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Product Liability

ALERT

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NEW STRATEGIES FOR WINNING DISMISSAL OF A FAILURE TO WARN CLAIM: *WU JIANG V. RIDGE TOOL COMPANY*

By Carl J. Schaerf and Tracy J. Weinstein

Given hindsight borne of any accident, it is seductive to argue, and for a jury to want to believe, that a few additional simple words of warning would have prevented a catastrophic consequence. In New York, failure to warn claims are sometimes favored by plaintiffs bringing product liability actions because they do not require the thorny analysis (or perhaps even expert analysis) of the risk and utility of the product at issue. "If only they had said this" is a powerful pitch, and, in a severe injury case, it provides a challenging argument for defense counsel to address before a jury.

A recent decision granting summary judgment for the defendant presents a compelling model for successfully defeating a failure to warn claim. *Wu Jiang v. Ridge Tool Company, et. al*, decided by the Honorable Rosalynn R. Mauskopf of the Eastern District of New York on March 27, 2018, is significant because it resolves the following issues, in favor of the defense, as a matter of law:

1. Adequacy of the warning; and
2. Conspicuity and intensity of the warning.

Also significant was the finding, as a matter of law, that plaintiff was a knowledgeable user and that he did not require a warning to conform his conduct to safe work practice.

The case involved a 2014 accident sustained by plaintiff, Jiang, while using a Ridgid Wet/Dry Vacuum after sanding a floor. There was no dispute in the case that the floor residue left after sanding was flammable and that Jiang knew it was flammable. Jiang noticed smoke emanating from the Vacuum, so he unplugged it and picked it up by the handles to carry it to the sink in the next room. When he lifted it, the bottom of the Vacuum detached and flames erupted from it, badly burning Jiang's arm.

Jiang, an immigrant, the decision points out, had been in the country for many years, and was somewhat conversant in the English language. The product has multiple warnings concerning the use of the vacuum to pick up flammable materials. "The warning on the Vacuum reads: 'WARNING . . . Do not pick up hot ashes, coals, toxic, flammable or other hazardous materials.' … Additionally, the user's manual reads: 'To reduce the risk of fire or explosion, do not use near combustible liquids, gases or dusts.' … Both warnings are accompanied by a graphic of a triangle with an exclamation point." Citations omitted. Note that the decision has value to the defense bar if for no other reason that it treats a warning contained in a manual in a similar manner to that mounted on the product itself, though here both sets of warnings were obviously quite similar.

The Court determined that the warning need not provide a full listing of materials that should not be vacuumed, and found the conspicuity and importance of the warnings to be sufficient as a matter of law. "Jiang contends that, despite including a warning not to use the Vacuum to pick up flammable dusts, the defendants should be held liable because they did not specifically mention polyurethane sanding dust. This argument fails to create a triable issue of fact as to adequacy." As the Court observed:

> "The defendants, having warned about the general hazard, were not required to provide a list of every single flammable substance that the Vacuum could be foreseeably used near, nor would it have been possible to do so. Attempting to create such a detailed warning could render the warning unclear, and therefore inadequate. In addition, '[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware,' and 'would neutralize the effectiveness of warnings.'" Citations omitted.

This is a very direct opinion, confirming that not every foolish practice needs to be warned against. There is a concept in Communications known as "information clutter." If you provide too many warnings, no one reads them. Moreover, with "information clutter," warnings that are important seem less important because they are surrounded by information to be readily dismissed as obvious. As the New York Court of Appeals held some 20 years ago in *Liriano v. Hobart Corporation*:

> "This is particularly important because requiring a manufacturer to warn against obvious dangers could greatly increase the number of warnings accompanying certain products. If a manufacturer must warn against even obvious dangers, '[t]he list of foolish practices warned against would be so long, it would fill a volume' (*Kerr v. Koemm*, 557 F Supp 283, 288 [SD NY 1983]). Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers."

