SUPREME COURT OF MISSISSIPPI

2006-CA-01128

MILTON WATTS

APPELLANT

v.

RADIATOR SPECIALTY COMPANY AND UNITED STATES STEEL CORPORATION

APPELLEES

Appeal from the Circuit Court of Smith County, Mississippi Cause No. 2002-364

BRIEF OF APPELLEE UNITED STATES STEEL CORPORATION

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The primary issue in this appeal is whether the trial court abused its discretion in striking the testimony of Plaintiff's expert Dr. Barry Levy, whose testimony was Plaintiff's sole evidence of causation. This issue presents no difficult or novel questions of law, and oral argument would not assist the Court in its review of the trial court's decision.

However, multiple alternate sustaining grounds exist to support the trial court's grant of judgment in Defendants' favor. In the event that the Court believes oral argument would be beneficial on the issues of the accrual of Plaintiff's claims under Miss. Code Ann. § 15-1-49, preemption of Plaintiff's claims by the Federal Hazardous Substances Act, or United States Steel Corporation's liability under the Mississippi Products Liability Act, United States Steel Corporation welcomes the opportunity to participate in oral argument on these issues.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

1. Milton Watts, Appellant.

2. Lance H. Lubel, J. Robert Black, and the law firm Heard, Robbins, Cloud, Lubel & Greenwood, LLP, counsel for Appellant.

3. Louis H. Watson, Jr., and the law firm Watson & Heidelberg, PA, counsel for Appellant.

4. Eugene Coursey Tullos, and the law firm Tullos & Tullos, counsel for Appellant.

5. Daryl L. Moore, and the law firm Moore & Kelly, P.C., counsel for Appellant.

6. United States Steel Corporation, Appellee.

7. Stephen L. Thomas, Mary Clay W. Morgan, and the law firm Bradley Arant Rose & White LLP, counsel for Appellee United States Steel Corporation.

8. Fred Krutz, Phillip S. Sykes, and the law firm of Forman Perry Watkins Krutz & Tardy LLP, counsel for Appellee United States Steel Corporation.

9. Carl B. Epps, III, and the law firm Nelson Mullins Riley & Scarborough, L.L.P., counsel for Appellee United States Steel Corporation.

10. Aristech Chemical Corporation, indemnitor of Appellee United States Steel Corporation.

11. Mitsubishi Corporation, indemnitor of Appellee United States Steel Corporation.

12. Chubb Custom Insurance Company, insurer of Mitsubishi Corporation as indemnitor of Appellee United States Steel Corporation.

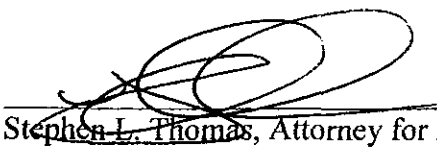
13. Radiator Specialty Company, Appellee.

14. Joe Basenberg, S. Leanna Bankester, George M. Walker, and the law firm Hand Arendall, LLC, counsel for Appellee Radiator Specialty Company.

15. James M. Riley, Jr., Stacy K. Yates, and the law firm Coats, Rose, Yale, Ryman & Lee, P.C., counsel for Appellee Radiator Specialty Company.

16. Rance N. Ulmer, counsel for Appellee Radiator Specialty Company.

Respectfully submitted, this the 12 day of September, 2007.



Stephen L. Thomas, Attorney for Appellee
United States Steel Corporation

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STATEMENT OF THE ISSUES

I. Did the trial court abuse its discretion in excluding the testimony of Dr. Barry Levy in its entirety as scientifically unreliable, when Dr. Levy failed to present medical literature supporting his opinion that Plaintiff's illness was caused by exposure to benzene?

II. Is the trial court's judgment in the Defendants' favor supported by one or more of the following alternate sustaining grounds:

A. Are Plaintiff's claims barred by the applicable statute of limitations because Plaintiff failed to file his Complaint within three years of the date he was diagnosed with a latent disease?

B. Are Plaintiff's claims preempted by the Federal Hazardous Substances Act?

C. Do Plaintiff's product liability claims against United States Steel Corporation, a supplier of a component ingredient in an allegedly defective product, fail as a matter of law when United States Steel Corporation had no control over the design or manufacture of the final product and had no opportunity to warn Plaintiff of any dangers associated with the final product?

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

In this products liability action, Plaintiff Milton Watts claims that he contracted small cell lymphocytic lymphoma, a cancer in the broader category of non-Hodgkin's lymphomas ("NHL"), as a result of exposure to benzene contained in a solvent called Liquid Wrench. Liquid Wrench was designed, manufactured, and marketed by Radiator Specialty Company ("RSC"). RSC purchased raffinate, a benzene-containing ingredient in some formulas of Liquid Wrench, from United States Steel Corporation ("U.S. Steel"). Plaintiff was diagnosed with NHL in March 1999. More than three years later, on October 11, 2002, Plaintiff and his wife Evie Watts sued U.S. Steel, RSC, and Reliable Supply Company, a distributor of Liquid Wrench.

Prior to trial, U.S. Steel and RSC moved for summary judgment on multiple grounds, including that Plaintiff's claims were barred by the statute of limitations because he failed to file his complaint within three years of the date he was diagnosed with NHL. Defendants also moved to exclude as scientifically unreliable the testimony of Plaintiff's proposed expert witness, Dr. Barry Levy. Dr. Levy testified that Plaintiff's NHL was caused by exposure to benzene.

The lower court denied Defendants' pre-trial motions, and the case proceeded to trial on November 8, 2004. The jury returned a $2,000,000.00 verdict in favor of Plaintiff.[1] The jury found U.S. Steel to be 45% at fault, and RSC to be 40% at fault.[2] Following the trial, U.S. Steel and RSC moved for judgment notwithstanding the verdict or, in the alternative, for a new trial.

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[1] Prior to submitting the case to the jury, the trial court granted Defendants' motion for directed verdict as to the loss of consortium claims asserted by Plaintiff's wife Evie Watts.

[2] The jury allocated the remaining 15% of fault to Plaintiff's former employer, which had required Plaintiff to wash tools in a tub of pure benzene. The jury did not return a verdict against Defendant Reliable Supply Company.

Defendants' post-trial arguments included (1) that the trial court erred in admitting into evidence the testimony of Plaintiff's expert Dr. Levy; (2) that Plaintiff's claims were barred by the statute of limitations; (3) that Plaintiff's claims were preempted by the Federal Hazardous Substances Act ("FHSA"); and (4) that Plaintiff had failed to prove the required elements of a products liability claim. On June 9, 2006, the trial court entered an order granting Defendants' post-trial motions. The trial court held that Dr. Levy's testimony was scientifically unreliable, and that it erred in admitting Dr. Levy's testimony into evidence. As Dr. Levy's testimony was the only evidence of causation offered by Plaintiff, the trial court entered judgment in Defendants' favor notwithstanding the jury's verdict. The trial court also conditionally granted Defendants' alternative motion for a new trial, and reserved the right to rule on Defendants' other post-trial arguments in the event its ruling as to Dr. Levy is reversed. Plaintiff appeals the trial court's grant of Defendants' post-trial motions.

II. Statement of Additional Relevant Facts[3]

A. U.S. Steel's Sale of Raffinate to RSC

U.S. Steel is a steel manufacturer. In manufacturing steel, U.S. Steel uses a process called coking that involves the burning of coal. A naturally occurring chemical called raffinate is generated and captured by U.S. Steel as a by-product of U.S. Steel's coking operations. P. Ex. F for ID [Graeber 39-40].[4] Raffinate naturally occurs when coal is burned and solvents are extracted from the resultant coal gases. *Id.*

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[3] To avoid needless repetition, U.S. Steel adopts by reference the "Statement of Facts Relevant to the Issue Presented for Review" from the brief of Appellee RSC, and here presents only limited additional facts relevant to the issues on appeal.

[4] References to the Clerk's Index in the Record on Appeal are made in the following format: "R. ___". Citations to the transcript of the trial are made as follows: "Tr. ___". References to trial exhibits are made as: _ Ex. _. Finally, references to the testimony of witnesses who testified by deposition are made to the deposition transcripts (which marked for identification at trial) as follows: _ Ex. _ for ID [witness name ___]".

