261 A.D.2d 302, 691 N.Y.S.2d 392, 1999 N.Y. Slip Op. 05359
(Cite as: 261 A.D.2d 302, 691 N.Y.S.2d 392)

Supreme Court, Appellate Division, First Department, New York.
Ralph VERGARA, Plaintiff-Appellant-Respondent,
v.
SCRIPPS HOWARD, INC., et al., Defendants,
Rockwell International Corporation, Defendant-Respondent-Appellant.
[And A Third-Party Action]
May 25, 1999.

Worker who was injured when clothing snagged on newspaper conveyor machine brought products liability action against corporate successor to manufacturer. After jury trial, the Supreme Court, Bronx County, Jerry Crispino, J., entered judgment for employee. Following denial of motion for judgment n.o.v. or new trial, successor appealed. The Supreme Court, Appellate Division, held that: (1) publisher's modification of machine by removing safety guards at location of accident was not foreseeable; and (2) evidence was insufficient to support a finding that successor had either actual or constructive notice, based on sporadic service calls by its employee, of alteration made by publisher.

Reversed; motion granted; complaint dismissed.

West Headnotes

[1] Products Liability 313A 153

313A Products Liability
313AII Elements and Concepts
313Ak153 k. Lapse of Time or Change in Condition. Most Cited Cases
(Formerly 313Ak16)
Fact that under workers' compensation scheme an employee may have no remedy in tort against his employer for injuries from a machine that employer has altered after purchasing it gives the courts no license to thrust upon a third-party manufacturer a duty to insure that its product will not be abused or that its safety features will not be callously altered by a purchaser.

[2] Corporations 101 445.1

101 Corporations
101XI Corporate Powers and Liabilities
101XI(C) Property and Conveyances
101k441 Conveyances by Corporations
101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases
Liability of corporate successor to manufacturer of newspaper conveying machine for injuries to worker whose pants snagged on conveyor track required a showing of successor's superior knowledge of the risk of personal injury created by operating the machine without proper safeguards.

[3] Corporations 101 445.1

101 Corporations
101XI Corporate Powers and Liabilities
101XI(C) Property and Conveyances
101k441 Conveyances by Corporations
101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases
Corporate successor to manufacturer of newspaper conveying machine was not presumed to have knowledge of publisher's removal of safety guards along conveyor track, for purposes of products liability claim asserted by injured worker, as dangerous condition arose after product left the manufacturer.

[4] Products Liability 313A 153

313A Products Liability
313AII Elements and Concepts
313Ak153 k. Lapse of Time or Change in Condition. Most Cited Cases
(Formerly 313Ak48)

Products Liability 313A 235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous Machines,

Tools, and Appliances. Most Cited Cases
(Formerly 313Ak48)
Newspaper publisher's modification of conveyor machine for bundled papers, by removing protective metal guard along a section of conveyor track, was not foreseeable, for purposes of failure to warn claim asserted against successor to manufacturer by worker injured when clothing snagged on moving track, where original metal mesh safety guard was welded onto the machine and required substantial effort to remove.

[5] Corporations 101 445.1

101 Corporations
101XI Corporate Powers and Liabilities
101XI(C) Property and Conveyances
101k441 Conveyances by Corporations
101k445.1 k. Assumption of Transferor's Liabilities. Most Cited Cases
As buyer of manufacturer's assets, successor is expected to be familiar with the product, for purposes of potential liability for failing to warn of hazard.

[6] Products Liability 313A 235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous Machines, Tools, and Appliances. Most Cited Cases
(Formerly 313Ak85)

Products Liability 313A 380

313A Products Liability
313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak380 k. In General. Most Cited Cases
(Formerly 313Ak85)
Evidence was insufficient to support a finding that successor to manufacturer of newspaper conveying machine had either actual or constructive notice, based on sporadic service calls by successor's engineer, that publisher had modified machine by removing safety guards along small section of conveyor track, and therefore worker who was injured when clothing snagged on moving track could not recover from successor for failure to warn; there was no general maintenance contract between successor and publisher, each of the machines in conveyor room was 250 to 300 feet long, and there was no evidence as to which parts of conveyor in question had been examined by engineer or how close they were to accident site.

[7] New Trial 275 72(1)

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k72 Weight of Evidence
275k72(1) k. In General. Most Cited Cases
Remedy for verdict against the weight of the evidence is a new trial, since “weight of the evidence” reversal does not mean that there are no triable issues, only that the jury incorrectly assessed the evidence.

[8] New Trial 275 70

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k70 k. Sufficiency of Evidence. Most Cited Cases
When a verdict is set aside as not based on sufficient evidence as a matter of law, the complaint must be dismissed.

