IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26956

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff/Appellant,

vs.

BARTON SOLVENTS, INC. and CITGO PETROLEUM CORPORATION,

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Lake County, South Dakota

The Honorable Tim D. Tucker, Presiding Judge

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff Nationwide Mutual Insurance Company ("Nationwide") appeals from a December 19, 2013, Order granting Defendants Barton Solvents, Inc. and CITGO Petroleum Corporation's (collectively "Defendants") motion for summary judgment, dismissing Nationwide's Complaint. (R 427-28.)[1] Notice of Entry of the Order was given on December 26, 2013. (R 429-32.) Nationwide filed its Notice of Appeal on January 22, 2014. (R 433-34.)

STATEMENT OF THE ISSUES

1. Whether, when viewing the facts in a light most favorable to Nationwide, a genuine issue of material fact exists as to whether Defendants provided an inadequate warning regarding the use of heptane, a liquid solvent manufactured, marketed, sold, and distributed by Defendants?

   The Circuit Court found no genuine issue of material fact and granted judgment as a matter of law holding the warning provided was not inadequate on both strict liability and negligence claims.

   - *Burley v. Kytec Innovative Sports Equipment, Inc.*, 2007 SD 82, 737 N.W.2d 397
   - *Jahnig v. Coisman*, 283 N.W.2d 557 (S.D. 1979)

2. Whether, when viewing the facts in a light most favorable to Nationwide, a genuine issue of material fact exists regarding Defendants' breach of express warranty regarding the heptane manufactured, marketed, sold, and distributed by Defendants?

   The Circuit Court found no genuine issue of material fact and granted judgment as a matter of law on the express warranty claim.

[1] The record below is cited as "R," followed by the page numbers assigned in the Clerk's Index. Items in the Appendix will be referred to as "App." along with the corresponding page number.

- SDCL § 57A-2-313
- *James River Equip. Co. v. Beadle Cnty. Equip., Inc.*, 2002 S.D. 61, 646 N.W.2d 265

3. Whether, when viewing the facts in a light most favorable to Nationwide, a genuine issue of material fact exists regarding Defendants' breach of implied warranty of fitness for a particular purpose regarding the heptane manufactured, marketed, sold, and distributed by Defendants?

   The Circuit Court found no genuine issue of material fact and granted judgment as a matter of law on the implied warranty for a particular purpose claim.

   - SDCL § 57A-2-315

4. Whether, when viewing the facts in a light most favorable to Nationwide, a genuine issue of material fact exists regarding Defendants' breach of implied warranty of merchantability regarding the heptane manufactured, marketed, sold, and distributed by Defendants?

   The Circuit Court found no genuine issue of material fact and granted judgment as a matter of law on the implied warranty of merchantability claim.

   - SDCL § 57A-2-314
   - *Crandell v. Larkin & Jones Appliance Co., Inc.*, 334 N.W.2d 31 (S.D. 1983)

STATEMENT OF THE CASE

Nationwide appeals the dismissal of its Complaint filed against Defendants stemming from an explosion, which occurred at A.H. Meyer & Sons, Inc.'s ("A.H. Meyer") wax rendering plant in Winfred, South Dakota on September 28, 2009. At the time of the explosion, Nationwide provided insurance to A.H. Meyer. Nationwide paid insurance

benefits to A.H. Meyer for property damage losses caused by the explosion. An investigation determined heptane, a liquid solvent manufactured by CITGO Petroleum Corporation ("CITGO") and marketed, sold, and distributed by Barton Solvents, Inc. ("Barton Solvents"), caused the explosion.

Defendants moved for summary judgment on all claims Nationwide asserted against them, including strict products liability, negligence, breach of express warranty, breach of implied warranty for a particular purpose, and breach of implied warranty of merchantability. Nationwide resisted, contending genuine issues of material fact existed regarding whether Defendants provided adequate warnings regarding the heptane, as A.H. Meyer complied with all warnings and instructions, yet the explosion still occurred. After briefing and argument by the parties, the Circuit Court, the Honorable Tim D. Tucker presiding, granted summary judgment from the bench on Nationwide's inadequate warnings claims.

The Circuit Court requested additional briefing on the remaining claims. On the negligence claim, Nationwide argued that Defendants failed to exercise reasonable care to inform A.H. Meyer of the facts which make the heptane likely to be dangerous, the failure to inform A.H. Meyer regarding the dangerous condition proximately caused the damages, and the jury should decide issues of breach of duty. On the breach of express warranty claim, Nationwide argued that A.H. Meyer used the heptane as directed and warranted, but that such use resulted in the explosion, plainly supporting a valid claim for breach of express warranty. On the implied warranty for a particular purpose claim, Nationwide contended Defendants had reason to know of A.H. Meyer's particular purpose for use of heptane and that it was not fit for A.H. Meyer's particular purpose given that an explosion occurred during its use. Finally, on the breach of implied warranty of merchantability claim,

Nationwide contended that SDCL § 57A-2-314 requires that merchantable goods conform to promises or affirmations made on the container or label of the goods. The same legal arguments for the basis for the express warranty claim supported the breach of implied warranty of merchantability claim.

After briefing by the parties on the remaining claims, the Court issued a written decision granting Defendants' motion for summary judgment on the remaining claims. Nationwide appeals, raising a host of issues related to the Circuit Court's grant of summary judgment.

STATEMENT OF FACTS

The key material facts regarding Defendants' inadequate warnings and whether they breached the myriad of warranties imposed by South Dakota law are vehemently disputed and must be viewed in the light most favorable to Nationwide.

A.H. Meyer is a small family-owned beekeeping operation that extracts and produces honey and processes beeswax. (R 2.) Jack Meyer, Jr. ("Jack") is the president, treasurer, director, and a stockholder of A.H. Meyer. (App. A at 2.) J.B. Meyer ("J.B.") is the vice president, secretary and a stockholder of A.H. Meyer. (*Id.*)

Barton Solvents markets, sells, and distributes a wide range of solvents and petrochemicals, including heptane. (R 2-3, 12.) Barton Solvents has marketed, sold, and distributed heptane to A.H. Meyer for over 20 years, which A.H. Meyer uses in its wax rendering plant. (App. B at 14.) In fact, representatives from Barton Solvents have toured the facility and witnessed what A.H. Meyer does in its wax rendering plant with the heptane. (*Id.* at 35-36.) These representatives have never expressed any safety concerns to A.H. Meyer regarding the use of the heptane in the wax rendering process. (*Id.* at 36.)

During the wax rendering process, heptane is pumped through a series of pipes from a tank outside the plant and into two tanks located in the plant. (*Id.* at 15-16.) Thereafter, the heptane is piped throughout the wax rendering process along with the wax product before it is distilled from the rendered wax and returned to the heptane storage tanks. (*Id.* at 17-20.) Additionally, heptane is used to clean the presses utilized in the wax rendering process. (*Id.* at 21.) Heptane is piped into the kettle, a 150-gallon storage tank with a lid, explosion proof motor, and stirring unit, where it is heated, and then pumped over the presses to remove the small bits of wax left over in the presses. (*Id.* at 22-23.)

Rarely, some of the liquid heptane would spill from the top of the kettle and vaporize. (App. C at 47-48.) Therefore, A.H. Meyer equipped its wax rendering plant with a ventilation system to remove heptane vapors. (App. B at 24-25.) The ventilation system, which included intake and exhaust fans and automatic sensors, would turn on when heptane vapors were detected. (*Id.* 26-27.) The system could also be turned on manually. (*Id.* at 28.) In fact, A.H. Meyer ran some ventilation system fans constantly to ensure air exchange throughout the building and to remove any vapors which may escape during the wax rendering process not detected by the sensors. (App. B at 29); (App. C at 49.)

J.B. took over operations of A.H. Meyer's wax rendering plant in February 2006 after the plant was reconstructed. (App. C at 10.) At that time, J.B. learned from Jack and his grandfather, Jack Meyer, Sr., that any non-explosion proof (standard) switches or electrical equipment needed to be five feet from the floor as heptane is heavier than air in vapor form causing it to sink to the floor. (*Id.* at 44-45.) Standard switches were located more than five feet off the floor and the switches, which were used to start and stop the flow of heptane from the tank inside the facility to the kettle, were located more than five feet from the kettle lid. (*Id.* at 46.) Indeed, the design of the facility required the kettle to be

more than five feet from any standard switches or other electrical equipment. (App. B at 30.) Jack Meyer, Sr. engineered and designed the reconstructed plant following an explosion in 2004. According to Jack, who worked with his father for over 40 years, Jack Meyer, Sr. was meticulous in his work. (*Id.* at 32.)

Barton Solvents provided A.H. Meyer with a Material Safety Data Sheet ("MSDS") regarding heptane when it made delivery of the heptane manufactured by CITGO on August 19, 2009. (App. F at 86.) The MSDS is a ten-page document describing heptane and its potential hazards. (*See* App. G at 88-97.) However, it provides no specifics about the proscribed separation of heptane from ignition sources. (*Id.*) Instead, it states "[a]ll electrical equipment should comply with the National Electrical Code." (*Id.* at 92.) The National Electrical Code ("NEC") is a multi-volume set of books, which includes buried within it the NFPA 497, which contains the proscribed 5-foot radial distance for heptane and standard ignition sources for use in ventilated rooms in one of its sections. (*See* App. E at 56.) While the plant was reconstructed in February 2006, Wayne Nelson, the South Dakota State Electrical Inspector, conducted a final inspection of the building and stated the installation under the permit "was in compliance with South Dakota Laws and Rules and the National Electric Code." (App. I at 99.)

Unfortunately, an explosion occurred in the wax rendering plant on September 28, 2009. (App. B at 13.) Following the explosion, Kenneth Scurto conducted a cause and origin investigation. (App. D at 50.) Mr. Scurto determined the cause of the explosion to be a heptane spill from the kettle when the vapors were ignited after an A.H. Meyer employee pressed a standard switch to stop the flow of heptane into the kettle. (*Id.* at 54.) According to Mr. Scurto's analysis, after the explosion, the distance between the lip of the kettle and the base of the switch used at the time of the explosion was four feet, six inches. (*Id.* at 53.)

Based upon this measurement taken after the explosion, Dr. Green, one of Nationwide's experts in this matter, concluded the radial distance from the switches located on the west wall of the facility to the lip of the kettle was 4 feet, 8.23 inches. (App. E at 56.)[2]

However, the kettle was not secured to the floor of the facility when the explosion occurred. (App. B at 31.) The explosion shifted equipment and piping throughout the facility, including a large water tank that was mutilated and shifted from its original location. (*Id.* at 33.) Moreover, the water tank was much heavier than the kettle. (*Id.* at 34.) Additionally, many other pieces of equipment and the heptane piping were destroyed in the explosion. (*Id.* at 31.) Therefore, it is probable the kettle itself was moved from its original location when the explosion occurred. (*Id.*) Mr. Scurto also concluded the air currents created by the ventilation system lifted the heptane vapors to a point where they were able to be ignited by the electrical switch. (App. D at 54.)