On December 11, 1959, U.S. Steel sent RSC a one-gallon sample of raffinate. P.Ex. 52. There is no evidence of any sale of raffinate by U.S. Steel to RSC prior to 1959. Tr. 1345. From 1960 to 1978, U.S. Steel sold the raffinate it produced to RSC. Tr. 1343-45; P. Ex. 8; D.USS Ex. 1. RSC incorporated raffinate into one formula of its product Liquid Wrench. Tr. 1345. Liquid Wrench is a penetrant primarily used to loosen rust or corrosion on bolts, screws, pipe joints, and similar parts. P.Ex. 17; Tr. 748. Liquid Wrench is a product designed, manufactured, marketed, and labeled solely by RSC. U.S. Steel has never had any involvement in the design, manufacture, marketing, labeling, or sale of any formula of Liquid Wrench. Tr. 1342.

The raffinate that U.S. Steel sold to RSC contained benzene. U.S. Steel notified RSC of this fact. P.Ex. 6. There is no dispute that RSC was aware that raffinate contained more than 5% benzene, and that Liquid Wrench formulas that included raffinate were therefore subject to the labeling requirements of the Federal Hazardous Substances Act ("FHSA"). Tr. 408, 490, 1354.

Liquid Wrench did *not* contain raffinate as an ingredient after March 1978. P.Ex. 24; Tr. 751, 1345. Accordingly, for purposes of Plaintiff's claims against U.S. Steel (all of which arise from U.S. Steel's sales to RSC of raffinate, a benzene-containing chemical component of Liquid Wrench) the alleged exposure period is 1960 to 1978.

B. The Labels on Cans of Raffinate-Containing Liquid Wrench Complied with the Requirements of the Federal Hazardous Substances Act.

Pursuant to and in compliance with the FHSA, RSC designed the warning labels on its product in strict conformity with the Act. Tr. 1324. As a result, Liquid Wrench containers "tracked word for word what was in the regulations of the Consumer Product Safety commission under the Federal Hazardous Substances Act . . . ." Tr. 490. RSC placed labels regarding the potential hazards of benzene on all benzene-containing Liquid Wrench during the time period that Plaintiff allegedly used the product. *Id.*

The RSC designed the labels of cans of raffinate-formula Liquid Wrench to incorporate specific warning features required by the FHSA. The FHSA-required warning content on Liquid Wrench cans included the prominent warning words "CAUTION", "DANGER", "POISON", "FLAMMABLE," "VAPOR HARMFUL," and "HARMFUL OR FATAL IF SWALLOWED", the skull and crossbones, and warnings to use the product with adequate ventilation. D.USS Ex. 7-14; P. Ex. 15.

C. Plaintiff Failed to File His Complaint Within Three Years of His Diagnosis.

Plaintiff's oncologist Dr. John Clay preliminarily diagnosed Plaintiff with the blood disorder pancytopenia in June 1998. P.Ex. 57; Tr. 784. In March 1999, Dr. Clay refined this diagnosis to small cell lymphocytic lymphoma, a form of non-Hodgkin's lymphoma. P.Ex. G for ID [Clay 10]. Plaintiff filed the Complaint in this action on October 11, 2002, three years and six months after Plaintiff learned of his diagnosis. R. at 1-13. From the time of his diagnosis until after the filing of this lawsuit, no doctor or other medical professional told Plaintiff that his diagnosis of small cell lymphocytic lymphoma was causally related to benzene exposure. P.Ex. G for ID [Clay 76, 103].

STANDARD OF REVIEW

I. Exclusion of Testimony of Dr. Barry Levy.

The central issue presented for the Court's review is whether the trial court erred in excluding the testimony of Dr. Barry Levy, the sole evidence Plaintiff presented as proof that his damages were caused by exposure to benzene. This Court reviews a trial judge's exclusion of evidence for an abuse of discretion. *Giannaris v. Giannaris*, No. 2005-CT-00498-SCT at ¶14 (Miss. July 19, 2007) (*quoting Puckett v. State*, 737 So. 2d 322, 342 (Miss. 1999)). Under this

deferential standard of review, a trial court's ruling will be upheld if the trial judge considered the legally relevant factors and made no clear errors in judgment:

> When the Court reviews such decisions of the trial court, it should first ask whether the court below applied the correct legal standard. If so, we then consider whether the decision was one of those several reasonable ones which could have been made. *The trial court's decision will be affirmed unless there is a definite and firm conviction that the court below committed a clear error in judgment in the conclusion it reached upon weighing of the relevant factors.*

Plaxico v. Mitchell, 735 So. 2d 1036, 1039 (Miss. 1999) (internal citations and quotations omitted).

II. Grant of Judgment Notwithstanding the Verdict.

The trial court's entry of judgment in Defendants' favor notwithstanding the jury's verdict, after its exclusion of Plaintiff's sole causation evidence, is subject to *de novo* review. *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). In reviewing the trial court's grant of judgment notwithstanding the verdict, the Court is not limited to the grounds on which the trial court based its decision. *Brocato v. Mississippi Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987) ("Defendants on appeal are, however, entitled to raise any alternative ground based on the pleadings in the court below which would support the judgment here."). Rather, "[a]n appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below." *Hickox v. Holleman,* 502 So.2d 626, 635 (Miss.1987).

SUMMARY OF THE ARGUMENT

The primary legal issue is whether the trial court abused its discretion in excluding the testimony of Plaintiff's expert, Dr. Barry Levy. Dr. Levy's testimony was Plaintiff's only evidence that his damages were caused by exposure to benzene. Dr. Levy's opinion that Plaintiff's form of lymphoma is caused by exposure to benzene is a view that is uniquely Dr.

Levy's within the medical community. The trial court correctly found that Dr. Levy's opinions were unsupported by medical evidence, and therefore scientifically unreliable.

Plaintiff cannot show on appeal that the trial court abused its discretion in excluding Dr. Levy's testimony. Instead, Plaintiff seeks to rewrite the history of this case. Plaintiff now claims that the injury at the basis of his claim was not his lymphoma, but pancytopenia, a precursor to Plaintiff's form of cancer. Thus, Plaintiff claims that even if the trial court correctly excluded Dr. Levy's causation testimony as to Plaintiff's lymphoma, the jury's verdict should stand based on Dr. Levy's testimony that Plaintiff's pancytopenia was also caused by benzene exposure.

Plaintiff's argument on this point is without merit. Contrary to Plaintiff's assertions, the trial court did not merely strike some of Dr. Levy's opinions, but excluded Dr. Levy's causation testimony in its entirety. The trial court did not abuse its discretion in doing so. Dr. Levy's opinion on the cause of Plaintiff's pancytopenia was nothing more than an unsupported declaration. Plaintiff offered no scientific studies or other medical evidence to back Dr. Levy's opinion. Dr. Levy's testimony regarding the cause of Plaintiff's illness – whether pancytopenia or lymphoma – failed to meet the standard for admissibility of expert testimony, and the Court did not abuse its discretion in excluding Dr. Levy's testimony in its entirety.

Even if Plaintiff could establish that the trial court abused its discretion in excluding Dr. Levy's testimony, reversal is still inappropriate. The trial court's grant of judgment in Defendants' favor notwithstanding the jury's verdict is supported by multiple other grounds. First, the Plaintiff's claims are barred by the applicable statute of limitations because he failed to file his complaint within three years of his diagnosis with a latent disease.

Second, Plaintiff's claims are barred by the FHSA, which preempts Plaintiff's claims. Moreover, RSC was required by federal law to label Liquid Wrench according to the strict

requirements of the FHSA, and RSC followed these requirements. Because federal law required RSC to label Liquid Wrench as it did, any additional warning Plaintiff claims U.S. Steel should have supplied would not have changed the final product label. Thus, Plaintiff's failure to warn claim against U.S. Steel fails for lack of causation.

