

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BAKORE MAKADJI and	:	
FATOUMATA MSIM PARA,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
GPI DIVISION OF HARMONY	:	
ENTERPRISES, INC., et al.,	:	NO. 05-3044
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

December 1, 2006

Plaintiffs Bakore Makadji and Fatoumata Msim Para bring this products liability action against the GPI Division of Harmony Enterprises, Inc. (“GPI”), Harmony Enterprises, Inc. (“Harmony”), and Ver-Tech, Inc. (“Ver-Tech”), alleging negligence, strict liability and loss of consortium. Defendants’ motions for summary judgment are presently before the Court.¹ For the following reasons, Defendants’ motions are granted in part and denied in part. Also before the Court is a motion for summary judgment filed by Third Party Defendant Accredited Autobale Corporation (“Accredited”). Because it is unopposed, the Court grants Accredited’s motion.

I. BACKGROUND

The following facts are undisputed. In December 2002, Bakore Makadji was working as a dish washer at Sonoma Restaurant in Philadelphia, Pennsylvania. (Defs.’ GPI & Harmony Mot. for

¹ Ver-Tech filed a motion for summary judgement separate from Defendants GPI and Harmony’s motion. Ver-Tech’s motion simply incorporated by reference the arguments made by GPI and Harmony in their motion. (Def. Ver-Tech’s Mot. for Summ. J. at 1.) Therefore, both motions are considered jointly.

Summ. J. [hereinafter Defs.' Mot.] Ex. E [hereinafter Davis Dep.] at 7-10.)² Makadji had been employed at Sonoma for approximately four years at that time. (Defs.' Mot. Ex. D [hereinafter Makadji Dep.] at 66.) As part of his responsibilities at Sonoma, Makadji compressed boxes in an industrial trash compactor. (*Id.* at 83.) When used as intended, the compactor worked as follows: (1) the user would load boxes into the machine and shut the outer door; (2) the closed door engaged a safety switch which enabled the operation of the machine; (3) once the safety switch was engaged the user could push a button, triggering the hydraulic plunger inside the machine and causing the plunger to descend to crush the boxes. (Pls.' Resp. to Defs.' Mot. for Summ. J. [hereinafter Pls.' Resp.] at 2.)

On December 31, 2002, Makadji loaded the compactor with boxes and pushed the button to begin operation. (Makadji Dep. at 93.) Makadji did not close the door to the machine.³ (*Id.* at 98.) As the hydraulic plunger descended, boxes began to fall out. (*Id.*) Makadji reached over to prevent the boxes from falling and, as he pushed in, his right hand was crushed by the declining plunger. (*Id.* at 94, 108.) Makadji alleges that he has lost complete function of his hand. (Makadji Dep. at 117.)

The trash compactor was manufactured by GPI and Harmony and was distributed by Ver-Tech. (Defs.' Mot. at 2.) Although the machine in question possessed the necessary safeguard, which required that the outer door be closed before the compactor would operate, the switch was not functioning properly. This allowed the compactor to operate with the outer door open. (*Id.* at 3.)

² Derek Davis was the President of the corporation that owned Sonoma Restaurant at the time of Makadji's injury. (Davis Dep. 7-8.)

³ According to Makadji, the compressor was already filled with boxes when he approached the machine, and because the machine was full, he could not have closed the door without removing boxes. (Makadji Dep. at 98-99.) Makadji also stated that the compactor was regularly operated with the door open. (*Id.* at 99-101.)

Plaintiff originally filed a Complaint in the Philadelphia Court of Common Pleas, alleging negligence, strict liability and loss of consortium. On June 24, 2005, Defendants removed the action to federal court. Defendants now seek summary judgment on Plaintiffs' strict liability claims.⁴

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2006); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Id.* at 248. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

⁴ As the Court understands Defendants' motions, Defendants do not move for summary judgment on Plaintiffs' negligence claims. Because negligence and strict liability are entirely distinct theories, the outcome of Defendants' strict liability motions will not be dispositive as to the issue of negligence. *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003). As such, Plaintiffs' negligence claim will proceed to trial.