[9] Negligence 272 251

272 Negligence
272IV Breach of Duty
272k251 k. Knowledge or Notice. Most Cited

Cases
Constructive notice requires that a defect be visible and apparent for a reasonable length of time.

[10] Products Liability 313A 116

313A Products Liability
313AII Elements and Concepts
313Ak116 k. Knowledge of Defect or Danger. Most Cited Cases
(Formerly 313Ak48)

Products Liability 313A 235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous Machines, Tools, and Appliances. Most Cited Cases
(Formerly 313Ak48)
Newspaper publisher's request for a different type of safety guard for new conveying machine to be designed by successor to the manufacturer of older machine did not give notice to successor that publisher had actually removed safety guard from a section of older machine, for purposes of successor's potential liability to worker injured at that location; all that could be imputed to successor was knowledge of publisher's dissatisfaction with original safety guard.

[11] Evidence 157 574

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k574 k. Conflict with Other Evidence. Most Cited Cases
Expert testimony that engineer who made sporadic service calls on newspaper conveying machines must have had notice that safety guards were missing at location where a worker was injured, because a thorough engineer would have inspected the entire machine, was mere speculation unsupported by any direct evidence, and therefore jury, in holding engineer's employer liable for injuries, improperly accorded that testimony more weight than engineer's testimony that he never saw the alteration.
****393** Jay L.T. Breakstone, for Plaintiff-Appellant-Respondent.

Timothy J. Keane, for Defendant-Respondent-Appellant.

SULLIVAN, J.P., ROSENBERGER, TOM and WALLACH, JJ.

MEMORANDUM DECISION.

***302** Order, Supreme Court, Bronx County (Jerry Crispino, J.), entered on or about ****394** March 6, 1998, denying Rockwell International Corporation's ("Rockwell") motion pursuant to CPLR 4404(a) for judgment notwithstanding the ***303** verdict or a new trial, except to the extent of setting aside the jury's award of $620,000 for past pain and suffering and $1,040,000 for future pain and suffering, and ordering a new trial on the issue of damages unless plaintiff stipulated to accept damages of $200,000 for past pain and suffering and $500,000 for future pain and suffering, and the interlocutory judgment, same court and Justice, entered on or about October 15, 1998, determining the issue of liability in favor of plaintiff and against Rockwell and staying the new trial on damages pending resolution of the instant appeal, unanimously reversed, on the law, without costs, Rockwell's motion granted, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant-respondent-appellant dismissing the complaint as against it.

Plaintiff, then an employee of third-party defendant The New York Times ("Times") [FN1], sustained serious permanent injuries to his leg and back on July 21, 1989, when his trousers were caught by a tray on a conveyor for bundled newspapers at the Times's printing plant in Carlstadt, New Jersey. The conveyor track, which was moving at 250 feet per minute, pulled plaintiff into the press machinery. The accident happened because the Times had removed the protective metal guards with which the machine was originally designed, manufactured and

installed. The absence of a barrier between the worker and the fast-moving track made it possible for plaintiff's clothes to snag on one of the connected trays that made up the track of the conveyor belt.

> FN1. The third-party claims against the Times were not tried together with the main action that is the subject of this appeal. All defendants and third-party defendants other than Rockwell have been dismissed from this litigation.

At the time of the accident, there were three such conveyor machines in the room where plaintiff was working. They were known as Loop A, Loop B and Loop C. Each was rectangular in shape and between 250 and 300 feet long. Plaintiff was injured on Loop B. Loops A, B and C were manufactured and installed in the late 1970s (1976, 1977 and 1978, respectively) by the Sta-Hi Systems Division of Sun Chemical Company ("Sun"), subsequently known as the Sequa Corporation. Defendant Rockwell bought the Sta-Hi Division from Sun in 1978. As originally manufactured, Loop B included guard fences on each side along the entire length of the track. These guards were about one foot high and made of diamond-shaped metal mesh grid welded onto the machine. The openings were made too small for workers' clothing or body parts to slip through. ***304** Though aware that the purpose of the guard fence was to protect workers from coming into contact with the track for safety reasons, the Times removed a section of the guard in 1978 or 1979 to alleviate a jamming problem near one of the bundle entry devices. Initially, it replaced the original guard with three horizontal steel bars, but at some point prior to plaintiff's accident (apparently around 1984), the Times even took this makeshift barrier down and left this section of the track completely unshielded. Needless to say, this is where plaintiff's accident occurred.