Third, Plaintiff failed to prove the elements of a claim against U.S. Steel under the Mississippi Products Liability Act. U.S. Steel, as a supplier of a component ingredient in the final product Plaintiff used, had no duty or opportunity to warn the Plaintiff of any dangers associated with Liquid Wrench. U.S. Steel could not have requested RSC to vary the label of benzene-containing Liquid Wrench from the federally-mandated warning. Finally, raffinate, the "product" made by U.S. Steel, is a naturally-occurring chemical. As such, no alternative design for raffinate exists.

ARGUMENT

I. The Trial Court Acted Within its Discretion in Striking All Testimony of Dr. Levy.

The admissibility of expert opinions is governed by Rule 702 of the Mississippi Rules of Evidence, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. The party offering the testimony bears the burden of establishing that the testimony meets all standards of admissibility. *Webb v. Braswell*, 930 So. 2d 387, 397 (Miss. 2006). Rule 702 was amended in 2003 "to clarify the gate keeping responsibilities of the court in

evaluating the admissibility of expert testimony." Miss. R. Evid. 702 cmt. Thus, the trial judge must ensure that "expert testimony is relevant and reliable." *Id.*

Plaintiff claims the trial court excluded only a portion of Dr. Levy's trial testimony. In fact, the trial court held that all of Dr. Levy's testimony should have been excluded:

> The expert testimony offered by Plaintiff on the issue of medical causation should have been excluded as not scientifically reliable. Because that expert testimony was the only evidence Plaintiff offered in support of the medical causation element of his claim, Defendants are entitled to judgment notwithstanding the verdict as a matter of law.

R. at 2488. Thus, the trial court properly excluded *the entirety* of Dr. Levy's testimony as none of his opinions met the standards of scientific reliability required by the Mississippi Rules of Evidence.[5]

The bulk of the trial court's order granting Defendants' post-trial motions concentrates on Dr. Levy's opinion that Plaintiff's small cell lymphocytic lymphoma was caused by exposure to benzene. *Id.* The trial court's focus on this portion of Dr. Levy's testimony is logical, as it was the primary thrust of Dr. Levy's testimony and of Plaintiff's case at trial. Dr. Levy's last-minute opinion that Plaintiff's pancytopenia was also caused by benzene exposure was nothing more than an unsupported assertion, offered as an afterthought.

Plaintiff did not disclose prior to trial that Dr. Levy intended to offer an opinion on the cause of Plaintiff's pancytopenia.[6] R. at 353, 1387. The trial transcript reflects that the heart of Plaintiff's case at trial was the Plaintiff's cancer diagnosis. During the trial, the word "cancer"

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[5] Other courts have reached the same conclusion and excluded Dr. Levy's testimony. *See Knight v. Kirby Inland Marine, Inc.*, 363 F. Supp. 2d 859, 864-866 (N.D. Miss. 2005) (rejecting as scientifically unreliable Dr. Levy's testimony that benzene exposure caused plaintiff's Hodgkin's Lymphoma and bladder cancer, and describing Dr. Levy's opinion as "precisely the kind of testimony *Daubert* was intended to avoid"); *see also In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 611-616 (S.D. Tex. 2005); *Rivas v. Monsanto*, No. G-96-493 (S.D. Tex. 2005).

[6] In fact, Dr. Levy did not *once* utter the word "pancytopenia" during his pretrial deposition. Appellee RSC's Record Excerpts at Ex. B.

But even Dr. Levy's new theory regarding pancytopenia is unsupported, and thus the trial court also acted within its discretion in excluding Dr. Levy's opinion that Plaintiff's pancytopenia was caused by exposure to benzene. Dr. Levy's trial testimony on this issue was merely an unsupported assertion with no underlying medical proof. Tr. 565. Dr. Levy did not refer to a single epidemiological study or other piece of underlying evidence to support this opinion. *Id.* He did not state what underlying facts or data he relied upon in forming his opinion. He did not state what amount of benzene exposure can cause pancytopenia, or whether the dose of benzene exposure Plaintiff experienced was sufficient to indicate a causal connection between Plaintiff's exposure and his pancytopenia diagnosis. *Id.* Dr. Levy did not reveal what methodology he used to reach this opinion, or how he applied any methodology to the facts of Plaintiff's case. *Id.* In short, Dr. Levy's opinion that Plaintiff's pancytopenia was caused by exposure to benzene fails to meet not only the minimal standards of scientific reliability required by the Mississippi Rules of Evidence, but also the standard for expert testimony imposed by *Daubert*. *See* Miss. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Plaintiff bore the burden to establish that Dr. Levy's opinion on this issue met the standards of admissibility for expert testimony. *Webb*, 930 So. 2d at 397. He failed to do so.

Plaintiff claims in his brief that the Defendants did not challenge Dr. Levy's opinion that benzene caused Plaintiff's pancytopenia. Brief of Appellant at 10-13. This assertion is simply incorrect. The Defendants moved to strike Dr. Levy's testimony in its entirety, both pre-trial, during trial, and post-trial.[8] R. 1521, 1530; Tr. 557-58; R. 2256. As U.S. Steel stated in support of its motion for judgment notwithstanding the verdict:

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[8] Of course, the defendants' pre-trial motion to strike Dr. Levy's testimony does not specifically mention Dr. Levy's opinion regarding pancytopenia, because Plaintiff did not disclose that opinion prior to trial. R. at 1388 (Levy affidavit stating he was "employed by plaintiff's counsel in this case to determine whether or not Milton Watts' *non-Hodgkin's lymphoma* was due to his occupational exposure to Liquid Wrench") (emphasis added).

> Plaintiff offers no support for the statement that "the conclusion that benzene exposure causes pancytopenia is widely accepted in the medical, scientific and occupational hygiene communities." Without the proper epidemiological support, which defendants have already shown to be sorely lacking, Dr. Levy's testimony to this conclusion was scientifically unreliable. Again, contrary to Plaintiff's suggestion, defendants were not required to "disprove" this statement (although they have), other than to show, as defendants have done, that Dr. Levy had no basis for testifying to such a conclusion in the first place, and therefore should not have been permitted to testify to it before the jury.

R. 2451-52. The trial court considered Defendants' objections to *all* of Dr. Levy's testimony in reaching its decision, and acted within its discretion in striking Dr. Levy's testimony in its entirety.

As Dr. Levy's testimony was the only evidence of causation that Plaintiff offered at trial, the trial court correctly granted judgment in Defendants' favor notwithstanding the verdict after striking Dr. Levy's testimony. This Court should affirm the trial court's ruling.

II. Plaintiff's Claims are Barred by the Statute of Limitations.

Even if the Court finds the trial court abused its discretion in excluding Dr. Levy's testimony and granting judgment to Defendants on that basis, alternative grounds support affirmance of the trial court's result. All of Plaintiff's claims are time-barred, and judgment for the Defendants should be upheld on that basis alone.

The statute of limitations applicable to Plaintiff's claims is Miss. Code Ann. § 15-1-49 which provides, in relevant part:

> (1) All actions for which no other period of limitations is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitations is prescribed and which involve latent injury or disease, the cause of action does not accrue *until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.*

Miss. Code Ann. § 15-1-49. Under this statute, the latest date on which Plaintiff could have filed his claims is three years after he *discovered his injury. Id.*

Plaintiff was first diagnosed with a blood disease in June 1998, and was specifically diagnosed with small cell lymphocytic lymphoma in March 1999. At that time, Plaintiff was indisputably aware of the injury or disease which is the basis of this litigation. Therefore, his cause of action accrued, *at the latest*, in March 1999. Plaintiff filed the Complaint in this action on October 11, 2002 – three years and six months after the latest possible date that his cause of action accrued. Because this lawsuit was filed more than three years after the date on which Plaintiff learned he had been diagnosed with small cell lymphocytic lymphoma, Plaintiff's claims are barred by the explicit language of the statute.

Plaintiff admits he failed to file his claim within three years of his diagnosis. However, Plaintiff claims that the discovery rule contained in § 15-1-49(2) tolls the operation of the three-year statute of limitations applicable to his claims until he not only discovered his injury, but until he "discovered" the alleged cause and identified an alleged causal relationship between his injury and the actions of Defendants. *See* Appellant's Brief at 29.

