Circuit Court for Baltimore City
Case No. 24-X-20-000061

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1427

September Term, 2022

THERESA R. BASIL-FLIPPEN, et al.

v.

GENERAL ELECTRIC COMPANY, et al.

Nazarian,
Tang,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: February 8, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Barbara Basil's ("Ms. Basil") death due to mesothelioma as a result of her alleged exposure to asbestos dust forms the context of the present appeal.[1] According to the pleadings filed in the case, Ms. Basil was exposed to asbestos dust when she laundered her husband's clothes while he worked to install asbestos insulation on a turbine generator at the Morgantown Generating Station, an electric generating plant, in Charles County, Maryland. Ms. Basil initially filed a complaint in the Circuit Court for Baltimore City asserting various bases: a strict products liability claim for failure to warn and for defective design, a breach of implied warranty of merchantability claim, and a negligence claim against seven companies associated with her alleged exposure to asbestos: Paramount Global (hereinafter "Westinghouse"),[2] AC&R Insulation Company, General Electric Company,[3] Hampshire Industries, Inc., Kraft-Murphy Company, Metropolitan Life

[1] Mesothelioma is "a rare form of cancer believed by medical experts to be caused almost exclusively by exposure to and inhalation of asbestos dust." *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 506 (1996); *see also id.* at 506 n.2 (describing the medical field's study of mesothelioma and conclusions about its relation to asbestos); *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 474 n.4 (2005) (providing definitions of mesothelioma).

[2] At the time of Ms. Basil's alleged exposure, Paramount Global, the Appellee in this appeal, was called Westinghouse Electric Corporation. In their briefs, the parties use the name Westinghouse to refer to the Appellee, a practice we will continue in this opinion. When Ms. Basil initially filed her complaint in the Circuit Court, the company was called ViacomCBS but changed its name to Paramount Global during the course of this case.

[3] Although General Electric Company is the named party in this appeal, the claims against it were settled. The Appellee in the present appeal is Westinghouse.

Insurance Company,[4] and the Walter E. Campbell Company.[5] After Ms. Basil's death in 2021, her Estate and her children, Theresa Basil-Flippen and Dennis Basil, Appellants here (collectively "Ms. Basil-Flippen"), filed an amended complaint asserting an additional claim for wrongful death. Appellee Westinghouse successfully moved for summary judgment on the grounds that it was not liable to Ms. Basil-Flippen because it could not be held liable for the negligent work practices of a subcontractor and that the turbine was not a product for the purposes of strict products liability.

Ms. Basil-Flippen presents the following question[6] on appeal:[7]

[4] Ms. Basil asserted the three listed claims against all defendants. She asserted an additional claim against Metropolitan Life Insurance Company entitled "Aiding and Abetting and Conspiracy," alleging that the company assisted in and encouraged the concealment of information about the danger of asbestos.

[5] Ms. Basil's Estate and her children settled the claims against all defendants except Westinghouse.

[6] Ms. Basil-Flippen presented a second question in her initial brief arguing that the trial court may have improperly relied on an irrelevant case in granting summary judgment to Westinghouse. Ms. Basil-Flippen withdrew this appellate issue after Westinghouse's brief asserted that the case had no bearing on the strict liability issue on appeal.

[7] Westinghouse frames the questions as:

1. Is a party who procures and uses third-party asbestos-containing materials in its design and construction of a site-specific improvement a manufacturer or seller of an asbestos-containing product for purposes of a strict liability claim under Maryland law?

2. Even if such a party would otherwise constitute a manufacturer or seller of an injury-causing product, can a strict liability claim be stated under Maryland law for an injury incurred during the product's manufacture and, thus, before it was completed and had left the defendant's custody and control?

> Whether the trial court erred in granting summary judgment in favor of Westinghouse on [Appellants'] strict liability design defect claim where the evidence demonstrated that Westinghouse manufactured, designed, specified and sold a defective and unreasonably dangerous product—a turbine—inclusive of third-party manufactured asbestos insulation components, which was a substantial and contributing cause of Ms. Basil's mesothelioma and death.

We shall affirm the Circuit Court's grant of summary judgment to Westinghouse.

