

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Neal and Bonnie Messer,)	
)	Supreme Court
Plaintiffs and Appellants,)	Case No: 20150065
)	
vs.)	
)	
B&B Hot Oil Service, Inc. and JB's Welding,)	
)	
Defendants and Appellees,)	
)	

APPEAL FROM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ENTERED
FEBRUARY 20, 2015, ORDER FOR JUDGMENT ENTERED MARCH 5, 2015, AND
JUDGMENT ENTERED MARCH 6, 2015, BY THE HONORABLE WILLIAM A. HERAUF,
JUDGE OF THE DISTRICT COURT, STARK COUNTY DISTRICT COURT, STATE OF
NORTH DAKOTA, CIVIL NO. 45-2013-CV-00304

BRIEF OF APPELLANTS NEAL AND BONNIE MESSER

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STATEMENT OF THE ISSUES

- (1.) Whether district court erred in concluding there is no genuine issue of material fact in dispute precluding summary judgment in favor of defendant JB's Welding when evidence has been presented from which a reasonable juror could hold in favor of plaintiffs Neal and Bonnie Messer on their strict products liability and negligence actions against JB's Welding, including deposition testimony of fact witnesses, documentary evidence, as well as expert opinion testimony.
- (2.) Whether the district court erred by weighing the evidence presented in granting JB's Welding's motion for summary judgment.
- (3.) Whether the district court erred in its interpretation and application of North Dakota products liability law.

STATEMENT OF THE CASE

(4.) A building owned by Messers was destroyed as a result of an explosion at a nearby storage building. The cause of the explosion was the ignition of propane which had leaked from a hot oil truck owned by B&B Hot Oil Service, Inc. (hereinafter "B&B") and stored within the storage building. The subject truck was jointly designed, manufactured and assembled by defendants B&B and JB's Welding (hereinafter "JB's"). Despite Messers presentation of deposition testimony from representatives of B&B and JB's, documentation, and expert opinion testimony establishing the subject explosion would have been prevented had an electronic shut-off control valve been installed on the subject hot oil truck, as required by industry standards, and establishing such safety feature should have been incorporated in relation to the design, manufacture and assembly of the fire box assembly performed by JB's, the district court erroneously concluded there was no genuine issue of material fact in dispute and dismissed

Messers claims against JB's. The district court also erred in its interpretation and application of North Dakota's strict products liability law.

STATEMENT OF FACTS

I. GENERAL BACKGROUND

(5.) On January 15, 2010 a fire/explosion occurred ("subject explosion") at a storage building located at 4050 1st Street SW in Dickinson, North Dakota ("storage building"), causing destruction of the storage building and its contents and causing extensive damage to the surrounding property. At the time of the subject explosion, B&B leased half (west side) of the subject building and stored, among other things, two hot oil trucks for its trucking business inside its half of the subject building.

(6.) Messers were the co-owners of a building located at 4054 1st Street SW in Dickinson, North Dakota 58601 ("Messers' Building"). Messers' Building is located to the north of the storage building and was destroyed as a result of the subject explosion. Messers purchased and leased Messers Building for investment purposes. At the time of the subject explosion, Messers' Building was occupied by lessee Olheiser Masonry, Inc. Following the subject explosion, Messers tore down Messers' Building and rebuilt Messers' Building. As a result of the subject explosion, Messers incurred losses which include, but are not limited to, the loss of the value of Messers' Building, loss of income and loss of use, debris removal and cleanup costs, lost contents, and other losses. It is undisputed Messers are an innocent party not responsible in any way for the explosion and their resulting damages.

II. TESTIMONY OF B&B OWNER BLAINE FUGERE, JB'S WELDING OWNER JIM BAHLEY, AND JB'S WELDING EMPLOYEE SCOTT TYSVER

(7.) B&B has at all times relevant herein been owned by Blaine Fugere, who was deposed on October 22, 2013. Along with Fugere, the owner of JB's Welding ("JB's"), Jim Bahley, and

JB's employee Scott Tysver designed, manufactured and assembled a knockoff truck, which Messers' fire cause and origin expert, Bob Whiremore opines was the cause of the explosion. The transcripts of the Fugere, Bahley and Tysver depositions are in the record, along with attached deposition exhibits (docs. 116, 117 & 118). Following is a summary of pertinent evidence and the deposition testimony of Fugere, Bahley and Tysver relevant to this appeal.