III. DISCUSSION

Plaintiffs bring their product liabilities claims under Pennsylvania law. (Pls.' Resp. at 4). Applying Pennsylvania law, a plaintiff may recover under a theory of strict liability if a product contains a defect which renders it "unreasonably dangerous" for its intended use and such product causes harm to the plaintiff. *Spino v. John S. Tilly Ladder Co.*, 696 A.2d 1169, 1172 (Pa. 1997) (*citng* RESTATEMENT (SECOND) OF TORTS § 402A). Pennsylvania recognizes three potential defects for which a defendant may be held strictly liable: (1) design defect; (2) manufacturing defect; and (3) failure to warn. *Phillips*, 841 A.2d at 1012 n.1.

Here, Plaintiffs aver that the industrial trash compactor was defective for failure to adequately warn of the dangers of the product and by virtue of its defective design.⁵ (Compl. ¶ 20.) In their motions for summary judgment, Defendants argue that the warnings on the compactor were adequate and that the machine malfunction was the result of ordinary wear and tear or misuse rather than a manufacture or design defect.

A. General Principles of Strict Products Liability in Pennsylvania

Pursuant to the Second Restatement of Torts, adopted by the Pennsylvania Supreme Court in *Webb v. Zern*, a seller is liable for products that contain a "defective condition unreasonably dangerous to the user or consumer." 220 A.2d 853, 854 (Pa. 1966); *see* RESTATEMENT (SECOND) OF TORTS § 402A. The term "unreasonably dangerous" is not independently significant; it merely "represent[s] a label to be used where it is determined that the risk of loss should be placed upon the

⁵ Plaintiffs complaint avers all three defects, including a manufacturing defect. (Compl. ¶ 20). However, Plaintiffs' response to the motions for summary judgment clarifies their theory of the case, which is that Defendants are liable for design, rather than manufacturing, defects. (Pls.' Resp. 7-8.)

supplier.” *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1025-26 (Pa. 1970) (“[T]he phrases ‘defective condition’ and ‘unreasonably dangerous’ as used in the Restatement formulation, are terms of art invoked when strict liability is appropriate.”). To prevail in a strict products liability claim, a plaintiff must show: (1) that a product was defective; and (2) that the defect was the proximate cause of plaintiff’s injuries. *Spino*, 696 A.2d at 1172 (citing *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975)).

Determining whether a product is defective presents both legal questions for the court and factual questions for the jury. “It is a judicial function to decide whether, under the plaintiff’s averment of the facts, recovery would be justified” *Azzarello*, 391 A.2d at 1026; *see also Mackowick v. Westinghouse Elec. Co.*, 575 A.2d 100, 102-103 (Pa. 1990). Thus, the judge must decide, as a matter of law, which party bears the risk of loss. *Griggs v. BIC Corp.*, 981 F.2d 1429, 1432 (3d Cir. 1992). If the court determines that the risk of loss should fall on the manufacturer, then the case goes to the jury to decide whether the facts averred are true. *Id.* (citing *Azzarello*, 391 A.2d at 1026.)

B. Defendants are Entitled to Summary Judgment on Plaintiffs’ Strict Liability Claim for Failure to Warn

A product may be found defective for failure to include adequate warning regarding how to use the product safely. *Fleck*, 981 F.2d at 119; *see also Jacobini v. V. & O. Press Co.*, 588 A.2d 476, 478 (Pa. 1991) (“It is well established that there are circumstances where a manufacturer’s failure to warn of latent dangers in the use or operation of a product can render a properly designed product unreasonably dangerous and defective for the purposes of strict liability.”). Products should contain “such warnings and instructions as are required to inform the user or consumer of the possible risks

and inherent limitations of [the] product.” *Berkebile*, 337 A.2d at 902 (citing RESTATEMENT (SECOND) OF TORTS § 402A); *see also Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1990). A product that requires a warning of danger and fails to provide such a warning is considered defective for strict liability purposes. *Id.* The duty to warn does not require manufacturers to instruct all beginners or foreseeable users on the intricacies of and principles underlying the product. *Mackowick*, 575 A.2d at 102. However, the warning must notify the intended users of the unobvious dangers inherent in the product. *Id.*; *see also Phillips*, 841 A.2d at 1005 (discussion of intended user in design defect case); *Riley v. Warren Mfg.*, 688 A.2d 221, 225 (Pa. Super. Ct. 1997) (same).