RELEVANT LAW

We begin with a brief overview of the doctrine of strict liability. The Supreme Court of Maryland (then the Court of Appeals) adopted Section 402A of the Restatement (Second) of Torts in *Phipps v. General Motors Corp.*, 278 Md. 337 (1976). *Phipps* identified the language of the Restatement (Second) as follows:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Phipps, 278 Md. at 341 (quoting Restatement (Second) of Torts § 402A (1965)). The Court explained that strict liability under Section 402A has four "essential elements":

> (1) the product was in a defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4)

> that the product was expected to and did reach the consumer without substantial change in its condition.

Id. at 344. Essentially, Section 402A "extended the liability of sellers by prescribing a doctrine of strict liability as to those in the chain of distribution." *Stein v. Pfizer, Inc.*, 228 Md. App. 72, 90 (2016). The Supreme Court later explained that the "*Phipps* opinion expressly indicated that [its] adoption of [Section] 402A included the official comments." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 436 (1992) (citing *Phipps*, 278 Md. at 346).

The *Phipps* opinion articulated that the test for a defect is whether the product was "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him" at the time the product left the seller's control. *Phipps*, 278 Md. at 344 (quoting Restatement (Second) of Torts § 402A cmt. g (1965)). To be unreasonably dangerous, the article sold must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* (quoting Restatement (Second) of Torts § 402A cmt. i). Thus, consumer expectation constitutes the primary basis for the determination of whether a product is in defective condition.[8]

[8] Another basis for the determination of defective condition is known as the risk/utility test, which is not in issue in the present appeal. *Phipps* recognized this possibility by stating that "in some circumstances the question of whether a particular design is defective may depend upon *a balancing of the utility of the design and other factors against the magnitude of that risk* [of injury]." *Phipps*, 278 Md. at 348 (emphasis added). The risk/utility test has been used where a product malfunctions or where a safety device is feasible but not included in the product. *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 138 (1985); *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 74 Md. App. 613, 623 (1988), *cert. denied*, 313 Md. 32 (1988).

According to the evolution of the doctrine, a product may be in defective condition in three different ways. *Simpson v. Standard Container Co.*, 72 Md. App. 199, 203 (1987). A manufacturing defect may exist if there is "a flaw in the product at the time the defendant sold it, making the product more dangerous than was intended." *Id.* Further, there may be a defect for failure to warn if the producer does not adequately warn of a risk or hazard in the product's design. *Id.* Finally, a design defect may exist if "what proves to be a defect was actually intended by the manufacturer," in which "the inquiry focuses on the product itself" rather than the actions of the manufacturer. *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 485 (1992).

Two issues that arise in relation to strict products liability are pertinent to this case: who is a seller of the product and when does liability for a defective product attach? We shall address these in turn.

Comment f of Section 402A of the Restatement (Second) states, "this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant." As this Court stated in *Stein*, 228 Md. App. at 91–92, "in all jurisdictions that had adopted Section 402A (including Maryland), strict products liability was imposed on all entities in the distribution chain of a defective product."

A related issue is who, as a seller, is liable for an injury arising from a defective component part that is "part of a product to be assembled by another." Restatement

(Second) of Torts § 402A cmt. q. The Restatement (Second) did not mandate when strict liability would attach when a component part is defective but anticipated that "where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer," rather than to the assembler. *Id.* In *Ford Motor Co. v. Wood*, 119 Md. App. 1, 34 (1998), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 369 Md. 369 (2002), Judge James R. Eyler, writing for this Court, examined the justifications for "assembler's liability":

> As a general matter, however, those courts that have considered the issue have held that a vehicle manufacturer may be held liable in damages for defective component parts manufactured by another only if the vehicle manufacturer incorporated the defective component into its finished product. Such liability, often referred to as "assembler's liability," is justified because the assembler derives an economic benefit from the sale of a product that incorporates the component; the assembler has the ability to test and inspect the component when it is within its possession; and, by including the component in its finished product, the assembler represents to the consumer and ultimate user that the component is safe.

(Citations omitted.)

Beyond explaining when liability attaches to a "seller," Section 402A applies only when an injury results from a "product." Restatement (Second) of Torts § 402A cmt. a. Section 402A does not define "product," and neither this Court nor the Supreme Court of Maryland has provided a definition.[9]

[9] A statutory definition for "product" exists in a related context. Section 5-115(a)(4) of the Courts and Judicial Proceedings Article of the Maryland Code (1974, 2020 Repl. Vol.)

(continued. . .)