(8.) It is Messer's claim the subject explosion which destroyed their property was the result of the negligent design, manufacture and assembly of a hot oil truck referred to throughout this brief as the "knockoff truck". Both Fugere (B&B), Bahley and Tysver (JB's) admit they were jointly involved in designing, manufacturing and assembling the knockoff truck, and that they were trying to reverse engineer another hot oil truck B&B had purchased from third-party Energy Fabrication, Inc. ("EnerFab truck"). (App. 24 at 49-50; 28 at 196-97; 34-38, 40, 60-61, 66, 69, 72-76.) Enerfab is a national commercially branded manufacturer of hot oil trucks in Oklahoma. Of particular relevance to Messers' claims is the fact the EnerFab truck (upon which B&B and JB's were modeling their knockoff truck) was designed, manufactured and assembled with manual control valves to shut off the flow of liquid propane (by closing both the liquid propane valve and vapor valves on the back of the truck), as well as an electronic fail-safe control valve shutoff safety feature which would shut off the flow of liquid propane by flipping a switch located on a control panel located on the side of the truck just behind the driver's side door. (App. 22-23 at 41-46; 29-30 at 272-77.) The purpose of the electronic control valve shutoff was to provide a fail-safe or backup in case any of the manual control valves were not properly closed or otherwise failed and propane escaped from the tanks. (*Id.*) By comparison, the knockoff truck did not have an electronic control valve shutoff safety feature, and thus, if the

control valves were not properly closed manually or they failed, propane would escape from the tanks.

(9.) According to Fugere, back in 2008, he contacted third-party Enerfab for the purpose of having them design and build him a hot oil truck just like the 2005 Enerfab truck he had previously purchased from them. (App. 26 at 167.) Enerfab told Fugere they were backed up about two years on orders for hot oil trucks. (App. 26-27 at 165-67, 173.) Fugere did not want to wait two years for a hot oil truck so in 2008 he contacted Jim Bahley of JB's, as he was aware they had built several hot oil trucks for Hanson Hot Oil Service out of Watford City. (App. 26-27 at 165-67.)

(10.) According to Fugere, JB's work on the knockoff truck included, in part, building the burner box and propane distribution system, including piping. (App. 28 at 198.) Fugere was clear both B&B and JB's jointly designed, manufactured and assembled the knockoff truck.

Q: So would it be fair to say that this 2009 knockoff truck was designed and assembled and manufactured by JB Welding in combination with B&B Hot Oil?

A: Yes.

Q: You were both intimately involved in the design, assembly, and manufacturing process of the 2009 knockoff truck?

A: Yes.

(App. 28 at 196.) There was no ambiguity in Fugere's testimony in this regard.

(11.) Bahley is the long-time owner of JB's. Both Bahley and Tysver were involved in relation to JB's's work on the knockoff truck. The testimony by Bahley and Tysver makes clear the design, assembly, and manufacture of the knock-off hot oil truck (and specifically relevant to the claims against JB's, the design, assembly and manufacture of the hot oil system added to the truck chassis) was done jointly by JB's and B&B. (App. 34-38, 40-43, 59-61, 66-67, 72-76.)

Testimony by Bahley and Tysver makes this conclusion irrefutable. In fact, Bahley testified, as did Tysver, the design of the knockoff truck was done together with B&B, that the owner of B&B, Blaine Fugere, was at JB's shop on a daily basis during the design and assembly of the knockoff truck and had daily input in relation to the design and assembly work completed by JB's on the knockoff truck. (App. 37-43, 51-52.) They also testified Mr. Fugere would provide input in regards to any changes or modifications he wanted to the knockoff truck in relation to the design and assembly. (App. 51-52.) **Tysver testified 70% of the design and assembly work on the knockoff truck was done by JB's, and 30% by B&B.** (App. 41-43.) They also testified the knockoff truck was transferred back and forth between B&B and JB's as the design and assembly work progressed, and JB's and B&B were at that time located in shops that were next door to each other. (App. 44-45, 67.)

(12.) In responding to Messers' written discovery requests, JB's also described its work on the knockoff truck as follows:

JB's Welding built the sub-frame, fire box, and tool boxes. We mounted the pumps and propane tank. We plumbed suction and discharge. We built the hose rack, hard line racks, and bolted the unit to the chassis. The tank was built by Fargo Tank and it was welded to the subframe by JB's Welding.

(App. 108 at Answer to Interrogatory No. 8.)

(13.) Tysver and Bahley also testified there was significant concern on their part about B&B and Hanson's Hot Oil (another hot oil service company) storing hot oil trucks inside the shop with propane inside the tanks. (App. 45-47, 49.) In fact, Bahley complained to Hanson's about this but was told not to worry about it. (App. 47-48, 81-84.) After the explosion, there was discussion that this type of explosion was likely to occur when hot oil trucks were stored inside a building after being out in the cold. Specifically, the propane within the tanks was likely to expand due to the heat in the building and would result in leakage of the propane out of the relief

valve or other location on the propane truck which would explode if it found an ignition source. (App. 65-71.) This testimony establishes the existence of a viable strict products liability claim against B&B and JB's relative to their joint and negligent design, manufacture and assembly of the knockoff truck which rendered it unreasonably dangerous for its intended purpose.

(14.) JB's charged B&B almost \$60,000 for its work in this regard, and was paid by B&B. (App. 87-105). Further, testimony by Jim Bahley establishes JB's also secured parts for the knockoff truck. He also testified at least one of the five trucks owned by B&B was recently sold to third-party Enerfab. (App. 80, 85-86.)

