

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

M. DIANE KOKEN, AS LIQUIDATOR)
ON BEHALF OF RELIANCE INS. CO.)
(IN LIQUIDATION),)
)
Plaintiff)
)
v.) Civil No. 02-83-B-C
)
AUBURN MANUFACTURING, INC.,)
et al.,)
)
Defendants)

**RECOMMENDED DECISION ON
AUBURN MANUFACTURING, INPRO, REDCO AND O'CONNOR'S
MOTIONS FOR SUMMARY JUDGMENT
AND
MEMORANDUM OF DECISION ON
AUBURN AND INPRO'S MOTION TO EXCLUDE THE TESTIMONY OF
DR. EAGAR AND MESSRS. WAITE AND DOWNING**

On May 17, 1999, a small fire started during a torch-cutting operation being performed in connection with a project to construct an energy generation facility for Androscoggin Energy, LLC, in Jay, Maine. The workman conducting the operation on behalf of Redco, Inc., a subcontractor, used a dry chemical extinguisher to put out the fire and, in the process, a plywood barrier protecting a generator was dislodged and dry chemical residue fell into the generator and caused damage. Naturally, the project was insured against loss. But the insurer, Reliance Insurance Company, wanted to recover the insurance proceeds it paid out and the economic expectations of the primary contractor, Black & Veatch, had been substantially frustrated, in large part due to a liquidated damages provision in its contract with Androscoggin Energy.

The contract that governed the construction project included an insurance procurement provision and the contract of insurance included a waiver of subrogation. In addition,

subsequent contract litigation between Redco and Black & Veatch ended with a global release of all claims arising from or relating to the project. Despite these rather considerable obstacles to any tort litigation, it turns out that the small fire that precipitated the loss began underneath a length of 1000-degree-rated welding blanket allegedly manufactured by Auburn Manufacturing, Inc., and sold to the project by Inpro, Inc., an industrial supply shop. Although welding contractors understand that welding blankets are not proof against fire and although the welder and foreman on this job both testified not only that they understand small fires sometimes start despite the use of welding blankets, but also that the subject fire was the typical small fire one might expect, it turns out that Auburn manufactures 3000-degree blankets as well, something the contractors were not aware of. What is more, although Auburn product information indicates that the 1000-degree blanket can be used for horizontal capture¹ of sparks and cuttings, it recommends the 3000-degree blanket for horizontal capture of concentrated spatter and red-hot cuttings. Neither Auburn nor Inpro provided the project with Auburn's sales and marketing materials that discuss these products and others. Ergo, the instant products liability calamity.²

Now pending are motions for summary judgment brought by Auburn, Inpro, Redco and O'Connor Constructors, Inc., which was assisting Redco with its work. Although the motions present some very interesting tort law issues involving the economic loss doctrine and the right to contribution against third parties who are not subject to liability on the primary claims, my assessment is that the court need not reach those issues. I recommend that the court **GRANT**

¹ Horizontal capture simply means laying the blanket down to permit sparks and cuttings to fall on it. Welding blanket is also used in vertical applications as heat shields and to prevent sparks from flying away from a welding operation.

² All told, what with their affirmative, responsive and reply summary judgment memoranda and Local Rule 56 statements of material fact, their motions to exclude testimony, their motions to strike materials from the record, and their motions to impose sanctions for discovery violations (including unauthorized surreply papers), the parties have managed to deluge the court with in excess of 40 summary judgment related filings. When one surveys the 279 entries on this docket, it is abundantly obvious that substantial resources have been ploughed into very barren soil.

summary judgment to Auburn and Inpro on the primary products liability claims based on the absence of genuine issues of material fact with regard to the core elements of duty, breach, and causation.

THE PLEADINGS

M. Diane Koken, as Liquidator on behalf of Reliance Insurance Company (Reliance), pursues through subrogation a products liability suit against the presumed³ manufacturer of a roll of welding blanket, Auburn Manufacturing, Inc., and its distributor, Inpro, Inc. (Second Am. Compl., Docket No. 12.) Reliance's suit also includes tort and contract claims against Black & Veatch, Redco and O'Connor on the ground that they allegedly "destroyed" Reliance's subrogation rights by discarding the welding blanket following the fire. In a previous recommended decision, I recommended that summary judgment enter against the latter claims for destruction of subrogation rights. (Docket No. 133.) That recommendation was affirmed by the court. (Docket No. 153.)

In response to Reliance's action, Black & Veatch filed product liability cross-claims against Auburn and Inpro and indemnification and contribution claims against its co-defendants in connection with Reliance's claim for destruction of its subrogation rights. (Docket No. 15.) Black & Veatch's product liability cross-claims against Auburn and Inpro seek a recovery for economic losses Black & Veatch suffered as a consequence of having to repair the generator. A substantial portion of these damages appear to be related to a liquidated damages provision in Black & Veatch's contract with Androscoggin Energy that was triggered by project disruption.

³ The blanket was discarded after the fire. In a prior recommended decision, I concluded that there is sufficient circumstantial evidence that the blanket was made by Auburn and sold by Inpro for this case to proceed.

Like Black & Veatch, O'Connor and Redco filed cross-claims against Auburn and Inpro in relation to Reliance's action for alleged destruction of its subrogation rights. (Docket Nos. 35, 37, 38, 49.) They did not, however, assert independent claims against Auburn or Inpro.

Auburn and Inpro filed cross-claims for contribution and indemnification against their fellow defendants on Reliance's claims and against O'Connor and Redco in relation to Black & Veatch's cross-claims. (Docket Nos. 32, 45.) Auburn and Inpro's cross-claims include claims against one another. (Id.)

AUBURN'S MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 173)⁴

A movant is entitled to summary judgment only "if 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." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to the non-movants and I indulge all reasonable inferences in their favor. See Savard v. Rhode Island, 338 F.3d 23, 25-26 (1st Cir. 2003).

Auburn and Inpro contend that the summary judgment record is insufficient to generate a genuine issue of material fact on the core tort elements of duty, breach and causation. They also contend that summary judgment should enter because the subject blanket was not preserved, because the alleged damages were not foreseeable and because releases or waivers among Reliance, Androscoggin Energy, Black & Veatch, Redco and O'Connor should benefit Auburn and Inpro as well.

⁴ Inpro joins Auburn's motion. (Docket No. 184.)

*Statement of Facts*⁵

Black & Veatch contracted with Androscoggin Energy, LLC, to engineer, procure and construct an electric and steam generating facility on premises owned by Androscoggin Energy. (Docket No. 239, ¶ 46.) Black & Veatch entered into various subcontracts with Redco, Inc., for certain project work, while O'Connor Constructors, Inc., managed and provided other services for Redco on the project. Redco and O'Connor's scope of work included the generation building

⁵ In support of its motion for summary judgment, Auburn submitted a relatively succinct 43-paragraph statement of material facts. In opposition to Auburn's motion, Black & Veatch appropriately submitted an opposing statement of material fact. Black & Veatch's opposing statement sets forth, in a less than succinct manner, 129 additional paragraphs in support of its claim. In answer to Auburn's statements, Black & Veatch indicates whether it admits, denies or qualifies each Auburn statement and then cross-references its own statement of additional facts to support its position. Presumably Black & Veatch found this technique expeditious. I, however, did not. Although it is entirely appropriate and advisable for a summary judgment opponent to affirmatively set forth its case in a statement of additional material facts, it is not appropriate for the non-movant to disregard the defendant's statement in this manner. Pursuant to Local Rule 56(c), when the non-movant seeks to qualify or deny one of the movant's statements of material fact, the non-movant must "support each denial or qualification by a record citation as required by this rule." The "as required by this rule" is a reference to Local Rule 56(e), which explains that a record citation is a citation "to the specific page or paragraph of identified record material supporting the assertion," not a cross-reference to the non-movant's statement of additional material fact. The non-movant's statement of additional material facts is not record material of the kind contemplated by Rule 56 of the Federal Rules of Civil Procedure, which describes "pleadings, depositions, answers to interrogatories, . . . admissions on file [and] affidavits," Fed. R. Civ. P. 56(c). Failure to cite record material in support of denials and qualifications permits the court, in its discretion, to disregard the non-movant's denial or qualification and to treat the movant's statements as admitted.

