IN THE UTAH SUPREME COURT

CRAIG FEASEL, Plaintiff / Respondent, vs. TRACKER MARINE, LLC and BRUNSWICK CORPORATION, Defendants / Petitioners.	Case No. 20200327-SC

WRIT OF CERTIORARI FROM THE OPINION OF THE UTAH COURT OF APPEALS, 2020 UT APP 28, REVERSING AND REMANDING A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT, MORGAN COUNTY, CIVIL NO. 140500037

REPLY BRIEF OF PETITIONERS TRACKER MARINE, LLC AND BRUNSWICK CORPORATION

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I. Response to Feasel's statement of facts.

Feasel's arguments rely in large part on his assertion that Tracker and Brunswick "knew their products had a propensity to enter the circle of death and knew their warnings were inadequate."[1] These factual assertions either are not supported by the record or require further clarification. Tracker and Brunswick correct and clarify these statements as follows:

Statement of Fact 1. Contrary to Feasel's assertion, the product safety manager for Brunswick did not testify "that the circle of death is a 'common phenomenon.'"[2] Rather, he testified that "the term circle of death is not descriptive of all of the actions a boat might take if it's not under control, but certainly *if the boat enters a tight circle* and is propelling itself in a circle then the person in the water is subject to being struck by the propeller."[3]

Statement of Fact 2, 3, and 7. Paragraph 2 of Feasel's Statement of Facts states that the safety manager for Brunswick testified that he "knew that operators did not use the lanyard beginning when Brunswick 'instituted the lanyard in the late 70's.'"[4] Tracker and Brunswick clarify that the safety manager's testimony is regarding lanyard use in general, not lanyard use associated with Tracker and Brunswick's product. As for Statement of Fact 3, Brunswick did not testify that it "knew that users of its products are injured because

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[1] Opp., pp. 4, 43, 45, 58.
[2] *Id*., p. 4, ¶ 1.
[3] R.4228 (51:12– 52:12) (emphasis added).
[4] Opp., p. 4, ¶ 2, *quoting* R.4229-30 (65:24-66:4).

boat operators do not wear the lanyard."[5] Rather, the safety manager's testimony referred to injuries that occurred in general when a boat operator does not use the lanyard. His testimony is not specific to Tracker and Brunswick's product.[6] Additionally, Statement of Fact 7, which speaks of boaters not using the lanyard, is also testimony regarding general lanyard use and is not specific to Tracker and Brunswick's product.[7]

Statement of Fact 4. Brunswick's safety manager did not testify that "from its own customer research, Brunswick knew half of the operators of its boats openly admit to not using the lanyard."[8] Rather, the safety manager testified that no data-driven research had been conducted on this issue and that he would be speculating regarding how many of Brunswick's customers used the lanyard. His testimony regarding the 50 percent usage rate for the lanyard is based on a United States Coast Guard study of lanyard use in general. It is not based on Tracker and Brunswick's customers' use of the lanyard.[9]

Statement of Fact 8. In relation to paragraph 8, Tracker and Brunswick clarify that Tracker's compliance engineer Hellesen testified that he went to one Coast Guard informational seminar where two litigation attorneys for a propeller strike victim used the term "circle of death" during a meeting.[10] He had also read this term in a number of "publications", but clarified that "when [he] said publications, [he] was talking about

[5] Opp., p. 4, ¶ 3, *citing* R.4230, 5468-69, 5475.
[6] R.4230, 5468-69, 5475.
[7] Opp., p. 5, *citing* 4240 (50:15-51:10), 4245 (80:12-22).
[8] *Id*., p. 4, ¶ 4, *citing* R.4230, 5468-69, 5474.
[9] *Id*. p.5, ¶ 8, *citing* R.4246.
[10] R.4246 (94:1-94:21).

websites." He had "never seen anyone of technical orientation ever use the term [circle of death]."[11]

II. The court of appeals incorrectly applied the *House* factors.

The parties agree that the factors in *House v. Armour of Am. Inc.*[12] set the standard to determine whether a warning is adequate. These factors require that a warning:

> (A) be designed so it can reasonably be expected to catch the attention of the consumer;
>
> (B) be comprehensible and give a fair indication of the specific risks involved with the product; and
>
> (C) be of an intensity justified by the magnitude of the risk.[13]