(15.) In addition, JB's admits it has been involved in manufacturing numerous hot oil trucks for hot oil companies in addition to the five units with B&B, including seven units for Hanson's Hot Oil and an unknown quantity of hot oil trucks for Rod's Hot Oil. (App. 108 at Answer to Interrogatory No. 12; 50, 77-78.) JB's also admits B&B purchased, ordered and delivered parts to JB's for assembly of the knockoff truck. (App. 108 at Answer to Interrogatory No. 9.) In most cases, the hot oil company will provide a truck chassis to JB's whereupon JB's will design, manufacture and assemble the necessary modifications to the truck to convert it into a hot oil truck and charge the hot oil company for the very substantial improvements to the truck chassis. (App. 56-58.) In other words, JB's was and is in the business of designing and manufacturing hot oil trucks. In relation to the subject knockoff truck in this case, while B&B supplied the truck chassis, both B&B and JB's admit they jointly designed the knockoff truck. Although JB's asserts B&B simply hired JB's to perform welding work, the testimony of JB's owner Bahley, and employee Tysver, as well as the owner of B&B Fugere, conclusively establishes otherwise.

(16.) Following the subject fire, the propane tanks on the Enerfab truck stored within the warehouse were still full, i.e. at least 80% filled to the red line on the gauges. (App. 24 at 51; 25

at 96-99.) By comparison, the propane tanks on the knockoff truck were found to be mostly empty following the explosion. (App. 24 at 51.)

As indicated in the Fire Investigation Report of the State Fire Marshall:

It is my opinion that a fire started in the office area, possibly as a result of a faulty light ballast. The fire then ignited propane that had leaked over time into the building. The explosion incident caused an extreme amount of damage to this building along with several others in the area. The cause of the fire is undetermined at this time.

(App. 124 at Opinion and Conclusion.) With respect to the issue of leaked propane within the building, the Fire Investigation Report noted further as follows:

Even though there was total destruction to the entire building, it was clear that the incident started on the B & B side of the building. There were two hot oil trucks and a four wheeler located on this side of the building. The cabs of both hot oil trucks were totally destroyed. The truck tanks (propane and liquid) were intact. Each truck had two (2) one-hundred gallon propane tanks on them. The gauges on the first truck on the west side of the building showed that both propane trucks were full. The second truck located to the east of the first truck had very little propane left inside the tanks.¹

(App. 122-23 at Interior Examination.)

III. EXPERT OPINIONS OF ROBERT B. WHITEMORE

(17.) Messer's fire cause and origin expert in this case is Robert B. Whitemore. Whitemore is a nationally renowned fire cause and origin expert as is established by his curriculum vitae (App. 154-62.) Whitemore's opinions in this matter are summarized in paragraph 1 of Plaintiffs' Disclosure of Expert Witnesses (App. 138-48), and as elicited during his deposition (doc. 123), and through his affidavit testimony (App. 135-37). Whitemore's testimony establishes the existence of genuine issues of material fact in dispute relative to Messer's products liability and negligence claims against JB's to be decided by the jury.

(18.) It is Whitemore's opinion the subject explosion was the result of an LP-gas fuel/air vapor explosion, and the origin of the explosion was within the west half of the Krebs/Forster storage

¹ The second truck is the knockoff truck designed and manufactured by JB's Welding.

building occupied at the time of the incident by B&B Hot Oil. It is Whitemore's opinion the gas that leaked which caused the subject explosion came from the knockoff truck. (App. 141, 135 at ¶ 2.) It is Whitemore's opinion the Messer Building was destroyed as the result of the joint negligent design, manufacture and assembly of the knockoff truck by B&B Hot Oil and JB's. (App. 135-36 at ¶¶ 4-7; 129 at 82-83.) It is also Whitemore's opinion there was not a safety or override mechanism on the knockoff truck gas valve, and an appropriate design and manufacture of the knockoff truck would have required a safety or override mechanism, as was designed and included with the EnerFab truck, and required by industry standards established under NFPA 58, the LP-Gas Code Handbook. (App. 129 at 82-83; 135-36 at ¶¶ 2-7, 148.) According to Whitemore, the 2009 knockoff truck didn't have any safety features in relation to the burner assembly as required by NFPA 58, section 6.23. (App. 129.) In addition,

It is Whitemore's opinion the EnerFab truck (upon which B&B and JB's Welding were modeling their knockoff truck) was designed, manufactured and assembled with manual control valves to shut off the flow of liquid propane and vapor propane, as well as an electronic control valve fail-safe shutoff safety feature which would shut off the flow of propane by flipping a switch located on a control panel located on the side of the truck just behind the driver's side door. The electronic control valve shutoff was to provide a fail-safe or backup in case any of the manual control valves were not properly closed or otherwise failed and propane could escape from the tanks. The propane burner system on the knockoff truck was controlled by air only. In other words, the supply of propane to the knockoff truck would not be shut off by turning off the ignition on the knockoff truck to shut down the supply of propane to the burner. Rather, the operator of the truck would have to manually close three separate valves on the knockoff truck to shut down the supply of propane to the burner. The thermostat on the burner of the knockoff truck was set at 200 degrees, and therefore would likely be constantly calling for propane while inside the building on the night of the fire. Further, no leak would need to occur to result in leaking propane, but rather the system was designed for the burners to call for propane all the time, unless the manual valves were shut down. As indicated, the manual valves were controlled by air pressure only. This makes it highly probable that propane was leaking from the knockoff truck located in the building after it was parked by the operator the evening prior to the fire. The knockoff truck was not designed or manufactured by B&B Hot Oil and JB's Welding with an electronic control valve shutoff safety feature, and thus, if the control valves were not properly closed manually or if the valves failed, propane would escape from the tanks.