Plaintiff could not sue the Times directly because the Workers' Compensation Law provides the exclusive remedy for workplace injury, including one caused by an employer's negligence. Therefore, plaintiff sought to hold Rockwell and related entities liable, based on an alleged failure to warn the Times of the danger of removing the safety guards. Following a verdict in plaintiff's favor, the trial court ordered a new trial on damages unless plaintiff stipulated to a reduced amount, and denied Rockwell's motion to set aside the verdict pursuant to CPLR 4404(a). Plaintiff appeals from the court's ruling on damages and Rockwell cross-appeals from the denial****395** of its motion for judgment notwithstanding the verdict or a new trial.

[1] There is no doubt that plaintiff's accident was caused by negligence, but it was the negligence of his employer, not of Rockwell, whose connections to the altered machine were too attenuated to support liability under any of the theories presented by plaintiff. The common flaw in all of plaintiff's arguments is that plaintiff simply failed to prove that Rockwell had notice of the dangerous modification. A defendant can hardly have a duty to warn about a hazard of which it is unaware (*see*, *Schumacher v. Richards Shear Co., Inc.* 59 N.Y.2d 239, 249, 464 N.Y.S.2d 437, 451 N.E.2d 195). "Unfortunately, as this case bears out, it may often be that an injured party, because of the exclusivity of workers' compensation, is barred from commencing an action against the one who exposes him to unreasonable peril by affirmatively rendering a safe product dangerous. However, that an employee may have no remedy in tort against his employer gives the courts no license to thrust upon a third-party manufacturer a duty to insure that its product will not be abused or that its safety features will be callously altered by a purchaser" (*Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 481, 426 N.Y.S.2d 717, 403 N.E.2d 440).

[2][3][4][5] Rockwell cannot be held liable simply because it is a successor to the corporation that manufactured the Loop B conveyor. Successor liability is premised on the successor corporation's superior knowledge of the risk of personal injury created by ***305** operating the machine without proper

safeguards. As the buyer of the manufacturer's assets, the successor is expected to be familiar with the product (*Schumacher, supra,* at 243, 464 N.Y.S.2d 437, 451 N.E.2d 195). Here, however, the dangerous condition arose *after* the product left the manufacturer, due to its modification by the Times. Nor is this a case where the buyer's potentially unsafe modification was foreseeable because the safety feature was designed to be removable (*compare, Lopez v. Precision Papers,* 67 N.Y.2d 871, 873, 501 N.Y.S.2d 798, 492 N.E.2d 1214). Testimony at trial established that the original metal mesh safety guard was welded onto the machine and required substantial effort to remove (*see, Liriano v. Hobart Corp.,* 92 N.Y.2d 232, 241, 677 N.Y.S.2d 764, 700 N.E.2d 303 [noting that "a safety device built into the integrated final product is often the most effective way to communicate that operation of the product without the device is hazardous"]).

[6] Since Rockwell's notice of the modification could not be presumed based on its predecessor's manufacture of the conveyor, a duty to warn the Times could only be premised on Rockwell's subsequent discovery of the dangerous alteration through the visits of Rockwell's employee Robert Eckerson, a mechanical engineer, who responded to sporadic service calls from the Times, and helped design the newspaper bundle conveyor known as Loop C. The majority of the trial evidence on liability centered on this theory. The jury's implicit finding that Eckerson had notice of the hazard, and that his failure to warn the Times caused plaintiff's terrible accident, is not supported by sufficient evidence. In other words, because of serious factual gaps in the plaintiff's proof, there is "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v. Hallmark Cards,* 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145).

[7][8] Rockwell's motion to set aside the verdict was based on the argument that the verdict was against the weight of the evidence. Were we to base our decision on that ground, the remedy would be a new trial, since "weight of the evidence" reversal does not mean that there are no triable issues, only that the jury incorrectly assessed the evidence ****396**(*Nicastro v. Park,* 113 A.D.2d 129, 495 N.Y.S.2d 184). By contrast, when a verdict is set aside as not based on sufficient evidence as a matter of law, the complaint must be dismissed (*Cohen, supra,* at 498, 410 N.Y.S.2d 282, 382 N.E.2d 1145).

The trial evidence showed that there was no contract between Rockwell and the Times for routine, system-wide inspection and maintenance of the newspaper bundle conveyors. Rockwell was only called sporadically during the late 1970s ***306** and early 1980s to respond to specific problems with the conveyors, for which it sent Eckerson (*see, McMurray v. P.S. El., Inc.,* 224 A.D.2d 668, 669-670, 638 N.Y.S.2d 720, *lv. denied* 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604 [error to allow jury to infer negligent maintenance when defendant had no duty to inspect machine as a whole]). Eckerson also surveyed the conveyor room in 1978 in connection with designing Loop C. Loop C was set up to pass over Loop B at certain points.

