No. 06-CV-952

In the

District of Columbia Court of Appeals

MILDRED DEBNAM, Individually and
as Personal Representative of the Estate of PLUMMER DEBNAM,

Plaintiff-Appellant,

v.

CRANE CO.,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2005 CA 004626 A (Hon. Frederick H. Weisberg, Judge)

BRIEF FOR PLAINTIFF-APPELLANT

PETER T. ENSLEIN
BAR NO. 367467
DANIEL A. BROWN
BAR NO. 444772
BROWN & GOULD, LLP
7700 Old Georgetown Road
Suite 500
Bethesda, MD 20416
(301) 718-4548

Attorneys for Plaintiff-Appellant

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COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

PARTIES AND COUNSEL

Mildred Debnam appeared below, and appears in this Court, through her counsel, Peter T. Enslein and Daniel A. Brown of Brown and Gould, LLP.

Crane Co. appeared below through its counsel, David T. Case and Christopher Dominguez of Kirkpatrick & Lockhart Nicholson Graham LLP. Crane Co. appears in this Court through its counsel, David T. Case and Lisa M. Richman of Kirkpatrick & Lockhart Nicholson Graham LLP.

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QUESTIONS PRESENTED

1. Should the trial court's entry of summary judgment be reversed since the plain and unambiguous language of the 1959 Agreement provided that Crane assumed liability for "all" warranty claims asserted against National, including those of Plummer Debnam and others who lack privity with National?

2. Should the trial court's entry of summary judgment be reversed since the affidavit of Floyd Abrams establishes a genuine issue of material fact concerning Crane's assumption of National's warranty liability?

STATEMENT OF THE CASE

Plaintiff Mildred Debnam is the widow of Plummer Debnam and the personal representative of his estate. On June 16, 2005, Mrs. Debnam commenced the instant asbestos disease product liability action against Defendant Crane Co. ("Crane").[1] On April 26, 2006, Crane moved for entry of summary judgment. The trial court (Weisberg, J) granted Crane's motion on June 19, 2006.[2] Mrs. Debnam filed her Notice of Appeal on August 1, 2006, after her motion for reconsideration was denied earlier that day.[3]

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[1] Joint Appendix ("JA") 6.

[2] JA 637.

[3] JA 655.

STATEMENT OF FACTS

A. Plummer Debnam

Mr. Debnam died from asbestosis and lung cancer caused by his years of exposure to asbestos-containing boilers, including those manufactured by Crane's predecessor, National-U.S. Radiator Corporation ("National"). This action seeks to hold Crane responsible for the warranty liability it expressly assumed when it purchased National's assets in 1959.

Mr. Debnam worked for the District of Columbia Public Schools for 34 years, from 1964 through 1998.[4] In that span of years, Mr. Debnam worked with and around boilers that contained, and were covered with, asbestos materials.[5] Mr. Debnam worked in boiler rooms at three schools: Thomas Elementary, Aiton Elementary, and Evans Junior High School.[6]

Two "Pacific" boilers were installed in the Thomas Elementary boiler room in 1948.[7] The boilers contained and were encased with asbestos.[8] It is undisputed that National manufactured the boilers through its Pacific-Steel Boiler Division. From 1964 through 1966, Mr. Debnam worked as a

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[4] JA 241, 298.

[5] JA 244-98.

[6] JA 244-48.

[7] JA 246-47.

[8] JA 244-51.

janitor at Thomas Elementary.[9] He was exposed to asbestos when he cleaned the Pacific boilers.[10]

For three months in 1966, Mr. Debnam worked as a boiler fireman at Evans Junior High.[11] Later in 1966, Mr. Debnam returned to Thomas Elementary as an assistant engineer and worked there until 1970.[12] Throughout these years, Mr. Debnam was stationed in the boiler room where he operated and maintained the Pacific boilers.[13] Mr. Debnam's responsibilities included repairing insulation on steam pipes that led to and from the boilers.[14]

In 1967, Mr. Debnam sustained the heaviest and most significant asbestos exposure of his career.[15] In that year, the boiler room at Thomas Elementary underwent a major, three month renovation.[16] The asbestos-laden Pacific boilers were torn out

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[9] JA 244-45.

