

WISCONSIN SUPREME COURT

RUBEN BAEZ GODOY, a minor, by his guardian ad litem,
SUSAN M. GRAMLING,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 2006AP2670

Case No. 06-CV-277

E.I. DU PONT DE NEMOURS AND COMPANY,
THE SHERWIN-WILLIAMS COMPANY,
AMERICAN CYANAMID COMPANY,
ARMSTRONG CONTAINERS,

Defendants-Respondents,

WALTER STANKOWSKI,
WAYNE STANKOWSKI AND
WISCONSIN ELECTIC POWER COMPANY,

Defendants,

ACUITY,

Intervenor-Defendant.

**BRIEF OF AMICUS CURIAE
THE PRODUCT LIABILITY ADVISORY COUNCIL
IN SUPPORT OF DEFENDANTS-RESPONDENTS E.I. DU PONT
DE NEMOURS AND COMPANY, AMERICAN CYANAMID
COMPANY, THE SHERWIN-WILLIAMS COMPANY, AND
ARMSTRONG CONTAINERS**

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INTRODUCTION AND STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association consisting of 120 voting members, all of whom are companies in the business of designing, manufacturing and/or marketing products. Three of PLAC’s member companies are headquartered in Wisconsin, many more have facilities in Wisconsin, and virtually all of PLAC’s member companies sell products in Wisconsin. (App.1).

PLAC’s unique perspective and interest in this case derive from the experiences of its members, who design products in a wide range of industries and frequently face product litigation. One of PLAC’s principal missions is to file *amicus curiae* briefs in cases, like this one, that affect the development of product liability law and have a potential impact on American industry. Since 1983, PLAC has filed over 825 *amicus curiae* briefs in state and federal courts to present the views of product manufacturers seeking fairness and balance in the application and development of the laws of product liability.

The crux of this case is whether a plaintiff can state a cause of action for design defect where both the “design” and the “defect” attacked are inherent characteristics of the product itself. Although

Godoy goes to great pains to cast his claims as ones about paint pigments in general, in the end it is clear that the real focus of his attack is on white lead carbonate. Courts in other states have concluded that such an attack is unavailing because it fails to establish a design defect as required by Section 402A of the Restatement (Second) of Torts (1965). And, indeed, to permit Godoy to pursue his design defect claims as urged here would open the door to a species of products liability – referred to in the literature as “generic,” “absolute” or “category” liability – that numerous courts and commentators flatly have rejected. Such a result would constitute a substantial departure from the law of this and all other states and have profoundly negative consequences for Wisconsin citizens and businesses.

FACTS PERTINENT TO THIS AMICUS BRIEF

The complaint at issue in this case sets forth a relatively basic set of facts. *First*, Godoy asserts that he was exposed to paint containing white lead carbonate in his rented family home. (Godoy Br. at 1) *Second*, Godoy asserts that this exposure caused lead poisoning. *Id.* *Third*, Godoy contends studies show that lead is harmful to children. *Id.* at 2-4. In his complaint, Godoy asserts that the defendants “designed”

white lead carbonate to be used as a pigment in paint, that the pigment is “hazardous” for this use, and that the defendants knew white lead carbonate was hazardous. *Id.* at 5-7. Plaintiff does not allege that there was any particular “design” process that makes white lead carbonate defective. Rather, he argues that white lead carbonate is “unreasonably dangerous” because it has lead and, therefore, it is “defective.” *Id.* at 13. The trial and appellate courts both found that these allegations failed to state a claim for design defect under Wisconsin law. Notably, however, these rulings do not bar Godoy’s failure to warn claim.

ARGUMENT

I. **To Impose Tort Liability, a Product Must Actually Be Defective.**

To bring a tort claim based on the use of a product – regardless of the theory under which it is brought – a plaintiff must identify a product defect that caused the plaintiff’s injury. This threshold requirement of a defect is written into the language of Section 402A of the Restatement (Second) of Torts:

One who sells any product in a **defective condition** unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . .

. [This rule] applies although . . . the seller has exercised all possible care in the preparation and sale of his product.

(emphasis added). *See also* James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1266 (1991) (“a system of liability without defect is beyond the capacity of courts to implement.”); Harvey M. Grossman, *Categorical Liability: Why The Gates Should be Kept Closed*, 36 S. Tex. L. Rev. 385, 386 (1995) (“A cardinal principle of product liability law, reiterated time and again in the cases, is that strict liability is not absolute liability; manufacturers are not to be deemed insurers of their products. The persistent rejection of that equation is reflected in the requirement that product liability claims be premised on proof of ‘defect,’ a showing that there is ‘something wrong’ with the product at issue.”)

Comment i to Section 402A makes clear that manufacturers are not subject to liability associated with “inherent characteristics” of a product that could not be removed without compromising the product’s desirability. *See Dudley v. Baltimore Gas & Elec. Co.*, 632 A.2d 492, 501-02 (Md. Ct. Spec. App.1993) (flammability and explosiveness were

qualities intrinsic to natural gas and were not “defects” for purposes of strict products liability).

In the more than 40 years since Section 402A was elucidated, philosophical and legal arguments have abounded about the scope and meaning of “defective condition.” It now is well established that one may state a claim for three types of defect: manufacturing, design and warning. *See, e.g., Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 346 n.1 (5th Cir. 1983); *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985); *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. Ct. App. 1987); John E. Montgomery & David G. Owen, *Reflecting on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. Rev. 803, 811 (1976). There is no claim for manufacturing defect here, and, as noted, the claim of defective warning remains and is not on appeal. The question here is whether a claim of defective design can apply under Wisconsin’s consumer contemplation test to products which have no design defect, but which can inflict harm.

II. Godoy Seeks to Avoid the Requirement of a Design Defect By Means of Semantic Sleight of Hand – An Effort Courts Have Rejected.

Godoy seeks to avoid that question by contending that the “appropriate question” in this case is “whether residential paint pigment can be made without lead.” (Godoy Br. at 9-10) (citing *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶50, 285 Wis. 2d 236, 701 N.W.2d 523, Godoy presents the proposition that there are “safe alternatives to white lead paint” such as “zinc-based paints.” (Godoy Br. at 10). But this very argument has been made before and rejected by other courts as failing to state a claim for design defect. See *City of Philadelphia v. Lead Indus. Ass’n*, 1992 WL 98482, *3 (E.D. Pa. Apr. 23, 1992), *aff’d* 994 F.2d 112 (3d Cir. 1993) (rejecting this claim as “akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead. The challenge is to the product itself, not to a specific design.”).

Other cases have applied the same reasoning in rejecting design defect claims against lead pigment manufacturers. For example, in *Wright v. Lead Indus. Ass’n* (July 6, 1995), Baltimore City, Md. Cir. Ct. Nos. 94363042/CL190487 and 94363043/CL190488, Order at 8-10, *aff’d*,

Appeal No. 1896, Slip Op. at 8 (Md. Ct. Spec. App. Oct. 21, 1997), again facing claims just like those advanced by Godoy here, the court aptly observed that lead pigment “is essentially a processed lump of lead and, as Defendants argue, ‘to demand removal of lead from lead pigment is like demanding removal of aluminum from aluminum foil.’ It would be an altogether different product.” (App.25-27, App.11).

Just a month ago, a New York court overturned a judgment against a lead pigment manufacturer like the defendants here, reasoning that the defendant could not be liable for distributing a lawful product that became dangerous only after it fell under another party’s control. *Smith v. NL Industries Inc.*, 2008 Slip. Op. No. 4923 (N.Y.A.D. 1 Dept. June 3, 2008) (App.36). Just like Godoy here, the Smith plaintiffs did not allege any specific defect in the design of the paint pigments manufactured by the defendant. *Id.* at 2. Rather, they contended that since all lead is hazardous to children, any lead pigment used in the interior residential paint must, by implication, be defective. *Id.* The appellate court granted judgment to the defendants, observing that, (like Wisconsin), “New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.” *Id.*

What then is Godoy arguing for? It would appear that at base, Godoy is arguing that white lead carbonate is a “bad” product and that liability should attach to the product itself, regardless of design. This, however, goes too far.