The parties, however, disagree regarding the application of these factors. Feasel argues for, and the court of appeals accepted, a heightened and unworkable standard that would require manufacturers to plaster their products with placards regarding every conceivable risk scenario. That is not what *House* requires. All that *House* requires is "a fair indication of the specific risks involved with the product."[14] If a manufacturer provides such warning, it is adequate as a matter of law.[15]

A. The boater checklist and manuals were designed to reasonably catch the attention of consumers.

Feasel argues that Tracker and Brunswick's warnings were not designed to catch the attention of consumers because the placard on the boat was "inconspicuously" located

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[11] *Id.*
[12] 886 P.2d 542, 551 (Utah Ct. App. 1994).
[13] *Id.*, 551.
[14] *Id.*
[15] *Id.* (summary judgment is proper on adequacy of warning if reasonable minds cannot differ).

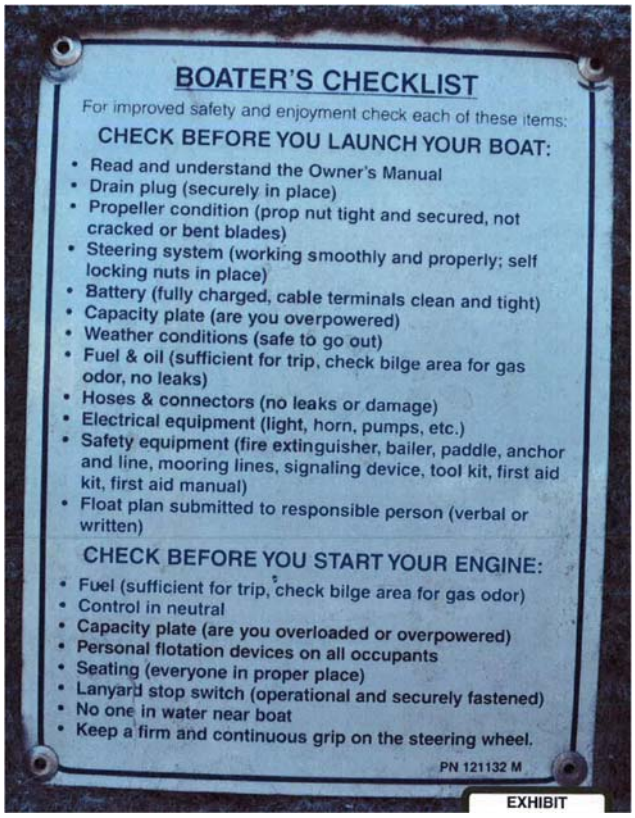
"behind a seat" and the "purported warnings in the manuals were mere statements," not warnings.[16] Neither argument has merit.

1. The placard was seen and understood by Martinez.

Feasel's argument refers to the placard located next to the operator's seat and the boat's throttle. This placard is designed as a checklist to be quickly and efficiently reviewed by the boat's operator to ensure that he or she has complied with all safety protocols before taking the boat out on the water. Among other things, the checklist tells operators to verify that: "Lanyard stop switch (operational and securely fastened)."[17] This safety checklist also states that the operator must "read and understand the owners' manual."[18]

Contrary to Feasel's suggestion, there is nothing inconspicuous about the location of the checklist. The checklist placard is located directly adjacent to the driver's seat and the throttle for the boat:

[16] Opp., p. 37.
[17] R.3193.
[18] *Id*.



This location is not "hidden."[19] Rather, having a checklist next to the operator's seat and throttle is an obvious place for a checklist of items to review before starting and operating the boat. It is unclear where would be a more conspicuous place for such a checklist. Feasel provides no suggestion.

Feasel argues that a more particularized placard regarding the risk of the circle of death should have been included somewhere on the boat. Such a requirement is not feasible. All the items on the checklist are important safety items, the failure to follow any one of which could result in injuries or death. It is possible to imagine several injury scenarios for each checklist item. For instance, the checklist warns the operator to determine weather conditions before taking his boat out on the water. Injuries associated

[19] Opp., p. 37.

with failure to heed this warning could include capsizing due to wind conditions, being struck by lightning, hypothermia, engine failure, etc. As another example, the checklist warns to check the capacity plate to determine if the boat is overloaded or overpowered. Dangers associated with failure to heed this warning could result in the boat losing flotation. [20] Requiring Tracker and Brunswick to placard their products with warnings regarding all the dangers associated with the checklist items undermines the purpose of the checklist, which is to allow a boater to quickly and efficiently perform a safety check before taking the boat out on the water.

