INTRODUCTION

Richard Duarte, a supervisor at Newark Sierra Paperboard, Inc. ("Newark Sierra"), a recycled paper manufacturer in Stockton, was knocked into a vat of molten paper when a falling 1,000 pound metal chute dislodged the safety rail supporting him.[1] He lingered for three weeks with third degree burns over most of his body and died in agony.[2]

There is no mystery as to why the chute fell. The bearing on which it rested snapped in half. Boggs Steel Fabrication ("Boggs") had installed an original bearing in an upside down tension configuration instead of the correct compression configuration. Not knowing it was upside down, Newark Sierra employees continuously replaced the bearing in that configuration, causing it to stick, freeze, and wear out.[3]

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[1] 1 CT 4 [Complaint]; 112:1-25 [Jugueta Depo.]; 208-209 at pp. 6:6-9:13 [Johnson Depo.]; 226 at p. 20:12-24 [Mendoza Depo.]; 229 at p. 5:9-17 and p. 8:16-20 [Udarbe Depo.]; 245-246 [OSHA Narrative Summary]. References to the Clerk's Transcript are abbreviated as "CT." They are preceded by the volume number and followed by the page number. References to the Reporter's Transcript are abbreviated as "RT" and are followed by the page number. Names of witnesses are listed after record references to declarations or depositions.

[2] 1 CT 4 [Complaint]; 245-246 [OSHA Narrative Summary].

[3] RT 5:16-18 [Summary Judgment Motion Hearing]; 1 CT 90:16-22; 91:7-13; 92:3-6; 98:18-25; 99:1-9; 2 CT 286:19-21; 287:5-24; 288:7-13; 289:19-290:6 [Jennings Depo.].

After several bearing replacements, Newark Sierra twice hired expert engineering firm N.J. McCutchen, Inc. ("McCutchen") to design, fabricate, and install alternative swivel chute systems with different features.[4] Although McCutchen's contracts did not expressly require modification of the bearing configuration, its work both put a greater strain on the bearing and caused McCutchen to examine it several times.[5] Although a prudent engineer would have known the difference between a tension and compression configuration and spotted the defect, McCutchen did not.[6] As a result, McCutchen did not tell Newark Sierra the bearing was in an incorrect configuration and simply reinstalled it upside down.[7]

On the day the chute knocked Richard Duarte into the vat, the chute stopped moving when the bearing froze. Newark Sierra employees attempted to move it by hand, with ropes, and then with a forklift – a procedure they had used successfully in the past to unfreeze it. On this

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[4] 1 CT 67:10-16; 69:1-13; 70:2-9 [McCutchen Depo.].

[5] 1 CT 269:6-270:2; 273:14-25; 274:4-279:17 [McCutchen Depo.]; 2 CT 554:12-14; 4 CT 923:20-924:21 [Barnett Decl.].

[6] 3 CT 701, 709, 725; 4 CT 924-925 [McCutchen Depo.].

[7] 3 CT 709, p. 90:8-21, p. 91:9-16 [McCutchen Depo.]; 4 CT 924:23-925:6 [Barnett Decl.].

occasion, the bearing did not unfreeze; instead, it broke, releasing the chute.[8]

Richard's heirs brought a wrongful death action against Boggs and McCutchen alleging negligence and strict product liability. They lost on summary judgment.[9] Their appeal to this court raises the following issues:

ISSUES ON APPEAL

1. ***Was Newark Sierra's use of a forklift to push a 1,000 pound chute mounted on a stuck bearing an unforeseeable misuse of equipment as a matter of law? Alternatively, should the trial court have submitted the defense of alleged unforeseeable misuse to the jury to be assessed as part of comparative fault?***

Under established California law, the supplier of a defective product is bound to foresee that its customers may misuse that product in an attempt to get it to work. Despite the absence of any evidence suggesting that Newark Sierra's mere use of a forklift to turn a frozen bearing was unforeseeable, the trial court drew its own personal conclusion that, whenever a forklift is used to push an stationary object, "bad things are

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[8] 1 CT 109:1-13; 110:3-9; 214:1-215:16; 216:3-218:25 [Jugueta Depo.]; 208-209, pp. 6:6-9:13 [Johnson Depo.]; 224-226, pp. 12:19-20:25 [Mendoza Depo.] 229-230, pp. 6:9-11:9 [Udarbe Depo.].

[9] 3 CT 628A:1-6; 640:4-8 [Orders Granting Summary Judgment].

likely to happen."[10] In disregarding both the burden of proof and expert and engineering testimony to the contrary, the court usurped the jury's fault-finding function and its judgments must be reversed.[11]

2. ***May a designer and supplier of specialized industrial equipment escape liability for installing an upside down bearing configuration merely because its customer unwittingly replaced the original bearing in the same defective configuration?***

Richard Duarte's death resulted from *defective tension bearing configuration*, not a defective bearing. Boggs should have foreseen that its customer would reasonably believe the Boggs tension configuration was correct and install replacement bearings the same way. After all, that is presumably why it hired Boggs – an expert industrial designer and fabricator – in the first instance. Again, at a threshold level, Boggs should have anticipated injury from its defective installation.[12]

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[10] RT 9:6-10:9 [Summary Judgment Motion Hearing].

[11] *See* Statement of Facts Section 6 and Discussion Sections I & II(C) below.

[12] *See* Statement of Facts Section 2 and Discussion Section I(A)(2) below.

3. ***Is McCutchen relieved of strict liability on the ground that it did not participate in the swivel chute system's original design?***

McCutchen redesigned, retrofitted, fabricated, and reinstalled the chute in 1993 and 1998. By creating a new product with a design defect, McCutchen subjected itself to strict liability.[13]

4. ***Is McCutchen excused from negligence liability merely because its contract did not expressly call for bearing replacement when its expert engineer repeatedly observed the defective bearing configuration during the course of its work but nonetheless reinstalled it without any advice or warning to its customer?***

McCutchen had the opportunity to observe and did in fact observe the defective tension configuration of the Rotek M6-35PIZ swivel bearing. Yet its principal engineer did not know the difference between a tension and compression bearing configuration – something a reasonable and prudent engineer would have known. At minimum, McCutchen had a duty to inform Newark Sierra about the dangers associated with placing the bearing in the wrong configuration. By blithely reinstalling the wrong configuration with no warning to its customer, McCutchen breached the standard of care.[14]

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[13] *See* Statement of Facts Section 2 and Discussion Section II(B) below.

[14] *See* Statement of Facts Section 2 and Discussion Section II(A) below.

STATEMENT OF JURISDICTION

Plaintiffs appeal from summary judgments in favor of defendants Boggs and McCutchen.[15] Summary judgments are appealable under Code of Civil Procedure sections 437c(m)(1) and 904.1(a)(1). Plaintiffs' notice of appeal was filed within sixty days of notice of entry of judgment, as required by Rule 3 of the California Rules of Court.[16]

STATEMENT OF FACTS

1. Newark Sierra's Paper Recycling Assembly

Newark Sierra is a large-scale paper manufacturer that makes recycled paper from pulp material known as chop paper.[17] From the roof of Newark Sierra's plant, chop paper is dropped into a large cylindrical hopper called a cyclone.[18] Descending from the cyclone is a single stainless steel duct called a trim chute, through which the paper material is

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[15] 3 CT 628-628A; 639-640.

[16] 4 CT 963. This court previously dismissed plaintiffs' appeal *sua sponte*, on the ground that the judgments were not appealable. On plaintiffs' motion, the court reversed its ruling and reinstated this appeal. As a precautionary measure, plaintiffs filed a second notice of appeal while their reinstatement motion was pending. This court has consolidated the appeals for briefing and decision.

[17] 1 CT 37:10-12 [Mendoza Depo.].

[18] 1 CT 52:20-23 [Lennert Depo.].

fed into one of two enormous vats or filler pulpers.[19] The trim chute moves back and forth between the two vats on a "swivel bearing" bolted to the lower end of the chute through a flange.[20]

The swivel bearing consists of two large metal rings with ball bearings. An L-shaped lower chute with an elbow forming a 45^{N} angle is bolted to the bottom of the bearing . The lower chute is designed to be pushed by hand, rotating at the bearing, from one pulper to the other.[21]

2. <u>Defendants' Custom-Made Products for Newark Sierra</u>

Before 1991, Newark Sierra used a "pants leg" chute design with an internal damper door. The damper door flipped from one side to the other to direct the flow of pulp material into one of two different chutes, each of which hung over its own pulper vat.[22] Frustrated by the repeated mechanical failure of the damper door, Newark Sierra selected Boggs Steel Fabrication to design, fabricate, and install a single-chute system.[23]

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[19] 1 CT 64:24-65:4 [McCutchen Depo.].

[20] 1 CT 64:24-65:4 [McCutchen Depo.]; 95:6-11 [Jennings Depo.].

[21] 1 CT 53:1-4 [Lennert Depo.]; 95:6-11 [Jennings Depo.]; 117:15-25 [Johnson Depo.].

[22] 1 CT 44:9-12 [Lennert Depo.].

[23] 1 CT 82:22-25; 83:1-4 [Holmberg Depo.].

Newark Sierra gave Boggs a general description of the system it wanted.[24] Boggs' purchase order required it to "make up & install swivel drop chute with Rotek bearing No. M6-35P1Z chute to be 12 GA. stainless steel; to be installed between No. 1 and No. 2 filler pulpers" at a price not to exceed $7,669.26.[25] Boggs was required by its contract to ensure that chop paper flowed easily into either filler pulper."[26]

Working with Newark Sierra's basic concept, Boggs designed, fabricated, tested, and installed a new swivel chute.[27] Boggs' product was a 1,000-pound, 12-gauge stainless steel chute, affixed to a Rotek M6-35PIZ swivel bearing, installed between Newark Sierra's number one and number two filler pulpers.[28]

When Boggs installed the swivel chute system at the Stockton plant, it inserted the bearing in a tension rather than a compression

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[24] 2 CT 319:5-11 [Lennert Depo.].