III. Godoy Seeks to Establish a Claim of Generic or Category Liability – A Theory That Has Been Widely Criticized.

The approach Godoy asks this Court to adopt would be a serious departure from Wisconsin law. By seeking to impose strict design defect liability for an inherent characteristic of white lead carbonate pigment – simply by virtue of the fact that lead allegedly harms people – Godoy effectively argues that all manufacturers must be liable for injuries that occur from use of their product, even if the product has the safest design possible and all warnings are given. In short, Godoy seeks to establish a claim of absolute or generic liability against the manufacturer defendants.

The theory of absolute liability first arose in the 1980’s. Variouslly called “categorical,” “generic” or “absolute” liability, it “would hold manufacturers accountable for injuries from products in certain generic categories even though no independent, traditional defect in manufacture, design or warnings was proved.” Grossman, 36 S. Tex. L. Rev. at 386; *see also* Carl T. Bogus, *War on the Common Law: The Struggle at the*

Center of Products Liability, 60 Mo. L. Rev. 1, 5 (1995) (“Generic liability, or product category liability as it is also called, involves products that remain unreasonably dangerous despite the best possible construction, design and warnings.”).

In *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶163 n.51, 285 Wis. 2d 236, 701 N.W.2d 523, this Court took pains to confirm that its holding in no way should be seen as creating “absolute liability” for white lead carbonate as a category. The court in *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109 ¶57, 245 Wis.2d 772, 629 N.W.2d 727 likewise observed “[t]his is not to say that strict products liability is tantamount to absolute liability. Strict products liability does not impose liability in every instance that a consumer is injured while using a product.” (citation omitted). And for good reason: “To many, generic liability is a radical concept: it raises the specter of courts deciding which products may and may not be distributed, and they perceive it as a judicial usurpation of legislative authority.” *Bogus*, 60 Mo. L. Rev. at 8.

The term “generic liability” refers to products liability based on a claim that an overall product, not just a particular design feature, is unreasonably dangerous and should not be sold. Under a claim of generic

liability a plaintiff can contend that merely putting the product on the market was unreasonably dangerous – like Godoy’s arguments here about the intrinsic dangerousness of white lead carbonate.

No court has adopted the concept of generic liability that Godoy implicitly urges here. *See, e.g., Kotler v. American Tobacco*, 926 F.2d 1217, 1224-26 (1st Cir. 1990), *vacated*, 505 U.S. 1215 (1992); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326, 1327 (9th Cir. 1986); *Armijo v. Ex. Cam., Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158 (E.D. Pa. 1987); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240-41 (Colo. Ct. App. 1988), *overruled on other grounds, Casebolt v. Cowan*, 829 P.2d 352, 360 (Colo. 1992). Legislatures have overturned or limited every attempt by courts to outlaw a product through the concept of generic liability. *See, e.g., Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. Ct. App. 1985); *O’Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983); N.J. Stat. Ann. 2A:58C-3; Md. Code Ann., Art. 27, § 36-19(h); La. Rev. Stat. Ann. §9:2800.51-.59.

This resounding rejection of categorical liability is entirely consistent with Wisconsin law. This Court has previously disavowed the

far-reaching notion that manufacturers are insurers of their products and that all risks can be eliminated from a product. *See Dippel v. Sciano*, 37 Wis. 2d 443, 459–60, 155 N.W.2d 55, 63–64 (1967).

The consequences of adopting Godoy’s approach for design defect claims would be profound. Doing so would be more than a simple expansion of product liability law -- it would create a new form of liability with no prior basis in law. Because there are possible risks that can be associated with the use of virtually any product, adopting Godoy’s approach would mean that every time someone is injured by a product, he or she would have a design defect claim, even if the product were made as safely as possible. Manufacturers could avoid liability only by taking their products off the market. Courts would be thrust into the business of deciding which products could be made and sold, even where there is no negligence or other misconduct.

Under Godoy’s logic, one could say that the cheese in a cheeseburger contributes to childhood obesity – and that harm alone could be enough to impose absolute liability on cheese manufacturers. Likewise, paper and cloth could be deemed “defective” because they are flammable. Wood in a structure could be “defective” because it is not

steel; steel is “defective” because it is not titanium. As one widely-cited commentator has observed, “[o]nce the gates of categorical liability are opened, the range of products that might be swept through them in the interests of sympathetic plaintiffs is frighteningly broad. This legitimate fear is a potent argument against opening those gates.” Grossman, 36 Tex. L. Rev. at 409 (citation omitted).

IV. Godoy’s Approach Would Deny Wisconsin Citizens Access to Useful and Desirable Products and Constrict Wisconsin Businesses.

If the Court opens the door to generic liability in Wisconsin, the new rule would impose serious and troubling burdens on Wisconsin consumers and businesses. The rule would affect the availability and pricing of any product that is not defectively designed but by its nature can potentially cause injury, even when the product is a legal substance, and is useful or desired by consumers. Such products could include alcoholic beverages, firearms, insect sprays, household disinfectants and prescription drugs, to name just a few. Many chemical compounds that go into innumerable products likewise could be deemed “unreasonably dangerous,” thereby sweeping up - and effectively outlawing - the

products they go into, regardless of the utility of the products and regardless of instructions for use and warnings.

Manufacturers would be forced, at best, to raise the price of such products to cover the cost of the increased risks of litigation, to buy insurance if it is available or to plan for increased litigation. Because so many products that a jury may label “unreasonably dangerous” by their nature are readily and broadly obtainable by consumers, the size of the risk would be much greater than if these were arcane products or available only for industrial use. There would come a point when even increased pricing would not be enough to justify the risk of sale or the price would be so high that consumers would simply not pay the price of the goods. In the end, products could be withdrawn from the Wisconsin market and become unavailable to its citizens.

Further, Wisconsin-based manufacturers of such products would incur far greater costs of doing business, including increased insurance and other business costs. The more local or regional the manufacturer’s market, the worse the consequences for its business. There would be consequences, as well, for Wisconsin employees of such businesses that could be forced to cut back on manufacturing, marketing and sales, and

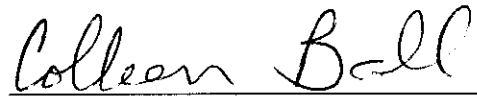
the employees in those positions. See, e.g., Council of Econ. Advisers, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* 6, 12-13, 16 (2002), http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf (excessive tort costs result in lower wages/job losses, higher prices, lower property values, and lower stock prices, which harm retirement savings); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 Wis. L. Rev. 237, 248-49 (“A particularly bad liability experience with a product can lead to costs that represent a large fraction of a company's value--and in the extreme may lead to financial disaster--no matter how small a portion of its assets was invested in the product.”). In short, there are sound public policy reasons not to extend plaintiff's view of the law of product liability.

CONCLUSION

For the foregoing reasons, and the reasons elucidated in the Defendants-Respondents' briefs in this appeal, PLAC respectfully requests that this Court uphold the rulings of the trial and appeals courts.

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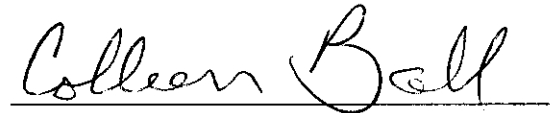
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c)(2) for a brief produced with a proportional serif font. The length of this brief is 2,838 words.

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Corporate Members of the Product Liability Advisory Council

as of 6/19/2008
Total:120

3M
ACCO Brands Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Easton-Bell Sports, Inc.
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company

Corporate Members of the Product Liability Advisory Council

as of 6/19/2008

Total:120

Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1896

September Term, 1996

ALVIN WRIGHT, a minor, etc. et al.

v.

LEAD INDUSTRIES ASSOCIATION, INC., et al

THE DOE RUN RESOURCES CORPORATION

v.

ALVIN WRIGHT, a minor, etc. et al.

Wenner,
Thiems,
Fischer, Robert F., (Retired,
specially assigned)
II.

Opinion by Wenner, J.

