, as indicated above questions of

fact exist and there is no prior contradiction as to the duty and failure to warn. The actually-aware user and the knowledgeable user defenses to the warning cause of action must await proof and resolution at trial.

ATHENA seeks an Order of conditional summary judgment for common law indemnification in the event the Court does not grant AKRON's motion for summary judgment. Given the continued viability of the failure to warn claim, the issue of indemnification is referred to the trial court and shall abide the event.

Wherefore, it is

ORDERED that HAPCO and T&D's motion to consolidate (seq. #015) is **GRANTED**, without opposition, to the extent that the two actions under Index No. 24476/2010 and Index No. 2306/2011 shall be tried jointly but are not merged; and it is further

ORDERED that HAPCO and T&D's motion for summary judgment (seq. #016), pursuant to CPLR 3212:

(a) as to the plaintiff's claim for strict products liability based upon a defect in design, is **GRANTED**;

(b) as to the plaintiff's claim for strict products liability based upon a defect in manufacturing, is **GRANTED**;

(c) as to the plaintiff's claim for strict products liability based upon a duty to warn and/or a failure to warn, is **DENIED**;

(d) as to the plaintiff's claim for breach of warranty of fitness for a particular use, is **GRANTED**; and

(e) as to the request for common law indemnification against AKRON, is **referred to the trial court for determination** in the event there is a finding of liability for strict products liability based upon a duty to warn and/or a failure to warn as against HAPCO and T&D; and it is further

[* 15]

ORDERED that ATHENA's cross-motion for summary judgment (seq. #017), pursuant to CPLR 3212, dismissing the complaint against ATHENA is **DENIED**. ATHENA's request for summary judgment on its cross-claims for the imposition of common law indemnity as against HAPCO and T&D is **referred to the trial court for determination** in the event there is a finding of liability for strict products liability based upon a duty to warn and/or a failure to warn as against ATHENA; and it is further

ORDERED that third-party defendant AKRON's cross-motion for summary judgment (seq. #018) seeking dismissal of the third-party complaint of HAPCO and T&D is **DENIED**. That branch of AKRON's cross-motion for summary judgment seeking the dismissal of the cross-claims of ATHENA is also **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Submit judgment on notice.

Dated: July 16, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**