[25] 1 CT 86 [Boggs Purchase Order].

[26] 2 CT 329:19-24 [Holmberg Depo.].

[27] 2 CT 325:2-327:4; 329:19-24 [Holmberg Depo.].

[28] 1 CT 165, p. 11:19-23; 166, p. 22:1-11; 168, pp. 36:22-37:4; 172, pp. 50:25-51:14; 173, p. 54:10-11; 174, pp. 60:23-61:5; 179 [Holmberg Depo.]; 245-246 [OSHA Narrative Summary].

configuration.[29] In layperson's terms, the bearing was put in upside down.[30] Boggs did so despite Rotek's manufacturer's instructions that the bearing not be inserted in a tension configuration without consultation with Rotek.[31] Rotek expressly invited users of its bearing to inquire about the feasibility of installing the bearing in a tension setting for particular applications.[32] Boggs made no inquiry. Its conduct in this regard fell below the industry standard of care.[33]

As a result of Boggs' failure to install the swivel bearing correctly, Newark Sierra employees had no lubrication access to the crucial ball bearings. Lubrication became difficult.[34] The bearing stuck or froze and the trim chute became difficult to turn.[35] Not cognizant of the problem,

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[29] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.].

[30] 4 CT 920:20-27 [Barnett Decl.].

[31] 2 CT 400 [Rotek Manual].

[32] 2 CT 400 [Rotek Manual]; 554:8-11 [Barnett Decl.].

[33] 2 CT 554:8-11 [Barnett Decl.].

[34] 2 CT 554:5-7; 4 CT 920:20-27 [Barnett Decl.]. Because of the tension configuration of the bearing, the entire circumference of the bearing could never be lubricated properly. (1 CT 202, p. 30:10-14 [Jennings Depo.].) Beginning December 4, 1997, Newark Sierra greased the bearing on a 7 to 10 day schedule. Even then, it could not be properly lubricated. (1 CT 202, pp. 32:19-33:7 [Jennings Depo.].)

[35] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.].

Newark Sierra replaced old bearings and installed new ones as old ones wore out, following the Boggs tension configuration for each replacement.[36]

In 1993, Newark Sierra outfitted its No. 2 pulper vat with a higher safety railing. The company hired N.J. McCutchen, Inc., an expert engineering firm, to redesign the swivel chute to clear the higher railing.[37] McCutchen had an ongoing professional relationship with Newark Sierra. Its president and owner, engineer Jay Allen McCutchen, regularly consulted with Newark Sierra about engineering issues in its plant.[38] Engineer McCutchen acted as supervisor for the jobs done at Newark Sierra on the No. 1 Trim Chute in 1993, 1998, and the 2000 bearing replacement after Richard's death.[39]

In its 1993 work, McCutchen took a chute that was in one piece and made it two pieces by adding a flange connection,[40] a cone, and a duct replacement. It also changed the angle of the elbow, raised the chute 7-8

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[36] 1 CT 194, pp. 149:23-150:16 [McCutchen Depo.]; 2 CT 354:15-355:18 [Bradt Depo.].

[37] 1 CT 67:10-16; 69:1-13; 70:2-9 [McCutchen Depo.].

[38] 1 CT 159, pp. 26-28 [Lennert Depo.].

[39] 1 CT 128-129 [McCutchen Decl.].

[40] 1 CT 191, p. 118:9-18 [McCutchen Depo.].

inches, and cut off part of the chute's end.[41] McCutchen's 1993 job required it to take down the entire trim chute from the whole bearing, thereby exposing the bearing to its expert view.[42] In order to put in a new flange, McCutchen had to remove the old flange that was connected to the top of the swivel bearing and reattach a new one, thereby observing the bearing again.[43]

Jay Alan McCutchen, a master mechanical engineer, drafted detailed plans for the new 1993 chute. His design increased the pressure on the bearing by changing the center of mass of the duct and placing a different vector of force on the bearing.[44] Because the new design would increase the pressure on the swivel bearing, a reasonable engineer would have checked the condition of the bearing before initiating the alteration.[45] McCutchen did not do so.[46] Instead, it reinstalled the bearing in its defective tension position, saying nothing to anyone at Newark Sierra about

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[41] 1 CT 191, p. 118:19-23 [McCutchen Depo.].

[42] 1 CT 191, p. 121:1-10 [McCutchen Depo.].

[43] 1 CT 193, p. 130:13-25 [McCutchen Depo].

[44] 1 CT 269:6-270:2; 273:14-25; 274:4-278:10 [McCutchen Depo.].

[45] 2 CT 554:12-14 [Barnett Decl.].

[46] 1 CT 276:8-279:17 [McCutchen Depo.].

the additional pressure on the bearing or the dangers associated with leaving it in tension.[47]

McCutchen made a new flange which it used to attach the redesigned chute to the existing bearing.[48] McCutchen elected not to change the configuration of the bearing when it installed the new chute. It was "careful to put the new mounting flange on the new duct in the same . . . place as the old flange" because, according to McCutchen, "it worked in that position."[49]

Newark Sierra sought McCutchen's expert assistance again in 1998 when it sought further modifications to the chute. Because he had been responsible for redesigning the chute system in 1993, Jay Allan McCutchen also supervised the 1998 job.[50] Before 1998, engineer McCutchen had used only two swivel bearings on all of his jobs and was not sure if he had ever

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[47] 1 CT 129:3-5 [McCutchen Decl.]; 276:8-21; 3 CT 709, p. 90:8-21, p. 91:9-16 [McCutchen Depo.]; 4 CT 924:23-925:6 [Barnett Decl.].

[48] 3 CT 698, pp. 46:24-47:4 [McCutchen Depo.].

[49] 3 CT 699-700, pp. 53:20-54:4 [McCutchen Depo.].

[50] 1 CT 272:9; 279:12 [McCutchen Depo.].

used a Rotek bearing.[51] Newark Sierra provided McCutchen with its copy of Rotek's bearing catalog and an engineering drawing of the bearing.[52]

As part of its 1998 job, McCutchen "removed the lower part of the duct and the swivel bearing so that [it] replaced the duct and the cyclone section."[53] McCutchen also disconnected the chute from the bearing and took away the whole bottom part of the chute. It disconnected the flanges that joined the bearing to the duct and replaced an existing flange just above the bearing.[54]

McCutchen knew from its observations in 1993 and 1998 that the bearing was installed in a tension configuration. But it had no idea there were two configurations – tension and compression – nor did it appreciate the significance of the difference. It learned that aspect of its work as a result of Richard Duarte's death.[55] McCutchen's ignorance on this point was below the engineering standard of care.[56]

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[51] 1 CT 193, p. 133:3-23 [McCutchen Depo.].

[52] 1 CT 194, p. 146:3-11 [McCutchen Depo.].

[53] 1 CT 184, p. 48:9-11 [McCutchen Depo.].

[54] 1 CT 184, p. 49:3-23; 271:6-15; 280:4-12; CT 194, pp. 149:23-150:16 [McCutchen Depo.].

[55] 3 CT 701:2-25; 709:7-16; 725:14-726:24 [McCutchen Depo.].

[56] 4 CT 924:15-25; 925:16-21 [Barnett Decl.].

After Richard's death, McCutchen supplied labor and materials to provide and install a new bearing and parts to modify the trim chute. Newark Sierra specified a Caydon RK No. 6-43P17 bearing in "mostly compression loading." McCutchen charged $12,000 for the bearing retrofit.[57]

3. Newark Sierra's Operation of the Defective Chute Assembly

Because the bearing was upside down and not fully lubricated, it often froze and stuck.[58] Newark Sierra employees lubricated the swivel bearing on an as-needed basis.[59] As part of the lubrication process, it used pressure to move the chute . While the bearing would be sticky in the beginning, once it was moving it would rotate smoothly.[60]

Using the chute that Boggs had fabricated and installed as a template, Newark Sierra replaced the bearing in the tension configuration on three occasions when the swivel bearing froze up altogether and failed – once in 1993, and again in 1995 and 1997.[61]

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[57] 1 CT 77 [Purchase Order].

[58] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.].

[59] 1 CT 93:9-94:5 [Jennings Depo.]; 104:11-21 [Bradt Depo.].

[60] 1 CT 96:24-97:12 [Jennings Depo.].

[61] RT 5:16-18 [Summary Judgment Motion Hearing]; 1 CT 90:16-22; 91:7-13; 92:3-6; 98:18-25; 99:1-9; 2 CT 286:19-21; 287:5-24; 288:7-13;

When the bearing became operable, Newark Sierra employees rotated the 1,000 pound swivel chute by hand. When human hands could not budge it, employees used a rope or a stiff forklift to gain additional leverage over the chute.[62] Newark Sierra employees had used a forklift to push the chute between 5 and 10 times before January 29, 2000. On each occasion, the bearing moved and did not break; the chute remained in place and continued to function.[63]

4. Richard Duarte's Death

Richard Duarte worked as a supervisor at the Newark Sierra plant. He was a good worker, well liked, and safety conscious.[64] Richard was working on the evening of January 29, 2000. The chute was positioned to feed material into pulper no. 1 when the pulper suddenly stopped boiling. Under Richard's direction, Newark Sierra's employees attempted to push the lower portion of the chute by hand to pulper no. 2. The bearing was frozen. When the chute failed to move by hand, Newark Sierra employees

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289:19-290:6 [Jennings Depo.]; 354:15-355:18 [Bradt Depo.]; 4 CT 921:1-6 [Barnett Decl.].