Martinez knew where the checklist was located, had read the checklist, and knew what was on the checklist:

> Q: So those are right –as you get in the boat, they're there every time you sit in the driver's seat of the boat; is that correct.
> A: Correct.
> Q: And you're familiar with those warnings and that checklist and what they say to do? Yes?
> A: Yes.[21]

The checklist caught the attention of the consumer.

2. The warnings in the manuals were not merely instructions.

In addition to the placard, the manuals included several warnings regarding the stop switch lanyard. Feasel argues that these warnings were merely statements because they did not indicate "warning or caution."[22] That is not an accurate portrayal of the warnings in the manuals. The need to wear the lanyard is specifically labeled in bold face type as a

[20] R.1084.
[21] R.2899, p. 256 ln 16-22.
[22] Opp., p. 37.

"WARNING". The lanyard warnings in the manuals are also labeled with a "safety alert" as pictured on this page. The "safety alert" is bright orange in the Brunswick manual and bright red in the Tracker manual. The first few pages of the Tracker and Brunswick manuals define these "safety alerts" as warnings, which if not followed could result in death or serious injury:[23]

A reader of the Tracker and Brunswick manuals need merely thumb through its pages for these pictured alerts to know what warnings he or she should take heed of and follow to avoid injury or death.

B. The warnings describe the product risk.

Feasel next argues the warnings and manuals did not give him a "comprehensible or fair indication of the specific risk of the boat's propensity to turn tightly in a circle of death or why the lanyard must be worn."[24] But that is not what is required. Manufacturers are not required to provide an "encyclopedic warning" about "every mishap or source of injury that the mind can imagine flowing from the product."[25] Rather, *House* requires only a "*fair indication* of the specific risk at issue."[26] Here, the warnings provided by Tracker and Brunswick do just that. The warnings explain the function of the lanyard:

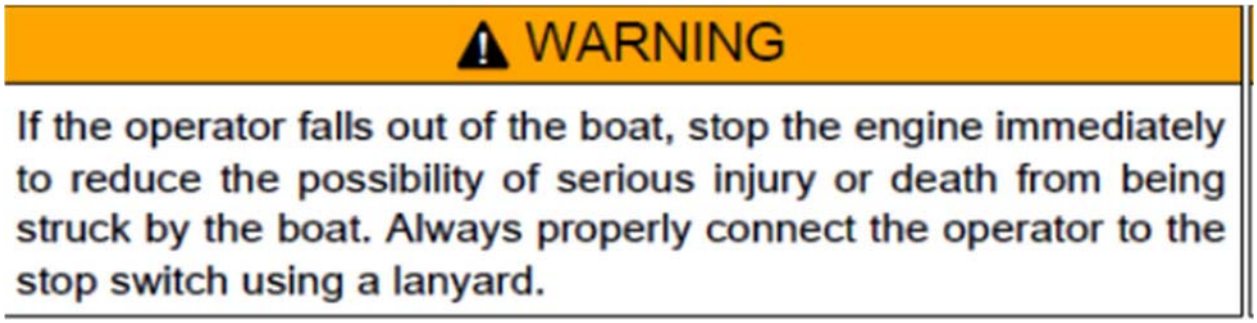
- Brunswick Manual: The purpose of a lanyard stop switch is to stop the engine when the operator moves far enough away from the operator's position to activate the switch. This would occur if the operator accidently falls overboard or moves within the boat a

[23] R.2954, R.1083.
[24] Opp., p. 38.
[25] *Hood v. Ryobi Am. Corp.*, 181 F.3d 608, 610 (4th Cir. 1999).
[26] *Id*. (emphasis added).

sufficient distance from the operator's position. Falling overboard and accidental ejections are more likely to occur in certain types of boats such as low sided inflatables, bass boats, high performance boats, and light, sensitive handling fishing boats operated by a hand tiller.[27]

- Tracker Manual: The [lanyard] switch is designed to turn off the engine whenever the operator, who should always be attached to the lanyard, moves far enough away from the operator's position to activate the switch.[28]

The Brunswick manual warns that the operator can be hit by the boat itself if the engine is not immediately turned off by the lanyard or otherwise:[29]