Furthermore, after the explosion, Duane A. Wolf, a mechanical engineer, whose professional experience includes fire and explosion investigation, ventilation-related issues, and product failure analysis, conducted an investigation "to evaluate the development of heptane vapors following a spill for purposes of determining whether or not a spacing of five feet between a [standard] switch and the kettle/heptane spill was a factor in this explosion." (App. J at 102.)

Mr. Wolf performed tests to simulate heptane spills, including tests in both a still environment and tests in an environment with ventilation, such as to be expected at the A.H.

[2] As mentioned above, standard switches were located more than five feet off the floor and the switches, which were used to start and stop the flow of heptane from the tank inside the facility to the kettle, were located more than five feet from the kettle before the explosion. (App. C at 46.) Indeed, the design of the facility required the kettle to be more than five feet from any standard switches or other electrical equipment. (App. B at 30.)

Meyer facility, as the NFPA 497 applies to enclosed ventilated areas. (*Id.*) Mr. Wolf also considered two sources of heptane vapors as the initial fuel source: the heptane in the kettle itself and the spill on the floor. (*Id.*)

While the lip of the kettle was four feet, six inches measured laterally from the switch after the explosion, Mr. Wolf eliminated the vapors from inside the kettle as the fuel source of this explosion. (*Id.* at 103.) Heptane vapors are heavier than air and the kettle was typically only filled half full. (*Id.*) Therefore, the heptane vapors would not escape from the opening on the kettle. (*Id.*) Simply stated, the lateral distance from the switch to the top edge of the kettle was not a factor in the explosion. (*Id.*) The fuel source for the explosion was the heptane vapors spilled onto the floor. (*Id.*) Additionally, based upon measurements taken following the explosion, the ignition source, *i.e.*, the switch, was located more than five feet from the heptane vapors on the floor. (*Id.*)

Importantly, based upon his testing, Mr. Wolf concluded "the addition of airflow above the pooled/spilled heptane significantly increased the generation of heptane vapors." (*Id.* at 102.) Simply put, the air flow from ventilation played a significant role in moving the vapors closer to the ignition source. (*Id.* at 102-03.) It is undisputed that Defendants did not warn A.H. Meyer that ventilation can cause heptane to drift outside of the five-foot proscribed radius, although the NFPA 497 (to which the product instructions refer users) specifically applies to a ventilated room where the five-foot distance warning applies. (*See* App. E at 56.) Mr. Wolf's testing proved that, in a ventilated room, heptane vapors can travel outside of this five-foot warning area, yet Defendants provided absolutely no warning about this particular hazard.

ARGUMENT

I. *Standard of Review*

The South Dakota Supreme Court's standard of review on summary judgment is well settled. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). It is a drastic remedy, "and should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for controversy." *Donald Bucklin Constr. v. McCormick Constr. Co.*, 2013 SD 57, ¶ 30, 835 N.W.2d 862, 869 (quotation omitted).

> [This Court] will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. In addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

Luther v. City of Winner, 2004 SD 1, ¶ 6, 674 N.W.2d 339, 343 (quotation omitted).

"Moreover, this Court is not bound by the factual findings of the trial court. Instead, [the Court] conduct[s] an independent review of the record." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 SD 23, ¶ 8, 779 N.W.2d 690, 693 (quotation omitted).

Here, the facts, when viewed in the light most favorable to Nationwide, plainly demonstrate that, at a bare minimum, genuine issues of material fact exist on all of

Nationwide's claims against Defendants.

II. *When the Facts are Viewed in the Light Most Favorable to Nationwide, A.H. Meyer Complied with All Warnings and Instructions, but the Explosion Still Occurred*

When the facts are viewed in a light most favorable to Nationwide, as is required by this Court's well-established precedent, A.H. Meyer complied with the warnings provided by Defendants for the use of heptane, yet an explosion still occurred. A.H. Meyer ensured standard ignition sources were at least five feet from heptane sources located in its plant in compliance with the NFPA 497 warning. Moreover, Barton Solvents knew the particular use A.H. Meyer made of the heptane and failed to provide an adequate warning regarding its use within A.H. Meyer's plant. Therefore, the warning provided was inadequate. At a bare minimum, genuine issues of material fact exist regarding the adequacy of Defendants' warnings. The Circuit Court's grant of summary judgment should be reversed.

According to this Court, the issue for a strict liability failure to warn claim "is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the reasonableness of the failure to warn judged by negligence standards." *Burley v. Kytec Innovative Sports Equipment, Inc.*, 2007 SD 82, ¶ 35, 737 N.W.2d 397, 409 (citation omitted). Put simply, the guiding principle of a strict product liability claim relieves a plaintiff of the evidentiary burden inherent in a negligence cause of action. *See id.*

> Importantly, the product itself does not have to be defective. *Id.* (citation omitted). *Where the manufacturer or seller has reason to anticipate that danger may result from a particular use of the product, and . . . fails to give adequate warning of such a danger, the product sold without such warning is in a defective condition within the strict liability doctrine*.

Id. (citation omitted) (emphasis added). Stated another way, in the context of strict liability, an otherwise safe product may be defective solely by virtue of its inadequate warning. *Smith v. U.S. Gypsum Co.*, 612 P.2d 251, 253 (Okla. 1980) (if warnings unclear or inadequate, product may be defective); *see also Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1521 (11th Cir. 1984) (stating a product sold without an adequate warning is defective).

As the Minnesota Supreme Court has stated, "to be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury." *Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) (citations omitted).

Here, the only warning provided by Defendants regarding the use of standard switches in the vicinity of heptane required A.H. Meyer to navigate a voluminous, winding maze of dense information in the NEC and NFPA, based upon the sole statement in the MSDS which stated "All electrical equipment should comply with the National Electric Code." (App. G at 92.) The NEC refers to the NFPA 497, which contains the proscribed 5-foot radial distance for heptane and standard ignition sources in ventilated rooms. (*See* App. E at 56.)

The design of the A.H. Meyer facility required the kettle to be more than five feet from any standard switches or other electrical equipment. (App. B at 30.) Moreover, J.B. testified the electrical switch which ignited the heptane in this case was more than five feet off of the floor and more than five feet from the kettle lid. (App. C at 46.) Additionally, the South Dakota State Electrical Inspector conducted a final inspection of the plant following

reconstruction in 2006 and stated the building "was in compliance with South Dakota Laws and Rules and the National Electric Code." (App. I at 99.) Simply stated, because A.H. Meyer complied with the warning provided by Defendants, but the explosion still occurred, at a bare minimum, genuine issues of fact exist regarding the adequacy of the warnings provided by Defendants.

Further supporting Nationwide's position is Duane Wolf's investigation and testing. While Nationwide anticipates Defendants will argue the lip of the kettle was four feet, six inches measured laterally from the switch after the explosion, Mr. Wolf eliminated the vapors from inside the kettle as the fuel source of this explosion. (App. J at 103.) Heptane vapors are heavier than air and the kettle was typically only filled half full. (*Id.*) Therefore, the heptane vapors would not escape from the opening on the kettle. (*Id.*) Simply stated, the lateral distance from the switch to the top edge of the kettle was not a factor in the explosion. (*Id.*) The fuel source for the explosion was the heptane vapors from liquid heptane spilled onto the floor. (*Id.*)[3]

Therefore, the only explanation ever offered for this explosion comes from Mr. Wolf (and touched upon by the initial cause and origin investigator, Ken Scurto of IFIC). Mr. Wolf demonstrated that when heptane is used in an enclosed environment with ventilation as required by the NFPA 497, heptane vapors may actually drift beyond the five-foot radius rendering the warning provided by Defendants inadequate. This was conclusively proven in his experiments on this subject, and provides the only explanation for how the A.H. Meyer

[3] It also must be noted, while the measurements taken showed the lip of the kettle to be 4 feet, 8.23 inches from the switch or 4 feet 6 inches, these measurements were taken *after* the explosion. The accuracy of these measurements is highly questionable given the incredible amount of damage and shifting of large equipment which occurred following the explosion. If Defendants' intend to rely upon this information, their efforts are deeply flawed. Regardless, as described above, A.H. Meyer complied with the five-foot warning.

explosion happened. Importantly, whether Defendants knew heptane could drift outside of the proscribed five-foot radius in ventilated rooms rendering the warning inadequate is irrelevant for a strict products liability claim. *Burley*, 2007 SD 82, ¶ 32, 737 N.W.2d at 408 (citation omitted). As held in *Burley*, "a defendant cannot avoid liability simply because at the time of production it did not know or could not have known of a product's dangerous proclivities." *Id.* (citation omitted). Indeed, "[a] manufacturer must anticipate all foreseeable uses of his product. In order to escape being unreasonably dangerous, a potentially dangerous product must contain or reflect warnings covering all foreseeable uses." *Smith*, 612 P.2d at 254.

Heptane is dangerous, because it is highly volatile, flammable, and combustible. At best (assuming users read the National Electric Code to which the product instructions refer users), Defendants warned that heptane should be kept five feet from standard electrical switches. Defendants (in particular Barton) knew of the particular use of heptane by A.H. Meyer, as Barton's employees had been on site and in the A.H. Meyer building in the past. Moreover, Defendants are certainly aware that heptane would generally be used by industrial users as part of manufacturing processes requiring a solvent such as heptane. Defendants would know that manufacturing or industrial facilities typically have ventilation. Defendants would know that ventilation, by definition, requires the movement of air within a room. Defendants would know that movement of air would also cause heptane vapors (like any vapor) to move in response to the air current. Regardless, Nationwide does not have the burden of proving Defendants' awareness of the defective condition created by inadequate warnings. *See Burley*, 2007 SD 82, ¶ 32, 737 N.W.2d at 408 (citation omitted).

It is undisputed that Defendants provided no warnings about heptane vapors causing catastrophic explosions more than five feet from the heptane source. At best, Defendants

warned that explosion-proof switches must be used within five feet of heptane, but that standard electrical switches may be used only beyond a five-foot radius. The switch that ignited the heptane vapors was more than five feet from the heptane vapors (under the facts viewed in the light most favorable to Nationwide), yet Defendants provided no warning that would have prevented this explosion. In fact, to the extent Defendants provided any warning in this regard, they warned (through reference to the NEC) that it was safe to use standard electrical switches beyond five feet as was the case in the A.H. Meyer facility.