[62] 1 CT 204, pp. 38:3-39:1 [Jennings Depo.]; 219:13-23; 220:2-16; 221:7-15 [Jugueta Depo.]; 230, pp. 10:13-11:9; 231, p. 21:19-24 [Udarbe Depo.]; 245-246 [OSHA Narrative Summary].

[63] 1 CT 219:13-23; 220:2-16; 221:7-15 [Jugueta Depo.]; 230, pp. 10:13-11:9; 231, p. 21:19-24 [Udarbe Depo.]; 4 CT 920:20-21 [Barnett Decl.].

[64] 1 CT 210-211, pp. 20:20-21:9 [Johnson Depo.].

attempted to move it as they had in the past – with four men pulling on a rope, then a forklift pulling on a rope, and then a forklift pushing the chute.[65]

The bearing broke in half and the chute fell, hitting and dislodging the safety rail at pulper no. 1.[66] Richard was leaning against the rail. As the rail was torn off, he fell into the vat of molten paper below.[67] When Newark Sierra employees lowered a ladder into the vat, Richard was able to grasp the ladder and they pulled him out.[68]

More than 60% of Richard's body sustained third degree burns as a result of his fall into the pulper. The entire remaining 40% was burned to the second degree. Richard died from his injuries two weeks later.[69]

Immediately following Richard's accident, McCutchen reconfigured the swivel bearing by placing it in its correct, upright, compression application.[70] McCutchen performed its task easily and quickly, as both

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[65] 1 CT 110-111 [Jugueta Depo.].

[66] RT 9:21 [Summary Judgment Motion Hearing]; 1 CT 219:1-12 [Jugueta Depo.]; 229, p. 8:16-20 [Udarbe Depo.]; 4 CT 922:5, 922:19 [Barnett Decl.].

[67] 1 CT 110:3-112:1-25 [Jugueta Depo.].

[68] 1 CT 209, p. 10:3-9 [Johnson Depo].

[69] 1 CT 4 [Complaint]; 245-246 [OSHA Narrative Summary].

[70] 2 CT 281:8-282:13; 3 CT 688, p. 9:23-24 [McCutchen Depo.].

McCutchen and Boggs could and should have done in the first instance.[71] The price was only $12,000.[72]

5. <u>Plaintiffs' Lawsuit</u>.

Plaintiffs are the heirs of Richard Duarte. Cathy Duarte is Richard's surviving spouse. Christina is his daughter. Kristopher Lanser-Duarte is his grandson and former dependent. As Kristopher's mother, Christina serves as Kristopher's guardian ad litem by court appointment on January 16, 2001.[73]

In their complaint, plaintiffs alleged causes of action against Boggs Steel Fabrication, Inc. and N.J. McCutchen, Inc. based on general negligence and strict products liability. With respect to negligence, the complaint alleged that defendants so carelessly and negligently designed, manufactured, maintained, inspected and installed the trim chute that it posed a danger to persons working on the premises. As a result of defendants' carelessness, Richard Duarte was knocked into a vat of liquid

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[71] 2 CT 554:24-27 [Barnett Decl.].

[72] 1 CT 77 [Purchase Order].

[73] 1 CT 6-7 [Application for an Appointment of Guardian Ad Litem of Minor].

paper pulp, suffered excruciating physical pain, and died on February 13, 2000.[74]

Plaintiffs' strict liability cause of action identified both defendants as manufacturers, assemblers, designers, and component part manufacturers of a product described as "swivel bearing; chute; and, related mechanisms." Plaintiffs further alleged that the product was used in the manner intended by defendants and that Richard was a bystander to the product's use.[75]

Plaintiffs' complaint sought economic damages for loss of Richard's financial support and non-economic damages for loss of his love, comfort, society, solace, support and companionship.[76]

6. <u>The Summary Judgment Motions</u>

Each defendant brought a summary judgment motion. The trial court simultaneously heard and granted both motions on August 5, 2002.[77]

Bogg's Motion. In its motion for summary judgment, Boggs made three arguments: (1) that it owed no duty of care to Richard Duarte because his accident resulted from an "unforeseeable misuse" of a Boggs product

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[74] 1 CT 4 [Complaint]; 110:3-112:1-25 [Jugueta Depo.]; 245-246 [OSHA Narrative Summary].

[75] 1 CT 5 [Complaint].

[76] 1 CT 3 [Complaint, ¶ 7].

[77] 3 CT 628-628A; 639-640.

that "had undergone several unforeseeable alterations;" (2) that Boggs was not strictly liable because its product was not used in an intended or reasonably foreseeable manner; and (3) that Boggs was not strictly liable because there is no evidence that its product – as originally designed, fabricated, and tested – was defective.[78]

Boggs failed to provide any expert evidence at all in support of its motion. It pointed only to a deposition excerpt from an unidentified Newark Sierra employee named Douglas Bradt who testified that, by light of hindsight, he understood that Newark Sierra employees should not have used the forklift to turn the bearing.[79]

McCutchen's Motion. McCutchen claimed that it had not breached a duty of care to Duarte in redesigning, modifying, or otherwise working on the swivel chute system, and that it was not strictly liable to Richard Duarte because it had not participated in the design or manufacture of the bearing as such. Like Boggs, McCutchen did not support its contentions with *any* expert evidence.[80]

Plaintiffs' Opposition to the Summary Judgment Motions. In response to defendants' motions, plaintiffs provided the court with

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[78] 1 CT 140-146 [Boggs Summary Judgment Motion].

[79] 1 CT 142:8-11 [Boggs Summary Judgment Motion]; 234, p. 42:1-5.

[80] 1 CT 18-23 [McCutchen Summary Judgment Motion].

numerous deposition excerpts and the expert testimony of Ralph Barnett, an engineer and expert in the field of industrial safety.

Mr. Barnett is one of the most superbly qualified consulting mechanical engineers in the country. In addition to a Master's Degree in Engineering from the Illinois Institute of Technology and numerous honors, awards, and professional society memberships, Mr. Barnett has authored 127 technical books and articles on engineering topics, holds 14 patents, and has given more than 250 professional addresses and seminars.[81] Mr. Barnett is a member of several professional engineering committees and organizations that promulgate safety standards.[82] He has worked in virtually all sectors of engineering, including as a research engineer, professor of engineering, development engineer, and both a corporate principal and advisor to businesses that manufacture and supply products for consumer and industrial use.[83]

Based on his experience and expertise, Mr. Barnett responded to the grounds in defendants' motions for summary judgment from the point of a view of an engineer well acquainted with the design and fabrication of

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[81] 2 CT 556-3 CT 598 [Barnett C.V.].

[82] 2 CT 557 [Barnett C.V.].

[83] *Id.*

industrial machinery. With respect to Boggs' motion, Mr. Barnett testified that:

- ***"The design, fabrication and installation of the #1 Trim Chute performed by Boggs was defective because the bearing was installed in a tension configuration, not a compression configuration and no reasonable means were provided to lubricate the bearing."***
- "Proper design, fabrication and installation would have prevented the #1 Trim Chute from becoming difficult to turn, sticking and/or freezing."
- "The Rotek bearing provided by Newark-Sierra is a commonly used bearing of the compression type. Any applications that would require this bearing to be pulled apart in tension must be checked out with the manufacturer as an exceptional case. Rotek invites this type of inquiry, and it is below the standard of care not to inquire."
- "The swivel chute concept proposed by Newark Sierra could have been achieved in a safe manner, however, it was unacceptable practice for Boggs to incorporate the swivel chute concept proposed by Newark Sierra without researching and investigating the proper and safe manner in

which these concepts could be accomplished. The Boggs incorporated the concept in its fabrication and installation created an unreasonable risk of inherent danger that outweighed the benefits of the #1 Trim Chute."

- ***"Had the bearing been incorporated properly into the #1 Trim Chute during its initial installation, the subject incident would not have occurred. After the subject incident, a similar bearing was used properly, which demonstrates the feasibility of such an application."***[84]

In assessing N. J. McCutchen's performance under its engineering contracts with Newark Sierra, Mr. Barnett testified as follows:

- "The change in the angle of the lower aspect of the #1 Trim Chute by N. J. McCutchen created an increased moment on the bearing that would require any engineer involved in the alteration to check the viability of the bearing."
- "Based on my background, training and experience, it is my opinion that the combined efforts and improper acts of Boggs and N. J. McCutchen and Newark Sierra Paper created an unreasonably dangerous condition."[85]

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[84] 2 CT 554:3-27 [Barnett Decl.]; emphasis added.

[85] 2 CT 554:12-17 [Barnett Decl.].

- McCutchen had numerous opportunities during the course of its work to observe the defective bearing configuration as it disassembled the chute and uninstalled and reinstalled the bearing assembly.[86]
- ***"[P]rudent engineering personnel in McCutchen's position who were unbolting and rebolting their work to the bearing would have discovered the improper installation, alerted Newark Sierra to it, and required its correction because they would have perceived a dangerous mode of failure in the equipment."***[87]

The Trial Court's Rulings on Summary Judgment. Notwithstanding Mr. Barnett's uncontested expert evaluation of the Boggs/McCutchen swivel chute projects, the trial court granted summary judgment to both defendants. With respect to Boggs, the court drew its own inferences and applied its personal experience to conclude that Richard's death was unforeseeable as a matter of law, relieving Boggs from any liability:

> "How it would have been foreseeable that someone might try using a fork-lift to turn that machine is left unexplained. *And yet I simply can't in my own mind conjure up why someone*

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[86] 4 CT 924:4-14 [Barnett Decl.].

[87] 4 CT 924:17-21 [Barnett Decl.]; emphasis added.

would use as a fork-lift to try to turn a piece of machinery, particularly one that's turning a piece of machinery over a vat of extremely hot liquid.