The primary purpose of the rule is to simplify the summary judgment process for the court so that the court need not root through the papers to figure out whether the non-movant has enough evidence to avoid a directed verdict following a trial. Black & Veatch's modification of the rule has frustrated this purpose not simply because it does not cite the record in opposition to Auburn's motion, but because its cross-references in most cases refer to numerous additional statements in response to Auburn's singular statement. Thus, for example, in Docket No. 174, paragraph 12, Auburn states that the welder and his foreman testified that the blanket performed as expected, a straight forward and singular statement of material fact. In response, Black & Veatch refers the court to five of its additional statements. (Docket No. 239, ¶ 12.) And this is just one example. In one responsive paragraph, Black & Veatch refers the court to 24 additional statements of fact in answer to a solitary statement by Auburn. (Docket No. 239, ¶ 43.) Here is another example: Auburn asserts that the subject welding blanket was not preserved. (Docket No. 174, ¶ 14.) Black & Veatch "qualifies" this statement with cross-references to ten of its additional statements of fact. The first one indicates that Redco and/or O'Connor employees discarded the blanket that day because they considered the fire to have been "benign." (Docket No. 239, ¶ 75.) Why that could not have been asserted at responsive paragraph 14 befuddles me. There are other problems as well. Some of Black & Veatch's qualifications are not really qualifications at all and amount to admissions once one follows the trail. Thus, for example, Auburn asserts that "Perry Austin, a Redco employee, was torch cutting at the time the fire occurred." (Docket No. 174, ¶ 3.) Rather than simply admit this basic fact, Black & Veatch qualifies it, cross-referencing two of its additional statements. As it turns out, nothing in either statement controverts Auburn's statement. (Docket No. 239, ¶ 64.)

It is one thing to ferret about in search of material disputes, but quite another when the quest fails to turn up even a material nuance. Although Black & Veatch's approach is not as deficient and convoluted as what is described in Learnard v. Inhabitants of Van Buren, 182 F. Supp. 2d 115, 119 (D. Me. 2002), it is still not in compliance with the rule. If I did not feel obliged to provide the court with a meaningful discussion of the pending motions, I would be inclined to simply treat Auburn's statements of material fact as admitted.

and other structures and the installation of electrical generators, including project generator number 3. (Docket No. 239, ¶ 47.) On May 17, 1999, a fire broke out when a Redco employee was torch cutting a steel lifting lug from the building that was to house generator number 3. Molten metal or slag fell from the lug, landed on a welding blanket manufactured from fire-resistant fibers, melted through the blanket and ignited tarp and plywood situated beneath the blanket. (Docket No. 239, ¶ 49.) The fire was quickly put out with a fire extinguisher and workers assigned to clean up the location discarded the burned-through blanket, believing the fire to have been an insignificant occurrence. (Docket No. 174, ¶ 7; Docket No. 239, ¶¶ 75-81.) As it turned out, however, dry chemicals from the fire extinguisher made their way into a cavity in generator number 3 and damaged the generator. (Docket No. 174, ¶ 23; Docket No. 239, ¶ 71.) Reliance, through subrogation, seeks to recover from Auburn and Inpro roughly \$1.6 million it paid to Androscoggin Energy and Black & Veatch for repair costs. (Docket No. 239, ¶ 99.) Black & Veatch, through cross-claims, seeks to recover roughly \$7.4 million in additional repair costs not covered by Reliance and liquidated damages that Black & Veatch paid to Androscoggin Energy for project disruption resulting from the generator repairs. (Docket No. 239, ¶¶ 100, 115 .)

Auburn Manufacturing manufactured the welding blanket at issue.⁶ (Docket No. 239, ¶117.) Inpro is an industrial supply house that sold to Redco/O'Connor a large roll of welding blanket from which the subject blanket was cut. (Docket No. 239, ¶ 117.) Although invoices from Auburn to Inpro identified the blanket roll as "2401-72-9383 AMI-GLAS CLOTH,"

⁶ Auburn disputes this statement and previously filed a motion for summary judgment contending that the record was insufficient to support a jury finding that the subject blanket, which was disposed of, was actually manufactured by Auburn. My recommendation on that motion was that there was enough information to submit the question of the blanket's origin to the jury. (Docket No. 134; Koken v. Auburn Mfg., Inc., Civ. 02-83-B-C, 2004 WL 51099, 2004 U.S. Dist. LEXIS 496 (D. Me. Jan. 8, 2004) (Recommended Decision).) Accordingly, for purposes of this motion, I view this evidence in the light most favorable to Reliance and Black & Veatch and conclude that the subject blanket was manufactured by Auburn and supplied to the project by Inpro.

invoices from Inpro to Redco/O'Connor identified the blanket roll as "72-inch by 25-yard 1,000 DEGF big cloth." (Docket No. 255, ¶ 67 & Ex. B, pp. 42-45.)

Perry Austin, a Redco employee and a veteran welder of some 26 years, was the welder performing the subject torch cutting operation. (Docket No. 174, ¶¶ 3, 4.) Over the years, Mr. Austin has seen many small fires start as a result of welding activity, notwithstanding the use of welding blankets. (Docket No. 174, ¶ 5.) The site Mr. Austin was welding at had been set up at the direction of his foreman, Paul Gagnon. (Docket No. 174, ¶ 9.) Like Mr. Austin, Mr. Gagnon understood that fires can arise despite the use of welding blankets. Both he and Mr. Austin indicated that they have observed many welding blankets with burn-through holes in them. (Docket No. 174, ¶ 6; Docket No. 239, ¶ 56.) According to Gagnon, fire watches⁷ are set up during welding activity to spot fires like this one. (Docket No. 174, ¶ 10.) According to John Davisson, Black & Veatch's project manager, fire watches are set up for various reasons, including because "a fire blanket, although good protection, is no guarantee that a piece of slag will not melt through the blanket, as happened, or [that] all of the fire from the cutting operation will be contained."⁸ (Docket No. 174, ¶ 11; Docket No. 239, ¶ 57.) Neither Mr. Austin nor Mr. Gagnon considered the fire that broke out to be significant. Austin indicated that he considered it to be only a minor incident at the time. Gagnon conceded during his deposition that it was

⁷ According to Austin, a fire watch is a person whose job is to put out any fires that arise during welding work. (Docket No. 174, Ex. D, p. 14.) According to Davisson, a fire watch might also be stationed to prevent others from walking under falling sparks when welding is occurring overhead. (Docket No. 239, Ex. 10, p. 151.) What the fire watch was doing in this case is not reported in the parties' statements of material fact.

⁸ Black & Veatch contends that this fact is immaterial because Davisson did not know of the limits on welding blanket prior to or as of the date of the fire. (Docket No. 239, ¶ 58.) The significance of Davisson's understanding is not diluted by the fact that he did not have it in May of 1999. It is the position he took on behalf of Black & Veatch in communications with Androscoggin Energy, the owner of the project, when explaining why Black & Veatch disagreed with statements by Androscoggin that the fire arose out of contractor negligence. (Docket No. 174, Ex. 14.) According to Davisson, a fire watch was present during the torch cutting because it was understood that the fire blanket was no guarantee that slag would not melt through the blanket. (Id.) The letter also reveals that the plywood covering the generator was not secured and that "[t]he dislodging of the plywood cover over the vent opening on the generator was a result of action by the fire watch to remove a plastic tarp that was on fire from the [g]enerator to help contain the fire." (Id.)

