



and for Dallas County against then-defendant Apache Stainless Equipment Corporation, alleging claims of negligent design and manufacture of the mixer/blender, strict liability, breach of implied warranties of fitness for intended purpose and of merchantability and loss of consortium. Defendant Apache Stainless removed the action to this Court pursuant to 28 U.S.C. § 1441(a) on August 11, 1997.

By Amended and Substituted Complaint, defendant Chemetron Investments, Inc. was substituted as party defendant; plaintiffs subsequently dismissed Apache Stainless as a party. Chemetron filed a third-party complaint against Kraft Foods, Inc., f/k/a Oscar Mayer & Co. Plaintiffs Daniel and Nyareath Mayan subsequently filed a direct claim against Kraft Foods, denominated as a "cross-claim."<sup>1</sup> Plaintiffs and Chemetron claimed Kraft negligently failed to add product safety improvements to the mixer/blender. Kraft filed a motion for summary judgment on the claims against it on April 6, 2000. Chemetron also filed a motion for partial summary judgment, which has been mooted by its recent settlement of plaintiff's claims.

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<sup>1</sup> Technically plaintiffs' claim over against Kraft is not a "cross-claim." They are not co-defendants. Plaintiffs' claim is permitted by Fed. R. Civ. P. 14(a) and effectively joins Kraft as a defendant to their Complaint.

Kraft's motion came on for hearing on May 22, 2000. Attorney David Luginbill appeared for Kraft; attorney Gregory Racette appeared for plaintiffs. The matter is fully submitted.

I.

Kraft's motion for summary judgment is subject to the following well-established standards. A party is entitled to summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990) (citing Fed. R. Civ. P. 56(c)); accord Munz v. Michael, 28 F.3d 795, 798 (8th Cir. 1994); Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

In assessing a motion for summary judgment a court must determine whether a fair-minded jury could reasonably return a

verdict for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248. The court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them. Matsushita, 475 U.S. at 587; accord Munz, 28 F.3d at 796; Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue meriting a trial. Grossman v. Dillard Dep't Stores, Inc., 47 F.3d 969, 971 (8th Cir. 1995); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). A conflict in the evidence ordinarily indicates a question of fact to be resolved by the jury. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983).

## II.

The following facts are either undisputed or represent the version favorable to plaintiffs. Mayan began work at IBP's Perry plant in 1995 but had worked with the Mepaco Model No. 170 mixer/blender for only about a week prior to his injury. On January 27, 1997, as he was cleaning meat by hand from the area of the discharge chute door of the mixer/blender, a co-worker turned on the power to the machine. Mayan's left hand became entangled in the agitators and was amputated.

The mixer/blender was originally manufactured by Meat Packing Equipment Co. (Mepaco), a unit of Chemetron Corporation.<sup>2</sup> It was purchased in 1971 by Oscar Mayer & Co., Inc., for use in its Goodlettsville, Tennessee plant. While there was a warning decal between the discharge doors of the mixer/blender stating "Danger Keep Hands Out Of Door Openings," the original installation and operation instruction manual accompanying the mixer/blender did not have safety warnings or instructions in it concerning cleaning the machine out. (Pl. Ex. 3, Hawley Depo. at 20-24 and Ex. 5). The on/off controls on the mixer/blender were initially placed on the right front of the machine where the operator could see the discharge doors. (Pl. Ex. 6, Chemetron's Answer to Plaintiff's Interrogatory No. 13).

In about February 1974 and again in 1977 Chemetron revised the installation and operating instructions for the mixer/blender to include warnings that hands should be kept out of discharge door openings at all times and if it became necessary to work inside the machine, a positive disconnecting means should be provided and the main power switch should be padlocked in the off position. (Pl. Ex. 9, 10). These were sent to Oscar Mayer's Goodlettsville and other plants, together with

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<sup>2</sup> Chemetron Corporation was the corporate predecessor of defendant Chemetron Investments, Inc. They will be collectively referred to as "Chemetron" in this ruling.

more permanent metal warning signs to be affixed adjacent to the discharge doors. (Pl. Ex. 12).