(App. 142-43.)

(19.) Whitemore testified there was a violation in the manufacturing process for the subject hot oil truck by JB's. (App. 129-32 at 82-95.) Specifically, under NFPA 58, JB's violated the provisions of NFPA 58 Section 6.23.7.4. (App. 132 at 94-95.) That provision indicates "[a]ll gas fired heating appliances shall be equipped with safety shut-offs in accordance with 5.2.7(A) except those covered in 6.19.2.8(2)." (App. 132 at 94-95.) In this case there was no such "safety shut off" provided at all with the "knock off" 2009 hot oil truck. (App. 132.)

(20.) Two comparison photographs were marked at Whitemore's deposition to show the difference between the 2005 Enerfab truck (photo #35) and the 2009 knock off truck (photo #34). (App. 132-34 at 96-100 & Exh. 58.) On the 2005 manufactured truck, there is an ignition switch for "propane" which is the shut off of the supply of propane which was controlled on the manufactured truck electronically. (App. 131 at 92.) There is no such electronic shut off on the truck manufactured by JB's. (App. 132 at 94.) The only way to shut off the supply of propane on the 2009 knock off truck was to manually shut the two control valves at the back of the truck to shut off the supply of propane. (App. 127-28 at 55-59.) With the Enerfab truck, the driver could simply shut off the electronic switch without closing the valves on the back of the truck and this would provide the fail safe necessary to prevent any leaking propane. (App. 132 at 93.)

(21.) Whitemore has done some checking with other manufacturers of hot oil truck and oil field equipment that use propane on their vehicles. He determined that all manufacturers (except JB's) had electronic safety shut off devices included in their design and manufacture. In other words, JB's was the only manufacturer of hot oil trucks or similar oil field service trucks that Whitemore is aware of that fails to comply with NFPA 58, subpart 6.23.7.4. A copy of the referenced NFPA provision is on record as document 128. Specific language which applies to

this case has been highlighted. That document was labeled at Whitemore's deposition as Exhibit 57, although the deposition exhibit copy was not highlighted.

(22.) In Whitemore's opinion "the subject knock-off truck . . . was defective in its design and manufacture at the time the finished product was provided and/or furnished to B&B Hot Oil Service, Inc." and "[t]he subject knock-off truck did not have any safety mechanisms pertaining to the LP gas system to shut the gas off in the event of a leak." (App. 135-36 at ¶ 4.) "Such a safety feature should have been addressed and designed into the system in conjunction with the fire box assembly" which "was manufactured by JB's and designed jointly by B&B Hot Oil Service, Inc. and JB's Welding." (*Id.*) In Whitemore's opinion, "the defects in the design and manufacture of the subject knock-off truck, including but not limited to the fire box assembly, rendered the finished truck unreasonably dangerous at the time it was accepted by, and/or furnished to, B&B Hot Oil Service, Inc., when put to a use for which it was intended or could reasonably be anticipated." (*Id.* at ¶ 5.)

(23.) In Whitemore's opinion "JB's was negligent in its attempt to reverse engineer an Enerfab hot oil truck by failing to design and manufacture the fire box assembly on the knock-off truck with an electronic shut off valve as contained on the Enerfab truck, or other suitable safety mechanism for the LP gas system to shut the gas off in the event of a leak." (App. 136 at ¶ 6.) Whitemore also opines "JB's Welding's negligence was a proximate cause of the explosion which resulted in the damage to the Messer storage building at issue in the above-entitled action." (*Id.* at ¶ 7.)

IV. MESSER CLAIMS AGAINST JB'S WELDING

(24.) Pursuant to Counts Four and Five in their *Amended Complaint and Jury Demand* (doc. 72) Messer assert claims against JB's under the theories of negligence (Count Four) and strict products liability (Count Five).

V. DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT DISMISSING MESSERS' CLAIMS

(25.) Pursuant to *Order Granting Motion for Summary Judgment* filed February 20, 2015 (doc. 147), the district court granted JB's motion for summary judgment and dismissed Messers' claims against JB's allegedly based upon undisputed facts. The following are the facts the district court concluded were undisputed.

Based upon the deposition transcripts and all exhibits filed in record, the following are the undisputed facts. B&B Hot Oil Services contacted JB's Welding to assist them in performing welding services to complete a hot oil truck. JB's Welding was paid on a hourly basis and JB's Welding welded up, effectively, the shell of this hot oil truck. Part of the welding of the shell included putting together the fire box, the control panel and running a propane line from the propane tank to the front tool box. Thereafter, JB's Welding had nothing to do with any part of the propane system. JB's Welding had nothing to do with the valves for plumbing, the electrical, or any other part of the propane lines. Further, JB's Welding had nothing to do with the wiring or the air lines. Moreover, JB's Welding had nothing to do with the decision as to whether or not there were to be or not to be safety valves. B&B Hot Oil Services was completely in charge of the propane system and wiring.

