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Court of Appeals
of the
State of New York

RAYMOND FINERTY and MARY FINERTY,

Plaintiffs-Respondents,

– against –

ABEX CORPORATION, *et al.*,

Defendants.

FORD MOTOR COMPANY,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Ford Motor Company states that it has no parent corporation.

The following is a list of publicly traded domestic and foreign companies in which Ford Motor Company directly or indirectly owns an equity interest of at least 10% but less than 100%:

China – Jiangling Motors Corporation, Limited

Turkey – Ford Otomotiv Sanayi Anonim Sirketi (Otosan)

The following subsidiaries or affiliates have issued debt securities to the public:

Ford Motor Credit Company, LLC

Ford Credit Canada, Ltd

Ford Holdings LLC

FCE Bank

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PRELIMINARY STATEMENT

Plaintiff Raymond Finerty alleges that he was injured from repeated exposure to asbestos, in part through his work as a mechanic in Ireland in the 1970s and 1980s, where he worked on asbestos-containing car and tractor parts. Mr. Finerty named Ford Motor Company ("Ford US"), among many other companies, as a defendant in this suit because some of those auto and tractor parts were "Ford" branded. It is undisputed, however, that the parts that injured Mr. Finerty were manufactured and distributed by Ford Motor Company Limited ("Ford UK"), a foreign entity that was owned (through other subsidiaries) by Ford US, and that was dismissed from this litigation for lack of personal jurisdiction. It is also undisputed that Ford US itself did not manufacture, distribute, or sell the auto and tractor parts that allegedly injured Mr. Finerty.

Those undisputed facts should resolve this case. While this Court has extended strict products liability to manufacturers, distributors, and certain sellers of defective products, it has also explained that the policy considerations justifying strict liability preclude extending it beyond the chain of distribution. Crucially, this rule applies fully to parent and subsidiary corporations: a parent corporation cannot be held strictly liable based on defective products manufactured, distributed, or sold by its subsidiary unless the plaintiff can pierce the corporate veil separating the subsidiary entity from the parent for purposes of legal liability.

That doctrine—which has been *unanimously* recognized by New York courts—follows both from fundamental corporate law principles of corporate separateness and limited liability, and from the policy justifications for strict products liability more generally. And because Ford US neither manufactured, nor distributed, nor sold the defective products causing Mr. Finerty's injury, that settled rule should have compelled the lower courts to grant Ford US summary judgment.

In holding that a reasonable jury could nevertheless find Ford US strictly liable, the Appellate Division applied a legal standard irreconcilable with New York products liability and corporate law. The court concluded that even though the auto and tractor parts at issue were "manufactured and distributed by Ford UK," R.1139, and even though "there is no basis for piercing the corporate veil," *id.*, Ford US could be held directly liable because it "acted as the global guardian of the Ford brand" and had a "substantial role" in the "design, development and use" of auto parts that were manufactured and distributed by Ford UK, "with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." *Id.* The court held that Ford US could be held directly liable based on these facts because they allowed a jury to conclude that Ford US was "'in the best position to exert pressure for the improved safety of products' or to warn the end users of these auto parts of the hazards they

presented." R.1140 (quoting *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57 (2d Dep't 2003)).

The Appellate Division's "best position to exert pressure" standard is entirely novel, and clearly wrong. Courts, such as the Second Department in *Godoy*, have explained that parties *within* the distribution chain—i.e., actual distributors or sellers of a defective product—can be held liable in part because they are in the best position to exert pressure on manufacturers to improve product safety. But neither this Court nor any other New York court has ever held that a party *outside* the distribution chain can be held strictly liable based on this or any other legal theory. Indeed, holding a parent corporation strictly liable on this basis for products manufactured, distributed, or sold by a separate corporate subsidiary would eliminate entirely the principle of corporate separateness in the products-liability context, because nearly *every* parent corporation can "exert pressure" on its subsidiary. The legal standard adopted by the Appellate Division is incorrect, and the answer to the certified question—i.e., whether the decision below was "properly made"—is no.

Nor are there any record facts identified by either court below that could justify denying Ford US summary judgment under the proper legal standard. Both courts below relied on Ford US's influence on product quality in its capacity as the worldwide owner of the Ford trademark, but New York courts have unanimously

held that trademark owners cannot be held strictly liable unless they themselves manufactured, distributed, or sold the defective product, even if the product was manufactured, distributed, or sold by the trademark holder's corporate subsidiary. The lower courts also relied on evidence suggesting that Ford US participated in the design of Ford UK-manufactured products. But as with trademark holders, only product designers that are themselves in the chain of distribution can be held strictly liable under a products liability theory, and Ford US was not in the chain of distribution. Finally, the trial court relied on evidence that it believed demonstrated Ford US's "control" over aspects of Ford UK's business. But such evidence of a parent's control over its subsidiary is irrelevant to whether the parent can be held directly liable for *its own* conduct. That evidence is relevant only to whether it is appropriate to hold the parent indirectly liable by piercing the corporate veil, which all agree is unwarranted here. No facts justify holding Ford US directly liable for its own conduct because it did not manufacture, distribute, or sell the auto and tractor parts that allegedly caused Mr. Finerty's injury. This Court should answer the certified question in the negative, and order summary judgment in Ford US's favor.

QUESTIONS PRESENTED

1. Whether the Appellate Division erred in holding that a parent corporation can be held liable for injuries caused by a defective product manufactured and

marketed by a distinct corporate subsidiary, where it is undisputed that there is no basis for piercing the corporate veil, but the parent corporation could "exert pressure for the improved safety of products or warn the end user of these auto parts of the hazards they presented." R.1140 (quotation omitted).

2. Whether a parent corporation is entitled to summary judgment on a claim for products liability when the undisputed record evidence demonstrates that the defective product was manufactured and distributed by its separate corporate subsidiary, and there is no basis for piercing the corporate veil.

STATEMENT OF JURISDICTION

The Court has subject matter jurisdiction over this appeal under CPLR § 5602(b)(1), because the appeal is taken from a non-final order entered by the Appellate Division, First Department, R.1138-40, and the Appellate Division granted Ford US's motion for leave to appeal to this Court, R.1136-37.