The plot thickens in the circumstance where the "product" at issue is incorporated into an improvement to real property. Strict liability is negated, however, for injuries resulting from dangerous conditions on real property or improvements because negligence concepts apply to real property pursuant to Comment a of Section 385 of the Restatement (Second) entitled "Persons Creating Artificial Conditions on Land on Behalf of Possessor: Physical Harm Caused After Work has been Accepted," cited with approval by the Supreme Court in *Council of Co-Owners Atlantic Condominium, Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 28 (1986). *See also id.* at 32 ("The duty of the architects and the builders in this case, to use due care in the design, inspection, and construction of this condominium extended to those persons foreseeably subject to the risk of personal injury created, as here, by a latent and unreasonably dangerous condition *resulting from their negligence*." (emphasis added)).

In this sense, the "improvement" is "[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes." *Rose v. Fox Pool Corp.*, 335 Md. 351, 376 (1994) (quoting Black's Law Dictionary (6th ed. 1990)). To determine whether the addition is an improvement, the Supreme Court has suggested consideration of "the nature of the addition

(continued. . .)

defines a product for the purposes of causes of action for products liability arising in foreign jurisdictions as "a tangible article, including attachments, accessories, and component parts, and accompanying labels, warnings, instructions, and packaging."

or betterment, its permanence and relationship to the land and its occupants, and its effect on the value and use of the property." *Id.* at 376–77.

Maryland has not conclusively decided whether a "product" affixed to real property is an improvement to real property and thus not subject to strict products liability. *See Rose*, 335 Md. at 375 (declining to address "whether the product [a residential swimming pool] may also be considered an 'improvement to real property'").[10]

Phipps and Section 402A are also clear that in order for strict products liability for a design defect to apply, the manufacturer or seller must no longer have possession or dominion over the "product" when the injury occurs. The first "essential element" for strict products liability is that "the product was in a defective condition *at the time that it left the possession or control of the seller*." *Phipps*, 278 Md. at 344 (emphasis added). The discussion in *Phipps* continually references this requirement, stating that "[f]or a seller to be liable under [Section] 402A, the product must be both in a 'defective condition' and 'unreasonably dangerous' *at the time that it is placed on the market by seller*." *Id.* (emphasis added). *Phipps* also states that "[p]roof of a defect in the product *at the time it leaves the control of the seller* implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product." *Id.* at 352 (emphasis added). The Supreme Court "stress[ed]" in *May v. Air & Liquid Systems Corp.*, 446 Md. 1, 28 (2015),

[10] At oral argument, both parties emphasized in response to questions from the Court that their focus was whether Westinghouse was a "seller" of a "product" that had left the control of the seller, which is the basis upon which we shall affirm summary judgment in this case. As such, we do not reach the question of whether an improvement can be subject to strict products liability.

"that a manufacturer is generally not strictly liable for products it has not manufactured or *placed into the stream of commerce*." (Emphasis added.)

When the seller is also the installer, the question of installer liability complicates the issue. When sellers are liable for injuries that occur during installation remains a question. As previously noted, Comment q of Section 402A of the Restatement (Second) does not express an opinion on liability for component parts, reasoning that "the absence of a sufficient number of decisions on the matter to justify a conclusion" precluded a firm stance on the issue, leaving the issue to individual courts that have adopted Section 402A to decide. One of the central issues with installer liability turns on when the "product" leaves the control of the seller and enters the stream of commerce. *See Ettinger v. Triangle-Pacific Corp.*, 799 A.2d 95, 105 (Pa. Super. Ct. 2002) ("[W]e agree with the conclusion reached by those jurisdictions that have held that Section 402A does not apply to an incomplete product that has not left the control of its manufacturer and thus entered the stream of commerce.").

Courts that have considered the issue generally distinguish between situations in which the ultimate product contemplated in the contract is an assembled product and those in which the product is unassembled. If the contract provides for an assembled product but is delivered unassembled, the seller remains obligated to install the product to meet the expectations of the contract. In those situations, the seller generally is not liable for injuries arising during installation because the product is not considered complete and "delivered" to the buyer until it is installed. *See Vaughn v. Daniels Co. (West Virginia), Inc.*, 841

N.E.2d 1133 (Ind. 2006) (seller not strictly liable because contract provided for delivery of completed coal plant and plant was not fully installed at time of injury); *Lukowski v. Vecta Educ. Corp.*, 401 N.E.2d 781 (Ind. App. 1980) (same for bleachers); *Ettinger*, 799 A.2d 95 (same for furniture finishing system).