[10] JA 246-49.

[11] JA. 282-83.

[12] *Id*. at 244.

[13] JA. 248-49.

[14] JA 367-69.

[15] Occupational medicine expert Susan Daum, M.D. and industrial hygiene expert Steve Paskal agreed that Mr. Debnam's heaviest and most significant exposure to asbestos occurred during the Pacific boilers' removal from the boiler room. JA 484-88, 559-60.

[16] JA 255-60, 322-24, 370.

and replaced with two new steam boilers.[17] The asbestos insulated pipes that ran to and from the old Pacific boilers were stripped of their insulation and new asbestos covering was applied.[18] The new boilers were also clad with asbestos materials.[19]

Mr. Debnam never saw warnings on the asbestos materials at Thomas Elementary or elsewhere.[20] Crane did not place asbestos health warnings on its products until the mid-1980's.[21] In 1990, Mr. Debnam was diagnosed with asbestosis, a chronic progressive lung disease caused by the inhalation of large quantities of asbestos fibers.[22]

In 2002, Mr. Debnam was diagnosed with lung cancer.[23] Plaintiff's occupational medicine expert testified that asbestos exposure was a substantial factor in causing Mr. Debnam's cancer.[24] Mr. Debnam died on May 1, 2005.

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17 JA 250-51.

18 JA. 255-56.

19 JA 256-61.

20 JA. 281-82.

21 JA 562.

22 JA 477-78, 501-2, 566.

23 JA 301-02.

24 JA 504.

B. Operations of National & Crane Circa 1959

In 1958, National boasted that it was "one of the nation's largest designers and producers of domestic and commercial hot water heating and air conditioning equipment . . . includ[ing] a complete range of cast iron and welded steel boilers[.]"[25] National maintained plants, industrial facilities and offices coast-to-coast, including operations in California, Colorado, Connecticut, the District of Columbia, Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, Ohio, Pennsylvania, New Jersey, New York, Virginia, Washington and Wisconsin.[26] National's net earnings for 1959 exceeded $1.3 million.[27]

By the early 1950's, Crane had established a nationwide market for its plumbing, heating and air conditioning products.[28] Crane operated manufacturing facilities in California, Illinois, New Jersey, and Tennessee. Crane maintained "branch houses" in nearly every state and the District of Columbia and trumpeted that "[w]holesalers in all major markets sell Crane products."[29]

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[25] JA 613.

[26] JA 582-83.

[27] JA 594.

[28] JA 607.

[29] *Id.*

C. 1959 Crane-National Sales Agreement

On December 22, 1959, Crane and National executed a Sales Agreement (the "1959 Agreement") whereby Crane paid $15.15 million in exchange for virtually all of National's property and assets.[30] The purchase included National's assets associated with Pacific boilers and the right to manufacture boilers under the Pacific name.[31]

In the 1959 Agreement, Crane expressly agreed to assume National's liabilities for all "warranty" claims. Paragraph 17 of the 1959 Agreement ("Paragraph 17") states, *inter alia*, as follows:

> Crane agrees that, on and after the date of closing, it will assume, ***take over and perform all obligations of every kind whatsoever of National under warranties of products sold by National in the usual and ordinary course of its business, prior to the date of closing***, except that National shall reimburse Crane on demand for the actual direct cost, including factory overhead, to Crane in honoring such warranties during the period of five months, commencing on the date of closing, not exceeding in the aggregate the sum of $20,000.00 plus the actual direct cost including factory overhead of meeting the claim relating to the electro-hydraulic crane on USNS Point Barrow.
>
> To induce Crane to assume such liability, National hereby warrants and represents that it does not know of or have reason to anticipate any prospective abnormal or extraordinary warranty claims, other than warranty claims in the ordinary course of business.[32] (Emphasis supplied)

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30 JA 130, ¶ 2.