STATEMENT OF FACTS

Plaintiffs seek to hold Ford US strictly liable under design-defect and failure-to-warn theories of product liability based on injuries caused by asbestos-containing auto and tractor parts that all agree were manufactured, distributed, and sold not by Ford US, but by a separate company owned through other subsidiaries of Ford US—Ford UK. Both courts below held, and plaintiffs have conceded, that the corporate veil between Ford US and Ford UK cannot be pierced as a matter of

law, and thus Ford US, as a general matter, cannot be held liable for its subsidiary's conduct. The Appellate Division nevertheless denied Ford US's motion for summary judgment, holding that Ford US *can* be held *directly* liable under strict products liability because a jury could reasonably conclude that Ford US was the "global guardian" of its brand, and that it was thus "in the best position to exert pressure" on Ford UK to improve product safety and warnings. R.1139-40 (quotation omitted). The Appellate Division granted leave to appeal that decision, and certified to this Court the question whether its decision was "properly made." R.1137. The factual and procedural background relevant to evaluating that question are as follows:

A. Factual Background

1. Plaintiffs are Raymond Finerty and his wife, Mary. Mr. Finerty was born in 1953 in Mullingar, Ireland, R.55, where he lived until 1985, when he moved to the United States, R.107. Mr. Finerty suffers from mesothelioma, which he alleges was caused by exposure to asbestos. R.5.

Mr. Finerty testified at deposition that he worked with many different asbestos-containing products over the course of some twenty years of employment. These included residential and commercial products, as well as automotive products. For example, he was exposed to asbestos from various products while installing the roof, windows, doors, and plumbing while building his family home

in Ireland in 1978 and 1980. R.218-20. He was also exposed to asbestos while working for various construction companies in Ireland from 1973 until approximately 1984 or 1985, when he did masonry work and concrete work on residential and commercial sites, and built complete houses. R.140-41. And he was exposed to asbestos from roofing materials he handled while working as a subcontractor in 1984 and 1985. R.142-43.

Most relevant here, Mr. Finerty alleges that he was exposed to asbestos while working as a mechanic at McNamee's Garage in Ballymore, County Westmeath, Ireland, on and off between 1971 and approximately 1980. R.131, R.136. Mr. Finerty testified that while at McNamee's Garage, he performed brake, clutch, and gasket work on various Ford, Volkswagen, Chrysler, Fiat, Datsun, Morris, and Austin vehicles. R.132-35.

Mr. Finerty testified that he was exposed to asbestos when performing repairs on Anglia, Escort, Cortina, Capri, and Granada Ford models. R.134-36, R.170. He claimed that the replacement parts on which he worked were manufactured by various companies, including a company he identified as "Ford." R.132-34. He additionally testified that he performed brake, clutch, and gasket work on "newer" Ford tractors, R.215, including by installing Ford brakes, R.216-17. Replacement parts at McNamee's Garage were purchased by Finerty's employer, Noel McNamee, at various shops, including Martin's Ford dealership,

which was located approximately ten to twelve miles away, and a dealership in the town of Athlone, County Westmeath, Ireland. R.132-34, R.171-72.

Finally, Mr. Finerty testified to performing various repairs on automobiles (including "Ford" automobiles) outside the scope of any employment. Almost all these repairs were performed in Ireland, with replacement parts purchased at Martin's. R.115-24. Mr. Finerty also performed brake repairs on a used Ford pick-up truck after moving to the United States, but could not identify the brakes he removed or installed during this repair. R.148.

2. Although Mr. Finerty could only identify the relevant auto parts from which he was allegedly exposed to asbestos as "Ford" parts, it is undisputed that none of those parts were manufactured or sold by Ford US, the defendant-appellant here. The undisputed record evidence demonstrates that during the relevant time period, Ford US did not manufacture, produce, sell, or distribute vehicles, tractors, vehicle parts, or tractor parts directly to dealerships, repair shops, or retailers in Ireland, and that such vehicles, tractors, or parts would have been obtained from Ford UK or its Irish subsidiary. R.261, R.263, R.336.

Ford UK is an English company itself owned by Blue Oval Holdings, another English company, which is in turn owned by Ford Automotive Holdings, also an English company. R.258. Ford Automotive Holdings is owned by Ford International Capital LLC, a Delaware limited liability company, which itself is

owned by Ford US. R.258. Ford UK controls its own inventory, has a separate board of directors, maintains its own production facilities in the United Kingdom, and has independent decision-making capacity for day-to-day operations. R.353-56, R.366, R.368-69.

Ford UK also owned a company named Henry Ford & Son, Limited ("Ford Ireland"), which was incorporated in 1917 and closed in 1984. R.258-59. Ford Ireland maintained its own books, records, financial statements, and bank accounts, completely separate and apart from Ford US, and had a separate board of directors. R.259.

The foregoing uncontradicted facts establish that the auto and tractor parts that exposed Finerty to asbestos were manufactured and distributed either by Ford UK or Ford Ireland, but not by Ford US. R.2.[1]

B. Procedural History

Plaintiffs brought this action on April 22, 2010, against numerous corporations, alleging that Mr. Finerty was exposed to asbestos through their

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[1] It is undisputed that Ford UK and Ford Ireland are distinct corporate entities. For purposes of this appeal, however, the distinction between those two entities is irrelevant, because the only question is whether Ford US can be held liable for defective products manufactured and distributed by either or both of those subsidiaries. Thus, for ease of reference, and following the Appellate Division's convention, this brief will refer to those two entities together as "Ford UK" unless otherwise noted.

products and seeking damages on theories of products liability. Ford US was one of the named defendants. R.40-47.

Finerty was deposed in June and August 2010. As explained above, he was unable to identify at deposition any products manufactured or sold by Ford US through which he could have been exposed to asbestos. Ford US accordingly served a "no opposition" motion for summary judgment, accompanied by three affidavits of knowledgeable Ford US employees setting forth the Ford corporate structure described above, and explaining that the asbestos-containing auto and tractor parts on which Finerty worked in Ireland could not have been manufactured or sold by Ford US. R.255-64.

On November 15, 2010, plaintiffs' counsel refused to consent to a "no opposition" summary judgment motion because Ford US's motion was "based on the argument that Ford Motor Company is not responsible for the Ford products that the plaintiff worked on," and plaintiffs' "preliminary investigation indicates that this is not the case and our investigation is continuing in this matter." R.267. Plaintiffs' counsel also stated that he "would like to depose the Defendant's affiants and/or a person most knowledgeable regarding this jurisdictional issue." *Id.* On May 15, 2011, the special master then assigned to this matter ordered discovery concerning the corporate structure of Ford US and its subsidiaries, including the deposition of the Ford US employees who had submitted the

corporate-structure affidavits mentioned above. R.269-74. But plaintiffs never deposed any Ford US witness on this issue.

On August 15, 2011, presumably in response to those corporate-structure affidavits, plaintiffs filed a new amended complaint that named, among others, Ford Ireland and Ford UK as defendants. R.303-11. Both new defendants moved to dismiss on personal jurisdiction grounds. Plaintiffs signed a no-opposition summary judgment motion as to Ford Ireland on September 2, 2014. R.389. Ford UK's motion for summary judgment on personal jurisdiction grounds was denied by the trial court, but that determination was reversed by the Appellate Division, which ordered dismissal of the complaint against Ford UK. R.1138, R.1140. Plaintiffs did not seek leave to appeal that determination.