Conversely, where the contract provides for the delivery of an unassembled product, the product has left the seller's control upon delivery despite its unassembled state and the seller generally can be held liable for any injuries arising from installation because the purchaser, not the seller, is obligated to install it. *See Lantis v. Astec Indus., Inc.*, 648 F.2d 1118 (7th Cir. 1981) (seller strictly liable because contract called for delivery of unassembled asphalt mixing plant and injury arose after such delivery).

Background[11]

In October 1966, Westinghouse and Potomac Electric Power Company ("PEPCO") negotiated for the purchase by PEPCO of a turbine generator for use at PEPCO's Morgantown Generating Station. After a series of revisions in September 1967, February 1969, and January 1970, Westinghouse and PEPCO executed the final contract for the sale of the turbine on February 20, 1970 ("Sales Contract"). The Sales Contract provided that Westinghouse was to manufacture and deliver one steam turbine generator unit consisting of specified components, features, and accessories. [E87] The standard features and accessories included insulating material "in accordance with factory specifications for

[11] The facts and contract references have been gleaned from the record available to the Circuit Court during the summary judgment proceedings.

installation by [PEPCO]." [E93] Under the Sales Contract, PEPCO was responsible for providing all labor, materials, and equipment for the installation of the turbine. [E116]

Simultaneously, Westinghouse and PEPCO negotiated a separate contract in which Westinghouse was to construct and install the turbine at the Morgantown Generating Station ("Installation Contract"). The final Installation Contract was executed on December 17, 1969 (*i.e.*, before the execution of the Sales Contract). [E171] The Installation Contract included a letter from PEPCO, signed by PEPCO Senior Vice President D. F. Hughes and dated February 14, 1967, referring to specific design specifications that PEPCO had provided to Westinghouse. [E154] Under the Installation Contract, Westinghouse was required to install insulation on the turbine's piping, cylinders, steam chests, throttle, interceptor, and reheat stop valves. [E162] Another letter regarding the Installation Contract from PEPCO signed by Senior Vice President Hughes, dated January 23, 1969, noted that it did not cover certain supervisory responsibilities, because they were included in the Sales Contract. [E153]

Westinghouse, in fulfilling its end of the bargain, subcontracted with the Walter E. Campbell Company ("WECCO"), which sold and installed asbestos insulation. Under the subcontract, WECCO was to supply and install heat insulation for the turbine according to Westinghouse's specifications. [E174, E179] These specifications included that the insulation was to consist of block and pipe insulation, which needed to be cut before application, and asbestos insulating cement, which needed to be mixed before application. [E437–445; E69–71]

Frank "Willie" Basil ("Mr. Basil") was an employee of WECCO. Between the end of 1969 and July 1970, Mr. Basil worked on the installation of the asbestos insulation on the turbine at the Morgantown Generating Station. [E213] He was responsible for cutting, mixing, and applying the insulation, which produced dust that collected on Mr. Basil's clothing. Mr. Basil's wife, Ms. Barbara Basil, laundered Mr. Basil's clothes once a week, shaking them to remove the dust. [E224]

After having been diagnosed with mesothelioma,[12] in 2020, Ms. Basil filed a products liability suit, including a count in strict products liability for defective design under Section 402A of the Restatement (Second) against Westinghouse, AC&R Insulation Company, General Electric Company, Hampshire Industries, Inc., Kraft-Murphy Company, Metropolitan Life Insurance Company, and the Walter E. Campbell Company in the Circuit Court for Baltimore City.[13] Before the case against Westinghouse was resolved, Ms. Basil died of mesothelioma, and her Estate and her children filed an amended complaint alleging additional claims for wrongful death.

[12] The record includes a 200-page expert affidavit detailing the link between asbestos exposure and mesothelioma and a letter report from the same expert concluding with a reasonable degree of medical certainty that, based on a review of Ms. Basil's medical reports and exposure history, "Mrs. Basil developed and died from a malignant pleural mesothelioma that was caused by her exposures to asbestos which she received through the work of her husband." [E721–22]

[13] As previously mentioned, only Westinghouse is a party in this appeal. The claims against all other parties were settled prior to the judgment in the Circuit Court.