Plaintiff's argument that his claim survives the bar of the statute of limitations is based on the fallacy that the discovery rules for all statutes of limitations are identical. Plaintiff cites *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 50 (Miss. 2005) for the proposition that under § 15-1-49, his claim did not accrue until he discovered an alleged causal connection between Defendants' actions and his cancer. In *Lowery*, the Court was not faced with the issue of whether the discovery rule in § 15-1-49 tolls the running of the statute until the plaintiff discovers both an injury and the alleged cause. Rather, the dispute in *Lowery* was whether the discovery rule applied to the plaintiff's non-latent injury. *Lowery*, 909 So. 2d at 50. The *Lowery* Court discussed the discovery rule's application to the various limitations periods in the Mississippi Code. *Id.* The section from *Lowery* on which Plaintiff relies is a quote from *Sweeney v. Preston,* 642 So. 2d 332, 334 (Miss. 1994), a medical malpractice case. *Id.* As

discussed below, the Mississippi Legislature has drafted different discovery and accrual rules for the various limitations periods in the Mississippi Code. To the extent *Lowery* can be read to equate the discovery rule found in the medical malpractice statute of limitations with the discovery rule found in §15-1-49(2), that holding would be inconsistent with this Court's prior precedent and the clear wording of §15-1-49(2).

In fact, the Mississippi Legislature and the Mississippi Supreme Court have clearly rejected this proposition and established that the discovery rule in the general statute of limitations in § 15-1-49, unlike the discovery rules applicable to other limitations periods in the Mississippi Code, tolls the statutory period *only* until the plaintiff discovered, or should have discovered, his *injury*. Discovery of the alleged cause of the injury is irrelevant. *See* Miss. Code Ann. § 15-1-49(2); *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990); *accord Pollard v. Sherwin-Williams Co.*, 2005 WL 2141454, No. 2003-CA-02030-COA, at *4 (Miss. Ct. App. 2005) ("[T]he accrual date for a cause of action [arises] on the date the illnesses [are] *diagnosed* by a doctor.") (emphasis added) (*citing* Miss. Code Ann. § 15-1-49).

The operative date for accrual is different under other statutes of limitations in the Mississippi Code. Unlike the general statute of limitations applicable here, the medical malpractice statute of limitations is tolled until "the date *the alleged act, omission or neglect* shall or with reasonable diligence might have been first known or discovered." Miss. Code Ann. § 15-1-36 (2) (emphasis added). Similarly, claims accrue under the Mississippi Tort Claims Act statute of limitations based on "the date of the tortious, wrongful or otherwise actionable *conduct*." Miss. Code Ann. § 11-46-11(3) (emphasis added). In drafting the statutes of limitation governing claims of medical malpractice and governmental liability, the Mississippi Legislature intentionally prescribed different triggers for accrual under these shorter limitations

periods.[9] This Court's decisions interpreting these other statutes reflect the different accrual standards that apply:

- *Sarris v. Smith*, 782 So. 2d 721 (Miss. 2001) (interpreting Miss. Code Ann. § 15-1-36, the two-year statute of limitations applicable to medical malpractice claims);
- *Williams v. Kilgore*, 618 So. 2d 51, 53, 55 (Miss. 1993) (interpreting medical malpractice action governed by "the more liberal" § 15-1-36, but acknowledging that § 15-1-49, by contrast, is triggered "when the plaintiff can reasonably be held to have knowledge of the *injury or disease*") (emphasis added);
- *Punzo v. Jackson County*, 861 So. 2d 340 (Miss. 2003) (interpreting Miss. Code Ann. § 11-46-11, the one-year statute of limitations applicable to claims against a state entity under the Mississippi Tort Claims Act).

The language of these other statutes focuses on the acts of the defendant; in contrast, the controlling statute here turns on the date the "*plaintiff discovered*, or by reasonable diligence should have discovered, *the injury*." Miss. Code Ann. § 15-1-49(2) (emphasis added). In no uncertain terms, the general statute of limitations makes the date of the plaintiff's discovery of his injury the operative date for running of the statute of limitations. Under § 15-1-49, neither knowledge of a specific defendant's acts nor knowledge of a connection between the defendant's acts and the injury is required to start the running of the statute.

This Court has discussed the important distinction between the statute of limitations at issue in the instant case, as opposed to other limitations periods in the Mississippi Code. The Court has plainly stated that a plaintiff's product liability claims involving a latent injury or

[9] In a recent opinion interpreting the medical malpractice statute of limitations, this Court highlighted the different accrual standards and discovery rules that apply to different statutes of limitations. *See Sutherland v. Ritter*, 2007 Miss. LEXIS 226 (Miss. 2007).

disease accrue on the date the plaintiff *is diagnosed*, even though the plaintiff may not know of the alleged causal connection between his injuries and the defendants' acts until a later time. *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990). The *Edwards* Court held the plaintiff's claims to be time-barred since he failed to file his claim within three years of his diagnosis, stating:

> The cause of action accrues and the limitation period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease. In the case at bar, that date is August 26, 1986, the date Charles Edwards was diagnosed with asbestosis. Though the cause of the injury and the causative relationship between the injury and the injurious act may also be ascertainable on this date, *these factors are not applicable under § 15-1-49(2) as they are under Miss. Code Ann. § 15-1-36.*

Id. at 709 (emphasis added). Thus, in its holding in *Edwards*, considering the latent disease of asbestosis, the Mississippi Supreme Court clearly held that the factors affecting the date a statute of limitations begins to run are different for the various limitations periods found elsewhere in the Mississippi Code. The *Edwards* Court also made it abundantly clear that, while the date a plaintiff learns of a causal relationship between the act of a defendant and his injury may be a relevant inquiry under some statutes of limitations, it is simply not a factor under Miss. Code Ann. § 15-1-49. Under § 15-1-49, the statute of limitations that controls in the instant litigation, the date a plaintiff is diagnosed with a disease is the *only* date that matters under the discovery rule. Therefore, Plaintiff's claims in this action accrued in March 1999, and Plaintiff was required to file his claims before March 2003. He failed to do so.

The Southern District of Mississippi followed this Court's holding in *Edwards* in two similar benzene exposure cases. *Wells v. Radiator Specialty Company, et al.*, 413 F.Supp.2d 778, 782-83 (S.D. Miss. 2006); *Fowler v. First Chemical Corporation, et al.*, 2006 WL 2527317 at *2 (S.D. Miss. 2006) ("The Mississippi Supreme Court has clearly held that a cause of action based on latent injuries accrues on the date of diagnosis."). In *Wells*, the plaintiff's decedent was

diagnosed with acute myelogenous leukemia (AML) on November 3, 2000. *Wells,* 413 F.Supp.2d at 779. The plaintiff failed to file her claims until October 22, 2004, nearly four years later. *Id.* Like Plaintiff here, the *Wells* plaintiff attempted to avoid the operation of the three-year statute of limitations by arguing that the statute of limitations was tolled until she allegedly discovered that the *cause* of the decedent's AML was his exposure to benzene. *Id.* at 781. The *Wells* court rejected this argument:

> There is no dispute as to when Mr. Wells was diagnosed with AML, November 3, 2000. The plaintiff's argument that the causative relationship of the disease and the decedent's alleged occupational exposure to benzene was not known at that time cannot carry the day in light of *Owens-Illinois'* holding that causative knowledge is not applicable under § 15-1-49.
>
> The Mississippi Legislature has established a three year window of opportunity for the discovery of any relationship between an injury and its cause by way of [§ 15-1-49]. The Legislature has determined that three years is an adequate time to discover a relationship between an injury and its cause and that suit beyond that period should not be allowed. That is peculiarly a legislative function upon which courts should not intrude.