C. Decisions Below

1. After completion of discovery relating to the corporate structure of Ford US and its subsidiaries, Ford US moved for summary judgment on the ground that it could not be held directly liable for the products manufactured and distributed by Ford UK and that there was no basis for piercing the corporate veil between Ford US and those subsidiaries. The trial court denied the motion.

a. The trial court summarized the evidence—viewed in the light most favorable to plaintiffs—which fell into three basic categories (with some overlap).

First, the trial court identified evidence that it believed demonstrated that Ford US exercised some level of general control over Ford UK:

- Ford US "owned and controlled [Ford UK] and Ford Ireland" because it "acquired 100% of [Ford UK's] stock" to "integrate and coordinate its products and its operations," and to "ensure product standardization among the American and European manufacturing companies." R.7 (citing R.557-75).

- According to a former Ford UK engineer's affidavit filed in a different case, Ford US "controlled Ford Tractor Operations," including Ford UK's operations. R.8 (citing R.630-33).

- Ford US appointed Ford Tractor Operations' executives and managers and approved prices from component part suppliers. R.8 (citing R.621-22, R.625-26, R.627-29).

- Ford US "controlled product manufacturing at the world-wide level" because it "had final approval of the products to be manufactured at each of its international facilities." R.9 (citing R.685-709).

Second, the court described evidence ostensibly showing that Ford US was "actively involved" in the design of certain products. R.8. According to the court, "tractors and their component parts ostensibly were designed and developed jointly by US and England Engineers." R.8 (citing R.606). The court observed that Ford US was "responsible for design proposals relating to [Ford UK] … Tractor and other International Styling requirements" and that Ford US "had functional supervision over the British and German styling groups." R.8-9 (citing R.669-70). The court also noted that U.S.-based engineers had approval authority over international product proposals. R.9 (citing R.671-83).

Third, the trial court believed the evidence could show that Ford US, based on its worldwide ownership of the "Ford" trademark, designed all replacement part boxes, packages, and labels, and implemented a worldwide program to brand and package Ford parts and accessories. R.8 (citing R.634-39). Under the trademark program, Ford UK's replacement parts and packaging had to meet Ford US's "design specifications and standards." R.8 (citing 647-57); *see also* R.7-8 (Ford US executives intended to "standardize the present U.S. and Ford of England [tractor] products," to adopt a "world-wide manufacturing plan," and to "ensure that all Ford tractors manufactured around the world contained standard parts." (citing R.587-90, R.591-605, R.607-09)); R.9 ("All international product proposals had to be approved by US based and engineering and product planning committees." (citing R.671-83)). As the cited record evidence demonstrates, Ford US's specifications for the use of its trademarks on Ford products, including vehicles and parts, did not contain any specifications about product warnings, and the trial court noted that there was "no evidence to show that the packages for such parts warned of the hazards associated with asbestos." R.8.

b. The court "agree[d] with Ford US that there is no basis upon which to pierce the corporate veil" between Ford US and Ford UK. R.7. Indeed, the very evidence on which plaintiffs relied, and the trial court cited, refuted any suggestion of veil piercing. As the trial court recognized, "piercing the corporate veil requires

a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." R.7 n.3 (quoting *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 (1993)). Yet the evidence on which plaintiffs relied and the trial court recounted demonstrated that Ford UK was in fact a fully separate entity. There is no dispute, for example, that Ford UK and its subsidiaries were fully operating entities that manufactured and sold their own vehicles and parts, not shell companies. *E.g.*, R.587, R.592, R.593, R.607, R.651. Ford UK had sales of nearly $750 million and cash-on-hand of $150 million by 1960. R.564. And Ford US treated Ford UK as a separate entity, with memoranda from Ford US executives to the Ford US board of directors making clear that the Ford US board could only "*recommend* to the Board of Directors of Ford England" that it approve new projects. *E.g.*, R.587, R.595 (emphasis added). The trial court's conclusion that "there is no basis upon which to pierce the corporate veil" (R.7) was so obviously correct that plaintiffs did not appeal it.

Nevertheless, the trial court concluded that "summary judgment must be denied" because the court believed that the same record evidence that could not establish veil-piercing showed that Ford US "exercised significant control over [Ford UK] and had a direct role in placing the asbestos-containing products to

which Mr. Finerty was exposed into the stream of commerce." R.7, R.9. Based on this evidence, the trial court found that there is "a question whether [Ford US] could have required [Ford UK] to either manufacture asbestos-free products and/or sell replacement parts which warned of the hazards associated with asbestos," and thus whether Ford US had "direct responsibility for plaintiffs' injuries." R.9.

2. Ford US appealed, and the Appellate Division affirmed. That court also "agree[d]" with Ford US "that there is no basis for piercing the corporate veil" between Ford US and Ford UK. R.1139. But the court nevertheless held that Ford US was not entitled to summary judgment because Ford US "acted as the global guardian of the Ford brand, having a substantial role in the design, development, and use of the auto parts distributed by Ford UK, with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." *Id.* Thus, the court held that there are issues of fact concerning whether Ford US "may be held directly liable as a result of its role in facilitating the distribution of the asbestos-containing auto parts on the ground that it was 'in the best position to exert pressure for the improved safety of products' or to warn the end users of these auto parts of the hazards they presented." R.1139-40 (quoting *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 60-61 (2d Dep't 2003)).

3. The Appellate Division granted Ford US's motion for leave to appeal to this Court. R.1136-37.

ARGUMENT

It has long been settled under New York law that strict products liability extends *only* to the manufacturer, distributor, or seller of the defective product. That rule cannot be reconciled with the Appellate Division's holding that Ford US could be held liable for Mr. Finerty's injuries—even though Ford US did not manufacture or distribute or sell the products that allegedly injured him—merely because Ford US could have "exert[ed] pressure" on its subsidiaries to improve the safety of the defective products or the warnings given about the dangers of those products. R.1140.

The Appellate Division's holding also contradicts fundamental corporate law principles of limited liability and corporate separateness, which preclude holding a parent corporation liable for the acts of its subsidiary even when the parent exercises control over that subsidiary. Indeed, the Appellate Division's rule allowing parent-corporation liability whenever the parent corporation is able to "exert pressure" on its subsidiary would outright *eliminate* the principle of corporate separateness in all products liability cases, because essentially *every* parent corporation can "exert pressure" on its subsidiary companies.

Under the correct legal standard, strict liability cannot extend beyond the distribution chain, absent veil-piercing that concededly cannot be shown here. The

Court should answer the certified question in the negative, and order summary judgment in favor of Ford US.