Liriano involved a 17 year old kitchen worker, literate in only Spanish (differentiating him immediately from Jiang), who lost his hand in a materially altered meat grinder (permanent guard removed with a blow torch). The manufacturer, the year after the subject grinder left its control and custody, began issuing a warning providing that the product was not to be used without the guard as provided by the manufacturer. In a very notorious decision for its time, the Court held that the manufacturer could be held responsible for the failure to provide that warning, obviousness notwithstanding, to apprise the plaintiff of the "option" of using a product with a guard. In *Liriano*, despite the Court's favorable comments on information clutter, the failure to warn issues were decided by a jury in favor of the plaintiff, and a plaintiff's verdict was affirmed.

Looked at in a broader perspective, the *Wu Jiang* decision is yet another example of increasing judicial antipathy to failure to warn claims. In *Liriano* itself, the Second Circuit predicted that New York law would apply a "heeding presumption" in warning cases, shifting the burden of proof to the defense. The Court of Appeals has recently held, explicitly, that it is plaintiff's burden to prove that, had an appropriate warning been issued, plaintiff would have read and heeded that warning. *Matter of New York City Asbestos Litig*., 2016 N.Y. LEXIS 1762 at *51 (Court of Appeals, June 28, 2016). *Wu Jiang*, in a sense, goes a step further, rejecting the notion that feigned questions as to the "adequacy" of a warning must go to a jury. If the subject to be warned against is touched on meaningfully, every last specific is not required. If appropriate signal language and presentation is provided, conspicuity can be resolved as a matter of law. And, importantly, a Court may consider the

warnings supplied in the manual on a motion for summary judgment as well.

In many warning cases post-*Liriano*, plaintiffs who tried to rely on a *Liriano* type warning argument came up very short, typically because plaintiff was deemed an experienced or knowledgeable user. See, e.g., *Ramirez v. Komori Am. Corp*., 1999 WL 187072 (S.D.N.Y. April 6, 1999); *Conn v. Sears Roebuck & Co*., 262 A.D.2d 954, 692 N.Y.S.2d 543 (4th Dep't 1999). As a practice tip, and as occurred in *Wu Jiang*, the best defense to a failure to warn claim remains demonstrating that plaintiff already knew everything a warning should have told him. Luis Liriano was new to his job, Mr. Jiang was not. Deposition questioning is critical. If the plaintiff was aware of the hazard of using a machine and knew he or she could be injured, there is no warning claim. As the Court held in *Liriano*, if plaintiff "participated in removal of the safety device whose purpose is obvious," a warning would be "superfluous" given that "actual knowledge of the specific hazard." The plaintiff would therefore not be able to prove causation; that is, that the plaintiff's conduct would have changed, the machine would not have been misused, and the accident would not have occurred had more purportedly "adequate" warnings been provided.

A plaintiff must be questioned about his or her experience with this machine, and all machines. Before deposing the plaintiff, attorneys should coordinate with their client and expert to learn everything about the right way to do the job. Make plaintiff into an expert in the usage of the product, even a teacher (that comes across to a Court on summary judgment and at trial). How many years have you used this machine? How many hours a day? Ever witness anyone get injured while using it? What were they doing wrong? Did you train others in the use of the product? If you saw someone else doing what you did, would you give them a safety infraction (remarkably, you might get a yes to this question)?

Questions about reading of the manual are no risk propositions for a defendant. If they read the manual, but did not heed the manual, the manual warnings can almost certainly be considered fair game on summary judgment. If they did not read the manual, that alone could be considered culpable conduct. It is important, however, to consider that many Judges and Jurors do not read manuals. How many of us read the entire manual for our automobiles, cover to cover, rather than consult it on an "as needed" basis (like when we need to change the clocks for daylight savings time).

Wu Jiang is a good roadmap for preparation and ultimate dismissal of a failure to warn claim. If plaintiff can be boxed into arguing for consequence related or cumulative warnings, and a good record is developed on "knowledgeable user," dismissal should follow. To further protect against liability, businesses should continue to emphasize in the marketing, sale and warnings supplied with the product the importance of safe product usage.◆

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