To proceed with a failure to warn claim, a plaintiff must establish that: (1) a warning of a particular danger was either inadequate or altogether lacking, rendering the product “unreasonably dangerous,” and (2) the user would have avoided the risk if he had been advised of it by the seller. *Philips v. A-Best Prods. Co.*, 665 A.2d 1167, 1171 (Pa. 1995). “The determination of whether a warning is adequate and whether a product is ‘defective’ due to inadequate warnings are questions of law to be answered by the trial judge.” *Davis*, 690 A.2d at 190.

Here, there is no factual dispute about the warning provided on the compactor. The warning read: **CAUTION: TO AVOID INJURY KEEP HANDS CLEAR OF THE MACHINE WHILE IN OPERATION.** (Defs.’ Mot. at 5; Pls.’ Resp. at 4.) The warning was written in large black bolded capital letters on a light-colored background and appeared twice on the machine, once on the interior and once on the exterior. (Defs.’ Mot. at 4; Pls.’ Resp. Ex. A [hereinafter Rasnic Prelim. Report] at 15.)

Plaintiffs assert that this warning was inadequate. Plaintiffs’ engineering expert, Russ Rasnic, argues that “GPI should have provided specific warnings regarding not tampering with the

interlock, as well as a warning not to operate the machine in the down mode with the door open.”⁶
(Rasnic Prelim. Report at 14.)

The written warning on GPI’s trash compactor is adequate as a matter of law. Makadji’s unfortunate accident occurred in exactly the manner predicted by the warning – his hand was crushed because it encountered the compactor while in operation. (Makadji Dep. at 92.) If the warning had been heeded, this accident would not have occurred. The alternate warnings suggested by Plaintiffs are only useful if the current warning is “blatantly ignored.” *Davis*, 690 A.2d at 190. As in *Davis*, Plaintiffs are “in effect suggesting that we require a manufacturer to warn against dangers that may arise if the stated warnings are not heeded.” *Id.* at 191. However, “the law presumes that warnings will be obeyed.” *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (“Where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed[,] is not in defective condition, nor is it unreasonably dangerous.”); *Pavlik v. Lane Ltd./Tobacco Exporters Int’l*, 135 F.3d 876, 883 (3d Cir. 1998).

Plaintiffs further contend that the warning should have employed a pictorial description of the hazards involved in operating the machine, especially given the likelihood that the operators would be unskilled laborers who might not speak English. (Pls.’ Resp. at 4-5.) Strict liability law takes into consideration the “intended user” of a product. *Mackowick*, 575 A.2d at 102. The caselaw is clear that the “intended user” is not equivalent to any “foreseeable user,” a concept relevant in

⁶ Based on the parties’ submissions, there appears to be a factual dispute as to whether certain employees at Sonoma had used cardboard to bypass the safety latch on the compactor. (*Compare* Makadji Dep. at 91 (stating that Makadji had never seen cardboard or any other materials used to bypass the safety) *with* *Davis* Dep. at 24-25 (stating that restaurant owner Davis had seen cardboard used to artificially depress the safety switch)). Presumably, this is the “tampering” to which Rasnic is referring.

negligence law. *See, e.g., Riley*, 688 A.2d at 227-28. Situations may exist where pictorial descriptions or multilingual warnings are necessary. However, Plaintiffs have not provided any evidence that such a warning is required because of the special characteristics of the “intended user” of the trash compactor. The Court further notes that a warning substantially similar to the one at issue here was upheld by the Pennsylvania Supreme Court in *Davis*. *See Davis*, 690 A.2d at 191 (holding that warning which stated “Danger, Keep Fingers Out of Door Openings” on meat blender was adequate as a matter of law).