I. UNDER NEW YORK LAW, A PARENT CORPORATION CANNOT BE HELD LIABLE ON A THEORY OF STRICT PRODUCTS LIABILITY WHEN THE OFFENDING PRODUCT WAS MANUFACTURED AND DISTRIBUTED BY A SEPARATE CORPORATE SUBSIDIARY

A. As A Matter Of Public Policy, New York Law Limits Strict Products Liability To Manufacturers, Distributors, And Sellers Of A Defective Product

This Court has held that "a product may be defective by reason of a manufacturing flaw, improper design or failure to warn," and that "[m]anufacturers of defective products may be held strictly liable for injury caused by their products, regardless of privity, foreseeability or due care." *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 94 (1986); *see also Jaramillo v. Weyerhaeuser Co.*, 12 N.Y.3d 181, 188 (2009). But the Court has also recognized that strict products liability is a particularly "onerous" form of liability, the imposition of which "rests largely on considerations of public policy." *Sukljian*, 69 N.Y.2d at 94-95. And in weighing the "complex mix of policy considerations" relevant to determining the extent of products liability, the Court has made clear that a "line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *Mondello v. New*

York Blood Ctr.-Greater New York Blood Program, 80 N.Y.2d 219, 227 (1992). (quotation omitted).

Based on its analysis of the relevant policy considerations, this Court has held that manufacturers and certain distributors and sellers of products can be held strictly liable for injuries caused by the products they manufacture, distribute, or sell. While the "basic justification for strict products liability is to place responsibility for a defective product on the *manufacturer* who placed that product into commerce," *Semenetz v. Sherling & Walden, Inc.*, 7 N.Y.3d 194, 201 (2006) (emphasis added; quotation omitted), the Court has held that strict liability also may be extended to certain *sellers* and *distributors* of defective products, for the specific policy reason that "the burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained," *Sprung v. MTR Ravensburg Inc.,* 99 N.Y.2d 468, 473 (2003); *see also Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 585 (1987); *Sukljian*, 69 N.Y.2d at 95.

This Court has made clear that because strict products liability is a form of liability imposed for policy reasons—not necessarily based on fault or blameworthiness—it may not be imposed when those policy reasons do not apply, or when other policy considerations counsel against extending it. Thus, for example, strict liability does not extend to an "occasional seller" of products,

because the "policy considerations" that "justify the imposition of strict liability on manufacturers and sellers in the normal course of business obviously lack applicability in the case of a party who is not engaged in the sale of the product in issue as a regular part of its business." *Sukljian*, 69 N.Y.2d at 95. "As a practical matter," the Court explained, "the occasional seller has neither the opportunity, nor the incentive, nor the protection of the manufacturer or seller who puts that product into the stream of commerce as a normal part of its business, and the public consumer does not have the same expectation when it buys from such a seller." *Id.* at 95-96. The Court also has refused to impose strict products liability on a successor corporation whose corporate predecessor had manufactured and sold the defective product—absent a showing akin to the one required for veil piercing—because such successor liability would "place[] responsibility for a defective product on a party that did not put the product into the stream of commerce," contrary to the "basic justification" for strict products liability. *Semenetz*, 7 N.Y.3d at 201.

This Court's analysis of the relevant policy considerations has thus yielded twin rules that control this case. On the one hand, it is "well settled that distributors of defective products, as well as retailers and manufacturers are subject to potential strict products liability." *Joseph v. Yenkin Majestic Paint Corp.*, 261 A.D.2d 512, 512 (2d Dep't 1999) (quotation and alteration omitted). But for the

very same policy reasons that strict liability does apply to manufacturers and certain distributors and sellers, strict liability "may *not* be imposed … upon a party that is outside the manufacturing, selling or distributive chain." *Kane ex rel. Kane v. A.J. Cohen Distribs. of Gen. Merch., Inc.*, 172 A.D.2d 720, 720 (2d Dep't 1991) (emphasis added); *see also Laurin Mar. AB v. Imperial Chem. Indus. PLC*, 301 A.D.2d 367, 367-68 (1st Dep't 2003) ("A party that is outside of the manufacturing, selling or distribution chain … cannot be held liable for … strict products liability."); *Passaretti v. Aurora Pump Co.*, 201 A.D.2d 475, 475 (2d Dep't 1994) (same); *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205, 211 (4th Dep't 1993) (same); *Watford v. Jack LaLanne Long Island, Inc.*, 151 A.D.2d 742, 744 (2d Dep't 1989) (same); *Smith v. City of New York*, 133 A.D.2d 818, 819 (2d Dep't 1987) (same); *Zwirn v. Bic Corp.*, 181 A.D.2d 574, 575 (1st Dep't 1992) ("Defendant thus demonstrated prima facie that it had neither manufactured nor distributed the subject lighter.").

B. A Parent Corporation May Not Be Held Strictly Liable Under Products Liability Theories When The Defective Product Is Manufactured, Distributed, Or Sold By Its Separate Corporate Subsidiary, Not The Parent Itself

The principal question in this case is whether the clear and settled rule described above—i.e., that *only* manufacturers, distributors, and sellers of a defective product can be held strictly liable for injuries caused by that product—should be subject to an exception for parent corporations, even when the corporate

veil separating the parent from its subsidiary remains intact. The answer is no. Consistent with fundamental and long-recognized principles of corporate and products liability law, as well as every relevant New York precedent, a parent corporation cannot be held strictly liable unless (i) there is no actual separation between parent and subsidiary—i.e., the corporate veil has been pierced—or (ii) the parent has *itself* manufactured, distributed, or sold the defective product.

1. *Established Principles Of Corporate Law And Products Liability Preclude Holding A Parent Corporation Directly Liable For Injuries Caused By Products Manufactured, Distributed, Or Sold By Its Separate Corporate Subsidiary*

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)). This Court has thus long recognized "the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). That rule fully applies in the context of parent and subsidiary corporations: "As a general rule, parent, subsidiary, or affiliated corporations are

treated separately and independently, and one will not be held liable for the contractual obligations, torts, or acts of another." 14 N.Y. Jur. 2d Business Relationships § 41 (footnotes omitted).

The corporate form—and the concomitant rule of corporate separateness—limits a parent corporation's potential liability to just two basic situations. *First*, a parent corporation may be held vicariously or derivatively liable for the acts of its subsidiary only if there is, in fact, no separateness between the two, i.e., if the "corporate veil" between parent and subsidiary can be pierced. To defeat corporate separateness, the plaintiff bears a "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). In other words, even though "complete domination of the corporation is the key to piercing the corporate veil . . . such domination, standing alone, is not enough." *Morris*, 82 N.Y.2d at 141. The plaintiff must, in addition, make "some showing of a wrongful or unjust act toward plaintiff." *Id.* at 141-42. But in all events, absent a showing that "the parent corporation . . . exercise[s] complete dominion and control over the subsidiary's daily operations," a parent corporation may not be held vicariously liable for the conduct of its subsidiary. *Achtziger v.*

Fuji Copian Corp., 299 A.D.2d 946, 948 (4th Dep't 2002) (quotation and alteration omitted).