When the facts are viewed in a light most favorable to Nationwide, A.H. Meyer complied with the inadequate warning provided by Defendants. Despite its compliance, the explosion happened anyway, causing significant damage to its building, along with injuries to three employees. *Burley*, 2007 SD 82, ¶ 35, 737 N.W.2d at 409 (citation omitted). The five-foot radial distance warning is inadequate. At a bare minimum, genuine issues of material fact exist regarding the adequacy of Defendants' warnings and the adequacy of a warning is generally a jury question. *See Rhodes*, 722 F.2d at 1521 (stating that it is generally a jury question to determine whether a product is defective, whether the user was aware of the danger, and whether his use of the product in view of this knowledge was unreasonable). The Circuit Court's grant of summary judgment should be reversed.

These same facts forming the basis for a products liability action also present a valid claim for negligence. This Court has, on numerous occasions, provided that summary judgment is generally not appropriate in negligence actions. *See e.g., Easson v. Wagner*, 501 N.W.2d 348, 350 (S.D. 1993); *Zeeb v. Handel,* 401 N.W.2d 536, 537 (S.D.1987). Issues of negligence are questions of fact for the jury and should be normally resolved at trial. *Id.* "Ordinarily, whether a defendant has breached the required standard of care is a question of fact for the jury. Where negligence is alleged there are highly disputed facts." *Nemec v.*

Deering, 350 N.W.2d 53, 55-56 (S.D. 1984). In such a case, summary judgment is improper as a matter of law. *Id.*

Put simply, it is for a jury to decide whether it was reasonable for Defendants to provide the five-foot distance warning for use of heptane in ventilated rooms when such a warning would not prevent an explosion. *See Berg v. Johnson & Johnson Consumer Cos., Inc.*, 2013 WL 6092202, at *8 (D.S.D. Nov. 19, 2013) (citing *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 914 (S.D. 1987)) (stating issues of reasonableness and foreseeability in the context of failure to warn claims are jury issues).

> In a products liability action based on negligence, the proof must show that the *manufacturer or seller failed to exercise reasonable care to inform those expected to use the product of its condition or of the facts which make it likely to be dangerous.*

Jahnig v. Coisman, 283 N.W.2d 557, 560 (S.D. 1979) (citing Restatement (Second) of Torts § 388 (1965); *Dougherty v. Hooker Chemical Corp*., 540 F.2d 174, 177 (3rd Cir. 1976); 63 Am.Jur.2d *Products Liability* § 42 (1972)) (emphasis added).

Based on this Court's precedent, Defendants had a duty "to exercise reasonable care to inform those expected to use the product of its condition or of the facts which make it likely to be dangerous." *Id*. The next question for this Court is whether there are any disputed facts with respect to Defendants' breach of the foregoing duty.

Again, the facts must be viewed in the light most favorable to Nationwide. *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 SD 23, ¶ 8, 779 N.W.2d 690, 693 ("[w]e view all evidence and favorable inferences from that evidence in a light most favorable to the nonmoving party"). Defendants breached their duty to exercise reasonable care to inform

A.H. Meyer regarding use of the heptane and other facts that make heptane use likely to be dangerous when they provided an inadequate warning.

Defendants' failure to inform A.H. Meyer that the heptane vapors could drift beyond five feet (and in fact implicitly stating that it was safe to use standard electric switches beyond five feet) proximately caused the damages in this case. A.H. Meyer was aware of the five-foot radius and abided by the warning. The jury is certainly entitled to conclude that if Defendants had properly apprised A.H. Meyer of the facts which make the heptane likely to be dangerous, A.H. Meyer would have heeded such a warning. When the facts are viewed in the light most favorable to Nationwide, Defendants' failure to exercise reasonable care to inform A.H. Meyer of the facts which make the heptane likely to be dangerous proximately caused the damages. The Circuit Court's grant of summary judgment should be reversed.

III. *When the Facts are Viewed in the Light Most Favorable to Nationwide, Genuine Issues of Material Fact Exist Regarding Defendants' Breach of Express Warranty*

Defendants' sale of heptane to A.H. Meyer was accompanied by an express warranty, which warranty Defendants breached giving rise to Nationwide's express warranty claim. The Circuit Court's grant of summary judgment should be reversed.

Under SDCL § 57A-2-313(b), *"[a]ny description* of the goods which is made part of the basis of the bargain creates an express warranty that the *goods shall conform to the description*." (Emphasis added). In a fairly exhaustive examination of the source of express warranties, this Court wrote, "[p]urchase agreements 'may incorporate by reference another document containing technical specifications for the product, *and this will likely create an express warranty by description.*'" *James River Equip. Co. v. Beadle Cnty. Equip., Inc.*, 2002 S.D. 61, ¶ 21, 646 N.W.2d 265, 269 (quoting 67A Am.Jur.2d *Sales* § 739 (1985))

(emphasis in original); *see also Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1230, 103 Cal. Rptr. 3d 614, 628 (2010) (instructions accompanying sale of goods forms express warranty that goods can be used in compliance with instructions).

Here, Defendants provided the MSDS and product warning label, which tell buyers to review the NEC for appropriate uses of the heptane. The NEC tells readers that standard electrical switches may be used near heptane in a ventilated room, provided they are five feet away from the heptane source. As established by Mr. Wolf, when heptane is used in an enclosed environment with ventilation, heptane vapors may actually drift beyond the five-foot radius. This was conclusively proven in Mr. Wolf's experiments on this subject, and provides the only explanation for how the A.H. Meyer explosion happened.

The bottom line is that A.H. Meyer used the heptane as directed in the equivalent of the instruction manual accompanying the heptane. The information provided to A.H. Meyer by Defendants formed an express warranty under SDCL § 57A-2-313(b) and *James River Equipment*, 2002 S.D. 61, ¶ 21, 646 N.W.2d at 269. The facts, when viewed in the light most favorable to Nationwide, establish that A.H. Meyer used the heptane as directed and warranted, but that such use resulted in the explosion. Stated another way, but for the defective nature of the heptane (that an explosion could occur outside of the five-foot radius in direct contradiction to Defendants' warning), an explosion would not have occurred. This plainly states a valid claim for breach of express warranty, and at a bare minimum, raises a question of material fact for trial. The Circuit Court's grant of summary judgment should be reversed.

IV. *When the Facts are Viewed in the Light Most Favorable to Nationwide, Genuine Issues of Material Fact Exist Regarding Defendants' Breach of Implied Warranty of Fitness for a Particular Purpose*

Defendants (and, at the very least, Barton) had reason to know of A.H. Meyer's particular purpose for use of heptane. This particular purpose would have become known to Defendants when Barton's employees were in the A.H. Meyer facility. Barton's employees would have seen the kettle, the ventilation, and noticed a lack of heptane vapors (an obvious sign of ventilation). Defendants, through regular sales of heptane and other solvents, would know that their customers were primarily industrial users who have industrial facilities where ventilation is common. When the facts are viewed in the light most favorable to Nationwide, Defendants had reason to know of A.H. Meyer's use of the heptane, including A.H. Meyer's particular industrial setting.

SDCL § 57A-2-315 provides the following: "[w]here the seller at the time of contracting has *reason to know any particular purpose* for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under § 57A-2-316 an implied warranty that the goods shall be fit for such purpose." (Emphasis added). Defendants plainly had reason to know A.H. Meyer's particular purpose for which the heptane was required. Defendants likely had reason to know that buyers of their products, such as A.H. Meyer with heptane, would rely upon the expertise, skill, and product warnings of Defendants. Accordingly, Defendants' sale of heptane to A.H. Meyer included a warranty that the heptane would be fit for A.H. Meyer's particular purpose.

The heptane was not fit for A.H. Meyer's particular purpose, as the explosion occurred as a result of the heptane vapors drifting more than five feet and coming into

contact with an electrical switch, a danger of which Defendants failed to warn. If an explosion occurs through the use of heptane, warranted for A.H. Meyer's particular purpose, a jury could easily conclude that the product was inadequate for such purpose. Nationwide has presented a valid claim for breach of the implied warranty of fitness for a particular purpose and at a bare minimum, has raised a question of material fact for trial. The Circuit Court's grant of summary judgment should be reversed.

V. *When the Facts are Viewed in the Light Most Favorable to Nationwide, Genuine Issues of Material Fact Exist Regarding Defendants' Breach of Implied Warranty of Merchantability*

When the facts are viewed in the light most favorable to Nationwide, Defendants are "merchants" under Article 2 of the UCC. SDCL § 57A-2-104(1) defines "merchant" as follows:

> "Merchant" means *a person who deals in goods of the kind or* otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(Emphasis added). While Defendants plainly hold themselves out as and are viewed as having peculiar skill with respect to heptane, the simplest route to Defendants being merchants is that they deal in goods of the kind, namely heptane. CITGO manufactures, ships, distributes, and sells heptane on a regular basis, and Barton regularly ships, distributes, and sells heptane. Defendants deal in heptane regularly and are therefore

merchants with respect to heptane.

Under SDCL § 57A-2-314(1), when goods are sold by a merchant, the sale includes a warranty that the goods shall be merchantable. SDCL § 57A-2-314(2) defines what goods require to be merchantable:

> (2) Goods to be merchantable must be at least such as
>
> (a) Pass without objection in the trade under the contract description; and
>
> (b) In the case of fungible goods, are of fair average quality within the description; and
>
> (c) Are fit for the ordinary purposes for which such goods are used; and
>
> (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) Are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) Conform to the promises or affirmations of fact made on the container or label if any.

Notably, the use of the word "and" between each subpart of SDCL § 57A-2-314(2) requires merchantable goods to have all of the characteristics listed. In particular, subparts (c), (e), and (f) of SDCL § 57A-2-314(2) are at issue.

SDCL § 57A-2-314(2)(c) requires merchantable goods to be fit for the "ordinary" purpose for which such goods are used. Heptane is normally used as an industrial solvent, such as the manner in which A.H. Meyer used the heptane sold by Defendants. The heptane started an explosive fire according to Nationwide's cause and origin expert and mechanical engineering expert. This case is similar to *Crandell v. Larkin & Jones Appliance Co., Inc.*, 334 N.W.2d 31, 36 (S.D. 1983), in which the court held the following:

> We believe it is apparent that the *implied warranty of merchantability was broken when the dryer started a fire in its drum because of overheating*. Substantial credible evidence was introduced to support this conclusion. *By starting a fire, the dryer was no longer fit for the purpose for which it was purchased*. But for the breach of this implied warranty, the dryer would not have caused the extensive damages which resulted from the fire. Thus, the breach was the proximate cause of appellant's loss.

(Emphasis added). Similarly, when the heptane caused an explosive fire by its vapors drifting farther than the five-foot radius represented by Defendants, the heptane was no longer fit for its ordinary purpose.