Id. at 783.[10]

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[10] A review of the history and purpose of the discovery rule in § 15-1-49(2) compels this interpretation. In its first incarnation, dating back to 1880, Mississippi's general statute of limitations did not include a discovery rule:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-49 (1972); Miss. Code Ann. § 722 (1956); *see also Ford Motor Co. v. Broadway,* 374 So. 2d 207, 208 (Miss. 1979). The Mississippi Supreme Court interpreted this statute strictly, holding that a cause of action "accrued" on the date of the alleged wrongful act or omission, regardless of when the injury occurred. *M.T. Reed Construction Co. v. Jackson Plating Co.*, 222 So. 2d 838, 840 (Miss. 1969) (declining to adopt discovery rule as "no exception has been engrafted upon our statute which would take into consideration the ignorance of an individual"); *see also Kilgore v. Barnes*, 508 So. 2d 1042, 1044 (Miss. 1987) ("If this action were governed by our general, catch-all statute of limitations, Miss. Code Ann. § 15-1-49 (1972), we would hold it barred. Under that statute, we have heretofore held that claims accrue and the clock begins to tick on the date of the wrongful act complained of.") However, in the case of latent diseases that may develop many years after the alleged wrongful acts, this rule worked an injustice. *See Edwards*, 573 So. 2d at 708 ("In the context of a latent disease cause of action, it would be illogical to equate the time of the wrongful act or omission, in this case the last exposure to the allegedly harmful or defective product, with the time of the injury.")

In the case at hand, the discovery rule in § 15-1-49(2) tolled the statute of limitations governing Plaintiff's claim for more than 20 years from the time of his last exposure in 1978 until the diagnosis of his injury in 1999. After his injury was diagnosed, Plaintiff bore the burden, like any plaintiff, to investigate and file his claim within the three-year statutory period. Because he failed to do so, Plaintiff's claims are time-barred as a matter of law. Therefore, even if the Court finds the trial court erred in excluding the testimony of Dr. Levy, the judgment in Defendants' favor notwithstanding the verdict should be affirmed.

III. Plaintiff's Failure to Warn Claims are Completely Preempted by the FHSA.

A. The FHSA Imposes Mandatory Labeling Requirements Which Apply to Liquid Wrench.

The FHSA, 15 U.S.C. §§ 1261-1278, was enacted in 1960 to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." H.R. Rep. No. 1861 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833, 2833. The FHSA imposes mandatory labeling requirements for "hazardous substances which are sold in interstate commerce and are intended or suitable for household use." H.R. Rep. No. 1861 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2833. Any "toxic" substance, defined as a substance having "the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface," is a hazardous substance subject to the FHSA. 15 U.S.C. § 1261(g).

To eliminate harsh results in cases of latent diseases, the Mississippi Legislature amended § 15-1-49 in 1990 to include a discovery rule tolling the limitations period until the plaintiff knew or should have known of the injury or disease. Miss. Code Ann. § 15-1-49(2). This amendment eliminated the disadvantage of plaintiffs whose injuries involve long latency periods and placed plaintiffs with latent injuries in the same footing as all other plaintiffs: once an injury is apparent, the burden is on the plaintiff to investigate and file any possible claims within the limitations period. *See Wright v. Quesnal*, 876 So. 362, 367 (Miss. 2004); *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 1001 (Miss. 2004). The discovery rule in § 15-1-49(2) achieves the ultimate purpose of any limitations period, "strik[ing] a balance between the necessity of providing the consumer with adequate time within which to discover a defect and institute a claim, and the need to provide the manufacturer with a definite period of liability and a date on which his exposure to suit ends." *Ford Motor Co. v. Broadway*, 374 So. 2d 207, 209 (Miss. 1979).

Congress empowered the Consumer Product Safety Commission ("the CPSC") to establish regulations governing the information to be provided on hazardous substance product labels to protect the public's health and safety. The CPSC has determined that products containing five percent or more by weight of benzene, like the raffinate-formula Liquid Wrench, are "special hazards" subject to supplemental labeling requirements deemed necessary for the adequate protection of the public health. 16 C.F.R. § 1500.14(a)(3), (b)(3). Because the raffinate-formula Liquid Wrench potentially contains more than five percent benzene (*see* P.Ex. 28; Tr. 754), it is statutorily a "hazardous substance" within the meaning of the FHSA.

Additionally, the FHSA's labeling requirements are addressed to hazardous substances "intended, or packaged in a form suitable, for use in the household . . . ." 15 U.S.C. § 1261(p). Federal regulations promulgated under the FHSA supplement that provision by defining it to mean:

> any hazardous substance, whether or not packaged, that under the customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed including, but not limited to, a garage, carport, barn, or storage shed. The term includes articles, such as polishes or cleaners, designed primarily for professional use but which are also available in retail stores . . . . Size of unit or container is not the only index of whether the article is suitable for use in or around the household; *the test shall be whether under any reasonably foreseeable condition of purchase, storage or use the article may be found in or around a dwelling.*

16 C.F.R. § 1500.3(c)(10)(i) (emphasis added); *see Canty v. Ever-Last Supply Co.*, 685 A.2d 1365, 1370 (N.J. Super. Ct. Law Div. 1996) ("Under the appropriate test, the focus is whether the product, through its normal distribution scheme, is made available to the ordinary consumer"); *see also, Pennsylvania Gen. Ins. Co. v. Landis*, 96 F. Supp. 2d 408, 412 (D.N.J. 2000), *aff'd*, 248 F.3d 1131, 2000 U.S. App. LEXIS 31820 (3d Cir. 2000) (TABLE) (lacquer

thinner used by professional in furniture finishing business fell within purview of FHSA where product was available for purchase by the general public in retail stores). Liquid Wrench was available for sale in retail stores, and was available for purchase by the general public. Accordingly, Liquid Wrench is subject to the mandatory labeling requirements of the FHSA.

B. At All Times Relevant To The Claims Against U.S. Steel, The Liquid Wrench Label Complied With The FHSA's Mandatory Labeling Requirements.

15 U.S.C. § 1261(p)(1) requires the following cautionary labeling for all substances defined as hazardous under the FHSA:

> (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Secretary by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable," "Vapor Harmful," "Causes Burns," "Absorbed Through Skin," or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary pursuant to section 3; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h); (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement "Keep out of the reach of children", or its practical equivalent . . . .

15 U.S.C. § 1261(p)(1). These labeling requirements must appear in English and be prominently placed on the label. 15 U.S.C. § 1261(p)(2). In addition, they must be stated conspicuously, meaning they must be "in contrast by typography, layout, or color with other printed matter on the label." *Id.*

Furthermore, if the CPSC finds that the labeling required by 15 U.S.C. § 1261(p) is inadequate to protect public health and safety, it has the authority to promulgate additional requirements specific to a particular hazardous substance. 15 U.S.C. § 1262(b).

In 1964, the CPSC promulgated regulations imposing additional **benzene-specific** requirements to all products containing five percent or more by weight of benzene. *See* 26 Fed. Reg. 1802-03 (Feb. 6, 1964) (codified at 16 C.F.R. § 1500.14(a)(3)). These regulations were intended to provide "specific label statements . . . deemed necessary to supplement the labeling required by section [1261(p)(1)] of the act" for protection of the public health. 16 C.F.R. § 1500.14(b). The regulations dictate that the following specific language must be included on a product's label to provide an adequate warning of the human health effects of exposure to benzene:

> [P]roducts containing 5 percent or more by weight of benzene shall be labeled with the signal word "**danger**," the statement of hazard "**Vapor harmful**," and the word "**poison**," and the **skull and crossbones symbol**. If the product contains 10 percent or more by weight of benzene, it shall bear the additional statement of hazard "Harmful or fatal if swallowed" and the additional statement "Call physician immediately."

16 C.F.R. § 1500.14(b)(3)(i) (emphasis added). Because the raffinate-formula of Liquid Wrench potentially contains over five percent by weight of benzene, these additional benzene-specific regulations are applicable to Liquid Wrench.

Together with the FHSA's primary labeling instructions, these benzene-specific regulations dictate the label's form and content, including warnings, instructions for use, the specific statement of principal hazard, and all the information required to be included on the Liquid Wrench labels. Therefore, in determining whether the label complies with the FHSA, all that is needed is to compare the language on the label with the requirements set forth in the FHSA. *See Moss v. Parks Corp.*, 985 F.2d 736, 740 (4th Cir. 1993)(granting summary judgment

on finding that label complied with FHSA as a matter of law); *Kirstein v. W.M. Barr & Co., Inc.*, 983 F. Supp. 753, 761 (N.D. Ill. 1997), *aff'd*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999)(label complied with FHSA as a matter of law); *Landis*, 96 F. Supp. 2d at 414 (as a matter of law, label on lacquer thinner complied with FHSA).