It's undisputed that using a fork-lift to turn a bearing was a misuse of the product. Although as defendant – or plaintiffs say, this invades the province of the jury. However, it's also undisputed that this chute is meant to be operated manually. *And when someone applies the force of a fork-lift to a piece of machinery that's to be operated manually, bad things are likely to happen*.

Mr. Duarte was injured as the result of his and his co-workers' use of this fork-lift to first pull and then push on the chute until the bearing literally ripped in half. *And in the duty context, I am forced to conclude that it was not foreseeable that once the bearing was jammed, the Newark employee would try to use a fork-lift to move it.*

Though the parties do not dispute that Newark employees had used a fork-lift to move the chute on previous occasions, they also do not dispute that Boggs was not aware of this fact. In fact, the parties admit that once the chute was

installed in 1991, Boggs was never advised of any problem with it.

It appears that the improper installation of a bearing is not the kind of harm that is likely to result from this sort of negligence, i.e., the plaintiff being knocked into a vat of pulp, when the chute is pulled apart by a fork-lift. He was injured as a result of the extreme measure taken in order to get the bearing to move, and therefore summary adjudication of this claim is therefore warranted.

As to the strict liability, plaintiffs being obligated to demonstrate that the product – inter alia that the product was being used in an intended or reasonably foreseeable manner cannot be sustained."[88]

With respect to McCutchen, the court concluded that the firm "played no part in the *original* design, manufacture, or marketing of either the chute or any of its component parts," and therefore could not be held strictly liable for its redesign, fabrication, and installation work on the chute system in 1993 and 1998.[89] According to the court, McCutchen could not be found negligent with respect to the defective bearing configuration

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[88] RT 9:6-10:13 [Summary Judgment Motion Hearing]; emphasis added.

[89] RT 6:8-16 [Summary Judgment Motion Hearing]; emphasis added.

because: (1) it "did not work on or alter the bearing;" (2) there was no evidence to support Mr. Barnett's "assumption" that it did not check the viability of the bearing; and (3) the "increased moment on the bearing was insufficient to cause the accident."[90]

7. Plaintiffs' Motion for New Trial

A motion for summary judgment is, in legal effect, a trial on an issue of law. A ruling made by the court in granting summary judgment can be re-examined on a motion for new trial.[91]

Plaintiffs filed a motion for new trial to address the trial court's inferences, supporting their motion with a second declaration from engineer Ralph Barnett and additional deposition excerpts. Mr. Barnett testified that prudent industry custom and commercially-recognized standards of care required Boggs and McCutchen to know bearing configurations, to anticipate modes of failure, and to take steps to minimize risks to human safety by planning "safe failure" – things they did not do in this case.

As Mr. Barnett explained, if the bearing had been installed in a correct configuration, Richard would not have been killed. Rather, when

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[90] RT 6:17-20; 7:14-16; 7:27-28 [Summary Judgment Motion Hearing].

[91] *Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762, 765 ["It is also well recognized that a motion for a new trial may properly be addressed to a summary judgment rendered under Code of Civil Procedure Section 437c."].

pressure was applied to turn the chute, it would have "bent under the force (*a safe failure*) and not broken in half and caused the chute to fall (*a dangerous failure*)."[92]

Addressing the court's remarks about the use of a forklift, including its inference that "bad things are likely to happen" when "the force of a forklift is applied to a piece of machinery that's to be operated manually,"[93] Barnett reiterated his distinction between safe and dangerous modes of failure. In his view:

> "The 'bad thing' that is likely to happen when excessive force of any kind is applied to a properly configured bearing that will not turn is that the pipe will bend, but not break in half. If proper installation is done, the mode of failure is a safe one. Here, improper, defective, and in my view, careless installation was done, resulting in an unsafe and dangerous mode of failure that killed Mr. Duarte."[94]

Noting common industrial knowledge that forklifts (and other vehicles and tools) are sometime used as "workhorses and can function

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[92] 4 CT 921:16-922:10 [Barnett Decl.].

[93] RT 9:16-18 [Summary Judgment Motion Hearing].

[94] 4 CT 922:15-22 [Barnett Decl.].

safely as such," Mr. Barnett perceived no support for the court's position that use of forklift was unforeseeable.[95]

The Trial Court's Ruling on Plaintiffs' Motion for New Trial. In denying plaintiffs' motion for new trial, the court emphasized that it considered all the evidence in argument, including *both* of the Ralph Barnett declarations. At oral argument on the new trial motion, the court engaged in the following dialogue with plaintiffs' counsel:

> *MR. TABAK [Plaintiffs' Counsel]: . . . "I called for this hearing because I wanted to know a couple of things. Number one, whether the additional materials that we submitted, including the supplemental declaration of Ralph Barnett, was considered by this Court.*
>
> *THE COURT: Yes, it was.*
>
> * * *
>
> MR. TABAK: As I'm sure the Court – as in the last case, we don't have serious injuries, we have death. We have an absolutely tragic, brutal situation. A man literally gets boiled in a vat. And we have uncontroverted testimony by way of two declarations of Ralph Barnett, eminently qualified,

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[95] 4 CT 922:23-923:9 [Barnett Decl.].

without any expert testimony proffered by the moving party defendants. And so I would appreciate some elaboration by the Court.

THE COURT: Okay. My views on this remain the same as previously expressed at the summary judgment hearing that whether or not the instrumentality that was being worked on was a bearing that was installed upside-down or a wiget or a blivit, *I don't think the manufacturer of any kind of article, faulty or not, would foresee that somebody would get up there on a forklift and try and turn it when it was made to be turned by hand*. Therefore, what possible duty could the manufacturer have had to foresee that someone would try to repair it in that fashion, irrespective of whether it's faulty or not, irrespective of whether it's installed upside-down. It's been repaired multiple times over its course of lifetime of service. *How would anybody see that somebody is going to try to get a forklift to try and turn this item? I think I used the analogy last time, it's like swatting flies with a pile driver or*

going hunting for squirrels with a hand grenade. How would somebody, how would anybody foresee that?"[96]

Plaintiffs have appealed from the summary judgments.

DISCUSSION

The Parties' Summary Judgment Burdens. On their respective motions for summary judgment, each defendant bore the burden of proving that one or more elements of plaintiffs' negligence and strict liability causes of action could not be "separately established" or that all of the elements of a complete affirmative defense had been established. If this threshold burden is not met, the law requires denial of the motion even in the absence of any opposition.[97]

Once defendant's burden is met, the burden shifts to plaintiff to show "a triable issue of one or more material facts exists as to that cause of action or a defense thereto."[98] If there is a single triable issue of material fact as to a cause of action, the motion must be denied.[99]

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[96] RT 26:26-27:15 [New Trial Motion Hearing]; emphasis added.

[97] Code Civ. Proc., § 437c(o), (p); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840; *Scheiding v. Dinwiddie Construction Co*. (1999) 69 Cal.App.4th 64, 83-84.

[98] Code Civ. Proc., § 437c (p)(2).

[99] *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 784 ["A motion for summary judgment may be granted only when *no* 'triable issue of one or more material facts' remains for trial."].

The Standard of Review. The aim of summary judgment procedure is to discover, through the use of declarations and other evidence disclosed prior to trial, whether the parties possess evidence requiring the weighing procedures of a trial.[100] The court must consider the evidence "and all inferences reasonably deducible from the evidence" in a light most favorable to the opposing party.[101]

The court has no power on a summary judgment motion to choose among competing reasonable inferences, weigh the evidence, or make credibility determinations.[102] If an inference is controverted by other evidence, or even by other reasonable inferences, there is a triable issue of fact and the motion must be denied.[103] In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed.[104] The moving party's evidence may itself

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[100] *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735; *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 988.

[101] Code Civ. Proc., § 437c, subd. (c); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839; *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.

[102] *Murillo v. Rite Stuff Foods, Inc*. (1998) 65 Cal.App.4th 833, 841; *Tully v. World Savings & Loan Assn*. (1997) 56 Cal.App.4th 654, 661.

[103] *Murillo v. Rite Stuff Foods, Inc*. (1998) 65 Cal.App.4th 833, 841; *Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 602.

[104] Code. Civ. Proc., § 437c, subds. (c) & (o); *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 604; *A-H Plating, Inc. v. American National Fire Ins. Co.*

give rise to reasonable inferences defeating that party's own motion.[105] On appeal, a de novo review is conducted. This court reviews all evidence independently under the same constraints and standards as the trial court.[106]

In the present case, neither defendant satisfied its burden of negating an element of plaintiffs' claims or of establishing a complete affirmative defense. Neither demonstrated *unforeseeable* misuse of the swivel chute or, indeed, any misuse at all. Neither demonstrated that plaintiffs could not prove breach of a duty of reasonable care or a design defect in their products.

Defendants chose to introduce no expert testimony at all on the mechanical engineering design and fabrication issues presented by plaintiffs case. In contrast, plaintiffs submitted testimony from a nationally recognized and superbly qualified engineer as well as deposition testimony from the parties and Newark Sierra employees, all of which revealed numerous triable issues of fact as to both defendants.

(1997) 57 Cal.App.4th 427, 434.

[105] *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 185.

[106] *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844.

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BOGGS STEEL FABRICATION, INC.

As to defendant Boggs, the court granted summary judgment on three grounds: (1) Boggs owed no duty of care to Richard Duarte because his death resulted from an "unforeseeable misuse" of a Boggs product that "had undergone several unforeseeable alterations;" (2) Boggs was not strictly liable because its product was not used in an intended or reasonably foreseeable manner; and (3) Boggs was not strictly liable because there was no evidence that its product – as originally designed, fabricated, and installed – was defective.[107]

As plaintiffs will show, none of these grounds has any conceivable legal merit; moreover, there were triable issues of fact as to each of them.