"not a big deal." (Docket No. 174, ¶ 7.) Gagnon also conceded that the fire blanket performed as he would have expected it to perform. (Docket No. 174, ¶¶ 12, 13.) For his part, Austin indicated that things did not work out as he had expected them to and that he was wrong to think that the blanket would have prevented a fire under the circumstances. He also indicated that the blanket had "bubbled black," something that surprised him and that he had not observed happen before. (Docket No. 239, ¶ 60.) However, despite this observation, Austin stated that he did not think that a different fire blanket was needed. (Docket No. 174, ¶ 12; Docket No. 239, ¶ 60.) Austin also testified that even if the subject blanket had "1000 degrees" printed on it, he still would have gone ahead with the torch cutting.⁹ (Docket No. 147, ¶ 8.)

Perry Austin was performing the torch cutting from a ladder positioned on a wooden platform constructed over the top of the generator. (Docket No. 239, ¶¶ 49, 51.) The fire started when molten metal or slag fell onto the blanket, burned through it, and ignited a tarp and plywood barrier covering the generator. (Id.) How quickly this transpired is not set forth in the record. It was Austin who first realized there was a fire, not anyone assigned to fire watch. (Docket No. 239, ¶ 51.) Austin first detected the fire by the smell of smoke, not by sight.¹⁰ (Id.) He called out "fire" and descended from his ladder. Meanwhile, the fire watch retrieved a

⁹ Mr. Austin's actual testimony was as follows:

Q. Well, what I'm wondering is if you had seen on the blanket that day before you got started thousand degree rated right across the front of it, would you have gone ahead with the work?

.....

A. You need an answer, I guess. Hmm. I would have just figured the job was set up and it was proper that way as long as there was no holes in the blanket and as long as the job looked good to me.

(Docket No. 239, Ex. 4, pp. 110.)

¹⁰ Black & Veatch contends that the subject fire was not a typical fire because Perry Austin was not able to simply stomp, or "smudge" it out. However, the fact is that Mr. Austin was perched roughly ten feet above the platform on a ladder and first detected the fire only by smell. He obviously was not in a position to stomp the fire out and it is apparent that the fire watch was not present on the plywood platform because this individual failed to detect the fire before Mr. Austin and retrieved the fire extinguisher for Mr. Austin from another location while Mr. Austin descended his ladder. (Docket No. 239, ¶ 54 & Ex. 4 at 43.)

chemical fire extinguisher and handed it up to Mr. Austin, who used it to extinguish the fire. (Docket No. 239, ¶ 54 & Ex. 4 at 43.)

Paul Gagnon, who was responsible for setting up the worksite, testified at deposition that he was unaware that welding blanket comes in different temperature ratings or weights. According to Gagnon, "[w]henever we wanted a fire blanket . . . we would tell purchasing. . . . I don't have no idea what they purchased." (Docket No. 239, ¶ 67 & Ex. 8, pp. 36-37.) Perry Austin testified that he, too, was unaware of welding blanket ratings. However, Austin relied on Gagnon to set up the worksite (Docket No. 239, ¶ 55) and Gagnon simply utilized the blanket material that purchasing provided (Docket No. 239, ¶ 67 & Ex. 8, pp. 36-37). The purchasing agent on this job was Jay Adams, an O'Connor employee. At his deposition, Adams testified that "fire blanket is fire blanket," that he had never heard of temperature ratings for blankets and that he would never "knowingly order the wrong product." (Docket No. 239, ¶¶ 68-69.) According to Adams, either he or another Redco/O'Connor employee would have selected the roll from which the subject fire blanket was cut from an Inpro catalog. That catalog, and the invoice for the order from that catalog, described the product as "1000deg Spun Silicon Fire Blanket" and "1000deg FB cloth," respectively. (Docket No. 255, ¶ 67 & Ex. B, pp. 42-45; see also Docket No. 239, Ex. 46.)

Inpro did not inquire of O'Connor's purchasing agent concerning the use the blanket would be put to. Nor did Inpro provide information to O'Connor concerning the proper use of the subject blanket material. (Docket No. 239, ¶ 116.) On the other hand, according to Ronald Downing, Black & Veatch's designated expert on what mechanical contractors and their purchasing agents expect of welding blanket product, a project manager or superintendent who does not educate himself about the products used in construction projects is not worthy of his

position. (Docket No. 255, ¶ 160.)¹¹ Auburn provides a warning with its individual blankets, not its blanket rolls, although blanket rolls comprise 99 percent of Auburn's welding fabric business. (Docket No. 239, ¶ 139.) Auburn does not require Inpro to provide product warnings in connection with sales of blanket rolls. (Docket No. 239, ¶ 141.) Auburn markets the subject blanket material as medium duty. Its marketing materials describe light duty blanket as inappropriate for horizontal application and applications in which weld or cutting spatter will be excessive or concentrated. (Docket No. 239, ¶ 132.) The medium duty blanket is marketed, by comparison, as appropriate "where there is greater but not absolute risk to personnel or equipment, and where weld or cutting spatter are more concentrated." The materials caution that although "primarily for vertical use, they may be used as drapes and drop-cloth where exposure to excessive spatter is minimal, but they should not be used to horizontally capture and contain excessive, concentrated spatter or red-hot cut pieces." (Docket No. 239, ¶ 133.) Auburn does not contend that the subject blanket was inappropriate for the cutting job that Perry Austin was performing. (Docket No. 255, ¶ 133.) Nor has Reliance or Black & Veatch designated any expert to offer an opinion to the effect that the 1000-degree blanket offered insufficient fire protection for this job.¹²

The specific details of Austin's torch-cutting operation are not set forth by Black & Veatch. What little detail there is reveals that he was cutting while perched on a ladder and that cuttings from the work fell approximately ten feet before coming in contact with the blanket.

¹¹ Mr. Downing's actual testimony was as follows:

Q. If the superintendent is not sure of precisely what product he needs, does he go to the field purchasing agent and say, figure it out, or does he take his own steps to figure out exactly what he needs?

A. [Q]uite frankly, my experience is, if a superintendent doesn't know what he needs, he doesn't need to be my superintendent.

(Docket No. 255, ¶ 160 & Ex. G, pp. 47-48.)

¹² The testimony of one designated expert, discussed below, is merely to the effect that a warning would have "at least [provided] an opportunity" not to use the product. (Docket No. 239, ¶ 162.)

Efforts to recreate the conditions Mr. Austin was working under (molten slag falling from a ten-foot height on a welding blanket covering plywood) failed to produce a fire. (Docket No. 174, ¶ 16; Docket No. 255, ¶ 89.¹³) According to Perry Austin, the subject blanket was "filthy," but not "ratty" or "full of holes or frayed." (Docket No. 174, ¶ 15; Docket No. 239, ¶ 88.) Because the blanket was disposed of, there is no way to determine what the filth on the blanket was, what the blanket's real condition was, or whether its condition may have impacted its effectiveness. Nor have Reliance or Black & Veatch divulged in their summary judgment papers how concentrated the spatter was from Mr. Austin's work or what the temperature of a piece of slag cut from a "lug" would be.

The generator did not suffer fire damage. Rather, the generator was damaged when dry chemicals discharged from a chemical fire extinguisher entered the generator. The chemicals were corrosive and contaminated the generator. (Docket No. 174, ¶ 23; Docket No. 239, ¶ 71.) Although the generator was covered with both a tarp and plywood to protect it from harm, a pathway for the dry chemicals to enter the generator was created "when the tarp and the plywood covering were dislodged"; the fire did not burn through the tarp and plywood to create an opening. (Docket No. 239, ¶ 97, citing *Davisson Depo*, Ex. 10, pp. 143-44.)

Expert Testimony

In opposition to Auburn's summary judgment motion, Black & Veatch relies on testimony from three experts, Robert Waite, Ronald Downing and Dr. Thomas Eagar. Robert Waite is a registered engineer, a certified welding inspector, and a certified engineering technician with experience using welding blanket in the trades for approximately thirty years.