A comparison of RSC's label on the raffinate-formula Liquid Wrench with the requirements set forth above conclusively establishes that, as a matter of law, the warnings provided on the Liquid Wrench label fully complied with these general and benzene-specific labeling requirements at all relevant times:

1. The label features the name and business address of Radiator;
2. Following the word "CAUTION" in red type, the label identifies the product as containing benzol or petroleum distallates;[11]
3. The label prominently displays the words "DANGER" and "POISON" on the primary panel of the Liquid Wrench can;
4. Skull and crossbones symbols appear on the primary panel of the Liquid Wrench can;
5. The label identifies the principal hazards of the product by displaying the words and phrases "FLAMMABLE," "VAPOR HARMFUL," and "HARMFUL OR FATAL IF SWALLOWED";
6. Following the word "CAUTION" in red type, the label recites the relevant precautionary measures, including, in addition to the aforementioned warnings, "Use only with adequate ventilation. Avoid prolonged or repeated breathing of vapor and contact with skin. Harmful if ingested. Keep out of reach of children."; and
7. The label provides first aid instructions under the heading "FIRST AID" in red type, including, but not limited to, "Call physician immediately!" and "If swallowed, do not induce vomiting."

D.USS Ex. 7-14; P. Ex. 15.[12] Further, in compliance with the additional benzene-specific regulations, the Liquid Wrench label contains the mandatory language identifying the principal

[11] "Benzol" is a synonym for "benzene." *See* WEBSTER'S II NEW COLLEGE DICTIONARY, Houghton Mifflin Company, Boston, 1999, p. 103.

hazards of the product by displaying the words and phrases "VAPOR HARMFUL" and "HARMFUL OR FATAL IF SWALLOWED." *Id.* Additionally, the label prominently displays the signal words "DANGER" and "POISON" and displays the skull and crossbones symbol. *Id.* Finally, the label directs the user to "Call physician immediately!" if swallowed. *Id.*

C. Compliance With The FHSA And The Regulations Promulgated Thereunder Establishes That The Liquid Wrench Warnings Were Adequate As A Matter Of Law.

Once a product like Liquid Wrench is classified as a hazardous substance, its label must conform identically with the labeling requirements set forth in the FHSA and its accompanying regulations. Otherwise, it is deemed a "misbranded hazardous substance," and the introduction of that substance into interstate commerce is prohibited. *See* 15 U.S.C. §§ 1261(p), 1263(a) (a "misbranded hazardous substance" is defined as a hazardous substance "intended, or packaged in a form suitable, for use in the household or by children, if the packaging or labeling of such substance . . . fails to bear a label containing the information required by the Act"); 15 U.S.C. § 1264 (failure to comply with labeling requirements is a statutory violation, punishable by civil and criminal penalties).

Indeed, because the FHSA mandates the specific form and content of the statements to be disseminated with a hazardous substance like Liquid Wrench, a manufacturer lacks *any* discretion in deciding whether to include particular warnings, instructions, or directions for use on its product's label. For RSC to vary, add or delete language from the Liquid Wrench label would defeat the uniform labeling goals of the FHSA, and make Liquid Wrench a "misbranded hazardous substance." Accordingly, a product whose label complies with the FHSA provides

[12] Although the implementing regulations now provide type-size requirements for cautionary labeling under the FHSA, those requirements were not implemented until 1985. 16 C.F.R. § 1500.121(h). Because U.S. Steel stopped selling raffinate to Radiator in 1978, type-size requirements enacted seven years later in 1985 are irrelevant to determining compliance with the FHSA requirements here.

warnings adequate, under both federal and state law, to protect the consumer. *See Torres-Rios v. LPS Lab.*, 152 F.3d 11, 11 (1st Cir. 1998) (product could not be found unreasonably dangerous by a jury given its FHSA-compliant label, which provided adequate warnings as a matter of law). Considerations about what other information *might have been* provided are thus irrelevant. *See Id.* ("Disagreement over the adequacy or sufficiency of the information provided on a label does not necessarily raise material issues of fact as to compliance. What matters is whether the label satisfies the requirements of the FHSA, not whether a label defines every phrase and addresses every hazard") (quoting *Canty*, 685 A.2d at 1377); *Landis*, 96 F. Supp. 2d at 414 ("the case law holds that an analysis of compliance with the requirements of the federal statute is based on the statutory language and the promulgations of the CPSC").

D. The FHSA Expressly Preempts Any State Law Damages Claim Challenging The Adequacy Of FHSA-Compliant Warnings For Hazardous Substances.

To further the goal of enforcing nationally uniform labeling requirements, Congress has expressly stated that the FHSA preempts state law in the area of hazardous substances labeling. The primary provision states:

> [I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. §§ 1261(p) or 1262(b)] designed to protect against a risk of illness or injury associated with the substance, *no State . . . may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).*

15 U.S.C. §1261, note (b)(1)(A) (emphasis added). In *Cipollone v. Liggett Group*, the United States Supreme Court held that the term "requirements" includes state law tort actions for

damages. *Cipollone v. Liggett Group*, 505 U.S. 504, 522 (1992).[13] Since *Cipollone*, federal and state courts addressing the scope of preemption under the FHSA, including this Court, have universally held that the FHSA expressly preempts state law tort claims, like Plaintiff's claims in this case, seeking to impose more elaborate or additional labeling requirements than those mandated by the FHSA and its implementing regulations. *Pollard v. Sherwin Williams Co.*, 955 So. 2d 764, 774 (Miss. 2007) (holding that claims for failure to warn after the effective date of the FHSA preemption provision are preempted); *see also, e.g., Comeaux v. Nat'l Tea Co.*, 81 F.3d 42, 44 (5th Cir. 1996) (per curiam) (claims under state product liability act preempted); *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 109 (2d Cir. 2001) (holding that claims for breach of warranty, strict products liability, and negligence seeking to impose additional or more elaborate labeling requirements were preempted by the FHSA); *Moss*, 985 F.2d at 740 (concluding that "a common law tort action based upon a failure to warn may only be brought for noncompliance with existing federal labeling requirements"); *West v. Mattel, Inc.*, 246 F. Supp. 2d 640, 644 (S.D. Tex. 2003) ("[A]ny positive enactment or common-law claim that is predicated upon a theory that [defendant manufacturer's] warning label . . . is inadequate is preempted because it would require a Court to enforce a requirement that was not identical to [those provided by the FHSA]"); *Landis*, 96 F. Supp. 2d at 414-15; *Kirstein*, 983 F. Supp. at 761. The courts of other states have agreed.[14]

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[13] In *Cipollone*, the Supreme Court addressed a similar preemption provision under the Public Health Cigarette Smoking Act of 1969. The specific language of the preemption provision in that statute stated, "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at 522; 15 U.S.C. § 1334(b) (1982).

[14] *E.g., Gurrieri v. William Zinsser & Co.*, 728 A.2d 832 (N.J. Super. Ct. App. 1999); *Runningen v. Am. Empire Surplus Lines Ins. Co.*, 592 N.W.2d 319 (Wis. Ct. App. 1999); *Lopez v. Hernandez*, 676 N.Y.S.2d 613 (N.Y. App. Div. 1998); *People ex rel. Lungren v. Cotter & Co.*, 62 Cal. Rptr. 2d 368 (Cal. Ct. App. 1997); *Busch v. Graphic Color Corp.*, 662 N.E.2d 397 (Ill. 1996); *Canty*, 685 A.2d 1365 ; *Salazar v.*

When determining whether a particular state law tort claim is subject to preemption under the FHSA, it is not necessary for the claim to explicitly challenge the adequacy of the product's label. *See Miles v. S.C. Johnson & Sons*, 2002 WL 31655188, CCH Prod. Liab. Rep. P16,455 (N.D. Ill. 2002) (breach of implied warranty of merchantability and strict liability claims preempted because success on those claims would impose different requirements than those mandated by the FHSA). Rather, the proper inquiry in any preemption analysis calls for an examination of the elements of the common-law duty at issue. *Bates v. Dow Agrosciences*, 544 U.S. 431, 445, 125 S. Ct. 1788, 1799 (2005) (discussing preemption under FIFRA); *Cipollone*, 505 U.S. at 524 (discussing preemption under cigarette labeling law). It is well-established that claims challenging the adequacy of warnings and other instructional information provided to the consumer likewise seek to impose cautionary labeling requirements and, as such, are preempted when they seek to impose requirements different from those imposed under the FHSA. *Moss*, 985 F.2d at 740; *Comeaux*, 81 F.3d at 42; *Kirstein*, 983 F. Supp. at 760.