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[107] 3 CT 628A:1-8 [Summary Judgment Order].

A. As a Product Designer, Fabricator, and Supplier, Boggs Breached Its Duty of Care to Richard Duarte When It Installed a Bearing in an Upside Down Tension Configuration That Was Unquestionably Defective and Dangerous.

Businesses that design, manufacture, supply, and install products owe duties of ordinary care to their customers and others who may be injured as a result of their work.[108] Boggs Steel Fabrication is no exception, yet the trial court relieved it from any negligence liability for Richard Duarte's death when it ruled that no business in Boggs' position could have foreseen that an indisputably improper and dangerous tension bearing configuration could cause anyone injury.[109]

In drawing its own inferences as to whether Boggs should have foreseen injury, the trial court confused threshold *legal* foreseeability – which requires only that a defendant be able to foresee injury from the general kind of conduct in which it engaged – from the *factual* foreseeability factors a trier of fact might weigh in determining the cause of a particular injury and the respective contributions of various actors to that

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[108] Civ. Code, § 1714; BAJI No. 9.21; *Merill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 478-479.

[109] RT 9:6-10:9 [Summary Judgment Motion Hearing].

injury. Based on the evidence before the court on summary judgment, a reasonable jury could conclude that: (1) Boggs installed the bearing upside down causing it to stick and freeze from inadequate lubrication;[110] (2) Boggs could anticipate that its customer would view its installation as the correct one and duplicate it when bearings wore out;[111] (3) Boggs could anticipate that its customer would apply force to turn the bearing when it stuck or froze;[112] and finally (4) Boggs could expect that a frozen bearing might break when force was applied, causing the chute to fall and inflict injury on one or more persons who might be present.[113]

As plaintiffs will show, the inferences just described give rise to factual questions that cannot be resolved on summary judgment.

1. Richard Duarte's Death Was Legally Foreseeable to Boggs.

As Boggs acknowledged in the trial court, the essential elements of a negligence claim are the existence of a legal duty to exercise reasonable

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[110] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.].

[111] RT 5:16-18 [Summary Judgment Motion Hearing]; 1 CT 90:16-22; 91:7-13; 92:3-6; 98:18-25; 99:1-9; 2 CT 286:19-21; 287:5-24; 288:7-13; 289:19-290:6 [Jennings Depo.].

[112] 4 CT 921:16-26 [Barnett Decl.].

[113] 4 CT 919:19-920:18; 921:27-922:14 [Barnett Decl.].

care, a breach of that duty, and resulting injury or death.[114] While the breach and causation elements are generally factual and require the evidence-sifting mechanism of a trial, duty is a question of law for the court.[115]

The Rowland Factors Defining a Duty of Care. Under California law, the threshold determination of legal duty is based on multiple factors, catalogued by the Supreme Court in *Rowland v. Christian*[116] as follows: the foreseeability of harm to plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden on the defendant and the consequences to the community of imposing a duty to exercise care, and the availability and prevalence of insurance.[117]

Legal and Factual Foreseeability. Foreseeability is the cornerstone of the "duty" policy discussion. It is relevant on two levels. *Legal foreseeability* is determined by the court; it establishes the existence of a

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[114] 1 CT 140 [Boggs' Motion for Summary Judgment].

[115] *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1364.

[116] (1968) 69 Cal.2d 108, 110.

[117] *Id*. at p. 113; *see also Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1077.

general legal duty of care. However, in determining the existence of duty, the court may only consider the risk of harm in very general terms – not the risk of the specific accident and harm that befell a particular plaintiff. As the Supreme Court held in *Ballard v. Uribe*:

> "*[A] court's task – in determining 'duty' – is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party*."[118]

In the absence of strong countervailing policy constrictions, *legal* foreseeability triggers a general duty of care. That duty then raises the issue of *factual* foreseeability which is necessarily determined by the trier of fact.[119]

On the basis of this legal framework, California law has firmly established the duty of a product supplier to use due care in the design, fabrication, and installation of a product. The supplier owes a duty of care to all users of the product so that the product "may be safely used in a

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[118] *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.

[119] *Id.* at p. 572-573.

manner and for a purpose for which it was made." A breach of this duty is negligence.[120]

This court has made similar observations about a service supplier's duty of care. In reversing summary judgment in a wrongful death action based on negligent failure to repair a rented truck, Justice Sims described legal foreseeability in *Jackson v. Ryder Truck Rental, Inc.*:[121]

> "[F]oreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct. One may be held accountable for creating even the risk of a slight possibility of injury if a reasonable person would not do so. Moreover, it is settled that what is required to be foreseeable is the general character of the event or harm – e.g. being struck by a car while standing in a phone booth – not its precise nature or manner of occurrence."[122]

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[120] BAJI No. 9.21; *see also* 6 Witkin, Summary of Cal. Law (9th ed. 1997), Torts, §§ 953-955; *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 465, 470; *DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 348-350.

[121] (1993) 16 Cal.App.4th 1830.

[122] *Id.* at p. 1840, citing *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56-58.

Thus, under *Ballard/Jackson* standard, plaintiffs clear the legal foreseeability threshold by showing no more than that Boggs, as a reasonably thoughtful designer and supplier of precision equipment for specialized industrial use, should have anticipated that its installation of a bearing in an upside down configuration in disregard of manufacturer's instructions might cause injury to persons around the bearing when it failed and broke. On the evidence, that test is easily met.[123]

Richard Duarte's employer, Newark Sierra, hired Boggs under a contract to design, fabricate and install a trim chute system. Boggs' work called for installation of a Rotek M #6-35P1Z swivel bearing.[124] Rotek's instruction manual for the bearing emphasized the limitations of tension configuration. The manual expressly invited bearing users and installers to inquire directly of Rotek about the efficacy of placing the bearing in a tension setting for particular applications.[125]

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[123] 4 CT 919:19-920:18; 921:16-922:14 [Barnett Decl.].

[124] 1 CT 36:22-25; 37:1-4; 165, p. 11:19-23; 166, p. 22:1-11; 168, pp. 36:22-37:4; 172, pp. 50:25-51:14; 173, p. 54:10-11; 174, pp. 60:23-61:5; 179; 2 CT 325, p. 26:2-11; 326, pp. 36:25-37:4; 329, p. 42:19-24 [Holmberg Depo.].

[125] 2 CT 400 [Rotek Manual]. Rotek's Large-Diameter Anti-Friction Bearings Catalog states the following: "Nearly all Rotek bearings provide greater capacity in compression than in tension . . . In Series 2100 bearings, flange rigidity imposes a limitation on tensile load capacity. *Rotek has produced bearings for use under tensile loading and would be pleased to recommend a design for your application. Please refer all such*

Boggs disregarded the manufacturer's instructions. It installed the bearing in a tension configuration; it made no inquiry of Rotek about its unorthodox installation.[126]

Boggs' swivel chute system was indisputably defective and below the standard of care.[127] Boggs' upside down, impossible-to-be-lubricated bearing configuration caused the bearing to stick and the chute to freeze. This invited the use of incremental pressure by the Newark Sierra employees whose job it was to rotate the 1,000-pound chute.[128] The huge size and weight of the chute assembly suggested that it could withstand significant force.

At times, human hands alone were not up to the task of moving the massive chute. On those occasions, Newark Sierra employees used a rope and a stiff forklift to gain additional leverage over the otherwise unwieldy assembly.[129] With success and without damage to the bearing, they had

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applications to our Engineering Department." (2 CT 377, 400; emphasis added.) Rotek provides free bearing designs for its customers. (2 CT 409-412.)

[126] 2 CT 554:8-11 [Barnett Decl.].

[127] 2 CT 554; 4 CT 920 [Barnett Decl.].

[128] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 245-246 [OSHA Narrative Summary]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.].

[129] 1 CT 204, pp. 38:3-39:1 [Jennings Depo.]; 219:13-23; 220:2-16; 221:7-15 [Jugueta Depo.]; 230, pp. 10:13-11:9; 231, p. 21:19-24 [Udarbe Depo.].

pushed the chute with a forklift on 5 to 10 prior occasions.[130] They had no reason to believe things would be any different on January 29, 2000.

In sum, the general type of harm – physical injury or death to a bystander from unexpected breakage of a defectively configured bearing – was eminently foreseeable. The *Rowland* legal foreseeability factor is satisfied.

The Other Rowland Factors. There can be no reasonable dispute that the remaining *Rowland* factors are satisfied as easily as foreseeability:

- Plaintiffs suffered injury. Their husband, father, and grandfather is dead.
- Richard's death resulted from Boggs' undeniable breach of an industrial standard of care for bearing configuration installation.
- Boggs' conduct is morally blameworthy. Anyone in its position should have known better. It brazenly disregarded manufacturer's instructions and put the bearing in upside down.[131]
- Boggs would have incurred no significant additional burden or expense to do the job right. Indeed, if there were any such

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[130] 1 CT 124:4-9 [Udarbe Depo.]

[131] 2 CT 554:8-11 [Barnett Decl.].

expense, it would have been paid by Newark Sierra as part of the job.

- Boggs has – or should have – liability insurance to protect it from its own carelessness in the course of installing potentially dangerous industrial machines. Liability insurance covering bodily injury and property damage is normal and carried by prudent equipment suppliers.

In sum, Boggs unquestionably owed a duty of care to Richard Duarte and to situated similarly others who might suffer injury as a result of Boggs' defective bearing configuration installations.