In March 1983 while the mixer/blender was still owned by Oscar Mayer, the company received a letter from Chemetron which informed Oscar Mayer of a product improvement relating to the placement of safety devices around the discharge doors of the mixer/blender. The notice stated in part:

We strongly recommend the immediate installation of additional safety devices around the discharge outlet doors to provide greater protection to all personnel exposed to the discharge area. We presently have such devices specifically designed for this purpose which are available for the subject Mixer-Blenders. You should immediately consider the acquisition and installation of these guards and devices.

Our services are available to perform the installation of these devices and we ask that you contact us so that a proposal can be prepared. Should you choose to install these devices in-house, or through an independent contractor, we would be happy to lend our assistance. It is important, however, that ALL personnel exposed to the discharge door outlets be provided protection which meets the functional design criteria afforded by our devices.

(Def. Ex. 2). Mayan's employer IBP, which had the same model mixer/blender at its Dakota City, Nebraska plant, received the same letter from Chemetron as well as the information provided in 1974. (Pl. Ex. 15; Def. Ex. 3).

In August 1987, at its address in Madison, Wisconsin, Oscar Mayer received a letter from Chemetron which again "strongly recommend[ed]" installation of safety devices on the mixer/blender, including additional warning tags and a discharge outlet door guard with a motor control interlock switch. (Pl. Ex. 16).

The mixer/blender at issue was moved from the Goodlettsville, Tennessee, plant to the Oscar Mayer meat processing plant in Perry, Iowa, at an unknown date. The point is disputed, but viewing the summary judgment record favorably to plaintiffs there is inferential evidence that at some point Oscar Mayer changed the location of the control panel on the mixer/blender from near the discharge doors to a location where the operator did not have a clear line of sight to the discharge doors. (Ex. 8, Meinecke Depo. at 57-60; Ex. 7, Kelloway Depo. at 21-22).

The mixer/blender became the property of IBP when IBP purchased the Perry meat processing plant and its equipment from Oscar Mayer on December 14, 1988. Oscar Mayer, a subsidiary of General Foods Corporation, merged into Kraft, Inc., now known as Kraft Foods, Inc. Oscar Mayer is now an operating division of Kraft. (Def. Ex. 13).

In the eight years following sale of the Perry plant

IBP used the mixer/blender regularly in the Offal Department; 5 days a week, up to 16 hours a day. (Def. Ex. 5, Meinecke Depo. at 21-22, 31-33, 61-63, 82-83). IBP warned its employees against placing body parts inside the mixer/blender. (Def. Ex. 4). Plaintiff admits that his supervisors at IBP warned him not to place his hands into the machine while it was operating. (Def. Ex. 9, Mayan Depo. at 57-58). However, he did not appreciate that it was dangerous to put his hands in the machine while turned off without locking it out. (Id. at 57; Ex. 19). He was not aware of, nor had he been trained on lockout procedures by IBP. (Pl. Ex. 17, Mayan Depo. at 43-44).

As noted, plaintiff had only worked with the mixer/blender a few days prior to the injury on January 29, 1997. (Id. at 21). He testified his supervisors observed him cleaning the discharge chute out with his hands, yet never told him he should not do that. (Id. at 45-46). In fact, Mayan says he was told to use his hands to take meat out of the discharge area as it tended to get stuck there, and he had seen another employee use his hands to clear meat out from the area. (Id. at 42-43).

The accident occurred as Mayan reached into the mixer/blender to clean a combination of meat and ice concentrated at the discharge door. (Id. at 73-81). To his

knowledge no one else was around the machine at the time. (Id.) The machine was not operating. As he reached his left hand inside the discharge door a co-worker turned the machine on resulting in the injury. (Id.; Amended and Substituted Petition at Law ¶ 6).

At the time of the accident, the mixer/blender did not have a bar guard in front of the discharge chutes, nor were there any warning signs located in the area. (Pl. Ex. 17, Mayan Depo. at 55-57). Plaintiffs allege the mixer/blender was defective because the operator controls were located where the operator could not readily see a person in the discharge area, the machine was not equipped with a barrier guard at the discharge door interlocked to the controls which would in Mayan's case have prevented the machine from operating when he lifted or removed the guard to clean the meat out, and effective warnings were not installed on the machine. They plead negligence against Kraft for failing to make the product safety improvements recommended by Chemetron. In resisting the motion for summary judgment, plaintiffs also maintain Kraft was negligent in failing to inform Chemetron of the sale of the mixer/blender to IBP and in failing to warn IBP of its dangerous condition at the time of the sale. Plaintiffs' failure to expressly plead warning is raised by Kraft in reply.