Plaintiffs’ expert also suggests that the color scheme on the warning sign was not standard.⁷ (Rasnic Prelim. Report at 14.) The Court does not dispute that the sign could have been designed in another way. The relevant inquiry, however, is whether the product with its existing warning was “defective” because the warning did not inform the user of the dangers inherent in the product. *Davis*, 690 A.2d at 190. The danger of the compactor was that a user could seriously injure himself by inserting his hand into an operating machine. Such danger is adequately addressed by a sign that warns: “Caution, keep hands clear of the machine while in operation.” Because the Court finds that the warning provided was sufficient to instruct users of the potential harms involved in operating the machine, summary judgment in favor of Defendants is warranted.

C. Defendants Are Not Entitled to Summary Judgment on Plaintiffs’ Defective Design Claims

A product must be designed so that it is safe for its intended use. *Azzarello*, 391 A.2d at

⁷ According to Rasnic, recognized protocol at the time the compactor was made required that the word “caution” be written in black letters against a yellow background. (Rasnic Prelim. Report at 14.) Plaintiffs have not presented color photographs or highlighted the color scheme of the actual warning at issue. However, the black and white copies provided indicate that the warning sign had large bold black writing on a lighter-colored surface.

1027. The relevant issue is whether the product should have been designed more safely. *Spino*, 696 A.2d at 1172; *see also Stetcher v. Ford Motor Co.*, 779 A.2d 491 (Pa. Super. 2001) (“Liability for design defects involves discrepancies between the design of a product causing injury and an alternative specification that would have avoided the injury.”). If the product in the users hands has been made less safe through alteration or misuse, “the question becomes whether the manufacturer could have reasonably expected or foreseen” such a result.⁸ *Davis*, 690 A.2d at 190. Although foreseeability is relevant to the design defect analysis, it is “the product itself [that is] . . . on trial, and not the conduct of the manufacturer.” *Lewis v. Coffing Hoist Div., Duff Norton Co.*, 528 A.2d 590, 593 (Pa. 1987).

In determining liability for defective design, a judge must first determine whether the product is unreasonably dangerous by deciding which party should bear the loss. In making this determination, the court conducts a utility, or social policy, analysis. *Riley*, 688 A.2d at 225. The relevant factors are: (1) the usefulness and desirability of the product; (2) the likelihood that the product will cause injury and the seriousness of that injury; (3) the availability of a substitute product which would meet the same need and be safer; (4) the manufacturer’s ability to eliminate the unsafe character of the product without making it too expensive to maintain its utility; (5) the user’s ability to avoid danger by the exercise of care; (6) the user’s anticipated awareness of the dangers inherent in the product and their avoidability; (7) the feasibility of the manufacturer spreading the loss by increasing the price of the product or carrying liability insurance. *Id.*; *see also Surface v.*

⁸ The *Davis* standard has been criticized for “muddying the waters” of strict liability with the vernacular of negligence, because of its reference to the concept of foreseeability. *Phillips*, 841 A.2d at 1007. The Pennsylvania Supreme Court has stated that “such a negligence-based test, which focuses on the due care exercised by the manufacturer is in tension with our firm and repeated pronouncements that negligence concepts have no place in strict liability law.” *Id.*

Caterpillar, Inc., 111 F.3d 1039, 1046 (3d Cir. 1997). Once the court performs this analysis and determines that the loss should be placed on the seller, the responsibility shifts to the jury to determine whether “the product left the supplier’s control lacking any element necessary to make it safe for its intended use or possessing any feature which renders it unsafe for its intended use.” *Azzarello*, 391 A.2d at 1027.

The compactor used by Makadji was undisputably broken. (Defs.’ Mot. at 8.) The machine was built with a safeguard that should have prevented the compactor from being operated with an open door. (*Id.* at 2.) An inspection of the machine six days after the accident, however, revealed that the safety switch was not working. (*Id.* Ex. C [hereinafter Cella Dep.] at 65.) Defendants argue that the safety switch broke as the result of ordinary wear and tear or intentional bypass by Sonoma’s employees, neither of which provide grounds upon which Defendants may be held strictly liable. (*Id.* at 8-10); *see also Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 922 (Pa. 1974) (manufacturer and seller not liable for normal wear and tear or misuse of product by purchaser).