2. Subsequent New Bearing Installations By Newark Using the Boggs' Tension Configuration Do Not Preclude a Duty of Care.

Boggs argued in the trial court that it was relieved of any duty it may have had because the overstressed, underlubricated, upside down bearing wore out and was replaced by Newark Sierra on several occasions before the accident.[132] To the contrary, Boggs, an expert in bearing installation, should have anticipated that Newark Sierra would follow its lead by

[132] 1 CT 140-143 [Boggs' Summary Judgment Motion].

adopting the Boggs tension configuration in subsequent bearing installations.[133]

Boggs was hired by Newark Sierra because it was, presumably, an expert in chute design and bearing installation. Notwithstanding its apparent expertise, Boggs negligently installed the bearing in an upside down configuration. Boggs' expert decision to install the bearing in a tension configuration naturally invited Newark Sierra to adopt that configuration in subsequent bearing installations, thereby creating a risk of harm to Richard Duarte.[134]

Indeed, Newark Sierra's periodic replacement of the original Boggs bearing with new bearings in the Boggs configuration most likely forestalled as long as possible injury of the type that eventually befell Richard Duarte. The new bearings temporarily improved the functioning of Boggs' bearing configuration which was doomed to inevitable failure by Boggs' own design and installation.

Engineer Ralph Barnett testified that Newark Sierra's decision to install subsequent bearings in the Boggs upside down configuration was readily foreseeable by Boggs:

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[133] 4 CT 921:1-6 [Barnett Decl.].

[134] 1 CT 90:16-22; 91:7-13; 92:3-6; 98:18-25; 99:1-9; 2 CT 286:19-21; 287:5-24; 288:7-13; 289:19-290:6 [Jennings Depo.]; 354:15-355:18 [Bradt Depo.]; 4 CT 921:1-6 [Barnett Decl.].

"After Boggs' upside-down installation of the bearing, Mr. Duarte's employer, Newark Sierra, continued to use the same configuration in subsequent bearing installations. *Having engaged and relied on Boggs as an outside expert consultant and designer/installer to put in the bearing correctly, Newark Sierra's actions in continuing the same installation configuration would, in my view, be prudent and within industry custom and practice.*"[135]

As a result of the foregoing, Newark Sierra's mere replacement of the M6-35P1Z Rotek bearing – which was not alleged or shown to be defective or improper in any way save in its repetition of the Boggs' tension configuration – does not defeat Boggs' negligence liability.

[135] 4 CT 921:1-6 [Barnett Decl.]; emphasis added.

3. Newark Sierra's Alleged Unforeseeable Misuse of the Chute System Was Not Established on Summary Judgment. Even if Proven, Any Misuse Would Not Bar Boggs' Liability for Negligence as a Matter of Law But Would Be Part of the Jury's Assessment of Comparative Fault.

Boggs Failed to Carry Its Burden of Proof on Summary Judgment. At the outset, Boggs never showed unforeseeable misuse. Its only evidence of alleged misuse was the deposition testimony of an unidentified Newark Sierra employee named Douglas Bradt.[136] The witness, who was not qualified as an expert and did not describe who he was, his relationship to the trim chute, or his connection with the events surrounding Richard's death, testified in a single question and answer as follows:

> "Q. Is it your understanding that the method that the workers were using on the date of Richard Duarte's accident in trying to move the swivel chute with the use of a forklift was a misuse of that chute?
>
> A. Yes."[137]

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[136] 1 CT 144:1-10 [Boggs' Summary Judgment Motion].

[137] 1 CT 234, p. 42:1-5.

From that single question and answer, the trial court inferred *unforeseeable misuse – as a matter of law*.

The evidence in the record at least permits – if it does not strongly suggest – the following contrary inferences:

- Newark Sierra was in the business of producing recycled paper. Like all businesses, it required its employees to be efficient and productive in operating its equipment to produce its product.[138]
- Confronted with a 1,000 pound swivel chute system that was heavy, difficult to lubricate, and constantly freezing and sticking, employees could be expected to devise ways of using pressure to rotate the chute.[139]
- Having successfully turned the chute five to ten times using a forklift, employees could reasonably believe that this was a safe and effective means of accomplishing that result.[140]

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[138] 1 CT 245-246 [OSHA Narrative Summary].

[139] 1 CT 97:7-12; 98:18-99:9 [Jennings Depo.]; 2 CT 554:3-7; 4 CT 920:20-27 [Barnett Decl.]; 245-246 [OSHA Narrative Summary].

[140] 1 CT 219:13-23; 220:2-16; 221:7-15 [Jugueta Depo.]; 230, pp. 10:13-11:9; 231, p. 21:19-24 [Udarbe Depo.]; 4 CT 921:20-26 [Barnett Decl.].

- As an industrial firm presumably familiar with the custom and practices in its business, including the use and misuse of chutes and bearings, Boggs was aware that employees might use everyday, on-hand equipment to gain additional leverage over a 1,000-pound steel chute.[141]
- Because Boggs introduced no percipient or expert evidence on the subject of unforeseeable misuse, it can be inferred that Newark Sierra employees did not use an unreasonable type or amount of pressure to move the massive chute.[142]
- In the absence of any evidence to the contrary, the bearing may well have failed if ropes or hands, rather than a forklift or some other device, had been used to rotate the chute on the date in question.[143]

As shown by the cited references, each of these inferences finds support in the record. They are explicitly drawn in plaintiffs' two expert

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[141] 1 CT 245-246 [OSHA Narrative Summary]; 4 CT 919:19-920:18; 921:16-922:5 [Barnett Decl.].

[142] RT 28:15-28 [New Trial Motion Hearing]; 4 CT 919:19-920:18; 922:23-923:9 [Barnett Decl.].

[143] *Id.*

declarations. In contrast, Boggs introduced *no* expert opinion or assessment of product defect or misuse. Indeed, it did not ever establish the amount of force applied to the chute just before the accident.

Fabricators and installers of products must anticipate a degree of misuse or abuse of their products in both consumer and industrial settings. Whether a particular alleged misuse extends beyond the misuse that a product supplier must anticipate is a question for the jury. As the Second District Court of Appeal has explained:

> "'***[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of its product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.***' '***[T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.***'"[144]

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[144] *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 833; citing *Self v. General Motors Corp*. (1974) 42 Cal.App.3d 1, 7 and *Balido v. Improved Machinery, Inc*. (1973) 29 Cal.App.3d 633, 645. Numerous other appellate courts have made the same point – foreseeable misuse is a question of fact for the jury. (*Thompson v. Package Machinery Co.* (1971) 22 Cal.App.3d 188, 196; *see also DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 344 ["Moreover, even if plaintiff's acts could be considered misuse of the product and contributory negligence, this would not foreclose an action in products liability but only reduces any award she might receive in an amount proportionate to the degree she is

Rather than submit the question of foreseeable misuse to the jury,[145] however, the court assumed the mantle of an engineering expert, drew its own inferences from the evidence, and utterly disregarded the other reasonable inferences. Statements such as "I simply can't in my own mind conjure up why someone would use a forklift to try to turn a piece of machinery" and "bad things are likely to happen" represent nothing more than the court's own horseback assessments of the evidence.[146] Because they were at odds with other reasonable inferences, they cannot be used to sustain a summary judgment.[147]

B. Plaintiffs' Strict Liability Cause of Action Against Boggs Was Not Barred by Unforeseeable Product Misuse.

At the time that it rejected plaintiffs' negligence cause of action against Boggs, the court also dismissed their strict product liability cause of action, observing that plaintiffs had not demonstrated that "the product (i.e.,

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deemed to be at fault."]; *Southern California Edison Co. v. Harnischfeger Corp*. (1981) 120 Cal.App.3d 842, 853 [determinations of intervening cause, proximate cause, and reasonable foreseeability were for the jury in a product liability action].

[145] *See Daly v. General Motors Corp*. (1978) 20 Cal.3d 725, 733; *DeLeon v. Commercial Manufacturing and Supply Co., supra,* 148 Cal.App.3d at p. 344.

[146] RT 9:8-10; 9:18 [Summary Judgment Motion Hearing].

[147] *Grant-Burton Covenant Care, Inc*. (2002) 99 Cal.App.4th 1361, 1369; *Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.

the chute) was being used in an intended or reasonably foreseeable manner."[148]

Allegations of unforeseeable misuse receive similar treatment in both negligence and strict liability contexts. In *Milwaukee Electric Tool Corp. v. Superior Court*[149] – a strict liability and negligence case in which drill operator forced a drill to perform certain tasks in defiance of the manufacturer's written instructions – the appellate court found triable issues of fact pertaining to both claims, observing that concepts of comparative fault have been imported into strict liability:

> "[C]omparative fault [i]s common to both negligence actions and those founded in strict products liability theory, . . . the concept of foreseeability is involved in both types of actions. 'An action [is] premised on strict products liability, just as [a]n action [is] premised on negligence, an element of foreseeability is involved; liability may not be imposed unless the injury results from a use of the product which is reasonably foreseeable . . . *Even if an injured plaintiff's acts constituted misuse of product, if those acts were foreseeable,*

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[148] RT 10:10-13 [Summary Judgment Motion Hearing]; 3 CT 628A:4-5 [Order Granting Summary Judgment].

[149] (1993) 15 Cal.App.4th 547.

strict liability may still apply, although the plaintiff's comparative negligence might serve to reduce any award he or she might receive proportionate to such fault . . . In apportioning and comparing fault, an injured plaintiff's conduct is to be compared with the defendant manufacturer's product, not the manufacturer's conduct."[150]

For the reasons stated by the court, allegations of product misuse are not an absolute defense to strict liability, but merely one part of the calculation of comparative fault to be made by the jury.

C. Boggs Failed to Show That Plaintiff Could Not Prove Product Defect Liability. Plaintiff Presented Triable Issues as to the Defective Character of Boggs' Design, Fabrication, and Installation of the Trim Chute.