SDCL § 57A-2-314(2)(e) requires merchantable goods to be adequately labeled, which is a *lower* standard than a strict product liability claim, only requiring evidence that a defective warning rendered a product unreasonably dangerous. As set forth above, the product labeling referred A.H. Meyer (and other buyers) to the NEC. The NEC tells readers

to keep heptane more than five feet away from electrical sources, unless those sources are specially wired or designed to be explosion-proof; on the other hand, standard electrical switches are permitted beyond the five-foot radius. A.H. Meyer used the heptane as directed. The lid of the kettle storing the heptane was more than five feet from standard electrical switches. The actual source of the heptane that caused the fire was spilled heptane on the floor well beyond five feet from any standard electrical switch. Yet, the heptane vapors drifted beyond five feet, encountered the standard electrical switch, and exploded. Mr. Wolf replicated this result in his laboratory experiments. As shipped and sold, the heptane was not adequately labeled for the reasons set forth above.

SDCL § 57A-2-314(2)(f) requires that merchantable goods conform to promises or affirmations made on the container or label of the goods. This is basically the same legal argument as the express warranty claim, therefore, Nationwide respectfully refers the Court to its argument above on the breach of express warranty claim.

For the foregoing reasons, the heptane sold by Defendants was not merchantable. Therefore, Nationwide is entitled to pursue a claim for breach of the implied warranty of merchantability. The Circuit Court's grant of summary judgment should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's grant of summary judgment to Defendants on all causes of action and remand to the Circuit Court to allow all claims to proceed to trial.

Dated at Sioux Falls, South Dakota, this 12th day of March, 2014.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 6,025 words and 31,211 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 12th day of March, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on March 12, 2014.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was emailed to the attorneys set forth below, on March 12, 2014:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26956

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff and Appellant,

v.

BARTON SOLVENTS, INC. and CITGO PETROLEUM CORPORATION,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
LAKE COUNTY, SOUTH DAKOTA

THE HONORABLE TIM D. TUCKER, PRESIDING JUDGE

BRIEF OF APPELLEE CITGO PETROLEUM CORPORATION

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NOTICE OF APPEAL FILED January 22, 2014

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JOINDER IN BRIEF OF APPELLEE BARTON SOLVENTS, INC.

Pursuant to SDCL 15-26A-67, Appellee CITGO Petroleum Corporation ("CITGO") joins and adopts by reference Appellee Barton Solvents, Inc.'s Brief in its entirety.

In this Brief, citations to the record before the Circuit Court will be "R" and followed by the page number(s) assigned in the Clerk of Court's Register of Actions.

ARGUMENT

Since 1997, CITGO has designed, manufactured and marketed hydrocarbon solvents such as heptane. (R. 17). CITGO sold heptane to Barton Solvents, Inc., who then re-sold that heptane to A.H. Meyer, Appellant's insured. (R. 2; R. 45) For the reasons set forth in Appellee Barton Solvents, Inc.'s Brief, which CITGO joins, and the additional reasons set forth below, this Court should affirm the Circuit Court's decision that CITGO is entitled to summary judgment as a matter of law.

To survive summary judgment, Appellant must identify some evidence suggesting that CITGO knew or should have known that the ventilation system at A.H. Meyer's facility was dangerous. (Appellee Barton Solvents, Inc.'s Brief pgs. 13-15). However, until this lawsuit, CITGO had no knowledge of A.H. Meyer's existence, its specific use of heptane or the configuration of its ventilation system. Indeed, Appellant's insureds admitted that A.H. Meyer never had any contact with CITGO and that CITGO has never visited A.H. Meyer's facility. (R. 105). Moreover, CITGO is not in the business of designing, engineering or inspecting ventilation systems. Accordingly, there is no evidence that CITGO had any general knowledge regarding the use of heptane in beeswax processing plants or the ventilation systems used in such facilities. Indeed, until

this lawsuit, CITGO was not aware that its heptane was ever suspected or alleged of being involved in a fire or explosion.

Appellant makes no mention of CITGO in either its summary judgment or appellate briefs, because there is no evidence in the record supporting the allegations against CITGO. Specifically, there is no evidence that CITGO's product or its warnings were defective in any way, that CITGO knew or should have known that A.H. Meyer's ventilation system was dangerous, that Appellant's loss was caused by anything CITGO did or did not do, or that there was anything CITGO could or should have done to prevent Appellant's loss. Therefore, summary judgment for CITGO must be affirmed.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Appellee Barton Solvents, Inc.'s Brief, this Court should affirm the Circuit Court's grant of summary judgment for CITGO on all causes of action.

Respectfully submitted this 24th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitations of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 416 words and 2,213 characters (not including spaces).

/s/ William C. Garry
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Brief of Appellee CITGO Petroleum Corporation was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to Ms. Shirley Jameson-Fergel, Clerk of Court, South Dakota Supreme Court, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070 on April 24, 2014.

The undersigned further certifies that an electronic copy of Brief of Appellee CITGO Petroleum Corporation was emailed to the attorneys set forth below on April 24, 2014:

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IN SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 26956

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff and Appellant,

v.

BARTON SOLVENTS, INC. and CITGO PETROLEUM CORPORATION,

Defendants and Appellees.

Appeal from the Circuit Court, Third Judicial Circuit
Lake County, South Dakota

The Honorable Tim D. Tucker
Circuit Court Judge

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NOTICE OF APPEAL FILED JANUARY 22, 2014

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JURISDICTIONAL STATEMENT

Defendant Barton Solvents, Inc. ("Barton") agrees with the Jurisdictional Statement set forth by Plaintiff Nationwide Mutual Insurance Company ("Nationwide"). In this Brief, citations to the record before the Circuit Court will be "R" and followed by the page numbers assigned in the Clerk of Court's Register of Actions. Items in Barton's Appendix will be cited to as "App." and followed by the corresponding page number.[1]

STATEMENT OF THE ISSUES

1. Whether the Circuit Court correctly determined that Nationwide failed to establish facts to support its failure to warn allegations.

   Authority: *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, 737 N.W.2d 397

2. Whether the Circuit Court correctly determined that Nationwide failed to establish facts to support its express warranty allegations.

   Authority: SDCL 57A-2-313(b)

3. Whether the Circuit Court correctly determined that Nationwide failed to establish facts to support its implied warranty allegations.

   Authority: SDCL 57A-2-315

   Virchow v. Univ. Homes, Inc., 2005 S.D. 78, 699 N.W.2d 499

   SDCL 57A-2-314

   Rynders v. E.I. DuPont De Nemours & Co., 21 F.3d 835 (8th Cir. 1994)

[1] Defendant CITGO Petroleum Corporation ("CITGO") intends to join in the arguments made by Barton in this Brief. Accordingly, references to "Barton" and the arguments made herein are equally applicable to CITGO unless CITGO's joinder filed with this Court indicated otherwise.

STATEMENT OF THE FACTS

On September 28, 2009, an explosion occurred in Winfred, South Dakota, at the beekeeping operation building that extracts and processes beeswax that is owned and operated by A.H. Meyer and Sons, Inc. ("A.H. Meyer"). (R. 2). The explosion occurred immediately after A.H. Meyer's employees spilled some heptane from a kettle tank and then flipped an electrical switch to turn off a pump. *Id*. Heptane, which is used by A.H. Meyer to process beeswax, is a volatile solvent. *Id*. The heptane was originally produced by CITGO and delivered to A.H. Meyer by Barton. *Id*. There is no dispute that the explosion that occurred on the day in question was caused when vapors from the spilled heptane were ignited by the spark from the flipping of the electrical switch. *Id*.

There is also no dispute that A.H. Meyer had purchased heptane from Barton for over twenty (20) years. (R. 90). When making a delivery, Barton would put the heptane into a 10,000 gallon tank owned by A.H. Meyer that was located outside of the building where the heptane was used. (R. 101-103). In addition, and with each delivery, Barton would give A.H. Meyer a Material Safety Data Sheet (MSDS) which described the volatile nature of heptane and which also contained numerous warnings. (R. 102, App. 14). The MSDS for heptane, which Barton gave to A.H. Meyer on every delivery of heptane, expressly warned that heptane liquid and vapor is "extremely flammable" and that the heptane vapor "may cause flash fire." (R. 131, App. 14). The MSDS also specifically stated that "[a]ll electrical equipment should comply with the National Electric Code." (App. 18). Barton would also occasionally give A.H. Meyer warning labels to be put on the ends of the 10,000 gallon tank. (R. 102). Jack Meyer, Jr., an owner of A.H. Meyer and Sons, Inc., personally affixed the warning labels to the 10,000 storage tank. *Id*.

In the course of A.H. Meyer's process of extracting beeswax with heptane, it was well known by A.H. Meyer that, on occasion, heptane would be spilled. (R. 126-127). It was also

well known by A.H. Meyer that, when spilled, heptane would vaporize and create an explosive hazard. (R. 127). Consequently, A.H. Meyer constructed its facilities with extensive fans and exhaust systems to quickly clean out any heptane vapors that may result from any spills. (R. 126-127). Importantly, A.H. Meyer knew that any ignition source would ignite heptane vapors, including electrical switches that were not explosion-proof. (R. 128-129). A.H. Meyer admitted to having such knowledge as far back as 1986. (R. 99-100).

It is also not disputed that the explosion on September 28, 2009, was not the first explosion at A.H. Meyer caused by heptane. *Id*. On December 4, 2004, nearly five years before the explosion at issue, heptane vapors were ignited by a vacuum pump that caused an explosion at the same location. *Id*. The December 4, 2004, explosion was catastrophic and required A.H. Meyer to start over and rebuild its facilities. (R. 160). The rebuilt facilities became operational in February of 2006. (R. 177).

In the course of rebuilding its facilities in 2005, A.H. Meyer learned that any electrical switches that were within five feet of heptane had to be explosion-proof. (R. 187, 225-227). This was important because the electrical switches in the building that was destroyed in the December, 2004, explosion, which were not explosion-proof, were only four feet from the heptane. (R. 182-183). One important source of this information during the rebuild came from Premier Engineering, Inc., an electrical and mechanical engineering company. (R. 239-241, App. 24). Premier Engineering was hired by A.H. Meyer during the rebuild to determine any electrical hazards. (App. 24-25). In doing so, Premier Engineering told A.H. Meyer that explosion-proof wiring had to be used within a five foot radius of any potential leak sources of heptane. (App. 25). In addition to Premier Engineering, A.H. Meyer also consulted with the State Fire Marshal regarding risks of fire and explosions. (R. 196-197). Consequently, when A.H. Meyer rebuilt its operation, A.H. Meyer tried to keep all electrical sources, including switches, more than five feet from the heptane. (R. 236).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Nationwide, as the insurance carrier for A.H.Meyer & Sons, Inc. ("A.H. Meyer"), began this subrogation action in December of 2011 against Barton and Citgo following the September 28, 2009, explosion at A.H. Meyer's facility. (R. 2). While multiple theories of liability were set forth in Nationwide's Complaint, all were rooted in allegations of defective or inadequate warnings. *Id.* However, Nationwide has failed to substantiate those allegations with both facts or expert opinions.