31 JA 579, 582.

32 JA 137, ¶ 17.

Following approval of the sale by National's shareholders, the asset transfer closed on January 31, 1960.[33]

D. National's Proxy Statement

In January 1960, National sent a proxy statement to its shareholders to explain the impending sale of the company to Crane.[34] National had this to say regarding Crane's assumption of National's warranty liability:

> Warranties of Products: Crane will assume on or after the date of closing, all liability of [National] under warranties of products sold by [National] prior to the date of closing. (Emphasis supplied)[35]

E. 1961 Crane-National Agreement

On October 11, 1961, Crane and National entered into a second agreement (the "1961 Agreement"), the purpose of which was to "revise," "clarify" and "ratify" issues pertaining to the original 1959 Agreement.[36] Crane affirmatively "acknowledged,

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[33] JA 150. Following the sale of its assets to Crane, National was essentially a corporate shell, lacking physical assets. National changed its name several times and ultimately became Federated Development Company ("Federated"). Today, Federated is a New York real estate investment trust. *See* Memorandum of Points and Authorities in Support of Crane Co.'s Motion for Summary Judgment, filed April 26, 2006 ("Crane Summary Judgment Mem."), at 5.

[34] JA 578.

[35] JA 581.

[36] JA 151-52, ¶ 1-2.

ratified and confirmed" its responsibility under Paragraph 17 for all warranty obligations of products sold by National.[37]

The 1961 Agreement was executed after the five month post-closing period. During that period, National had agreed to remain responsible for certain limited warranty liabilities. In 1961, when ratification occurred, Crane became the sole warrantor for all products sold by National.

F. National's Warranty Liability Circa 1959-1961

By 1959, manufacturers were subject to liability for injuries caused by defective products under theories of negligence as well as breach of express and implied warranties. Most states had already abandoned the privity requirement in negligence cases, following the landmark decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Many states had likewise jettisoned the privity doctrine in warranty cases involving food. *See* R.D. Hursh, Annotation, *Privity of Contract as Essential to Recovery in Action based on Theory other than Negligence, Against Manufacturer or Seller of Product Alleged to have Caused* Injury, 75 A.L.R.2d 39 (1961, updated 2006).

By 1959, five states in which Crane maintained business operations had already abandoned the privity doctrine in warranty cases that, like the instant case, involved

[37] JA 152, ¶ 3.

manufactured products: **California**, *Hinton v. Republic Aviation Corp.*, 180 F.Supp. 31 (S.D.N.Y. 1959) (applying California law, airplane); **Michigan**, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder blocks); **Missouri**, *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo.App. 1114, 253 S.W.2d 532 (1953) (detergent); **Ohio**, *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614 (1958) (hair preparation); **Pennsylvania**, *Mannsz v. Macwhyte Co.*, 155 F.2d 445, 449-50 (3rd Cir. 1946) (applying Pennsylvania law, wire rope).

Between 1960 and 1961 (when Crane reaffirmed its assumption of National's warranty liability), many more states abandoned the privity doctrine in product warranty claims: **Connecticut**, *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961) (detergent); **Hawaii**, *Chapman v. Brown*, 198 F.Supp. 78 (D. Hawaii 1961) (applying Hawaii law, hula skirt); **Indiana**, *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960) (applying Indiana law, surgical pin); **Iowa**, *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449, 455-56 (1961) (automobile); **Kansas**, *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 418 (1954) (hair preparation); **Louisiana**, *Laclede Steel Co. v. Silas Mason Co.* 67 F.Supp. 751, 758 (W.D. La. 1946) (applying Louisiana law, ammunition containers); **New Jersey**, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (automobile); **Oregon**, *Spada v. Stauffer Chemical*

Co., 195 F.Supp. 819 (D. Or. 1961) (applying Oregon law, herbicide); **Tennessee**, *General Motors Corp. v. Dodson*, 47 Tenn.App. 438, 338 S.W.2d 655, 661 (1960) (brakes).