As a third ground supporting summary judgment for Boggs, the trial court declared that the plaintiffs had not presented evidence of any defect in the swivel chute system.[151] To the contrary, Boggs produced no evidence that its upside down, impossible-to-lubricate tension configuration was not defective and plaintiffs presented expert engineering testimony demonstrating that Boggs installed the bearing in the chute in an upside

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[150] *Id*. at p. 558; emphasis added.

[151] 3 CT 628A:6-8 [Order Granting Summary Judgment].

down configuration, resulting in excess wear and tear and causing the bearing to stick and freeze.[152]

Plaintiffs submitted two declarations from engineer Ralph Barnett – one in opposition to summary judgment, and a second in support of a motion for new trial – demonstrating the deficiency in Boggs' product.[153] The Barnett declarations provided not only substantial and credible, but wholly uncontradicted evidence of a design and installation defect in Boggs' swivel chute system. Implicitly overruling Bogg's evidentiary objections, the trial court expressly considered all the evidence – including ***both*** Barnett declarations – in granting summary judgment and in denying plaintiffs' motion for new trial.[154]

Defendant Boggs introduced no expert or other evidence to rebut Barnett's declarations.[155] Each of those declarations created triable issues

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[152] 2 CT 554:3-7 [Barnett Decl.].

[153] *See* 2 CT 554; 919-923 [Barnett Decl.].

[154] RT 7:6-8:3 [Summary Judgment Motion Hearing]; 26:10-14 [New Trial Motion Hearing]. Boggs failed to press for any ruling on its evidentiary objections. As a result, all of those objections are deemed waived; all the expert evidence becomes part of the record and should be considered by this court in reviewing the summary judgment. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 [objections not ruled upon by trial court are deemed waived]; *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 175.

[155] 4 CT 922:23-923:9 [Barnett Decl.].

of material fact as to the presence of a defect and its causal relationship to Richard Duarte's death.

To establish a case of design defect at trial, plaintiffs are required to prove a risk of danger inherent in the design that outweighed the benefits of that danger or a failure to warn of a risk that was known or knowable to the manufacturer in light of the generally recognized and prevailing best scientific knowledge available at the time.[156] Once plaintiffs make a prima facie case that their injury was caused by the product's design, the burden shifts to defendant to prove, using a risk-benefit analysis, that the product is not defective.[157] Richard's Duarte's death was caused by a tension bearing configuration that made a chute difficult to move and invited the use of pressure to move it. The configuration disregarded manufacturer's standards. Boggs should have known it was defective and dangerous.[158] Boggs is strictly liable for its bearing configuration.

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[156] *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 568; *Barker v. Lull Engineering Co*. (1978) 20 Cal.3d 413, 418.

[157] *Barker*, *supra*, 20 Cal.3d at p. 431; *Moreno v. Fey Manufacturing Corp*. (1983) 149 Cal.App.3d 23.

[158] 2 CT 554:8-11; 4 CT 922:6-10 [Barnett Decl.].

II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO DEFENDANT N. J. McCUTCHEN, INC.

Defendant N. J. McCutchen, Inc., an expert engineering firm, was engaged by Newark Sierra to redesign the chute in 1993 and to replace the cyclone feature of the swivel chute system and the duct above the swivel bearing in 1998.[159] The McCutchen employee in charge of both of these Newark Sierra projects was the firm's president, Jay Allan McCutchen, a graduate of the U.C.-Davis engineering school and a licensed California master engineer.[160]

As they did against Boggs, plaintiffs alleged negligence and strict liability causes of action against McCutchen. The trial court's on-the-record statements reveal three grounds for granting summary judgment in McCutchen's favor:

- An alleged *component part defense* to both strict liability and negligence: "[T]he bearing was the part that failed and McCutchen did not work on or alter the bearing. After the accident, the same lower chute was reattached."[161]

  "The plaintiffs' evidence . . . doesn't show or support an

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[159] 1 CT 61:23-25; 67:5-20 [McCutchen Depo.].

[160] CT 269:9-14 [McCutchen Depo.].

[161] RT 6:17-20 [Summary Judgment Motion Hearing].

inference that McCutchen was negligent in performing the alterations on the chute."[162]

- An alleged *subsequent supplier defense* to strict liability: "McCutchen played no part in the original design, manufacture or marketing of either the chute or any of its component parts. And therefore McCutchen's strict liability cause of action has to fail."[163]
- An alleged *unforeseeable misuse defense* to both negligence and strict liability, which the court also applied to Boggs.[164]

As in the case of Boggs, the trial court's rulings with respect to McCutchen disregarded plaintiffs' expert and percipient evidence, drew inferences favorable to McCutchen when other reasonable inferences could have been drawn, and amounted to judicial usurpation of the right to jury trial.

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[162] RT 8:1-3 [Summary Judgment Motion Hearing].

[163] RT 6:12-16 [Summary Judgment Motion Hearing].

[164] RT 9:6-18 [Summary Judgment Motion Hearing]; 26:26-27:15 [New Trial Motion Hearing].

McCutchen was an expert engineering firm with superior knowledge of the configuration and operation of industrial bearings. It was hired to perform engineering design, fabrication, and installation work. In the course of that work, it placed additional stress on the bearing *and* actually observed the upside down, guaranteed-to-freeze bearing configuration numerous times.[165]

During the course of its work, McCutchen never examined the bearing to ascertain whether it could handle the additional stress or, if it did, failed to perceive that the bearing was upside down in an obviously dangerous configuration and, in any event, said nothing to Newark Sierra about it.[166] *Indeed, engineer Jay Alan McCutchen admitted that he did not even know there were two types of bearing configurations – tension and compression – until after Richard Duarte was killed.*[167] *Any reasonable engineer would have known what McCutchen did not.*[168]

Thus, McCutchen carelessly provided Newark with what it, as an expert engineer, he knew or should have known was a defective product;

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[165] 1 276:8-277:23; 3 CT 725, pp. 154:10-155:24 [McCutchen Depo.].

[166] 1 276:8-12 [McCutchen Depo.]; 4 CT 923:20-924:3; 924:23-925:6 [Barnett Decl.].

[167] 3 CT 701, pp. 59:20-61:25, 709, p. 91:9-16, 725, pp. 154:10-155:24 [McCutchen Depo.].

[168] 2 CT 554:12-23; 4 CT 919-925 [Barnett Dec.]

one that, unfortunately for Richard Duarte, was eminently correctable. For these reasons, McCutchen, as well as Boggs, should face the jury on plaintiffs' claims of strict liability and negligence.

A. McCutchen Had a Duty Not to Re-install an Obviously Defective Bearing Configuration Without Giving Warning of the Defect.

As plaintiffs have observed, McCutchen undertook a duty of due care as a result of its work at Newark Sierra to persons who might be injured as a result of that work. Although the scope of McCutchen's work under its written contract did not expressly require examination of the bearing, that activity was an implicit obligation McCutchen assumed for two reasons:

First, McCutchen's redesigned chute placed additional stress on the bearing assembly, thereby mandating its examination by an expert engineer to determine whether the reinstalled chute and bearing system could withstand the strain.[169] McCutchen should have performed the reexamination, seen the obvious defect, and told its customer that the bearing configuration would have to be changed because it would not hold up under industrial use.

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[169] 2 CT 554:12-23 [Barnett Decl.].

Second, during the course of its work, McCutchen removed, examined, and re-installed the swivel bearing three or more times. Each time a reasonable and prudent engineer would have observed that the bearing was in a defective and dangerous upside down configuration and given warning to its customer.[170] McCutchen, of course, did none of this because it did not ever know the difference between tension and compression bearing configurations.[171] It thereby breached the standard of care.

Expert engineer Ralph Barnett testified in support of McCutchen's negligence in two declarations filed with the court. He observed that McCutchen's work created additional stress on the bearing, that McCutchen observed the bearing numerous times, and that a prudent engineer would have perceived the defect, changed the configuration, or at least given a warning.[172]

The court stated on the record that Barnett's first declaration defeated plaintiffs' claim because, according to the court, Barnett assumed that McCutchen did not check the viability of the bearing without any

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[170] 1 CT 129:3-5 [McCutchen Decl.]; 4 CT 919-925 [Barnett Decl.].

[171] 3 CT 701, 709, 725 [McCutchen Decl.].

[172] 4 CT 924:4-21 [Barnett Decl.].

evidence to support his assumption.[173] The court's statement was incorrect. *Mr. McCutchen testified that he, as the engineer in charge of his company's work at Newark Sierra, never inspected the area where the chute was attached to the bearing.*[174]

In an admission that established his firm's negligent conduct, Engineer McCutchen candidly admitted that he knew from the beginning of his firm's work that the bearing was installed in a tension configuration, but did not know the difference between tension and compression configurations or the risks of installing the bearing in tension. As he testified:

> "Q. Well, when was the first time that you had an appreciation in your mind that th[e] swivel bearing was installed in a tension application?
>
> A. Probably from the – seems it's a matter of knowing the difference between tension and compression it was being pulled on. It was – I knew that all along.
>
> Q. And when you say you had known that all along, you're talking about the fact back to 1993 when you first did some work on that bearing – on that trim chute, correct?

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[173] RT 7:6-8:3 [Summary Judgment Motion Hearing].

[174] 1 CT 279:13-17 [McCutchen Depo.].

A. Yes.

Q. And again in 1998 when McCutchen did further work on that trim chute, correct?

A. Yes.

Q. And you still stand by your prior testimony that it was not until after this incident involving Mr. Duarte that you first learned about the difference between a tension swivel bearing and a compression swivel bearing?

A. Yes.

Q. Okay. So if I understand the total of your testimony in that regard then you appreciated back in as early as 1993 that this subject swivel bearing was installed in a tension application, but was not until after the Duarte death that you realized that there were two different types of swivel bearings, tension and compression; is all that true?