Filed: October 21, 1997

363D42

Appellants, Alvin and Allen Wright, appeal a series of orders by the Circuit Court for Baltimore City dismissing a suit filed on their behalf by their parents, Tina and Alvin O. Wright. Confronted with numerous defendants and various allegations, the trial court ultimately disposed of the case by granting three motions filed by appellees, one for dismissal and two for summary judgment. On appeal, appellants present us with the following questions, which we have condensed for brevity:

- (1) Did the circuit court err in granting Appellee's motion for summary judgment on the issue of proximate causation; and
- (2) Did the circuit court err in granting Appellee's motion for summary judgment on Appellant's allegations of conspiracy; and
- (3) Did the circuit court err in granting Appellee's motion to dismiss on the allegations of fraud, misrepresentation and violation of the Maryland Consumer Protection Act; and
- (4) Did the circuit court err in granting Appellee's motion to dismiss Appellants design defect claims as to the manufacture of lead pigments.

Finding no error, we shall affirm the judgments of the circuit court.

DOE Run Resources Corporation (DOE Run) appeals from the trial court's denial of its motion for Maryland Rule 1-341 sanctions. On appeal, DOE Run presents us with the following question:

Did the trial court err by denying the DOE Run's motion for Rule 1-341 costs and fees without making any findings of fact as to the Wright's alleged bad faith and/or lack of substantial justification in

commencing and maintaining its suit against DOE
Run?

Again finding no error, we shall affirm the judgment of the circuit court.

Facts

Alvin Wright was born on 26 January 1977, and his brother Allen was born on 28 January 1979. From their birth, the brothers lived with their parents at 1228 N. Ellwood Avenue in Baltimore, Maryland, until 1983.¹ In June 1980, the brothers were found to have and were treated for elevated blood levels of lead. Alvin died in 1994 of complications from kidney disease. Allen has been diagnosed with paranoid schizophrenia and schizoaffective disorder, symptoms of which he began to display in 1991. The Wrights contend that these medical problems arose from the brothers' exposure to lead paint at 1228 N. Ellwood Avenue.

The Wrights filed a complaint in December of 1994 on behalf of their sons, seeking damages from a number of defendants, appellees, who we have placed in two groups: those who have had some contact with 1228 N. Ellwood Avenue (the N. Ellwood Avenue group), and those in the lead paint industry (the Industry Group). The complaint contains a variety of claims, including strict liability, negligence, conspiracy, fraud (misrepresentation), and

¹ The record indicates that 1228 N. Ellwood Avenue was originally purchased in 1957 by Tina Wright's father. The record also indicates that Tina lived in this house with her parents and siblings, before living there with her husband and children.

wrongful death.² The W. Ellwood Avenue group consists of Sherwin Williams Company, Fuller O'Brien, A. Bauer & Company and Schumann Hardware Company. The Industry Group consists of The Lead Industry Association, The Atlantic Richfield Company, SCM/Slidden Company, St. Joe Mineral Corp (DOE Run), and E.I. Dupont de Nemours & Company.

Procedural History

Before proceeding, we shall review this matter's somewhat convoluted procedural history. Appellees filed a number of pre-trial motions endeavoring to narrow or eliminate certain issues. The trial court addressed each motion, and issued three separate orders which methodically eliminated claims and defendants, ultimately disposing of the entire complaint. The trial court issued its first order on 6 July 1995, granting appellees' motion to dismiss as to all parties those claims charging violation of the Maryland Consumer Protection Act (CPA), Md. Code Ann., Com. Law § 13-101, *et seq.*, and theories of fraud or misrepresentation. In addition, the order dismissed that portion of the complaint charging negligence and strict liability, claiming design defect in the creation of lead pigment.³

² This is not an exhaustive list. The complaint was amended on a number of occasions, with claims being deleted and added.

³ The trial court chose not to dismiss the Wrights' claim of design defect as to the creation of lead paint.

On 24 June 1996, the trial court issued an order granting summary judgment. This eliminated the Industry Group, and the N. Ellwood Avenue group as to the Wrights' charge of conspiracy.* The trial court issued a third order on 19 September 1996. We shall first address those issues disposed of by summary judgment.

I.

In reviewing the grant of a motion for summary judgment, "the standard of appellate review...is whether the trial court was legally correct." *BG & E v. Lane*, 338 Md. 34, 43, 656 A.2d 307 (1995). The trial court may grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(e).

In the case at hand, the trial court correctly recognized that, although the non-moving party is entitled to have facts and the inferences drawn therefrom construed in its favor, the non-moving party must "show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence," *Beatty v. Trailmaster*, 330 Md. 726, 737, 625 A.2d 1005 (1993), to raise the outcome of the action beyond mere speculation. "In other words, the mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the

* The N. Ellwood Avenue group includes two paint manufacturers, Sherwin Williams Company, Fuller-Obrien Company and two hardware stores, A. Bauer Company and Schumann Hardware Company.

grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Id.* (Emphasis added.)

A. Proximate Cause

In an action claiming both negligence and strict liability, the plaintiff bears the burden of proving that the defendant's tortious behavior was the proximate cause of the plaintiff's injury. See *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 604 A.2d 47, *cert. denied*, 506 U.S. 871 (1992). In Maryland, "a plaintiff may recover only those damages that are affirmatively proved with reasonable certainty to have resulted as the natural, proximate and direct effect of the tortious misconduct." *Jones v. Malinowski*, 299 Md. 257, 269, 473 A.2d 429 (1984) (emphasis added) (citation omitted). Proximate cause is measured in Maryland by the substantial factor test. *Eagle-Picher v. Balbas*, 326 Md. 179, 208, 604 A.2d 445 (1992) (plaintiff's exposure to asbestos dust could be inferred by jury as being a substantial factor in injury); *Bartholomew v. Casey*, 103 Md. App. 34, 651 A.2d 908 (1994) (Evidence insufficient to establish landlord's actions was a substantial factor in plaintiff's lead poisoning.).

Here, the Wrights failed to produce sufficient evidence to establish the necessary link between the N. Ellwood Avenue group's

products and the injuries suffered by their sons.⁵ Although the Wrights claim that Alvin and Allen ingested lead paint, Mrs. Wright's undisputed testimony was that she never saw the boys eat paint chips or flakes.⁶ It is important to note that discovery confirmed there to be little or no flaking paint at 1228 N. Ellwood Avenue. Moreover, Mrs. Wright testified she could not recall seeing flaking paint while the brothers were there. In sum, she remembered only a white powder on the boys' hands as they played near the living room window.⁷ Nonetheless, no evidence was presented that the powder contained lead, or was from lead paint.

As the Wrights see it, it was unnecessary for them to prove that their sons were injured by products manufactured by or purchased from the Industry or N. Ellwood Avenue groups. Instead, they choose to rely on the inferences that may be drawn from the facts presented. While a court must resolve all inferences in favor of the opposing summary judgment, "[t]hose inferences must be reasonable ones." (Citation omitted.) *Beatty* at 739. In support

⁵ A great deal of the evidence demonstrates that it is highly unlikely that the boys' lead poisoning was caused by appellees' paint products. A review of the record leaves us with the impression that either outside industrial sources in the area or their grandparents' home on Bennett Street was the source of the boys' illness.

⁶ In completing a medical questionnaire at the John F. Kennedy Institute in 1980, Mrs. Wright included paint chips among a number of items eaten by Allen. Nevertheless, we find this evidence unpersuasive in view of her extensive deposition.

⁷ According to Mrs. Wright, however, she washed their hands twice a day on seeing the powder on their hands, and would frequently clean the window sill. This further weakens the Wrights' claim that the lead poisoning arose from contact with the white powder.

of their position. The Wrights point us to *Owens Corning v. Garrett*, 343 Md. 500, 682 A.2d 1143 (1996), and *Shenerly v. Raymark Industries, Inc.*, 117 F.3d 776 (1997) (4th Cir.), as demonstrating:

Whether the exposure of any given bystander to any particular supplier's product will be legally sufficient to permit a finding of substantial-factor causation, is fact specific to each case. The finding involves the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace.