### III.

Kraft did not make the product safety improvements periodically recommended by Chemetron, and provided no warning to IBP about the dangers involved in using the machine when it sold it to IBP. The legal issue is the existence and extent of any duty of care on the part of Kraft to add the safety features or provide warnings. If, as Kraft concedes, it had a duty to warn of non-obvious dangers, the motion challenges the existence of such a danger and the sufficiency of the evidence on causation. Iowa law determines the legal issues.

#### Duty to Make Product Safety Improvements and/or Inform Chemetron of the Sale to IBP

Kraft argues Iowa common law does not recognize any duty by an end user to make safety improvements before selling a machine, relying on Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392 (Iowa 1985), a grain auger case. Plaintiffs rely on Nichols too in their resistance. The parties' differing views of Nichols have to do with whether Kraft stands in the shoes of the end user farmer in Nichols, as Kraft argues, or the dealer (Van Zetten Implement Company) which sold the grain auger to the farmer, as plaintiffs argue. While Kraft is neither a farmer nor dealer in equipment, as a casual or occasional seller its position is more analogous to the farmer. As explained below, under the holding in Nichols Kraft's duty was limited to

warning.

Nichols involved an injury occurring when plaintiff was unloading grain for his employer, Chillicothe Grain & Livestock Company, using a grain auger. Nichols slipped and his foot became entangled in the rotating auger flighting. 380 N.W.2d at 393. The auger was manufactured by Westfield Industries and originally was sold by farm implement dealer Van Zetten to farmer Greg Guitier. Westfield made a post-sale design change to a safety shield located on the auger and instituted a retrofit recall program. It contacted dealers to obtain names of purchasers and then offered those purchasers a safety package. Van Zetten responded by providing the name of one purchaser, but not Guitier's, even though his name was in their files. Therefore, Guitier never received notice of the recall program. Id. at 393-96.

Guitier's auger had the original mesh shield designed to prevent accidental contact with the auger. The auger was damaged while Guitier was using it and the shield came off. Guitier never replaced it and used the auger for about two years before selling it to plaintiff's employer, Chillicothe Grain. Guitier did not notify Chillicothe Grain that the auger had originally been equipped with a safety shield. Id. at 396, 400. Plaintiff sued Westfield, Van Zetten and Guitier.

One of the theories the trial court submitted against Van Zetten was negligent failure to fully participate in the recall program. The Iowa Supreme Court upheld the lower court on this point because "[t]he jury could find a reasonably prudent dealer, in Van Zetten's situation, would have cooperated in the manufacturer's recall campaign in order to reduce a perceived risk to users of the product." Id. at 398. Plaintiffs argue by analogy that once notified of safety equipment that would prevent serious injuries to workers using the machine, Kraft was duty-bound to exercise reasonable care to install the equipment. The significant distinction between Van Zetten's position and that of Kraft is that Van Zetten was in the business of selling the product to customers who were the expected users of the product. Kraft, like Guiter, was the ultimate purchaser and owner of the machine.

Nichols' claims against Guiter were that he negligently altered the auger by not replacing the shield and failed to warn of its changed condition. Id. at 399-400. The Iowa Supreme Court held Guiter had no duty to plaintiff with respect to any alteration of the auger because the alteration - the missing shield - "was not an occurrence which presented a danger to third persons during the time the auger remained in Guiter's control." Id. at 400. No breach of duty to the plaintiff

occurred until Guiter sold the auger to Nichol's employer at which point Guiter's only duty was "to warn of dangers known to him which he had reason to believe would not be realized by persons using the auger." Id. It follows from this that Kraft had no duty to Mr. Mayan with respect to any alteration by it of the location of the control panel or the installation of the safety devices recommended by Chemetron, except to warn a subsequent owner of associated non-obvious dangers.<sup>3</sup> See also Clute v. Paquin, 219 A.D.2d 783, 784, 631 N.Y.S.2d 463, 464 (A.D.N.Y. 1995)(casual seller's duty to subsequent user with respect to product modification is limited to warning of dangers which are not obvious or readily discernible).

Nichols also does not provide any support for plaintiff's argument that Kraft's duty of reasonable care required it to alert Chemetron to the fact that it had sold the mixer/blender to IBP.