A. Yes."[175]

McCutchen's admitted ignorance directly contributed to Richard's death. Expert engineer Ralph Barnett testified that McCutchen, as an engineer, should have known the difference between tension and

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[175] 3 CT 725, pp. 154:21-155:24 [McCutchen Depo.]; emphasis added.

compression installations and should have detected both the defect and the risk.[176] Instead, he directed reinstallation of the defective bearing without a word of warning to Newark Sierra.[177]

In California "the manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer had reason to believe they would not realize its dangerous condition."[178] Thus "[n]egligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about."[179]

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[176] 4 CT 923-925 [Barnett Decl.].

[177] *Id.*; 3 CT 709, p. 90:8-21, p. 91:9-16 [McCutchen Depo.]. In response to the court's criticism of his declaration, Barnett filed a second declaration in support of new trial in which he clarified and amplified his opinion in response to the court's concerns. (4 CT 923:20-924:3 [Barnett Decl.].) Although the trial court considered Barnett's new trial declaration, it did not change its summary judgment ruling with respect to McCutchen.

[178] *Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076-1077.

[179] *Anderson v. Owens-Corning Fiberglas Corp*. (1991) 53 Cal.3d 987, 1002.

Because plaintiffs proved that McCutchen did not warn of a risk for a reason that fell below the standard of care – its inexcusable ignorance of bearing configurations – summary judgment was improper.

B. As a Designer, Fabricator, and Supplier of New Equipment That Was Installed in Newark Sierra's Paper Plant, Mccutchen Was Strictly Liable for Any Defects in its Product as Well as for its Negligence.

The trial court's observation that McCutchen "played no part in the *original* design, manufacture or marketing of either the chute or any of its component parts" is correct as far as it goes.[180] It is also beside the point. McCutchen did design, fabricate, and install *the chute system* that killed Richard Duarte. That new system was the product of McCutchen's work in 1993 and 1998. McCutchen was, therefore, strictly liable for a defective design and installation – one that failed to detect an upside down bearing that was antithetical to the safe and successful operation of McCutchen's product.

[180] RT 6:13-15 [Summary Judgment Motion Hearing].

1. McCutchen May Be Held Strictly Liable Because It Participated In the Fabrication of the Defective Swivel Chute System That Killed Richard Duarte.

A manufacturer of a defective product is strictly liable in tort for injuries caused by the defect.[181] Strict liability extends to all business entities responsible for transmitting the product through the stream of commerce and into the hands of the eventual user.[182] Those entities include not only the parties readily identifiable as the manufacturer, designer, or vendor of a product, but also to every entity that comprises the link between the original manufacturer and the ultimate user or consumer.[183] As a custom designer, manufacturer, and installer of the swivel chute system that killed Richard Duarte, N.J. McCutchen is subject to strict liability.

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[181] *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63; *Smith v. Dhy-Dynamic Co.* (1973) 31 Cal.App.3d 852, 856-857.

[182] *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 251-252.

[183] *Edwards v. A.L. Lease & Co., Inc.* (1996) 46 Cal.App.4th 1029, 1033 ["In products liability action, every supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable."]; *Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268, 279 [defendant could not succeed on summary judgment because it did not deny involvement in the marketing or distribution of final product].

2. Having Designed and Supplied A Custom-Made Final Product, McCutchen Cannot Escape Strict Liability Based on the Component Part Defense.

McCutchen did not simply supply an off-the-shelf commercial product for use as a component part in some unknown application. Rather, it completely redesigned and fabricated the chute and flange and then reinstalled them to the bearing to create a new swivel chute assembly.

The fact that the existing bearing configuration was part of that assembly did not immunize McCutchen from liability for the defective condition of the assembly as a whole. *McCutchen itself reinstalled the bearing as part of the finished assembly without either changing the bearing configuration or advising its customer of the defective and dangerous condition in McCutchen's finished product.*[184]

McCutchen's status as designer and manufacturer and its role in making the trim chute assembly that killed Richard Duarte present triable issues of material fact. The rule of *DeLeon v. Commercial Manufacturing and Supply Co.*[185] governs McCutchen's liability. In *DeLeon*, plaintiff's arm was severed in part of a canning machine called a shaker bin. The

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[184] 3 CT 702, p. 62:1-6; 709, p. 90:8-21, p. 91:9-16 [McCutchen Depo.]; 4 CT 924:23-925:6 [Barnett Decl.].

[185] (1983) 148 Cal.App.3d 336.

shaker bin manufacturer had custom-designed its product to work in the cannery. While the bin itself was not defective, the manufacturer installed it underneath an unguarded line shaft maintained by plaintiff's employer that created a risk of injury.

Plaintiff sued the manufacturer on both strict liability and negligence theories. In its motion for summary judgment, the manufacturer argued, as McCutchen has here, that it could not be held liable because its bin was not defective and it was not responsible for choosing the location of its equipment in the fruit processing line. Plaintiff countered with a declaration of an engineering expert who testified that: "It is below the standard of practice to design equipment without considering hazards from adjacent equipment or components . . . [A] trained engineer and prudent manufacturer would have investigated the area surrounding the bin, noticed the dangers from the unguarded line shaft, and taken protective measures such as relocating the line shaft or bins, or recommending that a warning be placed on or near the bin."[186]

The Fifth District Court of Appeal reversed a summary judgment in the manufacturer's favor and remanded the case for trial on both strict liability and negligence claims. As to strict liability, the court ruled that the

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[186] *Id.* at p. 342.

bin, although not in itself defective, "could present an excessive preventable danger in its intended use because of its proximity to the line shaft."[187] Observing that the manufacturer's designer had visited the plant and measured the area where the bin was to be installed, the court found triable issues of material fact as to whether the designer should have noticed the unguarded shaft and either redesigned the bin or given a warning.[188]

Responding to the manufacturer's argument that plaintiff and her employer had misused the bin in an unforeseeable manner, the court held that manufacturers are legally bound to foresee that workers will resort to "alternative, less safe means because of the time or trouble involved using the 'safe' way."[189] According to the court, any conceivable misuse "only reduces any award [plaintiff] might receive in an amount proportionate to the degree she is deemed to be at fault."[190]

Under the rule of *DeLeon:* When a custom designer and manufacturer can foresee that its product will be used in an unsafe place or manner, it may be held strictly liable for failure to warn of the danger even

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[187] *Id.* at p. 344.

[188] *Id.* at pp. 343-346.

[189] *Id.* at p. 344.

[190] *Id.*

when its product is otherwise free of design or manufacturing defects. The rule has been universally applied in product liability cases.[191]

McCutchen fabricated and supplied a trim chute system to Newark Sierra which included, as a component part, a re-installed upside down bearing configuration. McCutchen was well aware in both 1993 and 1998 that its fabricated equipment would be installed above the Rotek bearing assembly and would be attached to the bearing to form a single functioning unit. Jay Alan McCutchen so testified.[192] Thus, this case is stronger than *DeLeon* in which the supplier's product was not physically attached to or a part of the overhead shaft.

In support of its motion for summary judgment, McCutchen cited cases in which manufacturers of component parts were relieved of liability because their particular part was not defective. None of these cases assists McCutchen. McCutchen did not supply an off-the-shelf non-defective tire

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[191] *See also Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1236 [manufacturer of a water cannon to be used on fire truck could be held strictly liable for failure to warn its customer of "the potential dangerous and foreseeable 'mismatch' of the deck gun and riser pipe attachments"]; *Gehl Brothers Manuf. Co. v. Superior Court* (1986) 183 Cal.App.3d 178, 184-185 [parties who supplied different parts of a wagon/forage unloader unit "as co-fabricators of a finished product, have *potential* design defect and duty-to-warn liabilities."]; *Hyman v. Gordon* (1973) 35 Cal.App.3d 769, 772-773 [defective location of an otherwise non-defective water heater may give rise to strict liability].

[192] 1 CT 61-63; 74:9-23.

into which its customer installed a defective valve stem as Firestone did in *Wiler v. Firestone Tire & Rubber Co.*[193] Nor was it a casual repair service that played no role in equipment design like the defendant in *Seo v. All-Makes Overhead Doors.*[194] McCutchen's duty *as an engineer* hired to design, fabricate, and install a custom-made product goes far beyond the duties of an off-the-shelf seller or a casual repair service. McCutchen knew the working environment of the chute and designed its chute assembly to function in that environment. Because the assembly was defective, McCutchen may be held strictly liable.

C. Like Boggs, McCutchen Cannot Escape Liability Based on the Unforeseeable Misuse Defense.

The trial court also applied the ***unforeseeable misuse defense*** to bar McCutchen's liability to plaintiffs. For the same reasons as plaintiffs have expressed above in relation to Boggs in Section I(A) above, that defense does not bar liability against McCutchen at the summary judgment stage. At most, it raises triable issues of material fact that require the evidence-sifting function of a jury trial.

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[193] (1979) 95 Cal.App.3d 621.

[194] (2002) 97 Cal.App.4th 1193.

CONCLUSION

Richard Duarte died because two companies who held themselves out as experts in the design, fabrication, and installation of industrial equipment did not adhere to the required standard of care and supplied defective equipment.

Summary judgments should not have been granted to either defendant. They must now be reversed.

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LAW OFFICES OF LAWRENCE M. KNAPP
DRIVON & TABAK, LLP
LAW OFFICES OF TONY J. TANKE

By:_____
Tony J. Tanke, *Attorneys for Plaintiffs and Appellants Cathy Duarte, Christina Duarte, and Kristopher Lanser-Duarte*

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LAW OFFICES OF LAWRENCE M. KNAPP
DRIVON & TABAK, LLP
LAW OFFICES OF TONY J. TANKE

By:_____
Tony J. Tanke, *Attorneys for Plaintiffs and Appellants Cathy Duarte, Christina Duarte, and Kristopher Lanser-Duarte*