G. Admissions of Crane's Robert Robinson

In 1967, Cahill Gordon lawyer Floyd Abrams represented United Ventures, a predecessor of National.[38] He was "retained to ensure that a defense was provided for United Ventures, either by Crane [or its] insurance carrier [in *Ortis v. United Ventures, as Successor by Merger to U.S. Radiator, Corp.*]."[39]

Mr. Abrams recounted this work in an affidavit filed in a later litigation, *Walker v. Federated Development Co.*, No. 4-94-0256 (Ill. App. 4th Dist. Dec. 6, 1994).[40] Mr. Abrams reported that he "had various conversations with representatives of Crane Company, which [he] recorded in a contemporaneous memorandum," including Robert Robinson, then Crane's assistant counsel and

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[38] JA 559-60.

[39] JA 599.

[40] The December 6, 1994 order entered in *Walker* which describes the litigation's course is set forth at JA 114-25. In *Walker,* a National boiler had exploded, injuring Walker and his property. Walker alleged that National's boiler was negligently manufactured and that "Federated or Crane was the successor in interest to [National], and Federated or Crane had assumed the liabilities of [National]." JA 114-15. Federated "filed a counterclaim for contribution against Crane alleging Crane had agreed to assume the liabilities of this nature [*i.e.*, negligence claims] in the agreement of sale entered into when it purchased certain asserts from [National]." JA 115. Unlike the instant litigation, Walker did not assert a warranty claim.

assistant secretary.[41]

In their meeting, Messrs. Abrams and Robinson discussed the nature and extent of National's liabilities assumed by Crane in the 1959 Agreement and, in particular, Paragraph 17, which is at issue here:[42]

> Mr. Robinson and I discussed the meaning of Section 17 of the Crane-National agreement. ***Mr. Robinson said that his reading of Section 17 was that Crane was liable for any matters after the date of closing on the agreement.*** After reading this section, I noted to Mr. Robinson that the section referred specifically to the word 'warranty' and that it could be therefore argued that it did not include causes of action in negligence and the like. In spite of the wording of Section 17, Mr. Robinson acknowledged once again his view of Crane's liability under Section 17. (Emphasis supplied)[43]

H. Proceedings in the Trial Court

The Complaint asserts several product liability causes, including breach of warranty (express warranty of safety and implied warranties of merchantability and fitness for use), strict liability and negligence.[44] Only the warranty claims are at issue here.

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41 JA 600.

42 JA 555.

43 JA 601.

44 JA 6. ¶ 2-11.

On April 26, 2006, Crane filed a motion for summary judgment.[45] Crane averred that while it "did retain certain warranty claims under the Agreement[,] Plaintiff simply cannot prove that [Crane's] retention of [National's] warranty claims encompasses the claims in this case."[46] The trial court agreed: "[T]he court concludes that the contract is unambiguous, and that reasonable persons in the position of the contracting parties could not have understood that Crane was agreeing to assume liability to third parties, who were not in privity of contract with National, who were injured as a result of inhalation of asbestos particles contained in the boilers or insulation materials sold by National and placed in buildings all over the country, where millions of people like Plaintiff's husband, would be exposed to them."[47] This appeal followed.

STANDARD OF REVIEW

This Court's review of the trial court's contract interpretation and grant of summary judgment is *de novo*. *Akassy v. William Penn Apts. Ltd. P'ship,* 891 A.2d 291, 299 (D.C. 2006); *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. 2002). The Court must assess the record independently and apply the same summary judgment standard as that employed by the trial

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45 JA 3.

46 Crane Summary Judgment Mem. at 2.

47 JA 643-44.

court. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005).

A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the defendant is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *Weakley*, 871 A.2d at 1173. The Court is not to make credibility determinations or weigh the evidence, and it must view all the evidence presented in the light most favorable to the plaintiff and draw all reasonable inferences from the evidence for her. *Id.* In short, the Court cannot try issues of fact; it can only determine whether there are issues to be tried. *3145 Deauville, L.L.C. v. First American Title Ins. Co.*, 881 A.2d 624, 627 (D.C. 2005).