On January 15, 2010, a fire/explosion occurred at the property where B&B Hot Oil Services was storing its trucks. The adjacent property owned by the Messers was damaged. The Messers have absolutely no fault in this matter whatsoever.

The cause of the explosion was propane leaking into the building from one of the hot oil trucks. The decision whether or not to part a truck inside the building was that of B&B Hot Oil Services, and JB's Welding had no control as to whether or not a truck would be parked inside the building. Even if the truck had been parked in the building, had B&B employees turned off the propane via the manual valves, that would have alleviated the problem of propane sweeping into the closed building. JB's Welding had no control over turning off the propane on the propane truck. Even if the truck had been parked indoors and the valve not turned off, had there been a safety feature designed in there for an automatic shut-off, the explosion would have been avoided. The decision whether or not to have an automatic shut-off for the propane system on this truck was solely that of B&B Hot Oil Services, Inc.

(App. 169-70.) A comparison of the evidence presented above with the district court's conclusions as to what constitutes undisputed facts in this case evidences clear error. The district court was obligated to interpret the evidence in the light most favorable to the non-moving party – Messer, which did not occur in this case.

ARGUMENT

I. STANDARD OF REVIEW

(26.) As stated by this Court,

We have often stated that negligence actions ordinarily should not be disposed of by summary judgment. Even if there is no dispute as to the evidentiary facts, if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence, there is a jury question and summary judgment is improper when questions of negligence are in issue. Where there exists the slightest doubt as to a factual dispute or genuine issue of fact, summary judgment should be denied in a negligence action.

Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840, 844 (N.D. 1986)(citations and quotations omitted). In considering a motion for summary judgment, the evidence must be viewed

. . . in the light most favorable to the party opposing the motion, and [the opposing party should be given] all favorable inferences which reasonably can be drawn from the evidence. The party moving for summary judgment bears the burden of establishing there is no genuine issue of material fact and that, under applicable principles of substantive law, he is entitled to judgment as a matter of law. . . .

Negligence and proximate cause are questions of fact unless the evidence is such that reasonable minds can draw but one conclusion.

Green v. Mid Dakota Clinic, 2004 ND 12, ¶¶ 5-6, 673 N.W.2d 257 (citations omitted). Messers' claims against JB's, whether denoted as strict products liability or negligence, all involve genuine questions of material fact precluding summary judgment in favor of JB's.

II. GENUINE ISSUES OF MATERIAL FACT ARE IN DISPUTE WHICH PRECLUDE SUMMARY JUDGMENT IN FAVOR OF JB'S WELDING

(27.) As a preliminary matter, Messer have brought separate claims under strict products liability and negligence theories. This Court has explained the differences between these two distinct legal theories as follows:

We have recognized that negligence and strict liability in tort are separate and distinct theories of products liability and that each theory has a different focus. Strict liability in tort focuses on whether or not a product is defective and unreasonably dangerous. Negligence focuses on whether or not the conduct of the manufacturer or seller falls below the standard of reasonable care. The essential difference between negligence and strict liability is that in negligence the foreseeability of harm by the manufacturer or seller is a question of fact for the jury while in strict liability knowledge of the product's propensity to inflict harm is assumed regardless of whether the danger was foreseeable by the manufacturer or seller.

Oanes v. Westgo, Inc., 476 N.W.2d 248, 253 (N.D. 1991)(citations omitted). Therefore, even assuming, arguendo, the Court concludes JB's cannot be held liable under strict products liability theory (which it should not), any such determination would not preclude Messer from proceeding with their negligence claim against JB's.

A. Strict Products Liability

(28.) Under North Dakota law, to find a manufacturer or seller at fault for strict product liability for defect in the design or manufacture of the product, the Plaintiff must prove the following elements by the greater weight of the evidence:

- 1) The manufacturer or seller was in the business of selling the type of product;
- 2) The product was defective because of its design or manufacture when the manufacturer or seller sold it, regardless of how careful the manufacturer or seller was;
- 3) The defective condition made the product unreasonably dangerous to the Plaintiff when put to a use for which it was intended or could reasonably be anticipated; and
- 4) The product was expected to and did reach the plaintiff or user without substantial change in the condition in which it was sold.

See e.g. NDJI-Civil C-21.00; *Morrison v. Grand Forks Housing Authority*, 435 N.W.2d 221, 227 fn. 12 (N.D. 1989).

The doctrine of strict liability in tort imposes on the manufacturer or seller, or both, for injuries sustained as a result of a defective condition, unreasonably dangerous to a consumer or his property, or for failure to give adequate and proper warning. In order to recover under this doctrine, the plaintiff must show by a preponderance of the evidence that the product was defective in design or manufacture, that the defect rendered the product unreasonably dangerous to the consumer; that the defect existed when the product left the manufacturer; that the product was expected to and did reach the consumer without substantial change in its condition; and that the defect was a proximate cause of the plaintiff's injuries.