Plaintiffs refer the Court to cases from Michigan which recognize a broad general duty on the part of sellers of used

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<sup>3</sup> This result fits with absence of any duty in Iowa on the part of a manufacturer to retrofit its products with safety devices. See Lovick v. Wil-Rich, 588 N.W.2d 688, 696 (Iowa 1999)(citing Burke v. Deere & Co., 6 F.3d 497, 509 (8th Cir. 1993), cert. denied, 510 U.S. 1115 (1994)). It is difficult to argue a higher standard should be imposed on the owner of the machinery for the benefit of those third parties who might eventually acquire or use it.

equipment "to future and foreseeable users . . . to exercise the reasonable care required of a reasonable product seller under the existing circumstances." Galanos v. United States, 608 F. Supp. 360, 374 (E.D. Mich. 1985), rev'd on other grds., 806 F.2d 94 (6th Cir. 1986)(quoting Johnson v. Purex Corp., 128 Mich. App. 736, 341 N.W.2d 198, 199 (1983)); see Blanchard v. Monical Machinery Co., 84 Mich. App. 279, 269 N.W.2d 564, 566-67 (1978). Iowa has not to this

point adopted such a duty beyond that found in Restatement (Second) of Torts § 388. See infra at 15-16; Nichols, 421 N.W.2d at 400.

#### Duty to Warn

##### a. Failure to Plead

Kraft raises a threshold issue about the sufficiency of the pleadings to permit the Court to consider plaintiffs' warning theory. Kraft argues the Court should not consider plaintiffs' warning theory because it is not pleaded in their cross-claim. The cross-claim pleads negligence based solely on Kraft's failure to add the product safety improvements recommended by Chemetron. The plaintiffs have not moved for leave to amend, they believe their cross-claim is sufficient to provide notice to Kraft under the liberal pleading rules reflected in the Federal Rules of Civil Procedure.

Plaintiffs' cross-claim does not provide Kraft with notice of a theory of negligence based on failure to warn. Plaintiffs have mended their hold to argue warning in response to Kraft's reliance on Nichols which indicates that plaintiffs' only potential theory of recovery is failure to warn. This shift in theory, however, does not mean summary judgment should be granted for failure to expressly plead it. The federal rules abolish the "theory of pleadings" doctrine which formerly

required a plaintiff to succeed only on those theories pleaded. See Oglala Sioux Tribes of Indians v. Andrus 603 F.2d 707, 714 (8th Cir. 1979). Rather, "[t]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits." 5 C. Wright & A. Miller, Federal Practice & Procedure §1219, at 192-94; see Greenwood v. Ross, 778 F.2d 448, 454-55 (8th Cir. 1985)(quoting Wright & Miller); Oglala Sioux Tribes 603 F.2d at 714 (same); see also Morgan Distributing Co., Inc. v. Unidynamic Corp., 868 F.2d 992, 995 (8th Cir. 1989). Plaintiffs' shift in theory will not prejudice Kraft in maintaining a defense. Trial has been recently been continued in part to permit the parties to conduct additional discovery involving IBP on issues relating to warning.

b. Merits

In Nichols the Iowa Supreme Court looked to the Restatement (Second) of Torts § 388 as defining the standard of care for a casual or occasional seller of equipment. That section provides

One who supplies directly or through a third person a chattel for another to use is

subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

The Nichols court held that this duty to warn is a "duty . . . to warn of dangers which are not obvious with respect to use of the chattel in the condition in which it is supplied." Id. at 401; see Vandelune v. 4B Elevator Components Unlimited, 148 F.3d 943, 946 (8th Cir.), cert. denied, 525 U.S. 1018 (1998).

In Nichols the danger posed by the auger in the condition it was in was obvious. Farmer Guter thus had no duty to warn, even if he was aware of means to reduce the risk of which the other party was not. Id. Significant to the court's decision was the fact that Guter did not have superior knowledge over Van Zetten or Nichols. Id.; see Vandelune, 148 F.3d at 946 (citing Lamb v. Manitowoc Co., 570 N.W.2d 65, 68 (Iowa 1997)); Anderson v. Glynn Const. Co., Inc., 421 N.W.2d

141, 144 (Iowa 1988).