Moreover, any doubt as to whether a genuine issue of material fact has been raised is sufficient to preclude entry of summary judgment. *Weakley*, 871 A.2d at 1173. Thus, "if an impartial trier of fact, crediting the [plaintiff's] evidence and viewing the record in the light most favorable to the [plaintiff], may reasonably find in favor of [the plaintiff], then the motion for summary judgment must be denied." *Id.* In sum, "the test for deciding a motion for summary judgment is essentially the same as that for a motion for a directed verdict." *Id.*

SUMMARY OF ARGUMENT

When a corporation buys the assets of another company, it acquires the seller's liabilities when, *inter alia*, the buying company expressly or impliedly agrees to assume the seller's liabilities. *See Bingham v. Goldberg, Marchesano, Kohlman, Inc.*, 637 A.2d 81, 89-90 (D.C. 1994).

The plain and unambiguous language of the 1959 Agreement states that Crane assumed "all" of National's warranty liability when it purchased National. Thus, Crane's assumption of liability includes Plaintiff's express and implied warranty claims, privity notwithstanding. The trial court erred when it held otherwise.

Assuming, *arguendo*, that the relevant terms of the 1959 Agreement are ambiguous, the trial court erred by refusing to consider the affidavit of Floyd Abrams, which creates a genuine issue of material fact regarding the contracting parties' intent, thereby precluding entry of summary judgment.

ARGUMENT

I.

THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT SHOULD BE REVERSED SINCE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 1959 AGREEMENT PROVIDED THAT CRANE ASSUMED LIABILITY FOR "ALL" WARRANTY CLAIMS ASSERTED AGAINST NATIONAL, INCLUDING THOSE OF PLUMMER DEBNAM AND OTHERS WHO LACK PRIVITY WITH NATIONAL.

The trial court understood the 1959 Agreement between National and Crane to pertain "only [to] standard warranty claims for defective products that had to be repaired or replaced[.]"[48] The court jettisoned the key, unambiguous terms of the Agreement and held that in the legal, historical context such a contract in 1959 could not have contemplated a warranty claim by a person lacking privity with National. For the reasons that follow, the trial court's analysis is simply untenable.

A. The Plain Meaning Rule

The language used by contracting parties must be construed in accordance with its plain meaning. *Akassy*, 891 A.2d at 299. To determine whether the language of a contract provision is susceptible of multiple readings, a court must "look at the face of the language itself, giving that language its plain meaning, without reference to any rules of construction." *Id.* Only if the language is ambiguous will the court admit extrinsic

[48] JA 644.

evidence to help ascertain the precise intention of the parties. *Id.*

Under the "plain meaning" rule, it is not what the *parties* might think that the contract language means -- whether their interpretation might be reasonable or unreasonable. Rather, the essential inquiry is how an objective source defines the language. Here, the plain meaning of the contract language, as evinced by dictionary definitions of the words employed, is clear, definite and unambiguous.

Moreover, contracts are presumed to be written in contemplation of the then-existing law. A*kassy*, 891 A.2d at 299. The trial court should have used October 11, 1961, rather than 1959, as the relevant date for its contract analysis.

As discussed *supra*, on October 11, 1961, Crane and National entered into the Second Agreement. There, Crane "reacknowledged, ratified and confirmed" its responsibilities under Paragraph 17 for <u>all</u> warranty obligations for products sold by National prior to closing. The parties' ratification of the 1959 Agreement established October 13, 1961 as the date upon which the contract should be interpreted. *See Oil, Chem. and Atomic Workers Int'l Union v. NLRB*, 842 F.2d 1141, 1146 (9th Cir. 1988) ("[A] contract is interpreted in light of the law when last ratified."). The errors in the court's analysis discussed *infra*, however, are readily apparent whichever date is used.