Second, under the principle of corporate separateness, a parent company of course can be "directly liable for its own actions," but the parent must be "directly a participant in the wrong complained of." *Bestfoods*, 524 U.S. at 64-65 (quotation omitted). Derivative-liability cases thus "are to be distinguished from those in which the alleged wrong involving the subsidiary can seemingly be traced to the parent corporation through the conduit of its own personnel and management and the parent is *directly a participant in the wrong complained of*." 14 N.Y. Jur. 2d Business Relationships § 42 (emphasis added). Indeed, holding a parent company "directly responsible for the actions of its … subsidiary … would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities," except in "extraordinary circumstances" where veil-piercing is appropriate. *Balintulo v. Ford Motor Co.*, __ F.3d __, 2015 WL 4522646, at *4 (2d Cir. 2015).

As applied in the products liability context, these principles compel the conclusion that when a parent corporation did *not* manufacture, distribute, or sell the allegedly defective product—i.e., the parent did not participate directly in the wrong complained of—the parent cannot be held liable, *unless* the plaintiff can pierce the corporate veil separating the parent from the legally responsible entity.

Because the "wrong" in a products-liability case is the manufacture, sale, or distribution of a defective product, *see supra* Part I.A., a company that did not itself manufacture, distribute, or sell a defective product has not participated directly in the "wrong" at issue. Thus, absent veil-piercing, the corporate parent cannot be held liable for the manufacture, distribution, or sale of defective products by a separate corporate subsidiary.

2. *The Recognized Policy Justifications For Strict Liability Do Not Support Extending Liability To A Parent Corporation When The Defective Product Is Manufactured, Distributed, Or Sold By Its Subsidiary*

The foregoing principles of corporate separateness themselves suffice to preclude holding a parent corporation strictly liable when it has not itself manufactured, distributed, or sold a defective product. But that conclusion is reinforced by the same "considerations of public policy" that justify imposing such "onerous liability" in the first place. *Sukljian*, 69 N.Y.2d at 95.

Most obviously, the "basic justification for strict products liability" is "to place responsibility for a defective product on the manufacturer who placed that product into commerce." *Semenetz*, 7 N.Y.3d at 201 (quotation omitted). There is no basis for extending strict liability to a party that did not itself manufacture or sell the defective product, since doing so would "place[] responsibility for a defective product on a party that did *not* put the product into the stream of commerce." *Id.* (emphasis added). Altering that rule to extend strict liability to the

ultimate, separate parent of the manufacturer or seller cannot be reconciled with the fundamental rule of corporate separateness, because a non-manufacturing or non-selling parent corporation can be viewed as the entity that "placed th[e] product into commerce" only if the parent and its subsidiary are treated as *the same entity*—a result directly contrary to the corporate separateness rule.

This Court has also explained that strict liability as against manufacturers, distributors, and sellers of a defective product is justified because "the burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained." *Sprung,* 99 N.Y.2d at 473. Yet it is fundamental that owners of a corporation—including the ultimate parent of a subsidiary—"are normally not liable for the debts of the corporation, and … it is perfectly legal to incorporate [a subsidiary] for the express purpose of limiting the liability of the [parent]." *Morris*, 82 N.Y.2d at 141; *see also Rapid Transit Subway Constr. Co. v. City of New York*, 259 N.Y. 472, 487-88 (1932) ("Many a man incorporates his business or his property and is the dominant and controlling feature of the corporation. He may do so for the very purpose of escaping personal liability, and he may do so as a cover if in fact the corporation really exists—is doing business as permitted by the laws of this state or the state of its incorporation, in other words, is a person recognized by the law. That is true equally where the

corporation is controlled by a natural or an artificial person." (quotation omitted)); *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995) ("The law permits the incorporation of businesses for the *very purpose* of isolating liabilities among separate entities." (emphasis added; quotation omitted)). In other words, a parent corporation can establish a subsidiary expressly to *avoid* having to treat the liabilities accrued by the subsidiary "as a cost of doing business" for which insurance must be purchased. Given that the policies underlying both strict products liability and the corporate form are so clearly at odds with extending strict liability to non-manufacturing, non-selling parent corporations, there is no justification for extending products liability beyond its established bounds.

Nor is there any compelling equitable reason to ignore the general rules and policies underlying corporate law and products liability to provide a remedy against parent corporations in this type of case. If the subsidiary corporation is not truly separate from its parent, then the parent can be held vicariously liable, and if the subsidiary is a separate entity, then it will normally be amenable to suit, and will be able to insure against damages caused by its defective products just as any other participant in the chain of distribution can do.

To be sure, plaintiffs here lack a remedy *in New York* because this State lacks personal jurisdiction over Ford UK, the actual manufacturer and distributor of the defective products. But that result merely follows from the fact that plaintiff

worked in Ireland and was injured in Ireland by products manufactured and distributed in Ireland and England. The generally applicable rules of corporate liability should not be altered to account for this relatively unusual situation. Indeed, this Court has previously observed that "virtual destruction of the plaintiff's remedies against the original manufacturer" is "not a justification" for imposing liability on a separate corporation, but is instead "merely a statement of the problem." *Semenetz*, 7 N.Y.3d at 200 (quotation omitted). And much more "than just a statement of the problem is required to justify a change in the corporate law." *Id.*; *cf. Boughton*, 65 F.3d at 836 ("The possibility that the plaintiffs may have difficulty enforcing a judgment against [the subsidiary] alone is not the type of injustice that warrants piercing the corporate veil."). The very purpose of the corporate form is to isolate liabilities between separate entities. *Morris*, 82 N.Y.2d at 141. If the absence of a remedy against a subsidiary corporation in one jurisdiction sufficed to justify imposing liability on the parent corporation, then the isolation of liability specifically intended by the corporate form would be utterly without meaning. *Id.*; *see also Rapid Transit Subway Constr. Co.*, 259 N.Y. at 487-88; *Boughton*, 65 F.3d at 836.

3. *New York Precedent Unanimously Recognizes That Parent Corporations Are Not Liable For Injuries Caused By Products Manufactured, Distributed, Or Sold By Their Subsidiaries Absent Veil Piercing*

Applying the principles and policies described thus far, New York courts have unanimously held that a parent corporation cannot be held strictly liable for a defective product manufactured, distributed, or sold by its subsidiary unless there are grounds for piercing the corporate veil.