¹³ Black & Veatch denies this assertion, but the materials it cites in opposition are either not of evidentiary quality or fail to support Black & Veatch's contention. (Docket No. 239, ¶¶ 89-91.) Regarding evidentiary quality, Black & Veatch's counsel is not a witness in this case. Regarding Black & Veatch's citation of the Hilsop report, the portion cited says absolutely nothing about whether a fire resulted or under what conditions. (See Docket No. 239, ¶ 91, citing *id.*, Ex.19, p. 212, l. 22– p. 213, l. 12.)

Ronald Downing has fifteen years of experience in mechanical contracting. Dr. Thomas Eagar is a certified engineer, a welding engineer, a professor at M.I.T. and the supervisor of M.I.T.'s welding laboratory. Black & Veatch would use the testimony of these men to establish that welders are not familiar with blanket ratings (Waite), that contractors and their purchasing agents would expect to be informed about blanket ratings (Downing), and that Auburn's existing marketing materials are confusing and ambiguous about whether 1000-degree rated material can be used horizontally to capture cuttings (Dr. Eagar). Although there is no evidence in this case that Auburn or Inpro undertook to advise Redco or O'Connor about what blanket to select for the project or that Redco or O'Connor sought out any advice related to their particular project needs, the gist of this expert testimony is that whenever there is a lack of information exchange between a project supplier and an experienced contractor and that lack of exchange leads to harm, the fault is the supplier's.

In addition to this testimony, Black & Veatch would elicit testimony from Waite that a warning should have been provided because the blanket was inappropriate for cutting operations. (Docket No. 239, ¶ 158.) Had such a warning been provided, according to Waite, people in the field would have "at least had an opportunity" not to use the product. (Docket No. 239, ¶ 162.) The key testimony Black & Veatch would elicit from Downing is that mechanical contractors expect a welding blanket to "protect" against the products of welding and cutting operations absent a warning that they will not. (Docket No. 239, ¶ 165.) As for Dr. Eagar, Black & Veatch would elicit testimony that Auburn's advertising and marketing material is "somewhat confusing and ambiguous on what is appropriate," essentially because it says the 1000-degree blanket can be used for horizontal capture but not horizontal capture of concentrated sparks and red-hot cuttings. (Docket No. 239, ¶169.)

Motion to Exclude "Warnings Experts"

Auburn moves pursuant to Rule 702 of the Federal Rules of Evidence to preclude Robert Waite, Ronald Downing and Dr. Thomas Eagar's testimony from coloring the summary judgment proceedings and from being introduced at trial. (Docket No. 180.) Inpro joins in the motion. (Docket No. 182.) Auburn's motion focuses on the fact that Waite, Downing and Eagar are not really warnings experts at all, but experts in welding fabrication and mechanical contracting.¹⁴ (Docket No. 180 at 2.) In opposition, Black & Veatch maintains that these experts can provide material assistance to the jury, who "will not be familiar with welding or cutting with a torch, the selection and use of fire blankets by the welding or construction industries, . . . fire blankets and their ratings . . . the performance of the blanket that was used May 17, 1999, and the lack of industry 'standards' for the selection and use of fire blanket." (Docket No. 271 at 1.) I conclude that the proffer made by Black & Veatch in opposition to the motion is deficient in some respects.

Pursuant to Rule 702 of the Federal Rules of Evidence:

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

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court assigned to federal judges the gatekeeping role of screening from introduction in evidence expert testimony that, although relevant, is nevertheless based on unreliable scientific methodologies. Id. at 597. In General Electric Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court explained

¹⁴ When discussing its experts, even Black & Veatch puts the term "warnings experts" in quotation marks. (Docket No. 271 at 1.)

that a judge exercising this duty must evaluate whether the challenged expert testimony is based on reliable scientific principles and methodologies in order to ensure that expert opinions are not “connected to existing data only by the ipse dixit of the expert.” Id. at 146. The latest Supreme Court pronouncement on Rule 702, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), extended the gatekeeping obligation to all manner of expert testimony that would purport to introduce specialized knowledge or opinion, whether such knowledge or opinion might properly be classified as “scientific” or not. Id. at 147-48. The Kumho Court reiterated that the gatekeeping function is “a flexible one” that “depends upon the particular circumstances of the particular case at issue.” Id. at 150; see also Daubert, 509 U.S. at 591, 594. In this vein, the First Circuit Court of Appeals has stated that “[b]ecause the exact inquiry undertaken by the district court will vary from case to case, the district court need not follow any particular procedure in making its determination.” United States v. Diaz, 300 F.3d 66, 73 (1st Cir. 2002).

It is the proponent of the challenged evidence who carries the burden of proof. That burden is not to prove that his or her expert’s opinion or conclusion is correct, but that “the expert’s conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.” Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998). In meeting this burden, the proponent must not assume that an evidentiary hearing will be held; the trial court has the discretion to decide the motion on briefs and with reference to expert reports, depositions and affidavits on record.¹⁵ Diaz, 300 F.3d at 83-84. Thus, it is incumbent on the proponent to ensure that the record contains evidence explaining the methodology the expert employed to reach the challenged conclusion and why this methodology is a reasonably reliable one to employ. Reali v. Mazda Motor of Am., Inc., 106 F. Supp. 2d 75, 79 (D. Me. 2000).

¹⁵ The oral argument I held in relation to the summary judgment papers did not address the admissibility of these experts’ testimony.

1. Robert Waite

According to Mr. Waite, welders in the field do not know that there are different ratings for welding blankets. He arrived at this understanding, presumably, by working among welders in the field, though Black & Veatch does not bother to say so. Despite this omission, I conclude that Mr. Waite is qualified to attest to this fact because if welders in general knew of welding blanket ratings, one could assume that Mr. Waite would have picked that knowledge up over the course of 30 years in the trade. The fact that he did not know of such ratings until he became involved in this case is indicative of the fact that the existence of ratings is generally not known. Based simply on the length and nature of this experience, I am also satisfied that Mr. Waite could testify that there is a danger of fire when molten slag falls on a 1000-degree rated welding blanket. (Docket No. 271 at 3, citing relevant deposition testimony.) This knowledge is based on skill and experience and might be considered useful by the jury. However, on the issue of what an appropriate warning would have been, Mr. Waite's skill and experience do not sufficiently explain the basis for his opinion that the subject blanket should have been supplied with a warning that it was not suitable for cutting operations. (Docket No. 271, Tab A at 90.) Nor is there any factual foundation for this testimony. Black & Veatch fails to refer the court to any evidentiary basis for Mr. Waite's unqualified assertion that a 1000-degree blanket is inappropriate for cutting operations. Indeed, the fact that Mr. Waite can assert, based exclusively on his personal experience, that a 1000-degree welding blanket is insufficient to protect against fire during cutting operations tends to cut against the claim that a warning is needed because both the catalog and invoice for this product divulged its 1000-degree rating. The only reasonable assessment of Waite's testimony is that it reflects the knowledge of an experienced welder,¹⁶

¹⁶ When asked why he considers himself an expert on the need for warnings on welding blankets, Mr. Waite responded, "Welding and my own experience of what I would expect on warnings on a product that I would be

already reflected in the testimony of Perry Austin, that blankets sometimes burn through and fires sometimes arise during torch cutting operations despite the use of welding blankets. Given the absence of any underlying methodology tending to support Waite's *carte blanche* statement that 1000-degree blankets are unsafe for torch cutting operations, I **GRANT** Auburn's motion (joined by Inpro) to exclude Mr. Waite's testimony that Auburn's blanket was rendered unreasonably dangerous because it lacked a warning that it was not adequate for torch cutting operations. (Docket Nos. 180 & 182).