B. Paragraph 17 Is Unambiguous; Crane Assumed All Warranty Liabilities of National

In Paragraph 17 of the 1959 Agreement, Crane agreed without qualification to "*assume, take over and perform all obligations of every kind whatsoever of National under warranties*" of National's products. (Emphasis supplied). Applying the plain meaning rule here, the scope of Crane's obligations with respect to National's warranties is self-evident: The 1959 Agreement describes "all obligations of every kind whatsoever."

The American College Dictionary (New York 1967) defines "all" as "the whole of." It defines "every" as "all possible." Finally, it defines "whatsoever" as an intensified form of "whatever," which itself is defined as "any amount or measure." In sum, Crane agreed to assume from National the whole of all possible warranty claims against National of any amount or measure.

Crane could have qualified the language it used. It could have, as National did in Paragraph 17,[49] limited the scope of its warranty liability by the plain meaning of the language it used. *See Princemont Constr. Corp. v. Baltimore and Ohio R.R. Co.*, 131 A.2d 877, 878 (D.C. 1957) (where terms of contract were broad and comprehensive "the presumption is that if the parties had

[49] In Paragraph 17 of the 1959 Agreement, National limited its warranty liability by assuming a monetary obligation "not exceeding in the aggregate the sum of $20,000" plus certain other limited costs, for a period of five months post-closing. JA 137, ¶ 17.

intended some limitation of the all-embracing language, they would have expressed such limitation").

Crane, however, did nothing to limit its potential liability. Rather, it agreed to assume all of National's warranty obligations. The categorical nature of Crane's assumption is so unassailable that the trial court avoided this language at an important point in its analysis. The all important words avoided by the trial court are highlighted here: Crane agrees to "assume, take over, and perform **all obligations of every kind whatsoever of National under warranties of products sold by National** in the usual and ordinary course of its business, prior to the date of closing[.]"[50]

C. The Trial Court's Warranty Analysis

The trial court wrongly concluded that the law in 1959 "did not contemplate expansive liability for breach of express or implied warranties for injury to third parties who were not in privity with the product manufacturer." In fact, by 1959, the following states had already embraced warranty actions in the absence of privity: California, Iowa, Kansas, Louisiana, Michigan, Missouri, Ohio and Pennsylvania. National had business operations in every one of these jurisdictions.

In 1960 and 1961, Connecticut, Hawaii, Indiana, New Jersey and Tennessee joined the growing number of states to abandon the

[50] JA 643.

privity requirement in warranty cases. In 1962, the District of Columbia likewise rejected privity in *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919, 923 (D.C. App. 1962) ("[W]e are convinced that the buying public in the District of Columbia is better protected by eliminating the requirement for contractual privity in suits brought by the user against the manufacturer for breach of implied warranty resulting from a defectively manufactured product.").

Against this background, the trial court's assertion that, in 1959, a warranty action was almost always unavailing to an injured person lacking privity with the manufacturer is simply not a correct statement of the law at that time.[51] Furthermore,

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[51] The trial court was also mistaken in its view that because the 1959 Agreement was to be "construed and enforced in accordance" with New York law, the parties could not have intended that Crane would assume warranty liability in the absence of privity. JA 137, ¶ 29, 644-45. The court's opinion is flawed for several reasons. First, by 1959, the privity doctrine's application in warranty cases had already become controversial in New York and the law unsettled. *See Hinton v. Republic Aviation Corp.*, 180 F.Supp. 31 (S.D.N.Y. 1959); *Parish v. Great Atlantic Pacific Tea Co.*, 177 N.Y.S.2d 7, 37 (N.Y. Mun. 1958) ("[T]he privity 'bugaboo', historically unsound, should be permanently discarded."). Moreover, the parties were bound by New York choice of law rules. *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md.App. 605, 687, 698 A.2d 1167, 1207 (1997) ("New York law includes, of course, New York's choice of law rules.").