In *Porter v. LSB Industries, Inc.*, 192 A.D.2d 205 (4th Dep't 1993), for example, the plaintiff was injured by a product distributed by the wholly owned subsidiary of the defendant (and manufactured by an unaffiliated company). *Id.* at 209. The court held that the parent-defendant could not be held strictly liable because "[p]roducts liability cannot be imposed on a party that is outside the manufacturing, selling or distribution chain." *Id.* at 211. The court separately concluded that "there is no basis for imposing liability upon LSB in its capacity as shareholder by 'piercing the corporate veil.'" *Id.* at 215.

So too in *Bova v. Caterpillar, Inc.*, 305 A.D.2d 624 (2d Dep't 2003), in which the Second Department held that Caterpillar, Inc. could not be sued for injuries caused by a forklift its subsidiary manufactured because while "the name 'Caterpillar' was on the forklift, the record indicates that CII [i.e., the subsidiary], not Caterpillar, Inc., manufactured and distributed the forklift," and "[l]iability cannot be imposed on a party that was outside the chain of manufacturing, selling,

or distributing a product." *Id.* at 626. And in *King v. Eastman Kodak Co.*, 219 A.D.2d 550 (1st Dep't 1995), a products liability action against Kodak for injuries caused by keyboards manufactured by its wholly-owned subsidiary, Atex, the First Department held that Kodak could not be held vicariously liable for Atex's conduct, and that it could not be held directly liable because "there was no evidence that Kodak was involved in the manufacture, sale or distribution of the product." *Id.* at 551-52.

This Court itself has not directly addressed the issue of parent-corporation liability in this context, but the Court has held in the related context of successor-company liability that a successor corporation cannot be held liable for a defective product manufactured and sold by its predecessor even though the successor corporation took over its predecessor's product line. *See Semenetz*, 7 N.Y.3d at 199-201. The Court's analysis is instructive: the successor should not be made subject to strict liability because doing so would "place[] responsibility for a defective product on a party that did not put the product into the stream of commerce," which would be "inconsistent with the basic justification for strict products liability." *Id.* at 201.

All relevant precedent thus confirms what principle and policy already make clear: a parent corporation cannot be held directly liable when it does not itself manufacture, distribute, or sell a defective product. Rejecting that principle

"would mark a radical change from existing law implicating complex economic considerations better left to be addressed by the Legislature." *Semenetz*, 7 N.Y.3d at 201 (quotation omitted). Absent such legislative action, the Court should reaffirm the settled rule that any "party that is outside of the manufacturing, selling or distribution chain … cannot be held liable for … strict products liability." *Laurin*, 301 A.D.2d at 367-68.

II. FORD US IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT IS UNDISPUTED THAT THE ASBESTOS-CONTAINING PARTS TO WHICH PLAINTIFF WAS EXPOSED WERE MANUFACTURED AND DISTRIBUTED BY FORD UK, NOT FORD US

Ford US is entitled to summary judgment under the correct legal standard. All now agree that Ford US cannot be held derivatively liable for Ford UK's conduct. Both courts below held that there is no basis for piercing the corporate veil between Ford US and Ford UK. R.1139; R.7. Plaintiffs did not appeal that determination. Indeed, plaintiffs asserted in their Appellate Division brief that the "area of derivative liability and piercing the corporate veil is completely irrelevant in this case … because that is not Plaintiffs-Respondents' theory of liability." Appellate Division Response Br. 30.

Nor can Ford US be held directly liable under the established legal principles discussed above, because it is undisputed that Ford US did not manufacture, distribute, or sell the products that caused plaintiff's injury. The Appellate Division's holding that Ford US could nonetheless be held liable

because it was in the "best position to exert pressure" on Ford US to improve product safety and warnings is irreconcilable with established corporate law principle of corporate separateness, and contradicts the settled rule that strict products liability cannot extend beyond the distribution chain. The certified question should be answered in the negative, and the Court should hold that Ford US is entitled to summary judgment.

A. The Appellate Division's "Best Position To Exert Pressure" Test Is Inconsistent With Established Principles Of Corporate And Products Liability Law

The legal test adopted by the Appellate Division for when a parent corporation can be held directly liable on theories of products liability is utterly irreconcilable with the principles and precedents described in Part I above. The Appellate Division did not dispute that the "asbestos-containing auto parts" at issue here were "manufactured and distributed by Ford UK." R.1139. The court also "agree[d] that there is no basis for piercing the corporate veil." *Id.* But the court nevertheless held that a reasonable jury could find Ford US directly liable. The Court concluded (on its view of the record) that Ford US "acted as the global guardian of the Ford brand" and had a "substantial role" in the "design, development and use" of auto parts that were manufactured and distributed by Ford UK, "with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." *Id.* Based on this factual

conclusion, the Court held that questions of fact exist as to whether Ford US may be held "directly liable" for its role because Ford US "was 'in the best position to exert pressure for the improved safety of products' or to warn end users of these auto parts and the hazards they presented." R.1139-40 (quoting *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 60-61 (2d Dept. 2003)).

The Appellate Division was obviously correct that there is no basis for piercing the corporate veil between Ford US and Ford UK, as plaintiffs have acknowledged. But the Appellate Division just as obviously erred in concluding that even absent such veil-piercing, Ford US can be held strictly liable for injuries caused by allegedly defective products manufactured or distributed by Ford UK. Nobody disputes that Ford US itself did not manufacture, distribute, or sell the products that allegedly exposed Mr. Finerty to asbestos. That should have been the end of the matter. *See supra* Part I.

The Appellate Division's contrary theory of Ford US's liability contradicts the fundamental rule of corporate separateness on which New York's (and every other state's) corporate law is based. The mere fact that Ford US could "exert pressure" on its subsidiary to improve product safety or warn consumers of product hazards cannot suffice to establish Ford US's liability for products manufactured or sold by its subsidiary, because those facts are true for virtually *any* corporate parent. The parent and subsidiary "share a common purpose whether or not the

parent keeps a tight rein over the subsidiary," and "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72 (1984). Indeed, it is "expected that a subsidiary will be controlled by its parent; otherwise, the parent would have little reason for creating it." 9-120 Business Organizations with Tax Planning § 120.05. For this reason, a parent corporation "necessarily exercise[s] a considerable degree of control over the subsidiary corporation," *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984), and at some point, "[e]very parent will benefit from its subsidiary's profit-generating activities, and every parent will have the opportunity to guide the affairs of its subsidiary," *Banff Ltd. v. Ltd., Inc.*, 869 F. Supp. 1103, 1107 (S.D.N.Y. 1994). The Appellate Division's novel rule would thus make essentially every parent corporation strictly liable for its subsidiary's manufacture, distribution, or sale of defective products—a complete end-run around the strict corporate separateness rule repeatedly recognized by this Court.