2. *Ronald Downing*

Based on his experience, Mr. Downing would testify that "absent a warning to the contrary, a mechanical contractor would expect that a welding blanket . . . would provide protection against fire resulting from sparks and/or slag," that a "field purchasing agent would likely not know the details or the specifics of the products he purchased," and that a mechanical contractor would expect a warning if there were "limitations" to a particular welding blanket.¹⁷ (Docket No. 271 at 6-7; Docket No. 239, ¶¶ 165-167.) Because these opinions rely on personal experience rather than a scientific methodology, they are more easily sustained. Furthermore, the criticisms raised by Auburn all go to weight. I **DENY** the motion as to Downing in its entirety.

3. *Dr. Thomas Eagar*

Dr. Eagar would testify that Auburn's advertising and marketing materials are "confusing and ambiguous." (Docket No. 271 at 9.) Although Black & Veatch does not explain the rationale behind this opinion, it cites to the relevant pages of Dr. Eagar's deposition transcript.

using or specifying in the course of my work in fabrication." (Waite Depo., Docket No. 271, Tab A at 86.) Regarding what he would expect based on his experience, Mr. Waite testified that in his thirty years of experience he never saw a warning on any of the welding blankets he used. (Docket No. 180, Ex. B, at 88-89.)

¹⁷ Despite this proffer, Auburn points out that Mr. Downing also testified that a job foreman or superintendent who fails to understand what products his workmen need is not really qualified for his job. (Docket No. 255, ¶ 160.) See also footnote 10, *supra*.

(Docket No. 271, Tab D at 64-66.) In my assessment, Rule 702 of the Federal Rules of Evidence calls for exclusion of this testimony, not because Dr. Eagar is unqualified to offer it or because his opinion is not supported by reason and analysis, but because the materials speak for themselves, can be adequately introduced through fact witnesses and the relative clarity or ambiguity of the materials can be determined by the jury without the aid of expert testimony. Moreover, based on the summary judgment papers, it is apparent that this testimony is immaterial. No evidence has been introduced by Black & Veatch or Reliance to suggest that either Redco or O'Connor saw Auburn's sales materials or relied on representations contained in them. According to the summary judgment record, the only materials that were reviewed were Inpro's catalog and invoices, which simply described the welding blanket as 1000-degree rated. (Docket No. 255, ¶ 169.) I **GRANT** the motion to exclude Dr. Eagar's testimony.

4. *The performance of the blanket*

On the first page of its memorandum opposing the motion to exclude, Black & Veatch suggests that these three experts have something material to say about the performance of the subject welding blanket. However, in the body of its memorandum, Black & Veatch does not proffer any expert testimony suggesting that the subject blanket was in any way defective in make or manufacture or that the subject blanket did not perform as expected. Nor does Black & Veatch even attempt to establish that any expert testimony about the blanket's performance would be admissible under Rule 702. Moreover, the relevant fact witnesses have indicated that the blanket performed as expected and that the fire was the typical sort of fire that sometimes arises during welding. Thus, to the extent that Black & Veatch is attempting to hold open the door with its passing suggestion that these three experts have material assistance to provide to the jury concerning the "performance of the blanket that was used May 17, 1999," that door is hereby shut and I **GRANT** that portion of this motion.

Discussion

According to Auburn, the evidence in the record is simply insufficient to support a failure to warn theory because the danger was apparent to the Redco and O'Connor personnel who set up and performed the torch cutting job and because there is no evidence that a warning would have caused these individuals to set up or perform the job in a different manner. (Docket No. 173 at 3-7.) According to Black & Veatch, Auburn had a duty to warn that the subject fire blanket was not suitable for any horizontal torch-cutting applications. (Docket No. 238 at 2.) According to Reliance, Auburn had a duty to warn that the subject blanket was not suitable for horizontal capture of concentrated spatter and red-hot cut pieces. (Docket No. 246 at 3, emphasis added.) Black & Veatch maintains that such a warning was required because O'Connor's purchasing agents need to be educated about what to buy for their welders and, in this case, unknowingly purchased the wrong product. (Docket No. 238 at 3-5.)

1. Duty

The parties' memoranda largely conflate the distinct issues of duty, breach and causation. In my view, the facts of this case warrant an entry of summary judgment on each and every one of these elements.¹⁸ As to the duty to warn, Auburn appears to recognize that it bears a duty to provide specifications regarding the limitations of its welding blanket products in some circumstances because it provides warning information with its pre-cut blankets. Additionally, there is nothing inherent in a welding blanket that makes its appropriateness or dangerousness for use in a particular application obvious, in contrast with certain dangerous products such as weapons. See Dickinson v. Clark, 2001 ME 49, ¶ 9, 767 A.2d 303, 306 (listing some of the "open and obvious" cases). On the other hand, although the maximum tolerance of a 1000-

¹⁸ Regardless of whether the case is viewed in terms of "negligence" or "strict liability," duty, breach and causation are all necessary elements of proof. Pottle v. Up-Right, Inc., 628 A.2d 672, 675 (Me. 1993).

degree welding blanket would not be obvious without experience or testing, I fail to comprehend how the danger of using a welding blanket to horizontally capture concentrated spatter and red-hot cut pieces on top of combustible materials could be anything but obvious to a user of the product.

It strikes me as beyond question that a novice welder (or a layperson) would recognize the danger in simply assuming that a 1000-degree welding blanket just ordered from a supplier's catalog would be sufficient to horizontally capture concentrated spatter and red-hot cut pieces atop combustible materials. Indeed, what, pray tell, does the 1000-degree designation signify? When a danger of this sort would leap to the mind of any reasonable person about to use this product for the first time, one is left to wonder why the duty of care does not shift to the end user to affirmatively seek out whatever information he considers to be lacking. But this is not a case about the typical consumer. This case presents an end user with 26 years of experience not only using welding blankets, but also experiencing fires during their use. What is more, this case presents a trade that has essentially determined that the relatively minor fires that do arise when welding blankets are used are an acceptable risk. The only reasonable assessment is that the danger of fire in a horizontal capture application atop combustible material is open and obvious precisely because no one other than a professional welder would proceed to face the danger knowing only that the blanket had a 1000-degree rating.

The sophisticated user doctrine also bars this suit. It is well established in the law that an end user's experience with a product can foreclose the imposition of a legal duty to warn on the manufacturer. Although denominated as an affirmative defense, summary judgment is appropriate in a case in which a defendant in a products liability action can establish that the end user was a "sophisticated user" of its product. This rule is drawn from the Restatement (Second) of Torts, § 388(b). There is every indication that the Law Court would apply § 388 of the

Restatement in the context of either a negligence action or "strict liability" action brought pursuant to 14 M.R.S.A. § 221. See Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280, 287 (Me. 1984) ("We recognize that the legislative history of our strict liability law adds force to the usual respect any court should accord . . . the scholarly work product of the American Law Institute."). The Eighth Circuit has described the sophisticated user doctrine as imposing "no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product." Vandelune v. 4B Elevator Components Unltd., 148 F.3d 943, 946 (8th Cir. 1998) (applying § 388 under Iowa law and quoting Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682, 687 (8th Cir. 1981)). In this case, we have contractors who not only have substantial experience and familiarity with the use of welding blankets, but who also have experience setting fires despite the use of welding blankets in their work. The evidence Black & Veatch offers to controvert this assertion is that Perry Austin had only worked welding and cutting "off and on" over 26 years, rather than continuously. This does not generate a genuine issue. Here we have professional contractors who were admittedly familiar with the fact that fires can occur during welding and cutting operations despite the use of welding blankets. The fire that occurred in this instance was not out of the ordinary. The fact witnesses who were present that day have testified that the fire was not out of the ordinary. The foreman who set up the worksite testified that the blanket performed exactly as expected. Even if these witnesses did not know that a more fire resistant blanket was available from Auburn, they understood the danger inherent in using welding blankets for horizontal capture of red-hot cut pieces and there is no indication that Auburn's 1000-degree product was different from or in any way less effective than blanket material they historically relied upon. Imposing a duty to warn under these circumstances would be contrary to law.