Kaufman v. Meditec, Inc., 353 N.W.2d 297, 300 (1984)(citations omitted).

(29.) Contrary to the district court's finding, substantial evidence has been presented in this case to establish each of the elements of Messer's strict products liability claims against JB's, creating a genuine issue of material fact on this claim for resolution by the jury.

1. JB's Welding Was In The Business Of Selling Hot Oil Trucks And/Or Component Parts Thereof

(30.) As discussed in the facts section above, the testimony of Bahley and Tysver establishes conclusively JB's was in the business of designing, manufacturing and assembling hot oil trucks and/or material component parts thereof, including, but not limited to, the truck mounted fire box assembly. (App. 37-38, 41-42, 50, 56.) JB's was paid for its work in this regard by hot oil companies, having designed, manufactured and assembled five such hot oil trucks/hot oil systems for B&B, seven such trucks/systems for Hanson Hot Oil, and an undetermined quantity of hot oil trucks/systems for Rod's Hot Oil. Under these circumstances, at the very least, a genuine issue of material fact exists as to whether JB's was in the business of selling hot oil trucks and/or component parts thereof (i.e. the fire box assembly)(the "product"). All questions of fact must be presumed to be as asserted by plaintiffs in relation to the pending motion for summary judgment.

2. The Knockoff Truck And/Or Material Component Parts Thereof Were Defective Because Of Their Design, Manufacture Or Assembly When JB's Welding Delivered And Sold It To B&B

(31.) As discussed, the explosion was the result of, in part, a defect in the joint design, manufacture and/or assembly of the knockoff truck, and specifically the hot oil system thereon (i.e. a material component part) in that the knockoff truck/hot oil system did not include any backup safety feature to prevent the leakage of propane from the knockoff truck as required by NFPA 58, such as an electronic fail-safe backup control valve system incorporated on the Enerfab truck. The testimony of Fugere, Bahley and Tysver establish the knockoff truck, and specifically, the hot oil system thereon, was jointly designed, manufactured and assembled by B&B and JB's, and the hot oil system was delivered and sold to B&B without the electronic shut off system or other comparable safety system either installed or designed into the system (defect). According to Messer's fire cause and origin expert, Whitmore, the knock-off truck, because it did not have an electronic fail-safe back up control valve system or other safety system installed as required by industry standards under NFPA 58, was defective in its design and manufacture. A genuine issue of material fact exists on this issue to be resolved by the jury.

(32.) JB's attempts to escape strict products liability responsibility by asserting it did not sell the knockoff truck to B&B. JB's argument in this regard mischaracterizes the nature of the product designed, manufactured and sold to B&B. It is not disputed JB's designed, manufactured and assembled the hot oil system, or at least material component parts thereof, and sold the product of its work thereon to B&B. JB's admits it built the sub-frame, fire box (i.e. burner box), tool boxes, hose rack, hard line racks, plumbed suction and discharge (i.e. propane piping), bolted the unit to the truck chassis and welded the propane tanks to the subframe. It is

not necessary for JB's to have sold the entire knockoff truck to B&B in order for JB's to be held responsible under strict products liability in this case.

(33.) North Dakota's products liability law is codified in chapter 28-01.3 of the North Dakota Century Code ("the Act"). Under the Act, the term "manufacturer" means, in relevant part, "a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer." N.D.C.C. § 28-01.3-01. What the district court neglected are the words in the products liability statute that say "prepares product" or "component part of a product". That is precisely what JB's did in this case - they prepared a product or component part prior to the sale of the product to the user or consumer. It has clearly been established that JB's "prepared" at a minimum 70% of the design and manufacture for the knockoff truck according to Scott Tysver, JB's employee. JB's also prepared a material component part of a hot oil truck as well, the hot oil system, including burner box and propane distribution system piping.

(34.) It is not disputed JB's was intimately involved in reverse engineering the Enerfab truck's hot oil system, including in relation to the design, manufacture and assembly of the burner box and propane distribution system, including piping on the knockoff truck. It is also not disputed the subject knockoff truck was transported back and forth between JB's and B&B during the design, manufacture and assembly process, and that JB's was fully aware the knockoff truck did not have an electronic control valve shut off safety feature as contained on the Enerfab truck, or other comparable safety feature. There were no written schematics or drawings prepared by B&B or JB's in relation to their reverse engineered knockoff truck. Instead, they simply looked at the Enerfab truck and tried to replicate it in making the knockoff truck, except they made the conscious decision not to include the electronic control valve shut off safety feature utilized on

the Enerfab truck. According to Whitemore, the subject explosion would not have occurred had the electronic control valve shut off safety feature, as included in the 2005 Enerfab truck being reverse engineered by B&B and JB's, been included on the 2009 knockoff truck. According to Whitemore, but for such omission, the subject explosion would not have occurred. The failure by B&B and JB's to incorporate the electronic control valve safety shut off feature, or other comparable safety feature, was a defect which existed when the hot oil system was delivered and sold to B&B, and otherwise existed when the product was placed into service for its intended use.