Discovery ensued, and after it concluded, Westinghouse filed a motion for summary judgment. Westinghouse argued that it had no duty to warn Ms. Basil of the dangers of asbestos, that it could not be held liable for the negligent work practices of a subcontractor, that the breach of warranty claims were barred by the statute of limitations, that the turbine was not a product for the purposes of strict products liability, and that it could not be held liable because Ms. Basil's exposure arose through the handling of asbestos materials originating from another producer before they were attached to the turbine. After briefing and oral argument, Judge Shannon E. Avery of the Circuit Court for Baltimore City entered a written order granting Westinghouse's motion for summary judgment on August 19, 2022, and entered final judgment on September 23, 2022. The two-sentence order granting summary judgment did not explain Judge Avery's reasoning for granting summary judgment in favor of Westinghouse. [E888].

Ms. Basil-Flippen timely appealed from the grant of summary judgment of the claim for strict liability for a design defect.

STANDARD OF REVIEW

Under Maryland Rule 2-501, a trial court may grant summary judgment if there is no showing of a genuine dispute of material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law. "A trial court does not have any discretionary power in granting a motion for summary judgment when there are no disputes of material fact." *Webb v. Giant of Md., LLC*, 477 Md. 121, 135 (2021). An appellate court reviews a grant of summary judgment as a matter of law. *Dashiell v. Meeks*, 396 Md.

149, 163 (2006). "Prior to determining whether the trial court was legally correct, an appellate court must first determine whether there is any genuine dispute of material facts[,]" and disputes of fact are resolved in favor of the non-moving party. *Id.* "Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law." *Id.* "We do not endeavor to resolve factual disputes, but merely determine whether they exist and 'are sufficiently material to be tried.'" *Newell v. Runnels*, 407 Md. 578, 607 (2009) (quoting *Sadler v. Dimensions Healthcare Corp.* 378 Md. 509, 534 (2003)).

Generally, "Maryland appellate courts will only consider the grounds upon which the lower court granted summary judgment" absent exceptional circumstances. *Irwin Indus. Tool Co. v. Pifer*, 478 Md. 645, 682 (2022) (quoting *State v. Rovin*, 472 Md. 317, 373 (2021)). When a trial court judge does not identify the bases for granting a motion for summary judgment, the reviewing court "assumes that the trial court carefully considered all grounds asserted and determined that all, or at least enough, of them had merit." *Id.* at 684. An appellate court "can affirm the [trial] court's judgment if the record indicates that the [trial] court did not err" or if "the record discloses [the trial court] was correct in so doing." *Id.* at 684–85 (quoting *Piscatelli v. Smith*, 197 Md. App. 23, 37 (2011); and then quoting *Smigelski v. Potomac Ins. of Ill.*, 403 Md. 55, 61 (2008)). Essentially, "an appellate court has the discretion to treat the ruling as being based on some or all of the dispositive issues raised in the motion for summary judgment if the record establishes that the trial court was correct in granting summary judgment." *Id.* at 685.

DISCUSSION

Westinghouse asserted various bases for a grant of summary judgment before the Circuit Court. Westinghouse argued that the turbine and/or its component parts were not a "product" under Section 402A of the Restatement (Second); that the turbine became an improvement to real property when it was affixed to the structure, so strict liability does not apply; that Westinghouse was not a seller or manufacturer of a product in defective condition; and that the turbine and/or its component parts did not leave Westinghouse's possession or control and thus it is not subject to strict products liability.

Because Judge Avery did not specify her reasons for granting summary judgment in favor of Westinghouse, we have the discretion to treat the grant as based on any of the dispositive issues raised by parties in their arguments regarding summary judgment. We can affirm the grant of summary judgment so long as the record discloses that Westinghouse was entitled to summary judgment. *Irwin Indus. Tool Co.*, 478 Md. at 685.

Turning to the application of Section 402A of the Restatement (Second), as adopted in *Phipps*, the parties contest whether Westinghouse was a "seller" of a defective "product" as required for strict liability. Ms. Basil-Flippen contends that the Circuit Court improperly granted Westinghouse's motion for summary judgment as to the strict liability for a design defect claim because Westinghouse placed an unreasonably dangerous product—the turbine, which included its asbestos-containing component parts specified by the Sales Contract—on the market by selling it to PEPCO. Further, Ms. Basil-Flippen maintains that

Westinghouse cannot attempt to ignore the Sales Contract to claim it acted only as an installer and not as a seller because there were two contracts about the turbine.