A. NATIONWIDE'S ORIGINAL THEORY

Nationwide retained an expert, Marc Green, Ph.D., who issued a report dated March 3, 2011, months before Nationwide began this lawsuit, to try and substantiate its failure to warn theories. (App. 40). In his report, Dr. Green opined that the various warnings Barton provided to A.H. Meyer said nothing about the important five foot distance between heptane and any non-explosion proof switches. (App. 43). Dr. Green therefore believed that the absence of that information in the warnings and literature Barton provided to A.H. Meyer, and A.H. Meyer's resulting lack of knowledge of it, meant Barton was responsible for the explosion. *Id.*[2]

As noted above, however, when Jack Meyer, Jr., testified at his deposition, he freely admitted that he knew all about the required five foot distance between heptane and non-explosion proof switches. (R. 187, 225-227). Mr. Meyer also confirmed that they specifically built the facility at issue with such knowledge, that they consulted with both Premier Engineering and the State Fire Marshal, and made sure that more than five (5) feet of distance

[2] Also vital to Dr. Green's opinion was the post-explosion measurement that the heptane kettle was just slightly within the five (5) foot radius of the non-explosion proof switch. (App. 40). Nationwide, in jettisoning both its original liability theory and Dr. Green in light of Mr. Meyer's candid testimony about his prior knowledge of the five (5) foot radius, also wisely stopped relying upon the post-explosion measurement that the kettle was just barely within that radius as Mr. Meyer also testified that the explosion was quite powerful and most certainly moved the kettle from its original position. (R. 236).

existed between non-explosion proof switches and sources of heptane. (R. 196-197, 239-241, App. 24).

The testimony of Mr. Meyer was devastating to Nationwide's and Dr. Green's theory of liability that Barton failed to warn about the five (5) foot radius and, as a result, A.H. Meyer was unaware of it. Mr. Meyer clearly and unequivocally testified that he and his family knew all about the need to keep heptane sources more than five (5) feet away from non-explosion proof switches that Dr. Green apparently assumed they knew nothing about. (R. 187, 225-227).

B. NATIONWIDE'S NEW THEORY

Based upon Mr. Meyer's testimony that nullified Dr. Green's opinions and Nationwide's original theory of liability, Barton moved for summary judgment on December 4, 2012. (R. 43). On January 3, 2013, in response to the summary judgment motion, Nationwide's counsel filed an affidavit which announced, for the first time, that Nationwide was focusing upon a new theory, and which sought additional time pursuant to SDCL 15-6-56(f) to allow Nationwide to conduct discovery on the heretofore unannounced and unpursued theory that air currents and the ventilation system A.H. Meyer installed in its facility may have had something to do with the explosion. (R. 313). The Circuit Court granted Nationwide's request for additional time for discovery, overruling Barton's objections that it was unfair to allow Nationwide to dramatically change course and try and construct a new theory of liability. (R., Transcript of Telephone Motion Hearing, p. 7-8).

As a result of the Circuit Court's decision giving Nationwide additional time to explore and develop its new theory of air currents and ventilation, the parties entered into a stipulation that set June 17, 2013, as the deadline for Nationwide to disclose any new experts and their reports. (R. 366). When that deadline passed and no new expert reports were received, Barton renewed its summary judgment motion and the Circuit Court set it for hearing on September 23, 2013. (App. 1).

On September 16, 2013, long after the deadline had expired, and only days before the scheduled hearing on the pending summary judgment motion, Nationwide produced a new expert, Duane A. Wolf, and his report. (R. 369, 372, App. 71). According to Mr. Wolf, the ventilation system in A.H. Meyer's facility that was to remove or eliminate any heptane vapors, did the opposite, stirred up the vapors, and wafted the vapors up near the non-explosion proof switches that were otherwise more than five (5) feet from where the heptane was stored and used. (App. 74). The lifted, stirred up vapors were then catastrophically ignited when A.H. Meyer's employee flipped the switch. *Id*.

Crucially missing from Mr. Wolf's report is any accusation that Barton did anything wrong, that Barton's warnings and accompanying literature were inadequate, or that Barton breached any duty or standard of care. (App. 71). In fact, Barton's name does not appear in his report. *Id*. Instead of stating an expert opinion of what Barton or anyone else supposedly did wrong, Mr. Wolf merely identified a possible explanation for the explosion: he points the finger at no one. *Id*.

Thus, by the time of the summary judgment hearing before the Circuit Court, Nationwide had completely changed course: no longer was Dr. Green and his opinions on the lack of knowledge by A.H. Meyer and a failure to warn about a five (5) foot radius of any importance; instead, Nationwide's new theory was Dr. Wolf's conclusion that the ventilation system did the opposite of what it was supposed to do and, instead of eliminating heptane vapors and reducing the harm those vapors posed, stirred up the vapors and made the risk of harm greater. From that benign opinion, Nationwide then claimed, during the summary judgment hearing and aided with no expert support of any kind, that Barton somehow was responsible for the explosion since Barton's warnings and related literature failed to warn A.H. Meyer that is ventilation system would do the opposite of what it was supposed to do and brought the heptane vapors within the

five (5) foot radius and near the non-explosion proof switch. (R., Summary Judgment Motion Hearing Transcript, p. 10).

The Circuit Court correctly rejected that theory. (R., Summary Judgment Motion Hearing Transcript, p. 27-28; App. 1). In doing so, the Circuit Court determined that the warnings Barton provided to A.H. Meyer complied with industry standards, further determined that A.H. Meyer had prior knowledge of the dangers of heptane vapors, and found that A.H. Meyer built its facility to specifically address the dangers associated with heptane. (R., Summary Judgment Motion Hearing Transcript, p. 27-28). The Circuit Court specifically rejected Nationwide's contention that the ventilation system which allegedly stirred up the heptane vapors rendered the warnings provided by Barton inadequate or ineffective. *Id*. Consequently, at the hearing, the Court granted summary judgment on all matters related to warnings and, additionally, the strict liability claims. *Id*.

Because Nationwide erroneously thought that the summary judgment motion was limited to only the strict liability claim, the Circuit Court gave Nationwide thirty (30) days to determine if any of the remaining claims could go forward and survive summary judgment in light of the Court's rejection of the failure to warn theory. (App. 1). Nationwide accepted that opportunity and, by written submissions, contended that its remaining theories of negligence and various permutations of warranty claims could go forward, free from any reliance upon inadequate warnings. (App. 1). The Circuit Court, by Memorandum Decision, disagreed, and determined that Barton was entitled to summary judgment as to all claims in the Complaint. (R. 416, App. 11). This appeal then followed. (R. 433).

ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

In reviewing a lower court's grant of summary judgment, this Court "must determine whether the moving party demonstrated the absence of any genuine issue of material fact and

showed entitlement to judgment on the merits as a matter of law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, -- N.W.2d --, -- (quoting *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101); SDCL 15-6-56(c). In so doing, the evidence must be viewed in the light most favorable to the nonmoving party. *See Niesche,* 2013 S.D. 90, ¶9, -- N.W.2d --, -- (quoting *Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101). That being said, this Court requires the nonmoving party to "present specific facts showing that a genuine, material issue for trial exists." *Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101 (quoting *Saathoff v. Kuhlman,* 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). "[A] material fact is one that might affect the outcome of the case[.]" *Englund v. Vital*, 2013 S.D. 71, ¶ 9, 838 N.W.2d 621, 626 (quoting *Smith ex rel. Ross v. Lagow Constr. & Developing Co*, 2002 S.D. 37, ¶ 9, 642 N.W.2d 187, 190). A "party challenging summary judgment "must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Tolle v. Lev*, 2011 S.D. 65, ¶ 10, 804 N.W.2d 440, 444 (quoting *Schwaiger v. Mitchell Radiology Assocs., P.C.,* 2002 S.D. 97, ¶ 7, 652 N.W.2d 372, 376). The mere assertion that there is a material question of fact is insufficient to create one. *See Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d at 101.

SDCL 15-6-56(e) provides: "When a motion for summary judgment is made and supported as provided in 15-6-56, an adverse party may not rest upon the mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so response, summary judgment, if appropriate, shall be entered against him." This Court has also noted:

> [w]hile we often distinguish between the moving and non-moving party in referring to the parties' summary judgment burdens, the more precise inquiry looks to who will carry the burden of proof on the claim or defense at trial. Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

W. Consol. Coop. v. Pew, 2011 S.D. 9, ¶ 19, 795 N.W.2d 390, 396. On a motion for summary judgment, a party may not claim a version of the facts more favorable than given in the party's own testimony. *See Dahl v. Combined Ins. Co.*, 2001 S.D. 12, ¶ 21, 621 N.W.2d 163, 169.

"Summary judgment is a preferred process to dispose of meritless claims." *Horne v. Crozier*, 1997 SD 65, ¶ 5, 565 N.W.2d 50. It should never be viewed as "a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Management, Inc. v. Litchfield*, 1998 SD 24, ¶ 4, 576 N.W.2d 233.

B. UNDISPUTED, MATERIAL FACTS SUPPORT SUMMARY JUDGMENT

Nationwide's primary argument in this appeal, while simplistic, is legally and factually erroneous: since an explosion occurred because of heptane, the supplier of the heptane must be liable. On page 10 of its brief, Nationwide sets forth that argument by claiming that A.H. Meyer complied with the warning information provided by Barton, built its facility so that more than five (5) feet separated sources of heptane from non-explosion proof switches, but since the explosion still occurred, *ipso facto*, Barton is liable.

Noticeably missing are any facts of what Barton supposedly did wrong. That omission speaks volumes and is fatal to Nationwide's case. At the summary judgment stage of the proceedings, Nationwide can no longer rest upon arguments and speculation: Nationwide must come forward with evidence showing that a genuine issue of material fact exists for trial. Other than the fact that the explosion occurred, Nationwide has nothing more; Nationwide certainly has no evidence of what Barton allegedly failed to do.

In this case, there is no dispute to the following facts:

- Barton had delivered heptane to A.H. Meyer for at least twenty (20) years. (R. 90).
- With virtually every delivery of heptane by Barton over those twenty (20) years, Barton provided A.H. Meyer with the Material Safety Data Sheet which expressly

warned about (1) heptane's volatile, explosive tendencies, and (2) that all wiring needed to comply with the electrical code. (App., 15, 18).