That corporate separateness rule by its terms refutes the Appellate Division's analysis. Under that rule, "the key to piercing the corporate veil" is to demonstrate "complete domination" of the subsidiary by the parent, and yet even such "domination, standing alone, is not enough." *Morris*, 82 N.Y.2d at 141. But if even *complete domination* of the subsidiary by the parent is not enough, it follows

a fortiori that the mere ability to "exert pressure" on a subsidiary cannot justify subjecting the parent corporation to strict liability for its subsidiary's product manufacturing and distribution.

There is no precedent for the Appellate Division's decision. The Appellate Division relied entirely on *Godoy*, but that case is inapposite. The cited portion of the opinion simply explains why "a *manufacturer, wholesaler, distributor, or retailer* who sells a product in a defective condition is liable for injury which results from use of the product." 302 A.2d at 60 (emphasis added). The *Godoy* court observed that the non-manufacturers *within that distribution chain* may be in the "best position to exert pressure for the improved safety of products." *Id.* (quotation omitted); *see also Sukljian*, 69 N.Y.2d at 95 (explaining that *sellers* that market a product "in the normal course of business" are "most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings, or through contribution or indemnification in litigation"). *Godoy* neither holds nor suggests that an entity *outside* the distribution chain can also be held strictly liable, especially when that entity is protected by corporate separateness rules that exist specifically to *preclude* parent company liability for the acts of subsidiary entities. Those rules preclude Ford US's liability here.

B. Ford US Is Entitled To Summary Judgment Under The Proper Legal Standard Applied To The Undisputed Facts

Not only is the legal test adopted by the Appellate Division incorrect, but there is no legal theory under which plaintiffs' claims can proceed to trial on the summary judgment record. The lower courts cited record evidence about Ford UK's use of the Ford trademark, Ford US's alleged influence over Ford-branded designs, and Ford US's purported "control" of Ford UK. *See supra* at 11-13. Yet none of that evidence can overcome the undisputed fact that Ford UK—not Ford US—manufactured and distributed the products that allegedly caused Mr. Finerty's injury.[2] That fact makes all the difference under New York law. Ford US is entitled to summary judgment.

1. *A Trademark Holder That Does Not Manufacture, Distribute, Or Sell The Defective Product Is Not Strictly Liable Under New York Law*

Both lower courts emphasized that Ford US, as the worldwide holder of the "Ford" trademark, allegedly sought to assure the proper use of its mark and the quality of the products to which it was attached. The Appellate Division stated that Ford US "acted as the global guardian of the Ford brand," with the "apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." R.1139. The trial court relied on similar facts. It noted that Ford US

[2] Ford US disagrees with the trial court's and Appellate Division's interpretation of the record evidence. For the reasons explained below, Ford US is entitled to summary judgment even if those courts' interpretations were correct.

owned the "Ford" trademark worldwide and, citing Ford US policies concerning the use of that mark, read the record evidence to show that Ford US designed all replacement-part boxes, packages, and labels, and implemented a worldwide program to brand and package Ford parts and accessories. R.8 (citing R.634-39). Under the trademark program, the trial court believed that Ford UK's replacement parts and packaging had to meet Ford US's "design specifications and standards." R.8 (citing 647-57); *see also* R.9 ("All international product proposals had to be approved by US based and engineering and product planning committees." (citing R.671-83)).

Ford US's ownership of and control over the "Ford" trademark it licensed to its subsidiaries does not subject Ford US to strict products liability. New York courts have repeatedly refused to extend such liability beyond the distribution chain based on trademark control: "Products liability cannot be imposed on a party that is outside the manufacturing, selling or distribution chain *and there is no reason to create an exception for licensors of trademarks*." *Porter*, 192 A.D.2d at 211 (emphasis added); *see Laurin*, 301 A.D.2d at 367-38 ("A party that is outside of the manufacturing, selling or distribution chain, including a trademark licensor, cannot be held liable for breach of warranty and strict products liability."); *Kane ex rel. Kane*, 172 A.D.2d at 720-21 (trademark licensor was not strictly liable for injuries caused by a defective product even though "[t]he licensing agreement gave

[the seller] the right to use the [trademark licensor's] name and logo and to participate in the [licensor]'s advertising program."). Imposing strict liability on trademark licensors that do not themselves manufacture and sell the products would undermine the basis for strict products liability by "plac[ing] responsibility for a defective product on a party that did not put the product into the stream of commerce." *Semenetz*, 7 N.Y.3d at 201. And it would impermissibly impose strict liability on a party with no ability to incorporate the cost of damage awards (or insurance) into the product's price. *See supra* at 18.

The rule applies with equal force when the trademark holder is a corporate parent of the subsidiary that actually manufactured or sold the product. *See Porter*, 192 A.D.2d at 211; *see also Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1222 (10th Cir. 1997) (parent corporation that gave its subsidiary license to use its name on product could not be held strictly liable for product defects); *Moffett v. Goodyear Tire & Rubber Co.*, 652 S.W.2d 609, 613 (Tex. Ct. App. 1983) (U.S. parent corporation not liable for product manufactured and distributed by foreign subsidiary even though subsidiary was "was primarily engaged in the manufacture and sale of tires with the Goodyear logo and was licensed by appellee to use the Goodyear trademark"). To treat a trademark licensor differently merely because of a parent-subsidiary relationship would be to disregard the rule of corporate separateness fundamental to the corporate form. Yet again, if a parent

corporation's trademark control sufficed to subject it to strict liability for defective products manufactured or sold by subsidiaries, then the parent corporation of nearly every multinational corporate family would be automatically subject to strict liability for "branded" products it did not manufacture, distribute, or sell—a result obviously contrary to the basic policy justifications for strict products liability and to the rules of limited liability and corporate separateness described above.

Imposing strict liability on a trademark holder also cannot be justified by the holder's influence over the nature or quality of products that its licensee manufactures or distributes. Not only is quality control an inherent aspect of any trademark licensing agreement, but a trademark licensor has an "*affirmative duty* of policing in a reasonable manner the activities of his licensees," including "the nature and quality of the goods or services in connection with which the mark is used." *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (quoting 15 U.S.C. § 1127; emphasis added). To abandon this duty is to risk abandoning the right to the trademark itself. *Id.* Because use of a trademark is not sufficient to justify holding the trademark licensor strictly liable under New York law, neither is the approval of "design specifications and standards" (R.8) that necessarily accompanies any valid trademark license, so long as the trademark holder itself is not a manufacturer, distributor, or seller of the product. *See Porter*,

192 A.D.2d at 211; *Kane ex rel. Kane*, 172 A.D.2d at 720-21; *see also D'Onofrio v. Boehlert*, 221 A.D.2d 929, 929 (4th Dep't 1995) ("The fact that Spalding, under the licensing agreement with defendant Sears Roebuck & Co. (Sears), had the right to approve or disapprove items and materials bearing its name and the marketing plan for those items is insufficient, without evidence of actual control, for imposition of liability.").