343 Md. at 526 (citing *Eagle-Picher v. Balbos*, supra).

Unfortunately for the Wrights, they have not presented sufficient facts from which a jury could reasonably infer that Alvin and Allen were injured by products manufactured by or sold by the Industry or N. Ellwood Avenue groups.⁸ The record reflects that Alvin's and Allen's grandfather used paint in 1228 N. Ellwood Avenue purchased from the N. Ellwood Avenue group. The evidence fails to show, however, is whether it contained lead; whether it was used in areas where the children were seen with white powder on their hands; or whether the white powder was a by-product of lead

⁸ The factual differences between *Owens Corning* and *Shenerly* and the matter before us are stark. In *Owens Corning*, there was ample evidence that the defendant's products, which contained asbestos, were used through out the areas in question, and direct testimony from fellow employees that the plaintiff worked in these areas during the time in question. The facts in *Shenerly* are even more compelling. All but one of the plaintiff's testified to extensive contact with asbestos products and the resulting dust, and there was direct testimony that the one deceased plaintiff had substantial exposure.

based paint.⁹ Although the facts are undisputed, the inferences that may be drawn from them are of no avail to the Wrights.

B. Conspiracy

The Wrights also contend the trial court erred in dismissing the conspiracy claim as to all but A. Bauer & Company and Schumann Hardware Company. While the trial court concluded there was insufficient evidence of a conspiracy, the Wrights contend the lead industry conspired to suppress information of the hazards of lead paint; had lobbied local government for regulations desired by the industry; and had failed adequately to fund research to resolve the question of what, if any, is a safe level of lead in paint.¹⁰ The trial court extensively discussed Wrights' conspiracy claim, and concluded that there was insufficient evidence. We agree.

The Wrights contend the lead industry conspired to suppress information concerning lead paint hazards, but failed to offer persuasive evidence in support of its position. The hazards of lead paint was publicized extensively and widely discussed in the media prior to and during the period of time in question. In fact, Baltimore regulated lead paint products, and mandated a label

⁹ Evidence that the paint used by the grandfather contained lead comes primarily from two sources. The first is his son whose recollections about lead paint in the house stems from those times when, as a child, he assisted his father in painting the house. Mrs. Wright's recollection is even more vague. She only recalls seeing three cans of paint containing lead warning labels during an inspection of a basement closet in 1980. Neither has any direct substantive knowledge of their father using lead based paint in the house.

¹⁰ We are hesitant even to dignify the Wrights' charges that the lead industry manipulated in some fashion research facilities of such institutions as the Johns Hopkins University and Harvard University, with requests to conduct research into these issues.

specifically warning purchasers of the danger of using lead paint inside homes and in areas accessible to children.¹¹ Nor is there evidence of the general public or Baltimore being convinced by the lead industry's efforts. In fact, there is no evidence whatsoever of any such effort. The Wrights rely on a number of notes made during meetings of the lead industry in support of their position. When read in the context in which they were made, these notes bear no indication that the speaker was referring to an organized conspiracy. This supports the trial court's conclusion that the Wrights had produced no evidence of an organized conspiracy.¹² We turn now to the motion to dismiss.

II.

In reviewing a motion to dismiss, we must "assume the truth of all relevant and material facts well pleaded and all inferences which can be reasonably drawn from those facts." *Stone v. Chicago Title Ins.*, 330 Md. 329, 333, 624 A.2d 495 (Md. 1993). Accordingly, we now turn our attention to the issues presented by the Wrights

¹¹ Interestingly, Mrs. Wright testified that the cans of paint that she saw in the basement closet in 1980 appeared to contain the appropriate warnings.

¹² Finally, in their brief the Wrights contend that the trial court abused its discretion by failing to grant their request to postpone its ruling on the motion for summary judgment until the close of discovery, because the record was not complete. As there was an eighteen month period for discovery, we fail to see what if any compelling evidence would have been uncovered in an additional four weeks. There was no abuse of discretion.

following the dismissal of their fraud, CPA, and design defect claims. We shall address these issues seriatim.

A. Fraud and Misrepresentation

"To prevail in an action for fraud, a plaintiff must show: (a) that a representation made by the defendant was false; (b) that its falsity was known to defendant; (c) that the representation was made for the purposes of defrauding the plaintiff; (d) that the plaintiff not only relied upon the representation, but had the right to do so and would not have done the thing from which the damage resulted if it had not been made; and (e) that plaintiff suffered damage directly resulting from the defendant's misrepresentation."

Parlette v. Parlette, 88 Md. App. 628, 635, 596 A.2d 665 (1991); *Griffin v. Medtronics*, 840 F.Supp. 396 (D.Md. 1994). Since the Wrights presented no evidence of Alvin and Allen being injured because of misrepresentations by the N. Ellwood Avenue and the Industry Group, the trial court dismissed the fraud claims. The trial court noted that the action for fraud may have initially been pursued by the Wrights or their parents, it was now barred by limitations.

The Wrights believe such a result to be unduly harsh to their minor children, and offer several theories to fill the gap in the law through which minors may fall. They first rely on dicta found in *B.P. Oil Corp. v. Mabe*, 279 Md. 632, 370 A.2d 554 (1976). In *Mabe*, the Court of Appeals was confronted with whether Mabe had established agency by estoppel in order to recover damages from injuries suffered at a service station leased to and operated by one Lonnie Faison. In responding to several cases relied upon by Mabe, the

Court said that "reliance upon the part of a parent or custodian of a child of tender years would be sufficient to permit recovery on behalf of a child if the facts and circumstances were such that the parent or custodian might have been able to recover for injury to that parent or custodian." *Mabe* at 648-649.

We see no need to adopt this dicta, as the issue now before us was not before the *Mabe* court. Nonetheless, the Wrights assert that an action for fraud may be maintained by a third party if the misrepresentation was made to an agent of a third party. In addition, they suggest that we adopt the decision of the New York Supreme Court, Appellate Division, in *The City of New York, et al v. Lead Industries Association, Inc., et al.*, 597 N.Y.S.2d 698, 190 A.2d 173 (1993), in which the Court said, "misrepresentations of safety to the public at large, for the purpose of influencing the marketing of a product known to be defective, gives rise to a separate cause of action for fraud. (Citations omitted.)" *Id.* at 700. We decline to accept the Wrights' suggestions. The premise of *The City of New York* is completely contrary to Maryland law, and we find no basis for adopting that court's ruling. The Wrights present *Butcher v. Robertshaw Controls Co.*, 550 F.Supp. 692 (1981), in support of their agency position. To be sure, *Butcher* supports the proposition that an action for fraud may be maintained when the fraud has been practiced upon the party's agent. Unfortunately for the Wrights, we have neither found, nor

been directed to; authority for the suggestion that parents have been, or should be, considered the agents of their children. Hence, the trial court properly rejected this suggestion, as do we.

B. Maryland Consumer Protection Act

The trial court dismissed the Wrights' CPA claim, Md. Code Ann., Com. Law § 13-101, *et seq.*, because of their failure to establish lead paint purchases subsequent to 1973. As the Court of Appeals said in *Scroggins v. Dahne*, 335 Md. 688, 694, 645 A.2d 1160 (1993), "there is no indication in the language of the CPA to support retroactive application of that statute." The Wrights believe there was a six month period during which the trial court could have inferred that lead based paint had been purchased and used. According to the Wrights, private consumers subjected to a violation of the CPA were afforded a private cause of action as of 1 July 1973. The trial court, however, had only determined that no purchases were made after 1 January 1974, leaving a six month period during which they believe it could be inferred that they had purchased lead based paint. Since we find nothing in support of this proposition in the Wrights' complaint,¹³ we shall affirm the order of the trial court.

¹³ The Wrights also argue that placing the phrase "at times material hereto" after alleging that lead paint was purchased by their family is sufficient to warrant those inferences contained in a well pleaded complaint. *See Stone v. Chicago Title Ins.*, 330 Md. 329, 333, 624 A.2d 435 (1993). We are not inclined to consider a complaint containing such catchall phrases to be "well pleaded."

Lead Pigmentation

Finally, the Wrights complain the trial court erred in dismissing their design defect claim. The Wrights believe the risk utility test is the appropriate test for evaluating a design defect claim. *Phipps v. General Motors Corp.*, 278 Md. 337, 163 A.2d 955 (1976). When reviewing such a claim, we must first respond to the question posed by the trial court: Is lead pigmentation inherently defective? *Phipps*, 278 Md. at 347. We respond as did the trial court: lead pigment is not inherently defective. In other words, the inclusion of lead pigment does not per se render the product defective. As we observed in *Dudley v. BG & E*, 98 Md. App. 182, 202-203, 632 A.2d 492 (1993), "To claim that the gas supplied by BG & E was defective and unreasonably dangerous because it is flammable and highly explosive is equivalent to asserting that a kitchen knife is defective and unreasonably dangerous because it is sharp and can cut things." The trial court noted that the District Court for the Eastern District of Pennsylvania made this same observation as to lead pigment in *City of Philadelphia, et al. v. Lead Industries Assoc., et al.*, Civ.A. No. 90-7064, 1992 WL 98482 (1992). Lead is the very essence of lead pigment.