The Tracker manual provides a similar warning that ejection from the driver's seat or loss of control of the boat "could result in severe personal injury or death" and the possibility that the boat could "complete a full circle" if the engine was not stopped by the lanyard or otherwise.[30] The manuals provide multiple warnings associated with the risks of being in the water with the engine running.[31]

Feasel argues that case law supports his position that a more specific warning regarding the circle of death was required. But the cases he cites do not support his

[27] R.1090.
[28] R.3006.
[29] R.1090.
[30] R.3006; R.2954; R.1083.
[31] Petitioners' opening brief on certiorari, pp. 9-13.

position. Rather, they stand for the unremarkable proposition that a manufacturer needs to give at least a fair indication of the specific risks associated with not following product instructions. For instance, in *Alder v. Bayer Corp.*,[32] the installer of an x-ray processing machine never warned machine operators that they could suffer chemical exposure injuries if the product's ventilation instructions were not properly followed. In that case, there was no warnings or instructions given to the operators at all. Likewise, in *Chronister v. Bryco Arms*,[33] a gun manufacturer failed to warn users that its gun had a propensity to misfire, which would cause an explosion in the gun's chamber. The result of this explosion was serious ear damage. The court held that the manufacturer's instruction to wear hearing protection did not give a fair indication that the gun had a specific risk of exploding.

The other cases that Feasel cites are likewise not on point. In each of these cases, the manufacturer failed to provide any instruction regarding the proper use of the product, or it did not fairly indicate the specific risk faced if a product instruction was not followed.[34]

That is not the case here. In this case, Tracker and Brunswick tied the need to wear the lanyard with the risk of possible death and serious injuries that are associated with an unmanned, out-of-control boat. Although the risk of death and serious injury under this

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[32] 2002 UT 115, ¶ 38, 61 P.3d 1068.
[33] 125 F.3d 624 (8th Cir. 1997).
[34] *See* Opp., p. 38, n. 169, citing *Casetta v. U.S. Rubber Co.*, 260 Cal. App. 2d 792, 816-17 (1968) (did not tie risk of explosion with instruction); *Marois v. Paper Converting Mach. Co.*, 539 A.2d 621, 624 (Me. 1988) (did not instruct that clearing area of machine dangerous); *Garner v. Santoro*, 865 F.2d 629, 640 (5th Cir. 1989) (inadequate instructions); *Tucson Indust., Incorp. v. Schwartz*, 501 P.2d 936, 940-41 (Ariz. 1972) (did not instruct regarding ventilation requirements); *Crane v. Sears, Roebuck & Co.*, 218 Cal. App. 2d 855, 859 (1963) (did not instruct regarding how far to keep product from open flame and that paint fumes were combustible).

circumstance should be obvious, Tracker and Brunswick warned that anyone in the water could be hit by such a boat, including those ejected from the boat.[35] Tracker and Brunswick did not need to come up with an encyclopedic warning of all the different paths the boat could take, the different objects the boat could hit, and the different injuries that could result from a driverless, out-of-control boat. They did, however, warn that an unmanned and out-of-control boat could perform a circle, could go in a straight line, and could hit anyone in its path.[36] Martinez understood these instructions and knew that given the low profile nature of his bass boat, ejection was a possibility. He also knew that an unmanned boat under power could hurt him, his passengers, and anyone in the water near his boat.[37]

C. Tracker and Brunswick's warnings were of adequate intensity.

Feasel claims that the warnings were not of adequate intensity because, according to Feasel, they were not "warnings", but merely "instructions" to use the lanyard. Feasel also argues that the warnings do not warn of the "catastrophic physical injury and death" that can occur from not wearing the lanyard.[38] Tracker and Brunswick already addressed Feasel's erroneous contention that the warnings directing the boat operator to wear the lanyard did not include a specific warning of the risk.[39] Feasel's arguments ignore the

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[35] R.3006.
[36] R.3006; *see also* R.3010 ("Keep at least one hand on the steering wheel at all times when the boat is running, regardless of whether you have mechanical or hydraulic steering. The steering torque of the engine can cause the steering wheel to spin if released, resulting in serious damage to the boat or serious injury or death to dislodged occupants.")
[37] R.2831-2835, R.2896-2898 (Martinez deposition).
[38] Opp., p., 45.
[39] *Supra,* pp. 7-9.