Plaintiffs argue that the compactor could have been designed in such a way that the machine would *never* operate with its outer door open. (Pls.’ Resp. at 8.) Plaintiffs have submitted expert reports stating that the design of the compactor was unreasonably dangerous because “[i]nterlocks should be designed to be ‘Fail Safe,’ in that the failure of a switch or other interlock performance results in the disabling of the machine.” (*Id.* Ex. C [hereinafter Rasnic Supplemental Report] at 2; *see also* Pls.’ Resp. Ex. B [hereinafter Wilcox Report] at 5.) Additionally, there were alternative safety devices available at the time of the compactor’s manufacture that would have rendered the safety switch more difficult to defeat. (Rasnic Prelim. Report at 9-10.) Defendants have not submitted expert reports in opposition to Plaintiffs’ experts.

The Court finds that summary judgment for Defendants on the issue of design defect would be inappropriate. Plaintiffs have provided expert testimony in support of their allegation that the machine could have been designed more safely using the “Fail Safe” technology available to Defendants at the time of manufacture. Defendants have not presented any evidence to contradict Plaintiffs’ expert. Nor have Defendants submitted evidence relevant to the Court’s determination under the utility analysis that they should not bear the risk of loss as a matter of law. As such, the Court reserves its legal judgment as to whether risk of loss should fall on Defendants until evidence is presented at trial. If, at the close of evidence, the Court decides that Defendants bear the risk of loss, the design defect claim will proceed to the jury for a determination of whether “the product left the supplier’s control lacking any element necessary to make it safe for its intended use or possessing any feature which renders it unsafe for its intended use.” *Azzarello*, 391 A.2d at 1027.

Moreover, although Defendants may be correct that the machine defect was the result of wear and tear or misuse, this is a factual question solely within the province of the jury. There is a genuine issue of material fact as to whether employees at Sonoma used cardboard to intentionally bypass the safety device on the compactor. (*See Makadji Dep. at 91; Davis Dep. at 24-25.*) Such potential misuse could be highly relevant, if the evidence established that the mishandling of the machine was the superseding proximate cause of Makadji’s injuries. *See Fisher v. Walsh Parts & Service Co.*, 277 F. Supp. 2d 496, 502 (E.D. Pa. 2003); *Sherk v. Daisy Heddon*, 450 A.2d 615, 618 (Pa. 1982). Accordingly, Defendants’ motions for summary judgment on Plaintiffs’ design defect claim are denied.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are granted in part and denied in part. Defendants' motions for summary judgment on are granted with respect to Plaintiffs' failure to warn claim. However, because there are genuine issues of material fact as to the existence of a design defect, as well as questions surrounding the misuse of the machine, Defendants' motions for summary judgment on Plaintiffs' defective design claim are denied.⁹ An appropriate Order follows.

⁹ Third Party Defendant Accredited's motion for summary judgment is granted as unopposed.

**IN THE UNITED STATES DISTRICT COURT
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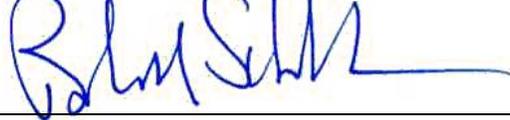
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Plaintiff,	:	
	:	
v.	:	
	:	
GPI DIVISION OF HARMONY	:	
ENTERPRISES, INC., et al.	:	NO. 05-3044
Defendants.	:	

ORDER

AND NOW, this 1st day of **December, 2006**, upon consideration of Defendants' motions for summary judgment, Plaintiffs' responses thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendants GPI Division of Harmony Enterprises, Inc. and Harmony Enterprises, Inc.'s Motion for Summary Judgment (Document No. 27) and Defendant Ver-Tech's Motion for Summary Judgment (Document No. 28) are **GRANTED in part** and **DENIED in part**, as follows:
 - a. Summary judgment is **GRANTED** for Defendants on the failure to warn claim.
 - b. Summary judgment is **DENIED** for Defendants on the design defect claim.
2. Defendant Accredited Autobale Corporation's Motion for Summary Judgment (Document No. 26) is **GRANTED**. All claims against Accredited Autobale Corporation are **DISMISSED**.

BY THE COURT:



Berle M. Schiller, J.