By 1959, New York choice of law rules mandated the litigation of warranty claims in the absence of privity in New York courts. *See Hinton,* supra; *see also Siegel v. Braniff Airways*, 204 F.Supp. 861 (S.D.N.Y. 1960) (applying Texas law, airplane); *Conlon v. Republic Aviation Corp.*, 204 F.Supp. 865 (S.D.N.Y. 1960) (applying Michigan law, airplane); *Middleton v. United Aircraft* Corp., 204 F.Supp. 856, 860 (S.D.N.Y. 1960) (applying

Crane and National should have known, and are now presumed to have known, what the state of the law actually was when they negotiated the 1959 Agreement. In short, the unambiguous terms of the 1959 Agreement should not be tortured to deny Mrs. Debnam her day in court.

D. The Trial Court's Foreseeability Test

The trial court asserts "that reasonable persons in the position of the contracting parties could not have understood that Crane was agreeing to assume liability to third parties, who were not in privity of contract with National, who were injured as a result of inhalation of asbestos particles contained in the boilers or insulation materials sold by National and placed in buildings all over the country, where millions of people, like Plaintiff's husband, would be exposed to them."[52]

There are fundamental problems here. The trial court wrongly engrafted a foreseeability test onto the contract analysis in interpreting the nature of the warranties assumed by Crane. Under the plain meaning rule, however, foreseeability of the alleged injury is irrelevant to the question of whether a

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admiralty law, helicopter). In any event, reasonable businessmen's understanding, in 1959, of the scope of National's warranty liability under the then-existing law is a question of fact for the jury to decide.

[52] JA 643-44.

warranty was assumed.

Moreover, the trial court's foreseeability test would require the manufacturer to have had Mr. Debnam in its sights from the moment it sold the asbestos-containing boilers to Thomas Elementary, where Mr. Debnam worked. It is not necessary that the precise type of injury be foreseen nor the specific person injured. The orbit of danger may be undefined in terms of time, space or persons. *District of Columbia v. Harris*, 770 A.2d 82, 92 (D.C. 2001); *see also Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928); *Hughes v. Lord Advocate*, 1963 S.C. (H.R.) 31. In short, not only does the court apply a foreseeability test where it does not belong, the trial court misstates the very concept of foreseeability.

Finally, questions of foreseeability are quintessentially questions of fact precluding summary judgment. *District of Columbia v. Carlson*, 793 A.2d 1285, 1288 (D.C. 2002) ("Questions of proximate cause are usually questions of fact.") Nevertheless, the trial court cites nothing in the record to support its conclusion that there was a "debate over whether the risk from exposure to asbestos particles was widespread knowledge in 1959."[53] Instead, the trial court, apparently believing (incorrectly) it appropriate to take judicial notice on this point, merely cites *Barnett v. City of Yonkers*, 731

[53] JA 644.

F.Supp. 594, 600-01 (S.D.N.Y. 1990). The court's citation to this precedent is particularly inapt.

Barnett concerned Yonkers' "constructive knowledge" in the "1950's and 1960's" of the danger of asbestos exposure to school children. *Id.* Mr. Debnam, of course, was occupationally exposed to asbestos boilers for decades. Moreover, the question whether there was "widespread knowledge in 1959" of the "risk from exposure to asbestos particles" was not put at issue by Crane in its summary judgment motion. More importantly, the only evidence of record demonstrates that by 1959 there was no question that asbestos caused asbestosis and cancer in occupationally exposed workers like Mr. Debnam.[54] Finally, this issue of extrinsic evidence -- the contracting parties' 1959 knowledge of asbestos hazards -- raised by the trial court, is a factual one for the jury to decide.

II.

THE TRIAL COURT'S ENTRY OF SUMMARY JUDGMENT SHOULD BE REVERSED SINCE THE AFFIDAVIT OF FLOYD ABRAMS ESTABLISHES A GENUINE ISSUE OF MATERIAL FACT CONCERNING CRANE'S ASSUMPTION OF NATIONAL'S WARRANTY LIABILITY.