III.

We must finally determine whether the trial court erred in dismissing DOE Run's motion for Rule 1-341 sanctions without a hearing. We addressed this situation in *Fowler v. Printers II*, 89 Md. App. 448, 487, 598 A.2d 794 (1991), and said "that if there is no basis for granting it apparent from the record, the trial judge need not issue any findings." As this is the situation in the case at hand, our conclusion is the same. There was no error.

JUDGMENTS AFFIRMED;
COSTS TO BE PAID
BY APPELLANTS.

TOTAL P. 52

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TIDINGS & ROSENBERG

ALVIN WRIGHT, et al.

Plaintiffs

v.

LEAD INDUSTRIES ASSOCIATION,
INC., et al.

Defendants

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY

* Case No. 94363042/CL190487
* Case No. 94363043/CL190488
*

MEMORANDUM OPINION AND ORDER

Heller, J.

I. Introduction

These companion actions were brought on behalf of minor children who allegedly suffered injuries as a result of exposure to lead paint in their home. They assert that Alvin Wright was born on January 26, 1977 and that with his parents, Tina and Alvin Wright, resided at 1228 N. Ellwood Avenue in Baltimore until approximately 1983. It is alleged that between 1977 and 1980, he was exposed to "substantial quantities" of lead paint at his home. Compl. ¶3. His brother, Allen Wright, was born on January 25, 1979, and also resided at 1228 N. Ellwood Avenue until approximately 1983. His alleged exposure to lead paint occurred between 1979 and 1980. Compl. ¶2.

Alvin Wright allegedly developed a lead-related kidney disease and has died. Compl. ¶9. His brother Allen is alleged to suffer from lead poisoning and suffers various medical disabilities. Compl. ¶8.¹ The Amended Complaint also states that the Plaintiffs "purchased and continued to use [lead] paint to touch up the

¹These citations are to Count One - strict liability - of each of the Complaints. Throughout this opinion, the cites are to both Complaints, and the Complaint is referred to in the singular.

premises on [Ellwood Avenue] from 1957 until 1980 when they were informed by a Baltimore City Health Department Inspector to get rid of the remaining lead-based paint in their possession." Count One, ¶¶3,4.

The Defendants are manufacturers of both lead pigments and lead paint and two hardware stores. The original Complaint was filed in this Court on December 29, 1994. Thereafter, on February 16, 1995, the Defendants removed this action to federal court. On March 2, 1995, Plaintiffs' motions to remand these cases to the Circuit Court for Baltimore City was granted. See Mem. Op., Allen Wright, et al. v. Lead Indus. Ass'n., et al., Civil Nos. S 95-473, S 95-474 (Ex. 1 to Defs.' Mot. to Dismiss).

Subsequently, Plaintiffs amended their Complaint by "interlineation" on April 5, 1995. As the Complaint now stands, Plaintiffs are asserting six counts on behalf of Allen and Alvin Wright and their parents: Count One - strict liability; Count Two - unfair and deceptive trade practice; Count Three - negligence; Count Four - conspiracy; Count Five - fraud; Count Six - loss of services and friendship; and as pertains to Alvin Wright, Count Seven - wrongful death.

All Defendants have moved to dismiss the Complaint pursuant to Maryland Rule 2-322, Counts Two, Four and Five in their entirety, and Counts One and Three in part. A hearing was held on these motions on June 19, 1995. The merits of the motions will be discussed below seriatim.

II. Standard for Motion to Dismiss

In deciding a motion to dismiss, a trial court "must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Sharrow v. State Farm Mut. Auto. Ins. Co., 306 Md. 754, 758 (1986). Any ambiguity or uncertainty in the allegations as to whether a cause of action has been stated must be construed against the pleader. Id. On the other hand, well pleaded allegations are viewed in the light most favorable to the plaintiffs. Berman v. Karvounis, 308 Md. 259, 264 (1987); Baker, Watts v. Miles & Stockbridge, 95 Md. App. 145, 186 (1993).

III. Discussion

A. Statute of Repose

Defendants have argued that the Maryland Statute of Repose requires dismissal of "each and every Count of the Amended Complaint to the extent that it asserts claims arising out of the application of lead paint" before 1957, more than 20 years before Alvin Wright could have been injured and, as regards Allen Wright before 1959, more than 20 years before he could have been injured. Md. Code Ann., Cts. & Jud. Proc. §5-108(a) (1995 Repl. Vol.) provides in pertinent part:

Section 5-108 Injury to person or property occurring after completion of improvement to realty.

(a) Injury occurring more than 20 years later. - Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years

after the date the entire improvement first becomes available for its intended use.

The Statute of Repose creates "a blanket prohibition against all suits that meet the statutory criteria." Rose v. Fox Pool Corp., 335 Md. 351, 360 (1994). In particular, as its specific language indicates, §5-108(a) precludes an action where plaintiff's injuries have resulted from an alleged "defective and unsafe condition of an improvement to real property [which] occurs more than 20 years after the date the entire improvement first becomes available for its intended use." There is no dispute but that the Statute of Repose applies to the Defendants who were "manufacturers of products other than those containing asbestos...." Md. Code Ann., §5-108(d)(2)(iv)(1). It is the Defendants' contention that all claims arising out of the pre-1957 application of lead paint in the Ellwood Avenue home must be dismissed because an application of lead paint is not an "improvement to real property." This Court disagrees.

The Rose court discussed in depth the two general approaches espoused by out-of-State courts in determining what constitutes an "improvement to real property." It rejected the "common law fixture" analysis and employed a "common usage" test in which the relevant inquiry is "whether the object is an improvement within the common, dictionary meaning of that term." Rose, 335 Md. at 376. Of significance, it found "persuasive" the narrow definition of "improvement" found in Black's Law Dictionary which provides:

[A] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or

capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset. Such expenditures are capitalized as part of the asset's cost. (Emphasis added)

Black's Law Dictionary 757 (6th ed. 1990) as quoted in Rose, 335 Md. at 376. Whether an item is "an improvement to real property" within the meaning of §5-108 should be made on a case-to-case determination. Id. at 377; Allentown Plaza Assoc. v. Suburban Propane Gas Corp., 43 Md. App. 337, 346 (1979) (holding meters and their couplings were not improvements).

According to the Complaint, which binds this Court for purposes of a motion to dismiss, lead paint was purchased and used at the Hillwood Avenue premises "to touch up the premises... from 1957 until 1980...." Am. Compl., Count One, ¶¶3,4. Certainly, using paint to "touch up" premises is more akin to a repair or replacement than to the permanent improvement as defined in Rose.

Moreover, even an application of paint that went beyond a mere "touch up" would not be in the same category as the swimming pool in Rose or the asbestos-containing acoustical plaster which made up the ceiling of the church in First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). In the First United case, cited by Defendants, there is no discussion of the meaning of "improvement to real property." Another case cited by Defendants, N.Y. Artcrafts, Inc. v. Marvin, 29 Misc.2d 774, 776, 215 N.Y.S.2d 788, 789 (Nassau Cty. Dist. Ct.

1961), is also distinguishable. In this case, the court did hold "painting" was an improvement for purposes of the mechanic's lien law but, in doing so, observed that New York courts had interpreted that law liberally and "[had] not been literal in the requirement of permanence." Id. at 790. This Court concludes on the facts as alleged that the painting of the Ellwood Avenue home was more akin to "repairs or replacement" and not a permanent "valuable addition made" to the property.

B. Counts One and Three - Design Defect Allegations

The Defendants have argued that Plaintiffs have failed to state a design defect claim in Counts One and Three, asserting that under Maryland law, design defect claims may not be predicated on the alleged intrinsic dangers of a product. Significantly, Defendants have not moved to dismiss the failure to warn claims in these counts but only those portions of the strict liability and negligence claims that rest on an alleged design defect in lead pigment and lead paint.