numerous warnings in Tracker and Brunswick's manuals that went beyond simply providing "directions" for the boat's proper use.[40]

Feasel complains that the warnings are allegedly equivocal regarding whether the operator needed to wear the lanyard. There is nothing ambivalent about these warnings:

- "*Always* properly connect the operator to the stop switch using a lanyard."[41]
- "The [lanyard] device is designed to turn off the engine whenever the operator, *who should always be attached to the switch lanyard*, moves far enough away from the operator's position to activate the switch."[42]
- "The operator *should attach the lanyard* stop switch to a belt loop, life jacket loop or around his wrist *before operating the boat*."[43]
- "*Before you start your engine*: Lanyard stop switch (*operational and securely fastened*)." [44]
- "The following checks and services *are essential* to safe boating and *should be performed* at each outing . . . . *Check the lanyard stop switch* for proper operation by starting the engine (on the water) and pulling the switch."[45]
- "If any problem is found during the safety checks [which includes lanyard check], **do not operate the boat**."[46]

These are exactly the types of warnings that numerous courts have found adequate as a matter of law.[47]

Feasel attempts to create ambiguity where there is none by claiming that the manual warns against using the lanyard.[48] The manual does no such thing. The reference cited by

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[40] *Id*.
[41] R.1090.
[42] R.3006.
[43] *Id*.
[44] R.3193.
[45] R.2979.
[46] *Id*.
[47] Petitioners' opening brief, pp. 24-26 (discussion and cases cited).
[48] Opp., p. 44.

Feasel merely provides instructions regarding how to properly wear the lanyard to avoid accidental activation and the dangers of accidental activation:

> The lanyard should be of sufficient length to avoid inadvertent activation. Accidental loss of power can be hazardous particularly when docking or in heavy seas, strong current, or high winds.[49]

Instructing a person how to wear a safety device correctly to avoid injury is not the same as warning against wearing the device at all. Moreover, such a warning is prudent and necessary to properly instruct an operator regarding proper lanyard use.

Finally, Feasel claims that the warnings are inadequate because consumers allegedly "widely disregard them." Feasel's record citation does not support the proposition that Tracker and Brunswick's customers are widely disregarding warnings.[50] Rather, the records cited speak of lanyard use in general. That the general boating population may not wear a lanyard is not the same as stating that Tracker and Brunswick's customers widely disregard their warnings to wear them. Here, Tracker and Brunswick adequately warned Martinez to wear the lanyard. Martinez's decision to disregard this warning is not the fault of Tracker and Brunswick.

III. The court of appeals erred when it held that Tracker and Brunswick owed a duty to warn to passengers.

Tracker and Brunswick's opening brief properly argues that the scope of their duty to warn ran solely to the owner/operator of the boat and that the court of appeals erred in holding that Tracker and Brunswick had a duty to directly warn/instruct passengers

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[49] R.3006.

[50] *Compare* Opp., p. 45, citing SOF 1-9, *with supra* 1-3 (addressing Pet. SOF 1-9).

regarding the lanyard. In response, Feasel and his amicus argue that this Court's opinion in *B.R. ex rel Jeffs v. West*[51] and the Restatement (Second) of Torts sections 402A and 388 set out a broad categorical duty to warn all users—including passengers—of latent defects and that whether Tracker and Brunswick satisfied that duty by warning Martinez as the owner/operator rather than by warning Feasel directly is an issue of fact. This misframes the question before the Court. The dispositive issue is whether there is a duty to directly warn Feasel at all. The answer to that question is no. The duty to warn ran solely to Martinez and, as shown above, Tracker and Brunswick adequately warned Martinez.

A. As a matter of law, Tracker and Brunswick's duty to warn is owed solely to the boat operator.

Whether a duty to warn exists is a legal question. Feasel and his amicus do not contend otherwise. Feasel and his amicus nonetheless cite this Court's opinion in *B.R. ex rel Jeffs v. West* to analyze whether a duty to warn exists in a products liability case. But as set forth in the opening brief, the analysis of whether a duty to warn exists under these circumstances goes beyond the general precept that manufacturers owe users of products a duty to warn, because this case (and others like it) involves an intermediary: the operator of the boat.[52]

Relying on *Jeffs,* Feasel and his amicus assert that "[h]ere, the general circumstances require the question to be framed as whether manufacturers and suppliers of watercraft owe duties to passengers to issue adequate warnings about latent dangers of the watercraft."[53]

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[51] 2012 UT 11, 257 P.3d 228.
[52] Petitioners' opening brief, pp. 29-47.
[53] Opp., p.51.