2. *Breach*

On the issue of breach, both the Inpro catalog from which the blanket material was ordered and the invoices supplied by Inpro reflected a 1000-degree rating on the blanket. This product specification is significant. Even if the court has some reservation about finding that no duty to warn existed as a consequence of the end user's knowledge of the danger, certainly experience and knowledge bear heavily on the question of whether the 1000-degree rating was sufficient information to provide to professional end users. The provision of the 1000-degree rating, in and of itself, discharged whatever duty to warn might reasonably be imposed in relation to professional welders.

3. *Causation*

On the issue of causation, "[p]roximate cause is 'that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred.'" Merriam v. Wanger, 2000 ME 159, ¶ 8, 757 A.2d 778, 780 (quoting Searles v. Tr. of St. Joseph's Coll., 1997 ME 128, ¶ 8, 695 A.2d 1206, 1209). "The mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to a judgment." Id. at 781. The additional product specification that was available and that Reliance and Black & Veatch contend was the cause of the fire is that the subject blanket was not recommended for horizontal capture and containment of concentrated spatter or red-hot cut pieces. When viewed through the proximate cause lens, the question becomes whether the failure to provide such a product specification to O'Connor purchasing agents proximately caused the fire. On that issue there simply is not sufficient, competent evidence. The relevant witnesses have not testified that the provision of this product information would have led Adams to purchase different blanket material, Gagnon to set up the project differently, or Austin to

forego his torch-cutting operation. Compare Brochu v. Ortho Pharm. Corp., 642 F.2d 652, 660 (1st Cir. 1981) (holding that proximate cause was established at trial where plaintiff's prescribing physician testified that, had he been informed of certain aspects of pharmaceutical defendant's product, he would have changed the plaintiff's prescription). Adams testified only that "fire blanket is fire blanket," that he had never heard of temperature ratings for blankets and that he would never "knowingly order the wrong product." (Docket No. 239, ¶¶ 68-69.) He did not testify that he would have purchased a more expensive, heavier weight welding blanket had he known one existed or that he would have sought out advice from a welder or from someone in Gagnon's position had he been confronted with information that the subject blanket was not appropriate for horizontal capture of excessive, concentrated spatter or red-hot cut pieces or that another, more expensive blanket was better for such high-intensity uses. Nor can one simply infer that such information would have led Redco's welders to request, or O'Connor's purchasing agents to buy, the 3000 degree blanket material for this particular application or for the larger project generally.¹⁹ Indeed, Adams's statement that he would not knowingly order the wrong product has no probative value because there is no evidence that the subject blanket was the wrong blanket or that it would not have been chosen for this particular torch-cutting operation had such information been provided. The mere fact that a small fire occurred is not evidence that this blanket was the wrong blanket for the job. The evidence establishes that small fires and burned-through blankets are common and that craftsmen anticipate and accept these types of occurrences in their work.²⁰ The evidence also establishes that this fire was considered to be an

¹⁹ Education is a two-way street; one tends to get out what one puts in. As Ronald Downing would attest, a project manager or superintendent who fails to educate himself about the products his craftsmen use in construction projects is not worthy of his position.

²⁰ This fact reflects the fallacy in Reliance's argument that summary judgment is precluded because "[n]either Austin nor Gagnon understood that fire blankets are rated." (Docket No. 246 at 3.) The fact is that both fully understood that this product has limits, is no guarantee against fire and will burn through when subjected to intensive welding operations.

insignificant occurrence when it occurred. In Gagnon's words, it was "not a big deal."²¹ Moreover, the only expert testing in the record indicates that the subject blanket material was adequate to prevent a fire under the circumstances. When this evidence is combined with Gagnon's concession that the fire blanket performed as he would have expected it to perform (Docket No. 174, ¶¶ 12, 13), Austin's statements that he relied on Gagnon to set up the site²² (Docket No. 174, ¶ 9), and the total absence of a simple statement to the effect that "had I known Auburn did not recommend this blanket for horizontal capture of concentrated spatter or red-hot cut pieces that exceed 1000 degrees I would have . . .," I fail to see how a jury could reasonably conclude that it was a lack of additional product specifications that proximately caused this fire. Reliance and Black & Veatch have simply failed to put all of the pieces together in support of the proximate causation element. Remarkably, neither Black & Veatch nor Reliance even argue in their memoranda that the provision of their suggested warning would (as opposed to could) have prevented the fire. Black & Veatch merely states, "If Auburn had provided a proper warning . . . [Redco/O'Connor] may have purchased a more appropriate blanket." (Docket No. 238 at 3.)²³ Although Reliance incorporates Black & Veatch's arguments in its memorandum, Reliance itself does not make any assertion on this issue in its own memorandum, discussing the claim exclusively in terms of whether it was foreseeable that the omission of a warning might lead to a

²¹ Black & Veatch contends that this fire was different because it could not simply be stomped out. This is a silly argument because Austin was situated ten feet above the fire on a ladder when the fire ignited and did not detect it until he smelled smoke. The fire watch apparently diverted his attention because the record reflects that Austin first detected the fire and then the fire watch went to get an extinguisher at Austin's behest.

²² Black & Veatch also points to Austin's testimony that he had never before seen a blanket "bubble black." However, the defect alleged in this case is a failure to warn, not a manufacturing defect. Moreover, this observation can only be viewed in light of Austin's indication that the subject blanket was filthy and that the fire was not detected until he smelled smoke from his perch atop the ladder. Were it a defective manufacture case, summary judgment would likely be in order because the blanket was disposed of and Reliance and Black & Veatch would not be able to prove that the product was in the same condition as when it was sold. See Fuller v. Cent. Me. Power Co., 598 A.2d 457, 460 (Me. 1991) (citing 14 M.R.S.A. § 221).

²³ Elsewhere, Black & Veatch argues that "[i]f Auburn had fulfilled its duty to warn, [Redco/O'Connor] could have ordered the correct material." (Docket No. 238 at 7.)

damaging fire.²⁴ (Docket No. 246.) To reiterate: "The mere possibility of . . . causation is not enough, and when the matter remains one of pure speculation or conjecture, or even if the probabilities are evenly balanced, a defendant is entitled to a judgment." *Id.*, ¶ 8, 757 A.2d at 781.

During oral argument, much was made of the fact that proximate causation is an issue of fact and, therefore, summary judgment should not enter on this basis. The distinction between issues of law and fact is, of course, highly significant. But summary judgment always turns on the factual record; not on legal issues decided in the abstract. Here the factual presentation offered by Black & Veatch and Reliance simply falls short. Even though the material witnesses were ignorant of the existence of a higher rated product more appropriate for horizontal capture of intensive cuttings, not one testified that he would have done anything differently to prevent this torch-cutting operation from taking place as it did had he been informed that Auburn's 1000-degree blanket material was not recommended for horizontal capture of concentrated spatter and red hot cuttings.²⁵

²⁴ Reliance cites *Hersum v. Kennebec Water District*, 117 A.2d 334 (Me. 1955), a case in which the defendants damaged a gas main adjacent to a home while excavating and the home exploded two months later when the owner's daughter manually turned on the hot water heater in the basement. *Id.* at 336. (Docket No. 246 at 4.) In *Hersum*, the inference of causation was not only palpable, but the plaintiffs had eliminated other possible causes of the explosion. *Id.* at 338-39. Moreover, in its discussion of the significance of foreseeability, the court was addressing only the issue of negligence (duty or breach), not causation. *Id.* at 339-40. The authority relied upon by Black & Veatch is even more tenuous. Black & Veatch cites precedent involving premises liability, including *Schultz v. Gould Academy*, 332 A.2d 368, 370 (Me. 1975). As in *Hersum*, the court's discussion of foreseeability in *Schultz* informs the issue of duty (hence the court's discussion of notice and opportunity), not causation. *Id.* at 370. And although foreseeability can inform the causation analysis, *Cameron v. Pepin*, 610 A.2d 279, 281-82 (Me. 1992), "reasonable foreseeability does not equal causation." *Merriam*, 2000 ME 159, ¶ 9, 757 A.2d at 781.