- A.H. Meyer had prior, affirmative knowledge of the requirement that more than five (5) feet separate any heptane sources from non-explosion proof switches. (R. 187, 225-227).
- A.H. Meyer, knowing about heptane's explosive tendencies because of the previous explosion at its facility from heptane, built its facility so that the heptane sources would be more than five (5) feet from non-explosion proof switches. (R. 236).
- To further address the explosive risks of heptane, A.H. Meyer consulted with an electrical engineering company, Premier Engineering, when it rebuilt its facility prior to the explosion at issue. (R. 239-241, App. 24).
- To even further address the explosive risks of heptane, A.H. Meyer consulted with the State Fire Marshal when it rebuilt its facility prior to the explosion in this case. (R. 196-197).

All of the foregoing facts were properly before the Circuit Court and are undisputed. Nationwide does not and cannot dispute any of them. To try and deflect attention away from those undisputed material facts, Nationwide contends that unnamed Barton employees toured or walked through A.H. Meyer's facility at some unknown point in time. As correctly noted by the Circuit Court, those "facts" do not alter the summary judgment analysis as there is no evidence that the Barton employees did anything other than walk through the facility: no evidence that they saw the ventilation system, no evidence that they saw any risks of a heptane explosion, and no evidence that they were asked to look for such risks. It is a giant and impermissible leap in logic for Nationwide to try and turn, at worst, a walk through of a facility into evidence that

Barton somehow breached a standard of care or is otherwise responsible for the explosion, irrespective of the absence of any duty in the first instance.[3]

That leap is all the more troublesome in light of the fact that A.H. Meyer worked with both an electrical engineer and the State Fire Marshal when it rebuilt its facility prior to the explosion at issue. How could Barton employees, about whom nothing is known except that they work for Barton, have seen, appreciated or known that the ventilation system would do the opposite of what it was supposed to do if both an electrical engineer and the State Fire Marshal did not see, appreciate or know about them? In other words, Nationwide's entire lawsuit is premised upon Barton employees, during a mere walk through of the plant, were to recognize and identify explosive risks that the electrical engineer and State Fire Marshal, both of whom consulted for that exact purpose, missed.

The vast evidentiary holes are all the more problematic when the opinions of Nationwide's expert are considered. Mr. Wolf believes that the ventilation system kicked up the vapors and caused the explosion: he offers nothing more. He does not blame Barton for any wrongdoing or failure. He does not say that any warnings were defective or insufficient. He does not say that Barton should have done something more. All he says is that the ventilation system, of which Barton knew nothing about, did the opposite of what A.H. Meyer hoped it would do and, instead of minimizing the risks of heptane vapors, actually increased them. Nationwide therefore has no expert of any kind saying what Barton did wrong.

Thus, Nationwide is before this Court seeking reversal of the Circuit Court's summary judgment decision armed with merely this: an explosion occurred and the ventilation system did the opposite of what it should have done. Beyond that, Nationwide has no facts and no expert opinion to substantiate its claim that Barton is at fault, failed to do something, or did something

[3] Barton delivered the heptane to a storage tank owned by A.H. Meyer located outside of the building at issue, and thereafter A.H. Meyer had exclusive control over the heptane as it was used in its facility. Barton had nothing to do with the use of the heptane whatsoever.

wrong. Merely because an explosion occurred does not mean that anyone did anything wrong. It certainly does not mean that a trial should occur. The undisputed material facts therefore clearly and conclusively support the Circuit Court's grant of summary judgment.

C. NATIONWIDE CANNOT ESTABLISH A FAILURE TO WARN CLAIM UNDER EITHER STRICT LIABILTY OR NEGLIGENCE AS THE RISK OF HARM OF THE VENTILIATION SYSTEM CAUSING HEPTANE VAPORS TO DRIFT NEAR NON-EXPLOSION PROOF SWITCHES WAS NOT FORESEEABLE

While the evidence needed to establish a strict liability claim for failure to warn is different than the evidence necessary to prove a negligent failure to warn claim, common to both is the concept of foreseeability. Under strict liability, the first element is a danger associated with a *foreseeable* use of the product. *See Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 35, 737 N.W.2d 397, 409 (emphasis added). Under negligent failure to warn, a plaintiff must prove that the defendant knew or reasonably should have known that the product was dangerous or was likely to be dangerous when used in a *reasonably foreseeable* manner. *Id*., ¶ 36. As noted above and established by Mr. Wolf, the theory Nationwide is pursuing in this case is that the ventilation system did the opposite of what it was supposed to do and increased rather than decreased the risk of heptane vapors coming into contact with non-explosion proof switches. While that theory may possibly explain why the explosion occurred, it does not prove anything as to what Barton knew or what should have been foreseeable to Barton. As discussed above, there is no evidence that Barton knew anything about the ventilation system. Moreover, there is no evidence that it would be foreseeable to anyone (including an electrical engineer and the State Fire Marshal) that the ventilation system would do the opposite of what it was intended to do.

At the top of page eleven (11) of its brief, Nationwide correctly quotes this Court's decision in *Burley* for what is required to establish a strict liability claim for failure to warn: "[w]here the manufacturer or seller *has reason to anticipate* that danger may result from a particular use of the product, and . . . fails to give adequate warning of such a danger, the product

sold without such warning is in a defective condition within the strict liability doctrine." 2007 SD 82, ¶35, 737 N.W.2d 397, 409 (emphasis added). Having accurately set forth the standard, Nationwide then completely ignores it as there is no evidence in this case that Barton had any reason to anticipate that the ventilation system, of which there is no evidence that Barton knew anything about, would do the opposite of what it was supposed to do and increase the risks posed by heptane vapors. Because there is no evidence that Barton had any reason to anticipate that A.H. Meyer's ventilation system would waft vapors close to non-explosion proof switches, there can be no liability for failing to warn against it.

To try and stave off summary judgment, Nationwide, instead of admitting that there is no evidence that Barton had reason to anticipate or foresee problems that the ventilation system would worsen and not lessen the harms of heptane vapors, focuses instead on the warnings Barton actually provided, claiming that the warnings "required A.H. Meyer to navigate a voluminous, winding maze of dense information in the NEC and NFPA[.]" Appellant's Brief, p. 11. That is not true: Jack Meyer, Jr., freely and candidly testified that he knew exactly what the codes required and affirmatively stated that he knew, before the facility at issue was built, that heptane vapors needed to be more than five (5) feet from non-explosion proof switches. Thus, while it is a convenient argument to claim that it would be difficult to have someone review such technical information, the argument does not apply here as A.H. Meyer knew exactly what those codes contained and required. Moreover, A.H. Meyer also consulted with experts – an electrical engineer and the State Fire Marshal –to specifically address those concerns. The actual undisputed facts of the case, therefore, invalidate Nationwide's claim. Accordingly, the grant of summary judgment on the express warranty claim is correct and should be affirmed.

D. NATIONWIDE CANNOT ESTABLISH AN EXPRESS WARRANTY CLAIM

Nationwide's express warranty theory, premised upon SDCL 57A-2-313(b), is without merit. Nationwide does not point to any actual express warranty. Nationwide also does not

contend that the heptane was defective, contaminated, or otherwise anything but the heptane A.H. Meyer expected to receive. Instead, Nationwide contends that the warnings Barton provided (1) somehow constitute an express warranty and (2) somehow render the heptane defective. Neither contention has any merit.

Nationwide cites no authority for its argument that warnings somehow constitute an express warranty. Instead, Nationwide cites to this Court's decision in *James River Equip. Co. v. Beadle Cnty. Equip., Inc*., which held that a purchase agreement may incorporate by reference other documents which may contain or create express warranties. 2002 SD 61, ¶21, 646 N.W.2d 265, 269. In this case, however, there is no purchase agreement, nor is there any other document that incorporates by reference some other document that may contain express warranties. The rationale and logic of *James River Equip. Co.* is therefore inapplicable here.

There is also no logic to claiming that a warning is somehow a warranty. A warning is the "pointing out of danger." Black's Law Dictionary, 6th Ed. In stark contrast, a warranty is "[a] promise that a proposition of fact is true." *Id*. One is an alert, the other a promise. It is therefore inaccurate and illogical to claim that a warning constitutes a warranty. They are entirely separate concepts that are unrelated to each other. It is therefore unsurprising that Nationwide could not find any authority to support its premise that a warning could somehow constitute an express warranty.

Regardless of the folly of trying to contort a warning into a warranty, the Circuit Court's grant of summary judgment on the express warranty claim is nonetheless correct as Barton met its duty and obligation through the warnings that Barton did provide. As noted above, there is no evidence that Barton had any knowledge or was otherwise aware that the ventilation system would apparently malfunction and exacerbate the risks of heptane vapors. Accordingly, Barton did not provide or breach any express warranty, and the summary judgment should be affirmed.

E. NATIONWIDE CANNOT ESTABLISH A CLAIM FOR ANY IMPLIED WARRANTIES

Because there is no claim of any kind that there was any defect with the heptane delivered by Barton to A.H. Meyer, Nationwide's claims of breach of the implied warranties of fitness for a particular purpose and merchantability are without merit and the grant of summary judgment should be affirmed.

SDCL 57A-2-315 generally describes the implied warranty of fitness for a particular purpose:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under § 57A-2-316 an implied warranty that the goods shall be fit for such purpose.

"When an implied warranty of fitness for purpose is created, the seller must deliver a product that is fit for the purpose for which it is intended." *Virchow v. Univ. Homes, Inc.*, 2005 S.D. 78, ¶ 21, 699 N.W.2d 499, 505. "A perfect product is not required." *Id.* (citing *Waggoner v. Midwestern Develop., Inc.*, 83 S.D. 57, 64, 154 N.W.2d 803, 807 (1967)). After all, "[p]roducts vary in the quality of their materials and the quality of their construction." *Id.* Ultimately, a "person asserting a violation of the warranty of fitness for a particular purpose must present sufficient evidence, direct or circumstantial, to permit the inference that *the product was defective when it left the manufacturer's possession or control.*" *Id.* (citing *Schmaltz v. Nissen*, 431 N.W.2d 657, 633 (S.D. 1988) (emphasis added); *Pearson v. Franklin Labs., Inc.*, 254 N.W.2d 133 (S.D. 1977)).

In this case, there is no allegation that the heptane was defective when it left Barton's possession or control; in fact, there is no allegation that the heptane was ever defective. Indeed, it was not. Instead, Nationwide alleges that the heptane somehow became defective when the ventilation system blew the vapors toward instead of away from the non-explosion proof switches. As is plain from the facts of the case, a ventilation system improperly blowing vapors around does not render the heptane delivered by Barton defective. It is therefore apparent that

this theory of recovery is completely misplaced as the heptane was not defective. If anything, it was the ventilation system, not the heptane, that performed wrongly and in contravention of what it was intended to do.