She also asserts that if the turbine sale and installation constituted one transaction, our precedent regarding hybrid transactions (those involving the sale of both a product and a service) looks to which aspect of the transaction was the predominate purpose. *See ACandS, Inc. v. Abate*, 121 Md. App. 590 (1998), *abrogated on other grounds by Scribner*, 369 Md. 369. Ms. Basil-Flippen argues that the predominate purpose was the sale of the turbine rather than Westinghouse's installation, pointing to the difference in price for the two ($9,926,341 for the turbine sale compared to $557,660 for the installation).

Ms. Basil-Flippen further highlights that, according to the Sales Contract, the legal and equitable title[14] of the turbine parts passed to PEPCO upon delivery, which she argues is indication that the turbine and its components left Westinghouse's control prior to Ms. Basil's alleged exposure. She asserts that workers harmed during the construction of a product can pursue a strict liability design defect claim if the product is intended to be assembled by the purchaser. She argues the Sales Contract provided that Westinghouse was to deliver an unassembled turbine, with PEPCO bearing the responsibility of assembly, a responsibility that it separately allocated to Westinghouse although PEPCO could have

[14] "Title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property" or "the legal link between a person who owns property and the property itself." Black's Law Dictionary (11th ed. 2019). "Legal title" is "[a] title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." *Id.* "Equitable title" is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Id.*

contracted with any company to assemble the turbine. She also avers that the only reason Westinghouse can claim it did not lose possession or control is because PEPCO happened to award Westinghouse the Installation Contract. Ms. Basil-Flippen contends that if PEPCO had contracted with any other entity to install the turbine, there would be no dispute that Westinghouse did not have possession of or control over the turbine and its asbestos-containing parts when Ms. Basil was allegedly exposed to asbestos.

Westinghouse, conversely, argues that, because it was contractually obligated to both supply and install the turbine, and because Ms. Basil's exposure arose from WECCO's handling of its own asbestos materials, not Westinghouse's, the asbestos components of the turbine had not left Westinghouse's control as required for strict products liability. Westinghouse maintains that even though there were two separate contracts covering the sale and installation of the turbine, the agreement between Westinghouse and PEPCO should be viewed as a whole. In Westinghouse's view, because negotiations for the Sales and Installation Contracts were simultaneous and ongoing, the contracting parties never intended for anyone other than Westinghouse to install the turbine at Morgantown. Further, Westinghouse relies on a set of out-of-state cases to reach its conclusion that whether the installer is liable for injuries arising from installation depends on whether the contract calls for the delivery of an assembled or unassembled product. According to Westinghouse, based upon the whole agreement between itself and PEPCO, Westinghouse's obligation was to provide a fully-assembled turbine, thereby precluding the imposition of liability for Ms. Basil's alleged illness due to asbestos exposure. Alternatively, Westinghouse argues

that because the asbestos material was manufactured and delivered to the Morgantown Generating Station by a third party (WECCO, not Westinghouse or PEPCO), the asbestos was never *in* Westinghouse's possession or control and thus could not have *left* its possession or control.

As we have discussed *supra*, a prerequisite for the application of strict products liability is that the product must leave the seller's possession or control or enter the stream of commerce. *Phipps*, 278 Md. at 344; *see also May*, 446 Md. at 25 (manufacturers have limited strict liability for failure to warn of "asbestos-containing replacement components that [the manufacturer] has not placed into the stream of commerce").

In this case, whether the turbine left Westinghouse's possession or control turns on the issue of installer liability, because Westinghouse was obligated to both sell and install the turbine at Morgantown Generating Station. Thus, if the agreement between Westinghouse and PEPCO envisioned the delivery of a completed turbine with Westinghouse bearing responsibility for installation, then the turbine and its asbestos components never left Westinghouse's control and strict liability cannot apply. Conversely, if the agreement envisioned the delivery of an incomplete turbine, then the turbine and its asbestos components did leave Westinghouse's control and strict liability could apply.

Maryland has not explicitly decided the issue of installer liability, so the parties in this case point to overlapping out-of-state cases to support their differing stances on

installer liability and whether the turbine left Westinghouse's possession or control. We shall address the most relevant of these cases in turn.