This analysis is incorrect. Critically, *Jeffs* was not a products liability case and does not address a manufacturer's duty to warn in that context. *Jeffs* was a medical malpractice case. The question was whether a prescribing provider's duty of *care* (not to warn) extended to third parties where a medication prescribed to a patient could cause the patient to harm third parties. In *Jeffs*, the Court outlined that "we all have a duty to exercise care when engaging in affirmative conduct that creates a risk of physical harm to others."[54] *Jeffs* considered whether there should be an exception to that rule "eliminating the duty of care for a class of defendants", because the case implicated "unique policy concerns."[55] In considering whether to carve out an exception eliminating the duty of care for a particular class of defendants, the *Jeffs* Court considered factors such as "the foreseeability or likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations."[56] The Court then applied this analysis to the class of defendants at issue (prescribing healthcare providers). What the *Jeffs* Court did not analyze, however, is whether the manufacturer of the medication at issue had an independent duty to warn third parties.[57] Had it done so, it would have addressed the issue under the learned intermediary doctrine. It is well established, pursuant to both

[54] 2012 UT 11, ¶ 21.
[55] *Id.*
[56] *Id.*
[57] As set forth below, when properly framed in the context of an intermediary, policy considerations favor directing warnings to the intermediary rather than a passenger or bystander.

Restatement Second 402A and Utah case law that a drug manufacturer's duty to warn runs solely to the prescriber, and does not extend to the patient or third parties.[58]

Unlike the issue before the Court in *Jeffs* (and analogous to whether a drug manufacturer has a duty to warn patients or third parties), the proper analysis in this product liability duty to warn case is whether Tracker and Brunswick's duty to warn of the need to wear the lanyard runs solely to Martinez as the operator of the boat. And, as this Court acknowledged in *Jeffs*, it has long been the law in this state that the knowledge and expertise of a third-party and the independent duties owed by a third party can cut off certain duties that would be otherwise owed by a tortfeasor.[59] In those cases, this Court has for policy reasons held that the duty runs to the intermediary and no further because the specific defendant at issue "lacks the capacity that others have to avoid injury by taking reasonable precautions."[60]

For instance, in *Schneider v. Suhrmann*,[61] this Court determined whether an intermediary cut off certain duties owed by a supplier to downstream customers. In that case, the supplier sold meat to a retailer. In selling the meat to the retailer, the supplier warned the retailer that it could not process the meat in a manner that would kill certain food-borne illnesses. The retailer thereafter did not properly process the meat and one of its customers contracted a food-borne illness. In analyzing the supplier's duty, the Court looked to Restatement (Second) of Torts § 388 and noted the general duty to inform a user

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[58] *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, 79 P.3d 922.
[59] *Jeffs,* 2012 UT 11, ¶ 31 & n.18.
[60] *Id*.
[61] 327 P.2d 822 (Utah 1958).

of latent dangers associated with its product. The Court held, however, that once the supplier adequately informed the retailer of this danger and the retailer accepted that responsibility, the supplier was "insulated" from any duty to warn any subsequent purchasers. It did not matter that the supplier had knowledge that the retailer may sell the product without further processing.

In *Smith v. Frandsen*,[62] this Court again had an opportunity to determine whether the knowledge of a third party insulated a seller from duties owed to an end user. In that case, the developer of property conveyed property to a residential contractor who in turn sold it to the plaintiffs. The Court held that where a developer conveys property to a residential contractor, the knowledge and expertise of the builder interrupts certain obligations running from the initial developer to subsequent purchasers. The rationale is that the builder would have "adequate time and opportunity" to discover the defects.[63]

In *Schaerrer v. Stewart's Plaza Pharmacy, Inc.,*[64] this Court acknowledged its adoption of the learned intermediary rule and applied it to pharmacists to carve out a duty. Under this rule, "manufacturers of prescription drugs have a duty to warn only the physician prescribing the drug, not the end user or patient."[65] The manufacturer is "held directly liable to the patient for the breach of the duty to make timely and adequate warnings to the medical professional of any dangerous side effects produced by its drug of