(35.) Under the district court's analysis, as JB's did not sell the truck as a whole completed unit, it therefore did not sell a product to a user or consumer. (App. 172 at ¶ 12.) This makes no sense. If someone manufactures brakes that go into a vehicle and that vehicle is later put into the stream of commerce or otherwise results in injury to innocent bystanders, the product manufacturer of the brakes is potentially liable in the event of a brake failure. Performing work in co-designing, manufacturing, and assembling the subject truck and material component parts thereof, and getting paid for that is a sale of a product to a user or consumer. In this case the sale of the product was the design, manufacture, and assembly work JB's Welding did or should have done. The district court also neglects the design element of Messers' claim and the undisputed fact JB's was a co-designer of the hot oil truck, including specifically with respect to the fire box assembly and hot oil system. **The district court failed to properly identify the "product" at issue by focusing upon the truck as a whole.** Messer's expert, Whitemore is of the opinion "the subject knock-off truck . . . was defective in its design and manufacture at the time the finished product was provided and/or furnished to B&B Hot Oil Service, Inc." and "[t]he subject knock-off truck did not have any safety mechanisms pertaining to the LP gas system to shut the

gas off in the event of a leak.” (App. 135-36 at ¶ 4.) “Such a safety feature should have been addressed and designed into the system in conjunction with the fire box assembly” which “was manufactured by JB’s Welding and designed jointly by B&B Hot Oil Service, Inc. and JB’s Welding.” (*Id.*) In Whitmore’s opinion, “the defects in the design and manufacture of the subject knock-off truck, including but not limited to the fire box assembly, rendered the finished truck unreasonably dangerous at the time it was accepted by, and/or furnished to, B&B Hot Oil Service, Inc., when put to a use for which it was intended or could reasonably be anticipated.” (*Id.* at ¶ 5.) The fire box assembly, in of itself, was a product designed and manufactured by JB’s for the intended use by B&B, the intended end user. JB’s was in the business of designing, manufacturing and selling such truck mounted fire box assemblies.

3. The Defective Condition Made The Product Unreasonably Dangerous To B&B And Messer When Put To A Use For Which It Was Intended Or Could Reasonably Be Anticipated

(36.) There is no dispute B&B’s use of the knockoff truck for the transport and storage of propane was the intended use of the knockoff truck, or at least was the reasonably anticipated use thereof. At the very least, a genuine issue of material fact in this regard exists for the jury to decide. A genuine issue of material fact also exists as to whether the failure to incorporate an electronic shut off or other backup fail-safe to prevent the escape of propane in the event the manual valves were not appropriately closed, or the manual control valves otherwise failed, was a defective condition which made the product (truck mounted fire box assembly and hot oil system) unreasonably dangerous to not only users of the product, but also to anyone or anything in proximity to the product. In Whitmore’s opinion such defect in design and manufacture rendered the product unreasonably dangerous when put to the use for which it was intended or could reasonably be intended. (App. 135-36 at ¶¶ 2-7.) Even if a jury were to conclude there

was no defect in the manufacture or assembly of the knockoff truck, and specifically the fire box assembly and hot oil system, when it was delivered and sold by JB's to B&B, the design of the knockoff truck was in itself defective and has been shown to have been a proximate cause of the subject explosion.

4. The Product Was Expected To And Did Reach B&B, The User, Without Substantial Change In The Condition In Which It Was Delivered And Sold By JB's Welding

(37.) The testimony of Bahley establishes JB's delivered the product it sold to B&B, the knock off truck and/or material component parts thereof, directly to B&B, the user, without any middlemen, and was paid directly by B&B for its design, manufacture and assembly work. (App. 62-65, 68, 79.) The defect in the design of the knockoff truck, and in particular the fire box assembly component part thereof by failing to incorporate any safety features to prevent the flow of propane in the event the manual control valve shut off fails to work or is not utilized due to user error, was a condition existing in the knockoff truck when it was delivered by JB's to B&B, the intended end user. Similarly, any defects pertaining to JB's work in manufacturing and assembly on the knockoff truck, including its hot oil system, would have existed at the time it was delivered to B&B. There is no evidence to establish any material changes were made to the fire box assembly and hot oil system following JB's sale and delivery thereof to B&B, particularly with respect to the lack of the industry required safety features pertaining thereto.

(38.) Under strict products liability, liability extends not only to the consumer or user of the unreasonably dangerous product, (B&B) but also to others who suffer personal or property injury as a result of the defective product (Messer). *See e.g. Horst v. Deere & Co.*, 769 N.W.2d 536, 547 (Wis. 2009)(“Bystanders injured by an unreasonably dangerous product may assert a strict products liability claim against the manufacturer or seller”). In fact, bystanders such as Messer

should be given even greater protection than users and consumers of unreasonably dangerous products as bystanders have no opportunity to inspect the product before its use or consumption.