2. *A Non-Manufacturing Or Non-Selling Party That Participates In The Design Of The Defective Product Is Not Strictly Liable Under New York Law*

The lower courts also suggested that there was evidence of Ford US's "active[] involve[ment] in the design" of products manufactured and sold by Ford UK. R.8; *see also* R.1139 (Ford US had a "substantial role in the design … of the auto parts distributed by Ford UK"). But product designers, like trademark licensors, cannot be held liable for defective products that others manufacture and distribute. *See Sage*, 70 N.Y.2d at 586-87; *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 478 (1980). As with trademark licensors, non-manufacturing or non-selling product designers are outside the chain of distribution and cannot incorporate the cost of damages into the product's price, so holding them liable would undermine the basis for strict products liability. As this Court has explained, the "burden of [a] plaintiff's accidental injuries" can be "placed on the *manufacturer* because it designed the defective product and placed

it in the stream of commerce"—"[i]nasmuch as the defect was in the design, the *manufacturer* was the logical party in a position to discover the defect and correct it to avoid injury to the public." *Sage*, 70 N.Y.2d at 587 (emphasis added). But this Court has never suggested that a party involved in the design of a product but *outside* its chain of distribution can be held liable on a products liability theory. To the contrary, this Court and lower New York courts have consistently limited products liability to manufacturers, distributors, and sellers. *See supra* Part I. Indeed, if strict products liability were extended to non-manufacturing product designers, there would be no reason to exclude from liability other entities that control or influence design or quality, including patent holders, trademark licensors, franchisors, individual inventors, and trade associations that impose quality standards—a proposition inconsistent with New York law. *See Porter*, 192 A.D.2d at 211 (trademark licensors, franchisors, and trade associations are not subject to strict products liability).

Relying on the same public policy considerations identified by this Court as underlying strict liability—including a non-manufacturer's inability to obtain liability insurance for defects and its lack of involvement in the chain of distribution—the Seventh Circuit concluded that a parent corporation that acted as "a non-manufacturer product designer" was not strictly liable "for a product manufactured and sold by its independent foreign subsidiary." *Affiliated FM Ins.*

Co. v. Trane Co., 831 F.2d 153, 154 (7th Cir. 1987). In describing the relevant public policy considerations, the Seventh Circuit cited *Fish v. Amsted Industries, Inc.*, 376 N.W.2d 820, 826-28 (Wis. 1985)—the same case this Court cited in *Semenetz* in rejecting the product-line theory of corporate successor liability, *see* 7 N.Y.3d at 200-01. Those policy considerations compel the same conclusion here: even if Ford US had any involvement in the design of products sold by Ford UK, it cannot be held liable on a theory of products liability because it neither manufactured, nor distributed, nor sold the defective products that caused Mr. Finerty's injuries.

3. *Evidence Of A Parent Corporation's Control Of Its Subsidiary Is Not Relevant To The Parent's Direct Liability*

Finally, the trial court (though not the Appellate Division) relied on record evidence that the court believed showed that Ford US "exercised significant *control* over [Ford UK]," thus raising "a question whether [Ford US] could have required [Ford UK] to either manufacture asbestos-free products and/or sell replacement parts which warned of the hazards associated with asbestos." R.9 (emphasis added).

Even if the summary judgment record could be read to demonstrate that Ford US "exercised significant control over [Ford UK] and Ford Ireland," R.9, as the trial court concluded, the court legally erred in relying on evidence of Ford US's alleged control of Ford UK in its analysis of Ford US's direct liability. A

parent's control of its subsidiary is relevant to whether the parent can be *derivatively* liable for the acts of its subsidiaries, *see*, *e.g.*, *Achtziger*, 299 A.D.2d at 948 (to pierce corporate veil, "the parent corporation must exercise complete dominion and control over the subsidiary's daily operations" (alterations omitted))—which, all now agree, Ford US cannot, *see supra* at 30. But such evidence of control is legally irrelevant as to the parent corporation's *direct* liability for *its own* conduct.

The U.S. Supreme Court held exactly that in *Bestfoods*. That case concerned a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which extended liability to "any person owning or operating" a polluting facility. 524 U.S. at 56 (quotation omitted). The question in the case was the extent to which a parent corporation could be held liable for pollution from a facility operated by its subsidiary. *Id.* at 60. The Court explained that a parent corporation could not be held liable for the acts of its subsidiaries absent derivative liability through veil piercing, *id.* at 61-64, but that the parent could be directly liable for its own conduct, *id.* at 64-65. And the court explained that direct liability under CERCLA required that the defendant itself "operate" a pollution facility. *Id.* at 65.

The federal district court in *Bestfoods*—much like the trial court here—held that the parent corporation could be held directly liable because it "actively

participated in and exerted significant control over [its subsidiary's] business and decision-making." *Id.* at 67 (quotation omitted). The Supreme Court rejected that test because of its improper "fusion of direct and indirect liability." *Id.* The district court had incorrectly asked "a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent's interaction with the subsidiary's facility (the source of any direct liability)." *Id.* But if "direct liability for the parent's operation of the facility is to be kept distinct from derivative liability for the subsidiary's own operation, the focus of the enquiry must necessarily be different under the two tests." *Id.* at 67-68. Thus, the Court held that the "question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary." *Id.* at 68 (quotation omitted). "Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine," the Court explained, "not direct liability under the statutory language." *Id.* (quotation omitted).

The Second Circuit recently held the same thing in a case against Ford US. The plaintiffs in that case had alleged that Ford US "controlled [its] South African subsidiar[y] from the United States such that [it] could be found directly—and not just vicariously—liable for [its] subsidiar[y's] conduct." *Balintulo*, 2015 WL 4522646, at *4. "But," the court explained, "holding Ford to be directly

responsible for the actions of its South African subsidiary, as plaintiffs would have us do, would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities." *Id.* Rather, such allegations of control would only be relevant to Ford US's liability if they could support "pierc[ing] the corporate veil," but such veil-piercing was appropriate only in "extraordinary circumstances," and plaintiffs had not offered any allegations to support veil piercing. *Id.*

So too here. If Ford US's control of Ford UK had been sufficiently significant, then Ford US might have been indirectly liable for Ford UK's conduct under a veil-piercing theory. But all now agree that indirect liability would be inappropriate here, and that Ford US can be held liable, if at all, only directly, for its own conduct. Thus, the question is not the extent of Ford US's control of Ford UK, but rather whether Ford US *itself* engaged in conduct for which it could be held directly liable. The answer is no—as explained above, direct liability in the products liability context applies only to parties that manufacture, distribute, or sell the allegedly defective product. Ford US did none of those things. The lower courts erred in denying Ford US's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the negative, and summary judgment should be entered for Ford.

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Respectfully submitted,

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