Also misplaced is the merchantability claim. SDCL 57A-2-314 is the source for the implied warranty of merchantability. "The warranty of merchantability generally promises that 'the goods will conform to the ordinary standards and are of average grade, quality, and value of like goods which are generally sold in the stream of commerce." *Rynders v. E.I. DuPont De Nemours & Co.*, 21 F.3d 835, 841 (8th Cir. 1994). "In an action based on the breach of warranty, it is of course necessary to show not only that the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained." SDCL 57A-2-314, U.C.C. cmt. 13. Thus, an affirmative showing by the seller that the loss resulted from an action or event following his delivery of the goods or that the seller exercised care in the manufacture, processing, or selection of the goods is relevant to the issue whether the warranty was in fact broken. *Id.* Further, "[a]ction by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury." *Id.*

As noted above, because there is no claim that the heptane was defective or contaminated, the Circuit Court was correct in rejecting the merchantability claim. Nationwide does not meaningfully contend that the heptane delivered by Barton was not merchantable; instead, Nationwide is merely recasting its failure to warn theory. In doing so, however, Nationwide conveniently omits the fact that Barton provided warnings in compliance with industry standards. In addition, Nationwide again glosses over the fact that there is no evidence that Barton knew anything about A.H. Meyer's ventilation system, and certainly no evidence that Barton knew or foresaw that the ventilation system would malfunction. The heptane, therefore,

was not defective and no claim can be credibly claimed that it was not merchantable. If was the ventilation system, not the heptane, that contained a defect and performed incorrectly.

CONCLUSION

The Circuit Court correctly concluded that summary judgment was proper on all claims in Nationwide's Complaint. Nationwide, despite changing theories and being given ample opportunities by the Circuit Court to substantiate its many claims, failed to do so and failed to produce any expert claiming what Barton did wrong. The warning information provided by Barton was in accordance with industry standards and was in addition to the extensive knowledge A.H. Meyer already had about the dangers of heptane. Barton had no knowledge of the ventilation system, and certainly did not know that the ventilation system would malfunction and do the opposite of what it was intended to do so. Accordingly, there is no genuine dispute of any material fact and Barton is entitled to judgment as a matter of law. Barton therefore respectfully requests that this Court affirm the Circuit Court's decision.

Dated this 24th day of April, 2014.

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ORAL ARGUMENT

Appellees respectfully request oral argument before the Court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellee's Brief does not exceed the number of words permitted under SDCL § 15-26A-66, said Brief containing 5,444 words.

/s/ *Michael F. Tobin*

Michael F. Tobin

CERTIFICATE OF SERVICE

I, Michael F. Tobin, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 24th day of April, 2014, a true and correct copy of Appellee's Brief was served via email upon:

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and the original and two (2) copies of Appellee's Brief were served by via U.S. Mail, postage prepaid to Ms. Shirley Jameson-Fergel, Clerk of Court, South Dakota Supreme Court, 500 East Capitol Avenue, Pierre, SD 57501.

/s/ *Michael F. Tobin*
Michael F. Tobin

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26956

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff/Appellant,

vs.

BARTON SOLVENTS, INC. and CITGO PETROLEUM CORPORATION,

Defendants/Appellees.

Appeal from the Circuit Court
Third Judicial Circuit
Lake County, South Dakota

The Honorable Tim D. Tucker, Presiding Judge

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ARGUMENT

Defendants Barton Solvents, Inc. and CITGO Petroleum Corporation ("Defendants") artfully attempt to distract the Court from Nationwide's real arguments by focusing their entire defense on A.H. Meyer's ventilation system. However, as the following makes clear, Defendants misinterpret and misconstrue the facts and law of Nationwide's claims. The facts, when viewed in the light most favorable to Nationwide, plainly demonstrate that, at a bare minimum, genuine issues of material fact exist on all of Nationwide's claims against Defendants. The Circuit Court's grant of summary judgment should be reversed.

When the Facts are Viewed in the Light Most Favorable to Nationwide, A.H. Meyer Complied with All Warnings and Instructions, but the Explosion Still Occurred as a Result of Defendants' Inadequate Warnings

Defendants misconstrue Nationwide's argument regarding its strict liability failure to warn claim. The crux of Defendants' position hinges on the Court accepting Defendants' focus on A.H. Meyer's ventilation system rather than the defective product – the heptane.

Defendants claim that Nationwide's argument contains no facts alleging what Defendants did wrong in this case. This is wrong on the facts and the law.[1] First, Defendants' MSDS refers readers to the NEC and NFPA 497, which contain the product use

[1] It is important to point out that Defendants erroneously claim that Nationwide must show facts of what Defendants did wrong. (Barton's Brief at 10.) In a strict products liability action based upon inadequate warnings, this is not required. "The issue under strict liability is whether the manufacturer's failure to adequately warn rendered the product unreasonably dangerous without regard to the reasonableness of the failure to warn judged by negligence standards." *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 35, 737 N.W.2d 397, 409 (citation omitted). What Defendants "did wrong" is negligence, but it does not impact strict products liability or warranty claims.

specifications for heptane in ventilated rooms. (*See* App. E at 76.) Essentially, the product use specification states that the five-foot radial distance between standard electrical switches and heptane sources, with which A.H. Meyer complied, makes the use of heptane in a ventilated building safe. However, the expert work of Duane Wolf proves that the five-foot radial distance in a ventilated building is not safe. Mr. Wolf concluded "the addition of airflow above the pooled/spilled heptane significantly increased the generation of heptane vapors." (App. J at 102.) Moreover, Mr. Wolf was able to conclude that the ignition source, *i.e.* the switch, was located more than five feet from the heptane vapors on the floor. (*Id.* at 103.) Simply put, the air flow from ventilation moved the vapors closer to the ignition source. (*Id.* at 102-03.) Once the scientific validity of the cause is established, as Mr. Wolf showed in his testing, no further expert testimony is required to link the explosion to the inadequate warning. The adequacy of the warning is a jury question at this point, because the expert report shows the warning given would not prevent the explosion. *See Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833, 837 (S.D. 1984) (adequacy of warning is a jury question). *See also Butz v. Werner*, 438 N.W.2d 509, 511 (N.D. 1989) (citations omitted) ("Whether a product is unreasonably dangerous to the user because of a lack of proper warnings is generally a question of fact.").

As Nationwide highlighted in its initial brief, and as Defendants admit in their own briefs, A.H. Meyer complied with the product use specification given in the NFPA 497. (*See* Barton Brief at 5.) The design of the A.H. Meyer facility required the kettle to be more than five feet from any standard switches or other electrical equipment. (App. B at 30.) Moreover, J.B. testified the electrical switch which ignited the heptane in this case was more than five feet off of the floor (where the spilled heptane was located) and more than five feet

from the kettle lid. (App. C at 46.) Additionally, the South Dakota State Electrical Inspector conducted a final inspection of the plant following reconstruction in 2006 and stated the building "was in compliance with South Dakota Laws and Rules and the National Electric Code." (App. I at 99.)

Mr. Wolf's investigation and testing demonstrated that when heptane is used in an enclosed environment with ventilation, as required by the NFPA 497, heptane vapors may actually drift beyond the five-foot radius rendering the warning provided by Defendants inadequate. It is undisputed that Defendants provided no warnings about heptane vapors causing catastrophic explosions more than five feet from the heptane source.

Simply stated, when the facts are viewed in a light most favorable to Nationwide, A.H. Meyer complied with the product use specification provided by Defendants, but the explosion still occurred. Defendants did not warn of the danger which caused the explosion. At a bare minimum, genuine issues of fact exist regarding the adequacy of the warnings and instructions provided by Defendants.

Defendants also confuse the issues by claiming that the risk associated with A.H. Meyer's ventilation system and heptane was not foreseeable because they did not have knowledge of the danger created by the ventilation system. They claim Nationwide must show some evidence suggesting Defendants knew or should have known the ventilation system was dangerous. This is wrong for two reasons. First, the ventilation system is not the issue, as the warning provided by Defendants required the five-foot radial distance in enclosed, ventilated rooms. The question is whether it was foreseeable to Defendants that A.H. Meyer would use the heptane in the manner it did, not whether Defendants knew the workings of the ventilation system. *Burley*, 2007 S.D. 82, ¶ 35, 737 N.W.2d at 409 (citation omitted). Secondly, and importantly, "[i]n strict liability the plaintiff need not prove

scienter of the defendant, *i.e.*, that defendant knew or should have known of the harmful character of the product without a warning." *See Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 912 (S.D. 1987) (citation omitted). Defendants misplace the focus on what they knew, which has no bearing on strict products liability. *Id.*

When viewing the facts in a light most favorable to Nationwide, A.H. Meyer's use of the heptane was foreseeable to Defendants. Instead of recognizing that it knew exactly what A.H. Meyer used the heptane for in its operation, Barton claims it had no idea about the ventilation system. This misses the point entirely. Barton admittedly marketed, sold, and distributed heptane to A.H. Meyer for over 20 years. Barton can hardly contend it was not foreseeable that A.H. Meyer would use the heptane in the manner it did, as an industrial solvent. Defendants' own MSDS states that is the exact purpose of heptane. (*See* App. G at 88.)

Foreseeability for CITGO is just as obvious as it is for Barton. CITGO admittedly has designed, manufactured, and marketed hydrocarbon solvents such as heptane for nearly two decades. CITGO is certainly aware that heptane would generally be used by industrial users as part of manufacturing processes requiring a solvent such as heptane. CITGO would know that manufacturing or industrial facilities typically have ventilation. In fact, their own product use specification refers to a ventilated room. Put simply, it is foreseeable to CITGO that A.H. Meyer would use its product as part of an industrial manufacturing process in a ventilated room. To deny this would be to deny the very purpose for which CITGO manufactures heptane.

It is undisputed that Defendants provided no warnings about heptane vapors causing catastrophic explosions more than five feet from the heptane source. Nationwide has no burden to establish what Defendants "did wrong" for its strict product liability action.

Moreover, Nationwide has offered sufficient facts demonstrating the instructions and warnings provided would not protect against the danger they intended to protect against, namely an explosion ignited by a standard electrical switch in a ventilated room more than five feet from a heptane source. As Nationwide has established the scientific validity of the cause via Mr. Wolf's expert report and evidence, the question is whether the warning was adequate as provided by Defendants. This is for the province of the jury and no further expert testimony is required. The five-foot radial distance requirement is inadequate. At a bare minimum, genuine issues of material fact exist. The Circuit Court's grant of summary judgment should be reversed.