In *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006), Daniels Company entered into a contract with Solar Sources that required Daniels to design and build a coal preparation plant on Solar Sources' property. *Id.* at 1136. Daniels subcontracted with Vaughn's employer to construct the coal plant. *Id.* Vaughn was injured during construction when he fell while assembling a coal sump at the plant. *Id.* Vaughn brought a strict products liability claim against Daniels, and the trial court granted Daniels's motion for summary judgment, concluding that "Vaughn was not a 'user' or 'consumer' of the coal sump within the meaning of the [Indiana Products Liability Act]."[15] *Id.*

On appeal, the Indiana Supreme Court affirmed that "use and consumption may include assembly and installation of a product, but only if the product is 'expected to reach the ultimate user or consumer' in an unassembled or uninstalled form." *Id.* at 1141. The Court reached this conclusion based largely on the Restatement (Second) of Torts, explaining that the comments to Section 402A indicate that consumers include those "who prepare [a product] for consumption." *Id.* at 1140 (quoting Restatement (Second) of Torts, Section 402A cmt. l). The Court ultimately ruled that Vaughn was not a consumer for purposes of strict products liability, because the contract between Daniels and Solar

[15] Vaughn's claim was premised on the Indiana Products Liability Act. *Id.* at 1138. As the Indiana Supreme Court later explained, this legislation incorporated Section 402A of the Restatement (Second). *Id.* at 1140–41.

Sources provided for the delivery of a *completed* coal plant. *Id.* at 1141. Vaughn, as an employee of Daniels's subcontractor, had no strict liability claim "as the user or consumer of a product *not yet in the hands of its buyer*." *Id.* at 1141–42 (emphasis added).

In *Lantis v. Astec Industries, Inc.*, 648 F.2d 1118 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit considered whether, under Indiana law, an employee of the purchaser of an asphalt mixing plant could pursue a strict products liability claim for injuries caused by a defective component part of the plant. *Id.* at 1119. Astec entered into a contract with E&B Paving Company providing that Astec would sell E&B a stationary asphalt mixing plant, designed according to E&B's specifications. *Id.* Astec built the plant on its own premises, then deconstructed it and shipped its components to E&B. *Id.* According to the contract, E&B was responsible for the reassembly labor, while Astec was to provide supervision. *Id.* Lantis was an employee of E&B and fell through a service platform while working on the reassembly and died. *Id.* His widow brought a wrongful death action against Astec based upon Section 402A strict liability, which the district court ruled was inapplicable to Lantis's claim and directed a verdict in Astec's favor. *Id.* at 1119–20. The Seventh Circuit ultimately disagreed and held that Astec should be held liable for Lantis's death because Astec clearly intended that E&B's employees, who bore the responsibility for reassembly, would use the service platform while reassembling the mixing plant. *Id.* at 1121–22.

The Seventh Circuit distinguished *Lukowski v. Vecta Educational Corp.*, 401 N.E.2d 781 (Ind. App. 1980), in which the Indiana Court of Appeals held that "the seller

had not introduced a defective product into the stream of commerce because the partially assembled bleachers had not yet been 'delivered' for their intended purpose." *Lantis*, 648 F.2d at 1121. The Seventh Circuit explained that the difference between *Lukowski* and *Lantis* was whether the sales contract contemplated the sale of an unassembled product. *Id.* Unlike in *Lukowski*, where the contract was for the sale of assembled bleachers, the Seventh Circuit concluded that Astec could be held liable for Lantis's death because the contract "called for delivery of an unassembled asphalt plant." *Id.* Delivery of the product, therefore, occurred when the component parts were delivered to E&B, despite Astec's obligation to provide supervision of the reassembly. *Id.*

Finally, in *Ettinger v. Triangle-Pacific Corp.*, 799 A.2d 95 (Pa. Super. Ct. 2002), Triangle-Pacific contracted with Production Systems Incorporated ("PSI") for Triangle-Pacific to buy a furniture finishing system. *Id.* at 99. PSI was to manufacture the system and ship it in parts for assembly at Triangle-Pacific's plant by PSI's subcontractor. *Id.* PSI's subcontractor subsequently retained Ettinger's employer to perform electrical work on the installation. *Id.* During installation, Ettinger fell from the upper level of the system, suffering serious injuries. *Id.* at 100.

After Ettinger brought suit against PSI, the trial court granted PSI's motion for summary judgment on Ettinger's strict products liability claim, because the unassembled system was not a product and Ettinger was not a user under Section 402A. *Id.* After reviewing out-of-state cases discussing Section 402A, including *Lantis* and *Lukowski*, the Superior Court of Pennsylvania concluded that Ettinger could not pursue a strict liability

claim because the system was an incomplete product that had not left PSI's control. *Id.* at 103–05.