It is important to identify what the relevant dangerous condition is in this case. It is not the general danger presented by proximity to the moving mixing agitators during normal operation of the mixer/blender. Plaintiff had been warned not to place his hands in the machine while it was operating and the danger and severity of the injuries which might result from contact with the agitator blades were obvious. Rather, the relevant danger was that another worker might turn the machine on while one in Mayan's position was cleaning meat from the discharge area by hand. The danger resulted from the facts that the control panel was in a place from which the first worker might not see the other cleaning out the discharge area and there was no device such as a guard to the discharge interlocked to the controls which would prevent operation when the discharge area was being cleaned. Mr. Mayan has stated, in substance, he did not appreciate the condition and risk involved. In view of the limited experience Mayan had with the machine and his lack of training the Court cannot say Mayan was bound to have known he might not be seen from the area where the controls were located leaving him exposed to injury if a co-worker started the mixer/blender while he was cleaning out the discharge area.

What Mayan's employer, IBP, knew about the danger

presented by the location of the controls at the time of the injury is difficult to determine on the summary judgment record. IBP owned the same model mixer/blender at another plant and received at one of its plants the information from Chemetron in 1974 and 1983 which Kraft received about unspecified safety devices available from Chemetron. IBP was in the same business as Kraft, evidently retained some of the former Kraft employees to run the Perry plant, and used the mixer/blender in question for many years after the purchase of the Perry plant. Beyond this the summary judgment record is not developed on IBP's knowledge.

It seems improbable that by the time of the injury IBP was unaware of the relevant dangerous condition and risk involved. However, the limited record on the subject, and the well-established proposition that knowledge of a dangerous condition and risk are usually jury questions, see Rowson v. Kawasaki Heavy Industries, Ltd., 866 F. Supp. 1221, 1240-01 (N.D. Iowa 1994), make the Court reluctant to conclude that there is no genuine issue of fact about whether Kraft had superior knowledge of the danger resulting from the relocation of the controls.

c. Causation

Finally, Kraft argues that any failure to warn on its

part could not have been a proximate cause of Mr. Mayan's injury. It contends Mayan and IBP were aware of the danger, and the acts of Mayan in reaching into the machine and the co-worker in starting it up were superceding or intervening causes which broke the causal connection to any failure to warn by Kraft.

Where there is knowledge of the danger failure to warn cannot be a proximate cause. Vandelune, 148 F.3d at 946. As noted above, however, while Mayan was aware of the general danger involved in getting his hands near the agitators of the mixer/blender while operating, he has testified he was not aware of the danger presented by the location of the control panel or the risk that a co-worker would start the mixer/blender while he was cleaning it out.

A superceding cause "is a third party's act or other force that intervenes to prevent the defendant from being liable for harm to the plaintiff that the defendant's antecedent negligence is a substantial factor in bring about." Hollingsworth v. Schminkey, 553 N.W.2d 591, 597 (Iowa 1996) (citing Restatement (Second) of Torts §440 (1965)). "[N]ot all intervening forces become superceding causes...." Hollingsworth, 553 N.W.2d at 597. If the intervening act or force is a "normal consequence" of the defendant's act, or is reasonably foreseeable there is no break in the causal chain. Id. at 597-

98; see Rieger v. Jacque, 584 N.W.2d 247, 251 (Iowa 1998).

Superceding cause is an unlikely candidate for summary judgment in this case. If there was a duty to warn, and if cause in fact is shown, the acts of the co-worker in starting the mixer/blender and of Mayan in cleaning it out with his hands would fall "within the scope of the original risk" which the warning would have addressed and hence would not supercede Kraft's omission. Rieger, 584 N.W.2d at 251-52; see Stevens v. Des Moines School Dist., 528 N.W.2d 117, 119 (Iowa 1995). Comment b to Restatement (Second) Torts § 449 summarizes the operative principle aptly:

The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability.

Moreover, the record is short of permitting the Court to conclude that this is the "exceptional case[]" in which proximate cause may be taken from the fact finder. Iowa R. App. P. 14(f)(10).

#### IV.

Defendant Kraft's motion for summary judgment is granted in part and denied in part consistent with the foregoing discussion.

IT IS SO ORDERED.

DATED this \_\_\_\_\_ day of June, 2000.

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ROSS A. WALTERS  
CHIEF UNITED STATES MAGISTRATE JUDGE