Defendants spend very little time discussing Nationwide's negligent failure to warn claim.[2] Instead, Defendants focus their attention on what they knew of A.H. Meyer's ventilation system. As with the strict product liability claim, this misses the point. Defendants had a duty "to exercise reasonable care to inform those expected to use the product of its condition or of the facts which make it likely to be dangerous." *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979). Stated another way, the duty to warn consists "of two duties: (1) the duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012). Defendants breached their duty to exercise reasonable care to inform A.H. Meyer regarding use of the heptane and other facts that make heptane use

[2] For sake of preserving the record, Nationwide disputes that the Defendants moved for summary judgment on all claims against Nationwide at the Circuit Court level. All of Defendants' arguments focused solely on the strict product liability failure to warn claim prior to the Circuit Court's decision. Only after the Circuit Court concluded Defendants moved on all claims did Nationwide receive the opportunity to brief the remaining claims.

likely to be dangerous when they provided inadequate product use instructions and warnings.

Defendants' failure to inform A.H. Meyer that the heptane vapors could drift beyond five feet (and in fact implicitly stating that it was safe to use standard electric switches beyond five feet) proximately caused the damages in this case. A.H. Meyer was aware of the five-foot radius and abided by the warning. The jury is certainly entitled to conclude that if Defendants had properly apprised A.H. Meyer of the facts which make the heptane likely to be dangerous, A.H. Meyer would have heeded such a warning. Indeed, Defendants admit A.H. Meyer did what it should do when it reconstructed its facility and abided by the five-foot distance requirement. However, the explosion still occurred. When the facts are viewed in the light most favorable to Nationwide, Defendants' failure to exercise reasonable care to inform A.H. Meyer of the use of heptane and of the facts which make it likely to be dangerous proximately caused the damages. The Circuit Court's grant of summary judgment should be reversed.

When the Facts are Viewed in the Light Most Favorable to Nationwide, Genuine Issues of Material Fact Exist Regarding Defendants' Breach of Express Warranty

Defendants erroneously contend "Nationwide does not point to any actual express warranty" and attempt to downplay the holding of *James River Equip. Co. v. Beadle Cnty. Equip., Inc.*, claiming that case should not apply. To the contrary, the *James River* case applies specifically to cases like this one.

Under SDCL § 57A-2-313(b), *"[a]ny description* of the goods which is made part of the basis of the bargain creates an express warranty that the *goods shall conform to the description*." (Emphasis added). Under the *James River* holding, "[p]urchase agreements 'may incorporate by reference another document containing technical specifications for the

product, *and this will likely create an express warranty by description*.'" 2002 S.D. 61, ¶ 21, 646 N.W.2d 265, 269 (quoting 67A Am.Jur.2d *Sales* § 739 (1985)) (emphasis in original).

Here, the invoice provided by Barton states tells the purchaser the heptane "May Be Hazardous Materials Read Label or MSDS Before Using." (App. F.)[3] Defendants provided the MSDS and product warning label, which tell buyers to review the NEC for technical specifications, specifically, product use specifications for heptane in ventilated rooms. Put simply, Defendants incorporated these product specification documents into the purchase of the heptane by reference.

The NEC and NFPA 497 tell readers that standard electrical switches may be used near heptane in a ventilated room, provided they are five feet away from the heptane source. In fact, the NFPA 497 provides an illustration demonstrating the proper use of heptane in a ventilated room. As established by Mr. Wolf, when heptane is used in an enclosed environment with ventilation, heptane vapors actually drift beyond the five-foot radius. This was conclusively proven in Mr. Wolf's experiments on this subject, and provides the only explanation for how the A.H. Meyer explosion happened.

Defendants claim that the invoice and the incorporation of the MSDS and NEC constitute a warning, which cannot be an express warranty. However, other authorities disagree. AM. L. PROD. LIAB. 3d § 19:31 ("A failure to warn of problems inherent in the use of a product as expressly warranted may constitute breach of the express warranty."); 29 *Causes of Action in Strict Tort Liability for Failure to Warn of Danger in Use of Product* 1, § 2 (updated March 2014) ("An action to recover a product manufacturer's failure to warn of a product-related danger may be predicated on theories of liability other than strict tort

liability. A negligence action and a breach of warranty action are common alternatives for the plaintiff[.]").

Moreover, it is wrong to claim that the illustration and information contained in the NFPA 497 is simply a warning. NFPA 497 states that it "provides information on specific flammable gases and vapors, flammable liquids, and combustible liquids, whose relevant combustion properties have been sufficiently identified to allow for . . . proper selection of electrical equipment in hazardous (classified) locations." (App E. at 77.) Put another way, it is an instruction manual with illustrations on the proper selection of electrical equipment for a building such as A.H. Meyer's when using heptane. This manual with instructions and illustrations on the use of heptane constitutes an express warranty. *See Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 279 (4th Cir. 2007) (jury could determine that illustration and instructions regarding installation of airplane cables buried deep within manual constituted express warranty).

Again, Defendants mistakenly claim the ventilation system was the issue. The NEC and NFPA 497 specification for the five-foot radius for explosion-proof switches refers specifically to ventilated rooms. Indeed, the MSDS also states to use heptane only with adequate ventilation. Defendants' misleading statements regarding the ventilation system have no bearing on their express warranty.

A.H. Meyer used the heptane as directed in the equivalent of the instruction manual accompanying the heptane. The information provided to A.H. Meyer by Defendants formed an express warranty under SDCL § 57A-2-313(b) and *James River*. The facts, when viewed in the light most favorable to Nationwide, establish that A.H. Meyer used the heptane as directed and warranted, but that such use resulted in the explosion. This plainly states a valid

[3] The invoice is difficult to read, but it clearly references the product label and MSDS.

claim for breach of express warranty, and at a bare minimum, raises a question of material fact for trial. The Circuit Court's grant of summary judgment should be reversed.

When the Facts are Viewed in the Light Most Favorable to Nationwide, Genuine Issues of Material Fact Exist Regarding Defendants' Breach of Implied Warranty of Fitness for a Particular Purpose and Defendants' Breach of Implied Warranty of Merchantability

Defendants correctly state that a "person asserting a violation of the warranty of fitness for a particular purpose must present sufficient evidence, direct or circumstantial, to permit the inference that the product was defective when it left the manufacturer's possession or control." *Virchow v. Univ. Homes, Inc.*, 2005 S.D. 78, ¶ 21, 699 N.W.2d 499, 505 (citations omitted). Defendants only argument is that Nationwide does not allege the heptane was defective when it left Defendants' control. (Barton Brief at 17-18.) On the contrary, Nationwide has alleged, and offered direct evidence, that the heptane was defective due to inadequate warnings and the product use instructions contained in and incorporated by the MSDS when Defendants possessed or controlled the heptane. There were no alterations to the heptane or warnings after the product left Defendants' possession and control.

Indeed, a product may be defective for the implied warranty of fitness for a particular purpose due to inadequate warnings. *See, e.g.*, *Assam v. Deer Park Spring Water, Inc.*, 163 F.R.D. 400, 405 (E.D.N.Y 1995) (quoting *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979) ("inadequate warnings will render a product defective for purposes of warranty and strict products liability"); *Central Soya Co., Inc. v. Rose*, 352 N.W.2d 727, 729 (Mich. Ct. App. 1984) (citation omitted) (failure to provide adequate instructions or warnings can constitute a product defect sufficient to sustain an implied warranty claim);

Hanson v. Murray, 190 Cal. App. 2d 617, 623-24 (Cal. Ct. App. 1961) (failure to warn constituted breach of implied warranty of fitness for a particular purpose).

Defendants plainly had reason to know A.H. Meyer's particular purpose for which the heptane was required – use as an industrial solvent. Defendants had reason to know that buyers of their products, such as A.H. Meyer with heptane, would rely upon the expertise, skill, and product warnings of Defendants. Accordingly, Defendants' sale of heptane to A.H. Meyer included a warranty that the heptane would be fit for A.H. Meyer's particular purpose. *See* SDCL § 57A-2-315.

The heptane was defective due to Defendants' inadequate warnings and product use instructions. The heptane was not fit for A.H. Meyer's particular purpose, as the explosion occurred as a result of the heptane vapors drifting more than five feet and coming into contact with an electrical switch, a danger of which Defendants failed to warn. If an explosion occurs through the use of heptane, warranted for A.H. Meyer's particular purpose, a jury could conclude that the product was inadequate for such purpose. Nationwide has presented a valid claim for breach of the implied warranty of fitness for a particular purpose and at a bare minimum, has raised a question of material fact for trial. The Circuit Court's grant of summary judgment should be reversed.

Additionally, contrary to Defendants' assertions, an inadequate warning may render the product defective and unmerchantable for purposes of § 2-314. *See, e.g.*, *Gardner v. Q. H. S., Inc.*, 448 F.2d 238, 243 (4th Cir. 1971) (a manufacturer's warranty of merchantability encompasses the provision of adequate warnings regarding product hazards); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 181 (Iowa 2002) (seller may breach implied warranty of merchantability by failing to provide adequate instructions or warnings); *DeWitt v. Eveready Battery Co., Inc.*, 550 S.E.2d 511, 517 (N.C. Ct. App. 2001); *Vassallo v. Baxter*

Healthcare Corp., 696 N.E.2d 909, 923 (Mass. 1998) (manufacturer of a product which lacks requisite warning breaches implied warranty of merchantability if risk reasonably foreseeable); *Streich v. Hilton-Davis, a Div. of Sterling Drug, Inc.*, 692 P.2d 440, 447-48 (Mont. 1984) (failure to warn of adverse effects results in breach of warranty of merchantability).

As with the fitness for a particular purpose warranty claim, Defendants only defense to the merchantability claim is that Nationwide has not claimed the heptane was defective. This is wholly untrue, as Nationwide has explained throughout its brief. The defect is the inadequate product use instructions and warnings provided by Defendants. As thoroughly explained in Nationwide's initial brief, the heptane sold by Defendants was not merchantable. Therefore, Nationwide is entitled to pursue a claim for breach of the implied warranty of merchantability. The Circuit Court's grant of summary judgment should be reversed.

CONCLUSION

For the foregoing reasons, and all the reasons established in Nationwide's initial brief, this Court should reverse the Circuit Court's grant of summary judgment to Defendants on all causes of action and remand to the Circuit Court to allow all claims to proceed to trial.

Dated at Sioux Falls, South Dakota, this 9th day of May, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 3,291 words and 17,697 characters, excluding the table of contents, table of authorities, and any certificates of counsel. This Reply Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 9th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on March 12, 2014.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellant" was emailed to the attorneys set forth below, on May 9, 2014:

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