Mrs. Debnam opposed Crane's motion for summary judgment with, *inter alia*, the affidavit of Floyd Abrams. If there is any ambiguity in the 1959 Agreement respecting Crane's assumption of National's warranty liability, the affidavit

[54] JA 453.

contains admissible, extrinsic evidence of the contracting parties' intent that precludes entry of summary judgment.

In a footnote, the trial court explained that it would not consider the testimony of affiant Floyd Abrams because, *inter alia*, "the Abrams affidavit is replete with inadmissible hearsay."[55] The trial court misapplied settled rules of evidence and summary judgment.

Two decades ago, Chief Justice Rehnquist observed: "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Celotex v. Catrett*, 477 U.S. 317 (1986). An affidavit is one such evidentiary material and perhaps the most common means employed by litigants to oppose summary judgment. Mrs. Debnam was right to do so here.

Contrary to the view of the trial court, Mrs. Debnam was not required to put Mr. Abrams' testimony in a form admissible at trial (*i.e.*, deposition testimony), as Chief Justice Rehnquist explained:

[55] JA 645.

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses.

Celotex, 477 U.S. at 325.

It is true that the Abrams affidavit contains hearsay. There, Abrams recounts the out-of-court statements, adverse to Crane's interests here, made by Crane official Robinson respecting the scope of warranty and other tort liabilities assumed by Crane in the 1959 Agreement.

However, Robinson's declarations constitute an admission by a party-opponent -- an exception to the hearsay rule – which is admissible at trial through the testimony of Abrams. *Coalition for the Homeless* v. *D.C. Dep't of Employment Servs.*, 653 A.2d 374, 378 (D.C. 1995) ("An admission by a party opponent is admissible as substantive evidence.")

This Court has "adopted the substance of Federal Rule of Evidence 801(d)(2) on 'admission by party-opponent,' and deem[s] such statements to be admissible into evidence." *Harris v. United States*, 834 A.2d 106, 115-16 (D.C. 2003). The Rule applies to out-of-court statements offered against a party where, as here, the admission is: (1) the party's own statement in either an individual or representative capacity; (2) a statement by a person authorized by the party to make a statement concerning the subject and/or (3) a statement by the

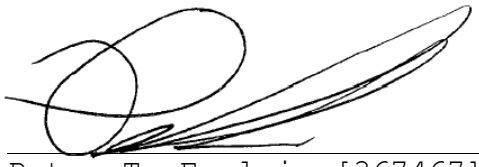
party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

Robinson's lack of personal knowledge of the formation of the 1959 Agreement is irrelevant because "[p]arty admissions do not require foundations to be admissible as substantive evidence; they need not have been made on personal knowledge and may be in opinion form." *In re M.D.*, 758 A.2d 27, 32 (D.C. 2000). The trial court therefore erred by rejecting the Abrams affidavit and should not have granted summary judgment.

CONCLUSION

For the foregoing reasons, Appellant Mildred Debnam asks this Court to reverse the judgment of the trial court and remand the case for further proceedings.

Respectfully submitted,



Peter T. Enslein [367467]
Daniel A. Brown [444772]
Brown & Gould, LLP
7700 Old Georgetown Rd., Ste. 500
Bethesda, MD 20416
Tel: 301-718-4548

Attorneys for Appellant

CERTIFICATE OF SERVICE

District of Columbia Court of Appeals
No. 06-CV-952
----------)
MILDRED DEBNAM, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF PLUMMER DEBNAM,

Plaintiff-Appellant,

v.

CRANE CO.,

Defendant-Appellee.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by BROWN & GOULD, LLP, Attorneys for Plaintiff-Appellant to print this document. I am an employee of Counsel Press.

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DAVID T. CASE
LISA M. RICHMAN
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM, LLP
Attorneys for Defendant-Appellee
1601 K Street, N.W.
Washington, DC 20006
(202) 778-9000

via Hand Delivery

Unless otherwise noted, 4 copies have been hand-delivered to the Court on the same date as above.

November 15, 2006