Accordingly, under the FHSA, it is easy to tell if a claim is preempted: if it challenges the adequacy of warnings and other instructional information provided to a hazardous substance user, and the label itself complies with FHSA cautionary labeling requirements, then the claim necessarily seeks to impose non-identical labeling requirements and, as such, is preempted.

E. Plaintiff's Claims Challenge The Adequacy Of Warnings Or Other Instructional Information Provided For Liquid Wrench, And Are Therefore Preempted By The FHSA.

Plaintiff acknowledges this Court's holding in *Pollard* that post-1966 claims for failure to warn are preempted. Brief of Appellant at 30; *see also Pollard*, 955 So. 2d at 774 (Miss. 2007). In an attempt to avoid the preemptive effect of the FHSA, Plaintiff relies on the Court's holding

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Whink Prods. Co., 881 P.2d 431 (Colo. Ct. App. 1994); *State ex rel. Jones Chems. v. Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994); *Jenkins v. James B. Day & Co.*, 634 N.E.2d 998 (Ohio 1994).

in *Pollard* that pre-1966 claims for failure to warn, and post-1966 claims alleging noncompliance with the FHSA, are not preempted. Brief of Appellant at 30. Plaintiff claims that he "brought suit on pre-1966 theories, and for post-1966 theories not [sic] based on a claim of non-compliance with the FHSA." *Id.* Plaintiff again attempts to rewrite the history of his case with this inaccurate statement.

Plaintiff points to no evidence in the record that his failure to warn claim was limited to his use of the product before 1966. Nor does he cite any evidence in the record that his claims were based on post-1966 noncompliance with the FHSA. To the contrary, the entire record – from Plaintiff's initial pleading to the instructions given to the jury – reveals that Plaintiff claimed Liquid Wrench's warnings were inadequate throughout the years he used the product. His failure to warn claim was not limited in time or scope to his use of the product before 1966. *See, e.g.,* R. 1-13, 3107-09. No expert quantified Plaintiff's exposure to benzene prior to 1966 or opined that Plaintiff's exposure to benzene prior to 1966 was sufficient to cause his injuries. *See* Tr. 782-836; 558-603. The jury instructions that Plaintiff requested on the failure to warn claim (the trial court granted) are not limited to Plaintiff's use of Liquid Wrench during any specific time period. R. at 3107-09. Further, Plaintiff requested no jury instruction outlining the elements of his supposed claim for noncompliance with the FHSA. Contrary to Plaintiff's assertions, his claims at trial were not limited to the narrow constraints of the FHSA and this Court's ruling in *Pollard.* Rather, they were precisely the types of claims preempted by the FHSA: they were failure to warn claims seeking to impose a state law requirement on the warning label of a FHSA-controlled product in violation of the statute's provisions.

The trial court submitted Plaintiff's failure to warn claims to the jury in violation of the FHSA's preemption clause. This error provides additional grounds to uphold judgment in the Defendants' favor on Plaintiff's failure to warn claims.

IV. Plaintiff Failed to Prove The Elements of a Claim Against U.S. Steel Under the Mississippi Product Liability Act.

A. Preemption Aside, Plaintiff's Failure to Warn Claim Against U.S. Steel Fails Because the Liquid Wrench Warnings Provided by RSC Were Adequate as a Matter of Law.

Obviously essential to any failure to warn claim is the requirement that Plaintiff demonstrate that the Liquid Wrench warnings were inadequate and that the inadequate warning proximately caused Plaintiff's injuries. *See* Miss. Code Ann. § 11-1-63(a). As discussed above, the FHSA mandated warnings to be provided with Liquid Wrench. As a matter of indisputable fact, the warnings RSC provided with Liquid Wrench complied with the FHSA mandates. Thus, whether or not the claims against U.S. Steel are preempted, Plaintiff's warnings claim fails because the warnings he received were adequate as a matter of law.

Further, because the content of the Liquid Wrench label was strictly dictated by federal law, no additional information that Plaintiff claims U.S. Steel should have provided to RSC would have changed the content of the Liquid Wrench warnings. Therefore, Plaintiff cannot prove that U.S. Steel's alleged failure to warn proximately caused Plaintiff's injury. Miss. Code Ann. § 11-1-63(a)(i)(2) and (iii); *see also Austin v. Will-Burt Co.*, 361 F.3d 862, 869-70 (5th Cir. 2004) (holding plaintiff asserting claim of failure to warn under the MPLA "clearly has the burden to prove that the claimed failure to adequately warn was a proximate cause" of the injury); *Wolf v. Stanley Works*, 757 So. 2d 316, 323 (Miss. Ct. App. 2000) (holding plaintiff must present evidence that "desired warning would have had any causative impact" to recover for failure to warn under the MPLA).

As discussed above, the FHSA controls the warnings on the benzene-containing Liquid Wrench product at issue in this case. The FHSA both requires and dictates, by regulation, the specific warnings to be provided if a product, like the raffinate formula of Liquid Wrench, contains more than five percent benzene. 15 U.S.C. § 1261(p); 15 U.S.C. § 1262(b); 16 C.F.R. §

1500.14(b)(3)(i). RSC was therefore required by federal law to label its benzene-containing Liquid Wrench product specifically as directed by these regulations, leaving RSC with no discretion to determine what information should be communicated to Plaintiff in order to provide an adequate warning of the hazards of exposure to RSC's product. As the supplier of a component part of RSC's Liquid Wrench product, U.S. Steel's duty, at most, was to provide RSC with the information necessary for RSC to communicate the FHSA-required warnings to the Plaintiff.[15] U.S. Steel satisfied this duty by advising RSC that its raffinate contained, potentially, five percent or more by weight of benzene, thereby providing RSC with the information necessary for RSC to place the specific warnings directed by the FHSA regulations. P. Ex. 6.

The evidence at trial also revealed that the labels on cans of Liquid Wrench containing raffinate were in complete compliance with these specific, mandatory labeling requirements of the FHSA. Tr. 490. Given that the warnings on Liquid Wrench cans were adequate as a matter of law because of compliance with the FHSA, anything else that U.S. Steel allegedly did or failed to do in providing RSC with information regarding raffinate would not have had any effect on the ultimate, federally-mandated warning Plaintiff received. Therefore, any such alleged action or inaction by U.S. Steel would not be a proximate cause of the Plaintiff's injury.

Further, even if the court were to find that RSC's warnings did not comply with the FHSA, Plaintiff's claims against U.S. Steel still fail. RSC, not U.S. Steel, was charged with meeting the requirements of the FHSA. U.S. Steel had neither the right nor the duty to alter the labels RSC affixed to its product Liquid Wrench. Therefore, any claims for non-compliance

[15] Even if the doctrine of federal preemption did not apply to Plaintiff's claims against U.S. Steel as a component part supplier of a federally regulated hazardous substance, which it does, the fact that the FHSA mandates the required warnings for a benzene-containing product like RSC's raffinate-formula Liquid Wrench nevertheless forecloses Plaintiff's failure to warn claim against U.S. Steel.

with the labeling requirements of the FHSA cannot serve as a basis for liability against U.S. Steel.

As Plaintiff presented no evidence that Liquid Wrench labels would have been any different had U.S. Steel provided additional warnings to RSC about raffinate, Plaintiff cannot prove that any additional warnings would have had any causative impact on Plaintiff's injury. Plaintiff's warnings claim against U.S. Steel therefore fails as a matter of law; judgment in U.S. Steel's favor should be upheld for this additional reason.