In this case, there are two different lead products of Defendants that are claimed to be defective. First are "lead pigments" which are defined in the Complaint as those "white lead pigments... which were mixed with other pigments and/or oil to produce lead paint,...." Compl., ¶7. There are also "lead paints" which are defined as "paints, glazes and other surface coverings consisting of more than 0.5% lead...." Compl., ¶6. Both the strict liability and negligence counts allege that the Defendants' lead products were defective in design in that they "contained harmful, deleter-

ious, carcinogenic, and otherwise inherently and latently dangerous lead...." See Count One, ¶¶3,4; Count Three, ¶¶16(a),17(a).

To recover under a strict liability claim, the Plaintiffs must prove: (1) the existence of a defect; (2) the attribution of the defect to the seller; and (3) a causal relation between the defect and the injury.² See Dudley v. B.G.&R., 98 Md. App. 182, 202 (1993); Klein v. Sears Roebuck, 92 Md. App. 477, 484-85, cert. denied 328 Md. 446, 447 (1992). To prove a defect in a product, the Plaintiffs must prove that "the product was in a defective condition and unreasonably dangerous at the time it was sold." Phipps v. General Motors Corp., 278 Md. 337, 344 (1976); Klein, 92 Md. App. at 484-85. A product may be defective for any one of three reasons: (1) a flaw in the product at the time the defendant sold it, making the product more dangerous than was intended; (2) a failure to warn adequately of a risk or hazard related to the product's design; and (3) a defect in the product's design. Simpson v. Standard Container Co., 72 Md. App. 199, 201, cert. denied 311 Md. 286 (1987).

Maryland has recognized certain "kinds of conditions which, whether caused by design or manufacture" are inherently defective. As stated in Phipps:

²The elements of proof are the same whether the claim be characterized as one for strict liability or negligence. Watson v. Sunbeam Corp., 816 F.Supp. 384, 387 n.3 (D.Md. 1993); Polansky v. Ryobi America Corp., 760 F.Supp. 85, 87 (D.Md. 1991). The difference is that in negligence, the plaintiffs must show a breach of duty of care and in strict liability that the product was unreasonably dangerous. Id. Maryland adopted strict liability as a basis for a product liability action under Restatement (Second) of Torts, §402A in Phipps v. General Motors Corp., 278 Md. 337 (1976).

For example, the steering mechanism of a new automobile should not cause the car to swerve off the road, [citations omitted]; the drive shaft of a new automobile should not separate from the vehicle when it is driven in a normal manner [citations omitted]; the brakes of a new automobile should not suddenly fail, [citations omitted]; and the accelerator of a new automobile should not stick without warning, causing the vehicle suddenly to accelerate. Conditions like these, even if resulting from the design of the products, are defective and unreasonably dangerous without the necessity of weighing and balancing the various factors involved.

Phipps, 278 Md. at 346.

This Court is persuaded that neither lead pigments nor lead-base paint products fall in the limited "inherently unreasonable risk" category. That limited type of design defect has been applied only in those cases where the product has not functioned as the manufacturer intended. Ziegler v. Kawasaki Heavy Industries, 74 Md. App. 613, 621 cert. denied 313 Md. 32 (1988).³

Moreover, as to the lead pigments, this Court concludes there is no design defect as lead is intrinsic to its nature. It is essentially a processed lump of lead and, as Defendants argue, "to demand removal of lead from lead pigment is like demanding removal of aluminum from aluminum foil." It would be an altogether differ-

³If a design defect is considered "unreasonably dangerous," the so-called risk-utility balancing test is not used as the risk is never "reasonable." Phipps, 278 Md. at 345; Ziegler v. Kawasaki Heavy Industries, 74 Md. App. 613, 620 (1988). Of interest, at least one Maryland decision has observed the risk-utility test is confined to those design defect situations where something goes wrong with the product. Kelly v. R. G. Industries, Inc., 304 Md. 124, 138 (1985) (Applying the 'consumer expectation' test). The trend in recent Maryland cases, however, is to apply the risk-utility test in a design defect case. See e.g., Klein v. Sears Roebuck, 92 Md. App. 477, 485-6 (1992); Ziegler, 74 Md. App. at 621-22; Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 108 cert. denied 303 Md. 471 (1985).

ent product. Therefore, this Court is in accord with the decision in City of Philadelphia v. Lead Industries, 1992 W.L. 98482 (E.D.Pa. 1992), aff'd, 994 F.2d 112 (3d Cir. 1993) that alleging a design defect is lead pigments is:

... akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead. The challenge is to the product itself, not to a specific design.

1991 W.L. 98482 at *3.

Further, merely because a product may be dangerous is not alone sufficient to conclude it is defective. See e.g. Kelley v. R.G. Industries, Inc., 304 Md. 124, 136 (1985) (Holding that a handgun is not defective merely because it is capable of firing a bullet with deadly force). For example, in the Dudley case, the plaintiff had alleged that the natural gas supplied by BG&E was "defective and in an unreasonably dangerous condition in that the gas was flammable and highly explosive." Judge Motz, writing for the Court of Special Appeals, found the claim without merit, observing that "[flammability] and explosiveness are intrinsic to the nature of natural gas." That opinion went on to say that to claim that the gas was defective and unreasonably dangerous because it was flammable was "equivalent to asserting that a kitchen knife is defective and unreasonably dangerous because it is sharp and can cut things." Dudley, 98 Md. App. at 203. For these reasons, the Court is persuaded lead pigment is not "inherently defective in its design."

The Complaint distinguishes between lead pigments in which lead by definition is inherent in the product and lead paint. It

is the Plaintiffs' position that the Defendants had a choice to include lead in their paint or a substitute that was harmless as early as the 1930's, and their choice to use lead created a design defect. Pls.' Opp. at 11. Based on this premise, Plaintiffs allege a viable design defect claim in regards to the lead-based paint products. That is, the allegations fall into that category of a design defect case where the question is "whether a manufacturer, knowing the risk inherent in his product, acted reasonably in putting it on the market." Klein, 92 Md. App. at 485, quoting Ziegler, 74 Md. App. at 621.

In sum, Defendants' motion to dismiss those portions of Counts One and Three for failure to identify a design defect in lead pigment is granted. The motion is denied in regard to lead paint.

C. Count Two - Maryland Consumer Protection Act

Count Two of the Amended Complaint seeks compensatory and punitive damages under Maryland's Consumer Protection Act ("CPA"), specifically Md. Code Ann., Com. Law §§13-301(1), (2)(i), (iv), (3) and (9)(i) (1990 Repl. Vol.). However, Plaintiffs' claims of unfair or deceptive trade practices are barred because they have failed to identify any misrepresentations made after 1973, the date at which the CPA was amended to provide for a private right of action.¹ See 1973 Md. Laws 1483, Ch. 704 (the current private right of action is set forth in Md. Code Ann. Com. Law §13-408).

¹A discussion of the importance and history of the private right of action is set forth in "Comment, Maryland's Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Trade Practices," 38 Md. L. Rev. 733 (1979).

Plaintiffs' Complaint has no specific allegations that they purchased any lead paint after 1973 or that Defendants made false or misleading statements or omitted any material information after that date. Indeed, at oral argument, they conceded that the parents did not make any paint purchases after 1973. See June 19, 1995 Tr. at 75. Rather, their argument is that Defendants "had a continuing duty to warn of the hazards associated with exposure to their lead-based paint products" up and through the time injuries were sustained by the minor Plaintiffs between 1977 and 1980. See Pls.' Opp'n at 16. There is no legal support for the contentions that the CPA has incorporated tort theories to impose such a continuing duty to warn. To the contrary, Scroggins v. Dahne, 335 Md. 688, 694 (1994) expressly held that there is no indication in the language of the CPA "to support retroactive application of that statute...." Id. For these reasons, the second count of the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

D. Count Five - Fraud and Misrepresentation

Count Five of Plaintiffs' Complaint is a claim for fraud and misrepresentation. The gist of the allegations concern the non-disclosure of material information by the Defendants regarding health risks of lead paint. The fraud claims fail for the following reasons.