The Court distinguished *Lantis* and related cases where the injury occurred during installation because, in those cases, the injured party was acting on behalf of the purchaser of the prefabricated product. *Id.* at 105. Importantly, the Court wrote that, "[a]lthough the component parts of the [system] had left PSI's manufacturing plant and were being assembled on Triangle Pacific's property, they had not left the seller's possession, as PSI indisputably retained the obligation to assemble the component parts and deliver a fully-assembled [system]." *Id.* at 104–05.

In this case, the record is clear that Westinghouse retained control over the turbine and its component parts at the time Mr. Basil, and, by association, Ms. Basil were allegedly exposed to asbestos. As in *Ettinger*, the component parts of the turbine had left their manufacturing plant and were being assembled at the Morgantown Generating Station, and Westinghouse had maintained an obligation to assemble the turbine, as well as supply it. Although Westinghouse "wore two hats" as both the seller and the installer under two separate contracts, it is clear that, during the negotiation of both contracts, it was never contemplated that any entity other than Westinghouse or its subcontractors would be handling the turbine and its component parts during the installation. The turbine and its component parts, therefore, never left Westinghouse's control, as Ms. Basil was exposed

to asbestos while her husband was acting on behalf of Westinghouse, the seller-installer, rather than that of the purchaser PEPCO's.[16]

Ms. Basil-Flippen places significant emphasis on the existence of separate contracts for the sale and installation of the turbine. We find this detail inconsequential. Based upon the overlapping dates in letters, contracts, and contract revisions, the record demonstrates that Westinghouse and PEPCO negotiated both contracts simultaneously, such that it is clear that the agreement between them always envisioned that Westinghouse would both sell and install the turbine. The Installation Contract was executed two months before the Sales Contract was executed. The dates of the contracts, the simultaneous negotiations of both contracts, and the cross-references between both contracts in letters between Westinghouse and PEPCO demonstrate that there was functionally one agreement between Westinghouse and PEPCO providing that Westinghouse both sell and install the turbine that was simply split into two contracts.[17]

Westinghouse's obligation as installer of the turbine, thus, arose prior to its finalized obligation to sell PEPCO the turbine. While not dispositive of Westinghouse's role, the

[16] Because we conclude that Westinghouse retained control over the turbine and its component parts, we do not address Westinghouse's alternative argument that it never had possession of or control over the asbestos insulation because it originated from a third party.

[17] At oral argument, counsel for Ms. Basil-Flippen expressed doubt about when the Sales Contract was actually finalized, indicating that perhaps it was entered into in 1966 (prior to the Installation Contract) rather than 1970 (after the Installation Contract). He pointed only to a date on the first page of the Sales Contract in support. However, the Sales Contract unequivocally reflects that it was executed and signed on February 20, 1970, so there is no genuine dispute of material fact on this issue that precludes summary judgment.

construction of both contracts reflects an intention that Westinghouse retain control over the turbine and its component parts until the turbine was fully constructed. Thus, "delivery" would be conditioned on completion.

Ms. Basil-Flippen also emphasizes that the Sales Contract provides that legal and equitable title of the turbine's parts would pass from Westinghouse to PEPCO upon delivery to a common carrier. We similarly do not find this fact dispositive. Regardless of which party possessed title to the turbine parts, Westinghouse and its representatives were the only parties expected to work with and use the turbine parts, including the asbestos insulation. Even were PEPCO to have legally owned the components, no entity other than Westinghouse was to interact with them. We are unpersuaded by Ms. Basil-Flippen's arguments concerning hybrid transactions for similar reasons: even if the agreement between Westinghouse and PEPCO constituted a hybrid transaction for the sale of the turbine and the service of its installation, Westinghouse was the sole entity intended to interact with the turbine and its parts, such that Westinghouse had sole control over them until the installation was complete.

CONCLUSION

We hold that the trial court did not err in granting Westinghouse's motion for summary judgment on the strict liability for defective design claim. Although two separate contracts dictated Westinghouse's responsibilities, the turbine and its component parts—including the asbestos that Ms. Basil was allegedly exposed to—never left Westinghouse's

control. Westinghouse, thus, was entitled to judgment as matter of law. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.