B. U.S. Steel Fulfilled Any Duty to Warn Owed By a Component Ingredient Supplier by Notifying RSC that Raffinate Contained Benzene.

As discussed, U.S. Steel had no duty, or opportunity, to warn Plaintiff of any dangers associated with RSC's Liquid Wrench product. But in any event, even if such a duty existed, it discharged its duty to warn the ultimate user of Liquid Wrench by justifiably relying on RSC, a manufacturer of solvents, to be knowledgeable of the dangers associated with its own products and to communicate those dangers to end users of those products. U.S. Steel, the supplier of a component ingredient to a product manufacturer, is in a position similar to that of a bulk seller. Miss. Code Ann. § 11-1-63(h); *see Little v. Liquid Air Corp*, 952 F.2d 841, 850-51 (5th Cir. 1992) (a bulk seller who sells a product to a manufacturer that in turn packages and sells the product to the public may rely on the manufacturer to warn ultimate users of the product of any dangers if the bulk seller ascertains (1) that the distributor to which is sells is adequately trained, (2) that the distributor is familiar with the properties of the product and the safe methods of handling it, and (3) that the distributor is capable of passing this knowledge to the consumer); *Swan v. I.P., Inc.*, 613 So.2d 846, 851 (Miss. 1993) ("[A] manufacturer's duty to warn may be discharged by providing information to a third person upon whom it can reasonably rely to communicate the information to the ultimate users of the product or those who will be exposed to

its hazardous effects.") U.S. Steel notified RSC of the components of raffinate, including that raffinate contained potentially more than five percent benzene. P.Ex. 6; Tr. 408, 490, 1354. By providing this information to RSC, a chemical products manufacturer familiar with chemical properties, U.S. Steel reasonably relied on RSC to warn ultimate users of its products and discharged any legal duty to warn.[16] Plaintiff's failure to warn claim against U.S. Steel therefore fails as a matter of law, and the trial court's judgment in U.S. Steel's favor should be affirmed for this reason also.

C. Plaintiff Failed to Prove the Elements of a Design Defect Claim Against U.S. Steel.

Plaintiff's defective design claim against U.S. Steel also fails as a matter of law. The evidence at trial proved that raffinate is not a product that U.S. Steel designed; rather, raffinate is a by-product that naturally occurs when coal is burned and solvents are extracted from the resultant coal gases. P.Ex. F for ID [Graeber 39-40]. U.S. Steel cannot be held liable for the alleged defective design of raffinate, because U.S. Steel simply did not "design" raffinate, which is a naturally-occurring material. Under the Mississippi Products Liability Act, a manufacturer cannot be held liable for design defect if there existed no feasible design alternative which could have prevented the harm suffered by the plaintiff. Miss. Code Ann. § 11-1-63(f)(ii). U.S. Steel presented uncontroverted evidence at trial that because raffinate is a naturally-occurring chemical, no design alternative exists. P. Ex. F for ID [Graeber 39-40]. Plaintiff offered no evidence to show that a feasible design alternative exists.

In order to sustain a design defect claim against U.S. Steel under the Mississippi Products Liability Act, Plaintiff is also required to prove that the raffinate to which he was exposed

[16] Similarly, as explained above, by advising RSC that raffinate contained more than five percent benzene, U.S. Steel provided RSC with all the information necessary for RSC to pass the federally mandated warnings along to the ultimate user of its raffinate-formula Liquid Wrench product.

reached him without substantial change from the time it left the control of U.S. Steel. Miss. Code Ann. § 11-1-63(f). Plaintiff presented no evidence at trial that he was exposed to pure raffinate produced by U.S. Steel. Rather, Plaintiff claims he was injured because of raffinate that U.S. Steel sold to RSC, which RSC in turn prepared and mixed with other ingredients to form the retail product, Liquid Wrench. U.S. Steel had no control over the formula RSC used for Liquid Wrench or the amount of raffinate RSC incorporated into its product. RSC had complete control over the decision whether and how much raffinate to use in Liquid Wrench. Tr. 1342. As the manufacturer of a component part of a product that allegedly caused an injury, U.S. Steel cannot be held liable for any alleged defects in that product where there was no defect in the component part itself. *See Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger*, 129 Cal. App. 4th 577, 581 (Cal. App. 2004) ("Under the rule of these cases, the manufacturer of a product component or ingredient is not liable for injuries caused by the finished product unless it appears that the component itself was 'defective' when it left the manufacturer"). The raffinate sold by U.S. Steel to RSC was substantially changed after it left U.S. Steel's control. Plaintiff's design defect claim against U.S. Steel therefore fails as a matter of law.[17] The Court's judgment notwithstanding the jury's verdict in U.S. Steel's favor should be affirmed.

V. As the Trial Court Conditionally Granted the Defendants' Motion for New Trial and Reserved Ruling on Other Dispositive Issues, the Relief Requested by Plaintiff is Inappropriate.

Plaintiff requests the Court to reverse the trial court's grant of judgment to Defendants and render judgment in Plaintiff's favor. Appellant's Brief at 33. In making this demand, Plaintiff disregards the full effect of the lower court's ruling.

The trial court's Order on Post-Trial Motions granted Defendants' motions for judgment notwithstanding the verdict, conditionally granted the Defendants' alternative motions for new

[17] Plaintiff did not submit to the jury a manufacturing defect claim under the Mississippi Products Liability Act against any defendant. *See* Miss. Code Ann. § 11-1-63(i)(1)); R. at 2252-2255.

trial, and reserved the right to rule on the other dispositive issues raised by Defendants prior to conducting any new trial:

> **Order Conditionally Granting Motions for New Trial.** Pursuant to MRCP 50(c), the Court also is obliged to rule upon Defendants' motions for new trial. To the extent that the Court's Order granting the motions for judgment notwithstanding the verdict is reversed or vacated on appeal, the Court conditionally grants the motions for new trial; provided, however, that the Court reserves the right to reach the additional issues raised by Defendants (including statute of limitations, pre-emption, and failure to prove defect) in their motions for judgment notwithstanding the verdict, prior to allowing such a new trial to proceed.

R. at 2490. The trial court's conditional grant of Defendants' motion for a new trial was based on "one or more of the following reasons" raised in Defendants' post-trial motions:

> allocation of fault contrary to the weight of the evidence; failure by plaintiffs to present adequate evidence to support the jury's damages award; admission of testimony concerning other information that the Liquid Wrench label could have provided over and above the federally-mandated information; errors in jury instructions; and that the verdict was against the weight of the evidence.

Id.

Plaintiff has not challenged in this appeal the trial court's conditional grant of Defendants' motion for new trial. Further, Plaintiff has not argued here that any of the grounds listed by the trial court in support of its conditional grant of new trial are insufficient to warrant a new trial.

Thus, even if the Court finds that the trial court erred in granting Defendants' motions for judgment notwithstanding the verdict, the order conditionally granting Defendants' motion for new trial stands unchallenged. In the event the Court reverses the trial court's order granting judgment in the Defendants' favor, the order provides that U.S. Steel's motion for a new trial is granted, subject to the other conditions set out in the order. Plaintiff has not appealed from those portions of the trial court's order. Hence, Plaintiff's request that the Court reverse the trial court's ruling and render judgment in his favor is without merit.

CONCLUSION

For the reasons set out above, the trial court's grant of U.S. Steel's Motion for Judgment Notwithstanding the Verdict or, In the Alternative, Motion for New Trial should be affirmed in all respects. U.S. Steel also requests such other relief as the Court may deem proper.

RESPECTFULLY SUBMITTED, this the 18 day of September, 2007.

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CERTIFICATE OF SERVICE

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THIS, the 18 day of September, 2007.

STEPHEN L. THOMAS

AMENDED CERTIFICATE OF SERVICE

I hereby certify that I have on September 20, 2007, served a copy of the foregoing on trial court judge Robert G. Evans by placing same in the United States Mail, first class postage prepaid and properly addressed thereto.

H. Vanna Blanchard

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