²⁵ Auburn also makes an "intervening, supervening cause" argument, contending that Perry Austin's use of a dry chemical extinguisher rather than a CO2 extinguisher was the only proximate cause of the damages. I am not persuaded by this argument because the law holds one responsible for the foreseeable negligent reaction that another might make when responding to the dangers created by one's own breach of duty. *Schultz*, 332 A.2d at 370 (Me. 1975). See also *Ames v. DiPietro-Kay Corp.*, 617 A.2d 559, 561 (Me. 1991) ("[T]he mere occurrence of an intervening cause does not automatically break the chain of causation stemming from the original actor's conduct. In order to break that chain, the intervening cause must also be a superseding cause, that is, neither anticipated nor reasonably foreseeable."). Damage to property from the use of an extinguisher is a foreseeable consequence of a fire.

4. *Breach of warranty*

Because the evidence demonstrates that the blanket performed as expected, there can be no breach of an implied warranty of merchantability. See Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me. 1990). Because there is no evidence that Redco/O'Connor relied upon Auburn or Inpro's skill or judgment as to whether the blanket might be used for a particular purpose outside the scope of its ordinary purpose, there can be no breach of an implied warranty of fitness for a particular purpose. Id.

5. *Spoliation*

Auburn asks that the court enter summary judgment because Black & Veatch's own subcontractor disposed of the blanket at a time when it should have been apparent that the blanket would be material evidence in litigation. If there is any basis for imposing a sanction against Black & Veatch for the routine disposal of the subject blanket, it would not be dismissal of the case. Auburn concedes that the blanket was not disposed of in bad faith. "[T]he most severe sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence." N. Assurance Co. v. Ware, 145 F.R.D. 281, 282 n.2 (D. Me. 1993). In the absence of such evidence, summary judgment should not enter on this ground.

6. *Sylvain*

In Sylvain v. Masonite Corp., the Law Court explicitly reserved opinion on whether "breach of a duty to warn of a dangerous chattel . . . requires bodily injury." 471 A.2d 1039, 1041 (Me. 1984). This issue has not been briefed by the parties, although its significance is obvious. I raise it only for the court's information.

THE REMAINING MOTIONS FOR SUMMARY JUDGMENT

If the court should agree with the recommendation on Auburn's motion for summary judgment, which is case dispositive, the remaining motions should be denied as moot. If the court rejects the recommendation, there is considerable grist for the analytical mill in the remaining motions. The parties have submitted quality memoranda on these rather novel issues and they address these questions as adequately as I might. Therefore, I only point out the highlights.

1. Black & Veatch does not own the generator

Inpro argues that Black & Veatch cannot maintain an action under Maine's strict liability statute because Black & Veatch does not own the property that was damaged (the generator). (Docket No. 177 at 3.) Maine's strict liability statute affords a cause of action for a claimant's injury to "his property." 14 M.R.S.A. § 221. Black & Veatch responds that it was a bailee²⁶ of the generator with sufficient property rights to get over the "his property" hurdle. Whatever property interest Black & Veatch once had, it fails to show that it presently has any cognizable property interest on which to base its strict liability claim.

²⁶ John Davisson, Black & Veatch's project manager for the Androscoggin Energy project, testified at his deposition that Black & Veatch did not have any ownership interest in the project itself or in any of the material components of the project. (Docket No. 178, ¶ 8.) He further testified that the generators were originally manufactured for a Wisconsin-based company ("Wisvest") and were supplied to the Androscoggin Energy project through that company. (Id., ¶ 9.) Davisson also testified that Wisvest had an ownership interest in the project and that Black & Veatch had asserted claims against Wisvest for late delivery of certain generator components and for problems with the performance of one or more of the generators. (Id., ¶ 9.) Black & Veatch has moved to strike Mr. Davisson's testimony concerning Black & Veatch's lack of ownership in the project, albeit in the context of O'Connor's motion for summary judgment, rather than Inpro's. (Docket No. 201.) According to Black & Veatch, this testimony is inadmissible because Davisson is a lay witness and property is a legal concept. The motion to strike is unnecessary. Whether Davisson's testimony on the issue comes in or not, Inpro and O'Connor succeed in generating the issue through their briefing. Therefore, I **DENY** the motion to strike. The real question is what manner of proof Black & Veatch can produce to establish that its ownership in the project justifies the maintenance of its strict liability claim.

2. *There are no contract warranty claims in this case.*

According to Inpro, to the extent that the breach of warranty claims being asserted in this case sound in contract, they are not maintainable because neither Androscoggin Energy nor Black & Veatch was in privity of contract with Inpro. (Docket No. 177 at 7.) Black & Veatch's response to this argument is that it "is not asserting a contractual claim" (Docket No. 249 at 6) and Reliance adopts Black & Veatch's memorandum (Docket No. 256 at 1). Accordingly, there are no contract warranty claims in this case.

3. *Third-party contribution and the joint tortfeasor category*

O'Connor and Redco move for summary judgment against Auburn and Inpro's cross-claims. (Docket No. 163; Docket No. 175.) According to O'Connor, they cannot have derivative liability to Auburn or Inpro, the primary defendants, because they do not have any direct liability to either Reliance or Black & Veatch and, therefore, are not "joint tortfeasors" sharing a "common liability." (Docket No. 163 at 3, 12.) That O'Connor and Redco are not subject to direct liability to Reliance or Black & Veatch is apparent from the record, which reflects that the relationship between and among Reliance, Androscoggin Energy, Black & Veatch, O'Connor and Redco is governed by an insurance procurement clause, a waiver of all claims covered by insurance, and a waiver of subrogation.²⁷ Furthermore, there is a global release among Black &

²⁷ See Docket No. 164, ¶¶ 11-17 & Ex. C at 2, 8, 11; Docket No. 176, ¶¶ 2-4, 12; Docket No. 200, ¶¶ 30-31. The language of the subrogation provision in the insurance contract raises another interesting issue. Although Reliance preserved its right to pursue subrogated claims against manufacturers and suppliers, which would include Auburn and Inpro, the relevant language has a further qualification that such claims would be "for the cost of making good any loss or damage which said party has agreed to make good under a guarantee or warranty, whether expressed or implied." (Docket No. 176, ¶ 3 (emphasis added).) Again, waiver of subrogation provisions are to be liberally construed in favor of waiver. Willis Realty, 623 A.2d at 1288-89; see also First Parish Congregational Church v. Knowles Ind. Serv., CV-01-289, 2003 Me. Super. LEXIS 106 (Me. Super. Ct., York Cty., May 21, 2003) (Fritzsche, J.) (extending protection afforded by waiver of subrogation provision to a material supplier because materials are necessary for a contractor to perform and the benefit of the waiver would otherwise be negated in the context of the material provider's cross-claims against the contractor for contribution on account of the contractor's negligence). The language, "has agreed to make good," suggests that if Reliance preserved any right to subrogation against Auburn and Inpro, it was only insofar as contractual warranties were offered. Reliance has conceded that it is not seeking to recover in contract, but in tort.