In order to recover damages in an action for fraud or deceit, a plaintiff must prove: (1) that a defendant made a false representation to the plaintiff; (2) that the defendant knew of its

falsity or that the representation was made with reckless indifference to its truth; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) the plaintiff relied on the misrepresentation; and (5) the plaintiff suffered an injury as a result of the misrepresentation. Nails v. S&R, 334 Md. 398, 415 (1994); Marten's Chevrolet, Inc. v. Seney, 292 Md. 328, 333 (1982). Concealment by a defendant of a material fact with the intent to deceive or defraud may also constitute fraud in Maryland. Finch v. Hughes Aircraft Co., 57 Md. App. 190, 232 (1984), cert. denied 300 Md. 88 (1984), cert. denied 469 U.S. 1215 (1985). However, mere non-disclosure of facts known to a defendant without the intent to deceive would not constitute fraud unless there existed a separate duty of disclosure to the plaintiff. Id.

Under Maryland law, a claim for fraud or misrepresentation will not lie unless a plaintiff can establish that he or she was the actual recipient of the alleged misrepresentation and that it was not made to a third party. See q.q., Parlette v. Parlette, 88 Md. App. 628, 635 (1991); Smith v. Rosenthal Toyota, Inc., 83 Md. App. 55, 61 cert. denied 320 Md. 800 (1990); Griffin v. Medtronic, Inc., 840 F. Supp. 396, 397 (D.Md. 1994) ("[F]raudulent misrepresentations must be made to the plaintiff who is claiming injury from her reliance on those representations, not to third parties.") Thus, in order to prevail, Plaintiffs must show that Mr. or Mrs. Wright purchased the lead paint that was used in their premises, as they have acknowledged that the minor Plaintiffs did not make the purchase and that, in any event, "a minor child, under the setting

of this case, could not be the target of a misrepresentation." Tr. at 65. Plaintiffs also admitted at oral argument that it was the grandparents who actually bought the lead paint products. Tr. at 82-83. As the grandparents are not plaintiffs in these cases, the fraud counts would fail for this reason alone.

There is another reason the fraud counts must be dismissed and that pertains to statute of limitations. Under the Complaint, Mr. and Mrs. Wright were informed by a Baltimore City Health Department inspector in 1980 of the fact that their premises had lead paint. See Am. Compl., Count One, ¶(3) and (4). This action was not brought until 1994. Therefore, the parents' claims are barred by the statute of limitations, and Plaintiffs conceded this during oral argument.

THE COURT: How can the parents stay in the case if they had notice of all this back in 1980?

MR. RICHARDSON: We have withdrawn the counts in the complaint that deals with the parents' loss of friendship and society.

THE COURT: I know. But how can any of their complaint stay in after 1980?

How can they stay in?

MR. RICHARDSON: For purposes of their claims, I don't think they should stay in. The statute has run.

Tr. at 76-77.

Further, later at the hearing, the following colloquy occurred:

THE COURT: Do Plaintiffs agree, then, that the statute has run to the parents' claim, in both of the Complaints?

MR. RICHARDSON: Yes.

Tr. at 79.

Further, Maryland law does not support Plaintiffs' contention that a minor does not have to rely upon any misrepresentations or omissions to state a claim for fraud because his parents are his agents. As discussed earlier, the Griffin and Partlette cases hold to the contrary. Moreover, this Court observes that in another context, that dealing with cases brought by DES "daughters" against drug manufacturers, there has been no case which has adopted the theory of "mother as agent" to sustain a cause of action for fraud against the drug manufacturers. Indeed, case law is to the contrary. See discussion in Brown v. Super. Ct. (Abbott Lab.), 751 P.2d 470, 483-84 (1988). Accordingly, Plaintiffs have failed to state a viable claim of fraudulent misrepresentation on behalf of either Allen or Alvin Wright.

E. Court Four - Conspiracy

It is Defendants' position since the fraud counts are the only intentional torts alleged by Plaintiffs that could be a predicate for their conspiracy claims, the dismissal of the fraud counts mandates dismissal of the conspiracy counts as well.

"A civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff." Green v. Wash. Sub. San. Comm'n., 259 Md. 206, 221 (1970); see also, So. Maryland Oil, Inc. v. Kaminetz, 260 Md. 443, 454 (1971); Alleco v. Weinberg Foundation,

99 Md. App. 696, 706 cert. granted 336 Md. 240 (1994). Further, the agreement to commit an unlawful act or to use unlawful means to accomplish a lawful act is not, by itself, sufficient to establish a claim of civil conspiracy. Yousef v. Trust Bank Sav., FSB., 81 Md. App. 527, 538 (1990). Rather, in order for a civil action for conspiracy to be maintained, there must be some unlawful act done in the furtherance of the conspiracy. Id.

Defendants' challenge to the conspiracy counts is twofold. First, they argue the Court should dismiss the conspiracy counts as Plaintiffs have failed to maintain the fraudulent misrepresentation claims. They claim the only remaining counts allege negligent conduct, and that only intentional acts may provide the basis of a conspiracy claim. In addition, they argue that Plaintiffs have failed to plead a time, place and circumstance of any alleged conspiracy with the specificity required by Maryland law.

There is no question but that the Amended Complaint could set forth with greater specificity the details of the alleged conspiracy. However, assuming Defendants are correct that conspiracy requires some intent on the agreeing parties to take action, the Court believes that the current Complaint survives the challenge.

First, a careful review of Count Four indicates that the alleged conspiracies are that the Defendants conspired to "market lead products by unlawful means, including, inter alia, their tortious conduct of suppressing their knowledge of the dangers of lead" and of placing these products on the market. Compl., Count Four, ¶¶19,20. The allegations are that the Defendants "knew

beginning in the early 1900's of the extreme dangers to those who are exposed to lead dust and lead-containing paint... and [i]nstead of warning consumers... as to the dangerous nature of their lead and lead products, [they] conspired with each other to hide the dangers, hide all information, and indeed to keep consumers and others ignorant...." *Id.*, ¶¶20,22. In making these allegations, Count Four specifically adopts and incorporates paragraphs 1 through 18 of the Amended Complaint which, in paragraphs 3 and 4, alleges that the Defendants actually knew or "unwillfully refused to know" of the defects and dangers of lead products and yet marketed them for "pecuniary motives" and "in conscious, wanton and reckless disregard for human life and safety, deliberately, intentionally and purposely withheld and concealed such information from the Plaintiffs." *Id.* These allegations would seem to state a claim that the Defendants conspired to suppress knowledge of the dangers of lead and intentionally marketed their lead products without effective warnings. *Cf., Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 695 (Del.Super. 1986). ("Thus the underlying wrong of this alleged conspiracy is the intentional marketing of a defective product.")

In addition, the conspiracy count further alleges that the Defendants acting through the Lead Industries Association, Inc. ("LIA") "intentionally" challenged and attempted to discredit information on the toxicity of lead products and "intentionally" promoted the use of these products by consumers and "opposed the use of appropriate warnings...." *Id.*, ¶¶25,28. Whether this con-

tention will survive discovery waits to be seen. For, if the means and the acts are lawful, then the conspirators' motives are immaterial in regard to civil conspiracy. Markey v. Wolf, 92 Md. App. 137, 172 (1992).

Nevertheless, at this stage of the proceedings, based on the pleadings alone, this Court declines to dismiss the conspiracy claims.

F. Medical Expenses

Defendants have argued that the statute of limitations bars Mr. and Mrs. Wright's claims to recover expenses they have incurred for medical and hospital care of their children. As discussed in Section D, Plaintiffs have conceded the parents' claims are barred but assert that the minor Plaintiffs' claims for medical expenses should proceed to the extent that those expenses are incurred after they reach the age of majority or they are able to show that their parents were "truly unable" to pay the medical expenses incurred on their behalf or that hospital liens exist. See Garay v. Overholtzer, 332 Md. 339, 365-73 (1993). At this stage of the proceedings, this Court declines to dismiss the minor Plaintiffs' claims for medical expenses in view of the Garay precedent.