As explained by the Missouri Court of Appeals for the Eastern District, Division Three:

The philosophy of California courts evolves naturally from the purpose of imposing strict liability, which is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. [*Nelson v. Superior Court*, 144 Cal.App.4th 689, 695, 50 CalRptr.3d 684 (2006)]. In fact, if anything, California courts find bystanders should be given greater protection than consumers and users where harm to bystanders from a defect is reasonably foreseeable. *Id.* Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. *Id.* Considering the purposes of bystander liability and the fact that California law applies to products once they are placed on the market, the class of uses that may be foreseen by the manufacturer must necessarily be quite broad. *Id.* If a manufacturer may be required to reasonably foresee misuse or abuse of a product by a user or third party in some circumstances, the same manufacturer should also foresee normal storage and movement of the product while it is still on the market. *Id.*

Clair v. Monsanto Co., 412 S.W.3d 295, 311 (Mo. Ct. App. 2013).

(39.) In the present case, it cannot reasonably be disputed Messer were simply bystanders in relation to the explosion of the unreasonably dangerous knockoff truck. Messer should be afforded even greater protection under strict products liability law than a user or consumer of the knockoff truck as Messer never had an opportunity to inspect the knockoff truck, or played any role in the purchase or use of the product.

(40.) The district court concluded JB's did welding work only. Even if JB's was only doing welding, which is contrary to the evidence, they would still have the responsibility to be familiar with and comply with what the NFPA codes required for the finished product, including the fire box assembly component part thereof. JB's cannot skirt its responsibility by asserting it relied on B&B to comply with codes (fact question), especially given its long history of designing and

manufacturing hot oil trucks for others, and given it is undisputed JB's was responsible for the fire box assembly. Also, query who built this knock off hot oil truck if not JB's and B&B.

B. Negligence

(41.) Even assuming, arguendo, the Court were to uphold the dismissal of Messers' strict products liability action on the basis JB's did not sell a product, which is denied, such determination would not justify dismissal of Messers' negligence claim against JB's. Under the Act, a "product liability action" is defined to mean, in relevant part, "any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of . . . property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product." N.D.C.C. § 28-01.3-01(2)(emphasis added). In other words, a products liability action does not require a "sale" of a product. Merely manufacturing, constructing, designing, formulizing, installing, preparing, assembling, testing, packaging, or labeling of a product in a negligent manner suffices.

(42.) Whitemore testified and opined the electronic shut off valve, or other comparable safety device, was required by applicable industry standards established by NFPA 58, and should have been included by JB's. As indicated, it is what JB's failed to do which constitutes negligence by JB's. Further, and importantly, they had the actual Enerfab truck to compare to the knockoff truck. Even a cursory examination of the Enerfab truck would have shown there was an electronic shut off switch on the control panel on the outside of the truck directly behind the driver's door. *See* App. 134 (photograph). It would have been readily observable by looking at

the 2005 Enerfab truck that an electronic shut off device, or comparable safety device, was required. Further, JB's did not consult anyone at Enerfab about the hot oil truck design or requirements, did not consult the internet for any drawings or parts, and were otherwise negligent. Negligence and proximate cause are questions of fact for a jury to decide. *Green v. Mid Dakota Clinic*, 2004 ND 12, ¶ 6 (citation omitted).

(43.) It was also certainly foreseeable that without the electronic shut off device or other safety feature an explosion was likely to occur. JB's, being knowledgeable about gases, certainly knew propane would expand under warm conditions when a hot oil truck was pulled inside a warm warehouse during the winter months. JB's had specific knowledge in this regard and had complained to Hansons' hot oil about this very concern. They are also certainly aware the thermostat on the hot oil truck would typically be left on which would allow the system to "demand" LP gas in the middle of the night. All of this was foreseeable to a hot oil truck manufacturer such as JB's, and a manufacturer of hot oil truck mounted fire box assemblies. The issue of foreseeability is also question of fact for the jury to decide. *Barsness v. General Diesel & Equipment Co., Inc.*, 383 N.W.2d at 844.

(44.) The evidence in this case establishes that on the evening prior to the explosion, the B&B driver of the knockoff truck failed to manually close the control valves to the propane tank on the back of the knockoff truck, which resulted in leaking propane. Had the driver made the same mistake in relation to the 2005 Enerfab truck, there would have been no leak of propane because the electronic switch would have prevented the propane from leaking, and thus no explosion would have occurred. JB's design and manufacturing defect was a "but for" cause of the explosion. It was the failure to design in the electronic shut off or other comparable safety feature, required by the applicable NFPA code, which ultimately caused the leaking propane

which resulted in the explosion. The opinions of Whitemore, and the testimony of Fugere, Bahley and Tysver create numerous genuine issues of material fact for the jury to decide.

CONCLUSION

(45.) For the foregoing reasons, Messer request the district court's grant of summary judgment dismissing Messer's claims against JB's be reversed and the case remanded to the district court for further proceedings.

(46.) Dated this 16th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

(47.) The undersigned, as attorneys for the Plaintiffs/Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,902.

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(48.) I hereby certify that a true and correct copy of the foregoing **Brief of Appellants Neal and Bonnie Messer** was on the 16th day of April, 2015, emailed to the following:

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