Veatch, O'Connor and Redco for claims arising out of the project. What is less clear is what impact these contract provisions have on the cross-claims for contribution. There is significant evidence in this case of negligence on the part of Redco/O'Connor personnel that would make it manifestly unfair for Reliance and Black & Veatch to be permitted to settle their claims against Redco and O'Connor, then pursue the totality of their damages against Auburn and Inpro, without permitting Auburn and Inpro to prove the causative fault of Redco/O'Connor and receive a set off in consideration of it. In Thermos Company v. Spence, the Law Court observed that "[a] defendant in a contribution action cannot be required to contribute to damages owed by another tortfeasor unless the contribution defendant has been found to have been a cause of the damages to the original injured party through the contribution defendant's own negligence." 1999 ME 129, ¶ 13, 735 A.2d 484, 487 (emphasis added) (holding that although a contribution claim is equitable in nature, both liability and apportionment of damages are triable of right to a jury). Furthermore, Maine precedent reflects that defendants can pursue contribution from third-parties who are not subject to direct liability to the plaintiff and that the "joint tortfeasor" category can include parties who are not liable to the primary plaintiff on account of a statutory defense. See, e.g., Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (Me. 1963) (permitting third-party action against husband where first-party plaintiff wife failed to assert a claim against him due to the doctrine of spousal immunity); Otis Elevator Co. v. F.W. Cunningham & Sons, 454 A.2d 335, 338-40 (Me. 1982) (holding that a joint tortfeasor directly liable to the injured party may seek contribution from another joint tortfeasor whose fault also caused the injury, even though the other joint tortfeasor would not be legally liable in a direct action by the injured party because the other joint tortfeasor's fault was less than the injured party's fault). Additionally, the relevant signposts suggest that the Law Court would not turn a blind eye to Auburn and Inpro's predicament. See Otis Elevator, 454 A.2d at 337-38. See also Lavoie v. Celotex Corp., 505

A.2d 481, 483 (Me. 1986) (holding in the context of a Pierringer release situation that "there is no basis in Maine law for allowing the settling defendant and the plaintiff to obtain judgment on the non-settling defendant's cross-claim without his consent").

4. *The economic loss doctrine*

O'Connor argues that the tort claims advanced by Reliance and Black & Veatch against Auburn and Inpro are barred by the economic loss doctrine. (Docket No. 163 at 4-11.) This court is familiar with the doctrine, Fireman's Fund Ins. Co. v. Childs, 52 F. Supp. 2d 139, 141 (D. Me. 1999) (certifying question to Law Court concerning application of economic loss doctrine to service contracts). The core rationale of the doctrine is that, although manufacturers ought to be liable in tort for unreasonably dangerous products that physically injure consumers or their property, the public policy justifications for imposing a tort duty, particularly in a strict liability context, are absent when a product merely fails to function properly, without causing personal injury or damage to other property. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866, 874-77 (U.S. 1986); Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 286-87 (3d Cir. 1980); Seely v. White Motor Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151-52 (1965) (Traynor, C.J.). In addition to this core rationale, a secondary rationale is often discussed in the context of contracts between commercial entities: such entities recognize and allocate, or should recognize and allocate, the risk of economic loss and often, as here, require that one or more party to the contract procure insurance to guard against such losses. E. River S.S., 476 U.S. at 871-72; Mount Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845, 848, 851 (6th Cir. 2002) (citing Louis R. Frumer & Melvin I. Friedman, *Products Liability*, § 13.11[1] (2000)); Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990). Despite its origin in products liability law, courts have expanded the economic loss doctrine to bar tort claims associated with service contracts between or among commercial

entities.²⁸ Me. Rubber Int'l v. Envtl. Mgmt. Group, Inc., 298 F. Supp. 2d 133, 137 (D. Me. 2004) (collecting cases); Childs, 52 F. Supp. 2d at 145 (collecting cases). Further expansion of the doctrine has been based on a rethinking of the "other property" distinction. See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1056-60 (D. S.C. 1993) (collecting cases and characterizing the exception as turning on whether loss to the so-called "other property" was within the contemplation of the contracting parties). Even further expansion has been based on an erosion of the privity requirement discussed in some of the earlier cases. See, e.g., Mount Lebanon Personal Care Home, 276 F.3d at 851-52 (precluding claim by owner of nursing home against manufacturer of fire retardant chemical applied to the home's roof trusses by building contractor); Cooper Power Sys., Inc. v. Union Carbide Chem. and Plastics Co., Inc., 123 F.3d 675, 681 (7th Cir. 1997) (precluding claim by commercial purchaser of weather-coating product against manufacturer of a resin component of product and reiterating that, "Wisconsin would decline in all circumstances to allow a negligence suit for the recovery of only economic damages, even when there is no contractual relationship between the parties"). See also E. River S.S., 476 at 859-60 (precluding claim by supertanker charterer against remote contractor that designed and manufactured the supertanker's turbines); Oceanside at Pine Point Condo. Owners Assoc. v. Peachtree Doors, Inc., 659 A.2d 267 (Me. 1995) (precluding claim by condominium owners—i.e., regular consumers and not commercial entities—against window manufacturer who appears to have supplied windows pursuant to a contract with the building contractor). Arguably, to impose "for-want-of-a-nail-the-kingdom-was-lost liability," Rardin v. T & D Mach. Handling, Inc., 890 F.2d 24, 25-26, 28 (7th Cir. 1989), on Auburn and Inpro for what is essentially a failure to educate a skilled contractor about a known risk, when the damages alleged

²⁸ Service contracts involving fiduciary relationships are generally excluded from such treatment. See Me. Rubber Int'l v. Envtl. Mgmt. Group, Inc., 298 F. Supp. 2d (D. Me. 2004) (collecting cases).

are all in the nature of economic loss,²⁹ would not be in keeping with the core policy concerns that underlie strict liability and the common law of torts in Maine. But this argument relies so heavily on policy considerations that predicting what the Law Court would make of it is anybody's guess.

5. *Existing tort law offers a more traditional answer.*

Although it is tempting to think that this case calls for some new doctrinal development in the law of torts, contribution and/or products liability, the fact is that well established principles of tort law already warrant the dismissal of this action. According to the Restatement (Second) of Torts, § 338:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Here, the evidence is plain. There is every reason to conclude that "those for whose use the chattel [was] supplied" realized the dangerousness of using it to horizontally capture concentrated welding spatter and red-hot, torch-cut pieces. They knew that there was a likelihood that small fires would flare up on the blanket, exactly what occurred in this instance.

Under these circumstances, the law of torts does not impose a duty to warn. In any event, those

²⁹ The construction scenario presented herein may well present a special case calling for special application of the economic loss doctrine. In particular, Black & Veatch's tort claims seem especially susceptible to application of the economic loss rule because Black & Veatch does not own any of the alleged "other property" and the damages it alleges arise exclusively out of contractual arrangements that required it to build an operational facility and exposed it to liquidated damages for late performance.

who superintended the use of the welding blanket knew it was 1000-degree rated when they purchased it because the catalogue and invoice provided that information. Finally, knowledge of the danger on the part of the intended user of the product serves to break the causal chain between any alleged insufficiency in the warning and injury.

Conclusion

Auburn's motion to exclude the testimony of Robert Waite, Ronald Downing and Dr. Thomas Eagar (Docket No. 180) is **GRANTED IN PART**. I **RECOMMEND** that the court **GRANT** Auburn's motion for summary judgment (Docket No. 173), in which Inpro joins (Docket No. 184) and **DENY** the remaining summary judgment motions (Docket Nos. 163, 175, 177), as **MOOT**. For the reasons stated herein, summary judgment should enter against the claims asserted in Reliance's second amended complaint because Reliance has failed to generate a genuine issue of material fact on the existence of duty, breach and causation and because Reliance has waived any contract warranty claim. For the same reason, summary judgment should enter against the claims asserted in Black & Veatch's cross-claim. All of the remaining claims in this case against Redco and O'Connor are derivative of Reliance's and Black & Veatch's primary claims and therefore they should be **DISMISSED AS MOOT**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 20, 2004

KOKEN v. AUBURN MANUFACTURING, et al

Assigned to: JUDGE GENE CARTER

Referred to:

Demand: \$0

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 05/16/02

Jury Demand: Defendant

Nature of Suit: 190 Contract: Other

Jurisdiction: Diversity

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REDCO INC

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