ORDER

For all of the above-mentioned reasons, it is this 6 day of July, 1995, HEREBY ORDERED that:

1. Plaintiffs' design defect claims in regard to lead pigment in Counts One and Three of the Amended Complaint are HEREBY

DISMISSED;

2. Count Two of the Amended Complaint is HEREBY DISMISSED;

3. Count Five of the Amended Complaint is HEREBY DISMISSED;

4. All claims of Plaintiffs' Tina Wright and Alvin O. Wright are HEREBY DISMISSED;

5. Defendants' motions to dismiss Count Four are HEREBY DENIED;

6. Defendants' motions to dismiss the minor Plaintiffs' claims for medical expenses are HEREBY DENIED; AND

7. Defendants' motions to dismiss Plaintiffs' claims for injuries resulting from the pre-1957 application of lead paint at 1228 N. Ellwood Avenue are HEREBY DENIED.

JUDGE ELLEN M. HELLER

Ellen M. Heller
Judge

cc: All Counsel

--- N.Y.S.2d ----, 2008 WL 2246123 (N.Y.A.D. 1 Dept.), 2008 N.Y. Slip Op. 04923

Supreme Court, Appellate Division, First Department, New York.
Dante **SMITH**, et al., Plaintiffs-Respondents,
v.
2328 UNIVERSITY AVENUE CORP., et al., Defendants,
NL Industries, Inc., Defendant-Appellant.
June 3, 2008.

Background: Tenants brought action against landlord and manufacturer of lead-based paint pigments, seeking to recover damages for injuries infant tenants allegedly sustained as result of their exposure to lead-based paint in apartment where they resided. The Supreme Court, Bronx County, Lucindo Suarez, J., denied manufacturer's motion to dismiss, and manufacturer appealed.

Holding: The Supreme Court, Appellate Division, held that manufacturer had no duty to refrain from lawful distribution of non-defective product.

Reversed.

[1]  KeyCite Citing References for this Headnote

↳ 313A Products Liability

↳ 313AI Scope in General

↳ 313AI(B) Particular Products, Application to

↳ 313Ak43 k. Chemicals in General; Adhesives, Paints, and Solvents. Most Cited Cases

Manufacturer of lead-based paint pigments, which were not defective at time they were created, was not liable for injuries infant tenants allegedly sustained as result of their exposure to lead-based paint in apartment where they resided, where any problems with lead-based paint arose only after years of inadequate maintenance of a premises by the owner, if paint peeled and flaked, thereby becoming hazardous through possible ingestion or inhalation.


[2]  KeyCite Citing References for this Headnote

↳ 313A Products Liability

↳ 313AI Scope in General

↳ 313AI(A) Products in General

↳ 313Ak5 k. Strict Liability. Most Cited Cases

↳ 313A Products Liability  KeyCite Citing References for this Headnote

↳ 313AI Scope in General

↳ 313AI(A) Products in General

↳ 313Ak8 k. Nature of Product and Existence of Defect or Danger. Most Cited Cases

↳ 313A Products Liability  KeyCite Citing References for this Headnote

↳ 313AI Scope in General

↳ 313AI(A) Products in General


↳ 313Ak11 k. Design. Most Cited Cases

↳ 313A Products Liability  KeyCite Citing References for this Headnote

↳ 313AI Scope in General


↔ 313AI(A) Products in General
 ↳ 313Ak14 k. Warning or Instructions. Most Cited Cases

Manufacturers of defective products may be held strictly liable for injury caused by their products, that is, they may be liable regardless of privity, foreseeability, or reasonable care, and a product may be considered defective due to mistake in the manufacturing process, defective design, or inadequate warnings about the use of the product.


[3]  KeyCite Citing References for this Headnote

↔ 313A Products Liability
 ↳ 313AI Scope in General
 ↳ 313AI(A) Products In General
 ↳ 313Ak8 k. Nature of Product and Existence of Defect or Danger. Most Cited Cases

Law does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product.

[4]  KeyCite Citing References for this Headnote

↔ 313A Products Liability
 ↳ 313AI Scope in General
 ↳ 313AI(A) Products In General
 ↳ 313Ak11 k. Design. Most Cited Cases

↔ 313A Products Liability  KeyCite Citing References for this Headnote
 ↳ 313AI Scope in General
 ↳ 313AI(A) Products In General
 ↳ 313Ak15 k. Proximate Cause and Foreseeable Injury; Intended or Foreseeable Use. Most Cited Cases

To establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury.

Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for appellant.

Levy Phillips & Konigsberg, LLP, New York (Philip Monier, III of counsel), for respondents.

LIPPMAN, P.J., MAZZARELLI, WILLIAMS, SWEENEY, ACOSTA, JJ.

*1 Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about October 12, 2007, which denied the motion by defendant NL Industries, Inc. to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant NL Industries dismissing the complaint as against it.

This is an action for damages for injuries sustained by the infant plaintiffs as the result of their exposure to lead-based paint in the apartment where they resided between 1995 and 2001. While the litigation was pending, NL Industries was identified as the manufacturer of the paint pigments containing the lead used to make the paint that allegedly poisoned the infants; a second amended complaint alleged causes of action against NL for negligence and strict products liability.

The dangers to young children from exposure to lead-based paint are well known (see Matter of New York City Coalition to End Lead Poisoning v. Vallone, 100 N.Y.2d 337, 342-343, 763 N.Y.S.2d

530, 794 N.E.2d 672 [2003]). New York City has prohibited the sale and use of lead paint for residential interiors since 1960 (see New York City Health Code [24 RCNY] § 173.13), and requires the owners of multiple dwelling units to abate this hazard by remediating the condition in apartments occupied by children under age 7 (see Administrative Code of City of N.Y. § 27-2056.3). Even though it is the responsibility of the owners of affected buildings to remediate the lead conditions in any unit where a child of six or younger is living, these plaintiffs also demand recovery from the entity that allegedly produced the lead-based paint pigments to which the infants were exposed.

[1] [2] NL stopped manufacturing lead pigments decades ago. Any interior lead paint present in plaintiffs' home was applied before 1960, i.e., before the manufacture, sale and distribution of lead-based pigments and/or paint, and its use in residential units, was outlawed. While manufacturers of defective products may be held strictly liable for injury caused by their products, i.e., they may be liable regardless of privity, foreseeability or reasonable care and a product may be considered defective due to mistake in the manufacturing process, defective design or inadequate warnings about the use of the product (Sprung v. MTR Ravensburg, 99 N.Y.2d 468, 472, 758 N.Y.S.2d 271, 788 N.E.2d 620 [2003]), the paint pigments created by NL were not inherently dangerous to adults and only became so to young children upon deterioration in the form of peeling paint and dust, which presupposes a lack of proper maintenance by the owner and/or manager of the property.

Plaintiffs do not allege any specific defect in the design of the paint pigments manufactured by NL. It is their position that since all lead is hazardous to children, any lead pigment used in interior residential paint must, by implication, be defective notwithstanding the fact that the manufacturer of the lead component did not have exclusive control of the risk, the paint manufacturer decided which and how much pigment to use, and control of the risk passed to the residential landlord once the paint peeled and flaked, thereby becoming hazardous through possible ingestion or inhalation. At that point, the owners or landlord could control the risk by proper maintenance of their property (Brenner v. American Cyanamid Co., 263 A.D.2d 165, 172-173, 699 N.Y.S.2d 848 [1999]).

*2 [3] "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product" (Forni v. Ferguson, 232 A.D.2d 176, 177, 648 N.Y.S.2d 73 [1996]). The paint pigments manufactured by NL were not defective at the time they were created, nor was distribution thereof prohibited until 1960. Any problems with lead-based paint arise only after years of inadequate maintenance of the premises by the owner. Under these circumstances, a manufacturer of a product may not, as a matter of law, be found liable for harm inflicted some 50 or more years after its creation, especially in light of the duty of the landlord to abate any existing lead conditions in apartments inhabited by young children.

[4] "In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" (Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107, 463 N.Y.S.2d 398, 450 N.E.2d 204 [1983]). The harm that plaintiffs allege is not only far too remote from NL's otherwise lawful commercial activity to hold it accountable, but is also attributable to intervening third parties (see People v. Sturm, Ruger & Co., 309 A.D.2d 91, 103, 761 N.Y.S.2d 192 [2003], *lv. denied* 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 [2003]).

N.Y.A.D. 1 Dept., 2008.

Smith v. 2328 University Ave. Corp.

--- N.Y.S.2d ----, 2008 WL 2246123 (N.Y.A.D. 1 Dept.), 2008 N.Y. Slip Op. 04923

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