However, plaintiff presented no proof that Eckerson had actual notice, and not enough facts from which constructive notice could be inferred. There was no evidence as to which parts of Loop B were examined by Eckerson on these visits or how close they were to the relatively small section where the Times had removed the wire mesh guard (*see, De Milio v. De Milio,* 24 A.D.2d 447, 448, 260 N.Y.S.2d 254 [verdict for plaintiff set aside absent details about nature and visibility of defect, without which jury could not infer defendants' notice of defect and resulting duty to warn]).

[9] Constructive notice requires that a defect be visible and apparent for a reasonable length of time (*Gordon v. Am. Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d

774). The Times replaced the original protective mesh with three horizontal pieces of flat steel piping. Thus, there was no vertical protrusion above the surface of the conveyor track, which would have altered the silhouette of the machine in a way that would necessarily have attracted Eckerson's attention even if he were working on a different section of the machine. It is worth reiterating that Loop B was between 250 and 300 feet long, and that it was housed in a huge room with two other conveyors of similar size. Finally, at the time of plaintiff's accident, there was no guard at all on the portion of the track where he was injured. The three metal bars had been removed, apparently around 1984. It is not even clear from the record whether Eckerson was still responding to service calls from the Times by this date.

[10] Weighing somewhat in plaintiff's favor is the fact that when Eckerson was called to design Loop C, the Times requested a type of safety guard different from the wire mesh that had caused jamming problems on Loop B. Yet, plaintiff's entire case cannot rest on this fact alone. Although knowledge may be imputed to Rockwell that the Times was dissatisfied with the original safety guard, this does not mean that Eckerson was told that the Times had actually removed the existing mesh on Loop B, nor that Eckerson knew what alternate safety device (if any) the Times had put in its stead. In short, there ***307** was insufficient proof for a rational juror to conclude that Eckerson saw (or should have seen) the dangerous condition which caused plaintiff's accident.

[11] Plaintiff's expert's testimony that Eckerson must have had notice because a thorough engineer would have inspected the entire machine was mere speculation unsupported by any direct evidence (*Shapiro v. Hotel Corp. of Am.*, 25 A.D.2d 828, 269 N.Y.S.2d 660). The jury wrongly afforded it more weight than Eckerson's testimony that he never saw the alteration (*Trestman v. Heimer*, 163 Misc.2d 987, 988, 625 N.Y.S.2d 800 [verdict set aside where jury wrongly credited expert's speculation over defense witness' direct observation]), especially when no such duty to inspect existed (*McMurray, supra*).

****397** In light of the foregoing, we need not address the parties' other contentions.

N.Y.A.D. 1 Dept.,1999.
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History

Direct History

=> 1 **Vergara v. Scripps Howard, Inc.,** 261 A.D.2d 302, 691 N.Y.S.2d 392, 1999 N.Y. Slip Op. 05359 (N.Y.A.D. 1 Dept. May 25, 1999) (NO. 963, 964)

Leave to Appeal Denied by

H 2 Vergara v. Scripps Howard, Inc., 94 N.Y.2d 757, 724 N.E.2d 770, 703 N.Y.S.2d 74 (N.Y. Dec 20, 1999) (Table, NO. 1348)

Negative Citing References (U.S.A.)

Distinguished by

C 3 Leary ex rel. Debold v. Syracuse Model Neighborhood Corp., 9 Misc.3d 292, 799 N.Y.S.2d 867, 2005 N.Y. Slip Op. 25247 (N.Y.Sup. Jun 06, 2005) (NO. 01-0237) ★★ **HN: 4 (N.Y.S.2d)**

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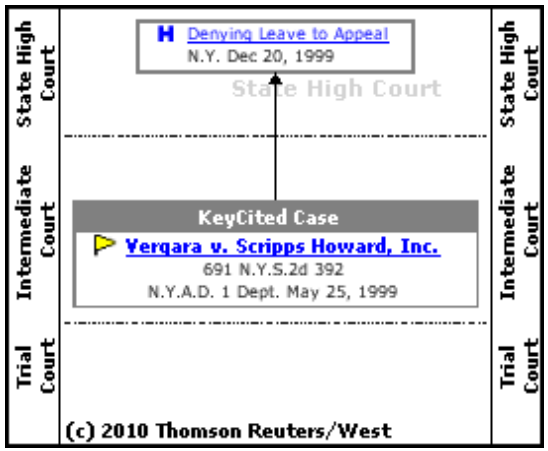
State High Court
Intermediate Court
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