[62] 2004 UT 55, 94 P.3d 919.
[63] *Id.*, ¶ 17.
[64] 2003 UT 43, 79 P.3d 922.
[65] *Id.*, ¶ 20.

which it knows or has reason to know."[66] The "physician, after having received complete and appropriate warnings from the drug manufacturer, acts as a learned intermediary between the manufacturer and the patient" when preparing the drug prescription.[67] It "is the physician who is best situated to weigh the potential risks associated with a prescription drug against the possible benefits of the drug and the unique need and susceptibility of each patient."[68]

Amicus cites a number of cases that it claims supports its position that there is a duty to warn passengers.[69] But Amicus's cases are not on point. None of the cases it cites analyzes whether a supplier's duty to warn can be interrupted by a third party. Most of these cases cited do not address the duty to warn at all.

Here, as in the above cases, a third party—the boat operator—is in a superior position to protect against the dangers. The boat operator is "captain of the ship," solely responsible for operating the boat, and has a duty to use reasonable care in doing so. The operator (not passengers) generally has access to and presumably has read the operating instructions for the boat. The operator is the only person who has control over the way the boat is operated. The operator is the only person who can wear the lanyard. The operator is best situated to ensure the lanyard is operational and is properly worn as per the operator

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[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Amicus, p. 10.

manuals. The operator is in the best position to receive and use instructions regarding how to operate the boat.[70]

B. The Restatement (Second) of Torts sections 402A and 388 do not impose a duty on Tracker and Brunswick to warn passengers directly.

Feasel argues that Restatement sections 402A and 388 of Torts fully answer the question of whether Tracker and Brunswick owe a duty to adequately warn about latent dangers of the watercraft. But that is not the issue in this case. The issue is not simply whether Tracker and Brunswick have a duty to adequately warn. Tracker and Brunswick admit they have such a duty. The question is whether Tracker and Brunswick owed Feasel an independent duty to warn that was not satisfied by adequately warning the owner/operator (Martinez).

Section 402A deals with the duty owed in strict liability cases. Nowhere in section 402A does it state that a manufacturer has a duty to warn every user of a product, including passive users such as a passenger. Rather, comment j of section 402A states that "in order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warnings, on the container, as to its use."[71] However, this section does

[70] Amicus argues that other policy considerations favor imposing a duty to warn passengers directly. Specifically, it argues that "manufacturers who fail to warn about hidden dangers from passengers should be held accountable for the harms occasioned by their fault." *Id.*, p. 9. By gearing instructions/warnings towards operators, manufacturers are not "hiding" information from passengers, but rather giving the instructions to the person that is in a superior position to protect against the harm, which is entirely consistent with the policy considerations in a duty to warn case.

[71] Restatement (Second) of Torts § 402A, comment j.

not state that such directions must be directly given to every "user" as that term is defined in section 402A.

Restatement (Second) of Torts section 388 also does not support Feasel's position that Tracker and Brunswick had an independent duty to warn passengers directly. Comment n to section 388 specifically recognizes that a third party, such as a sophisticated intermediary, can cut off duties owed from a manufacturer to an end user, such as a passenger. This Court has likewise similarly cited section 388 as providing a basis to carve out a duty exception in cases involving sophisticated intermediaries.

C. The sophisticated intermediary doctrine applies.

Feasel argues that the "sophisticated intermediary doctrine does not apply" because "Martinez simply owned and operated the boat" and therefore could not be an "industry professional," a "distributor in petitioner's supply chain" or an "employer that already has a full range of knowledge of the dangers, equal to that of the supplier."[72] Feasel misstates the test. The sophisticated intermediary doctrine does not require that the intermediary be an industrial professional, employer, or distributor. Nor does the test exempt certain categories of third parties such as lay boat owners from its application. Rather, the test merely requires that the intermediary already have the full range of knowledge of the dangers, equal to that of the supplier, or that the supplier make the intermediary knowledgeable by providing an adequate warning and safety instructions to the intermediary.[73] Indeed, Feasel appears to acknowledge that the sophisticated intermediary

[72] Opp., p. 55.
[73] *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 277-78 (Minn. 2004).

test applies and argues for the same test that Tracker and Brunswick presented in their opening brief.[74]

Feasel does, however, argue that the sophisticated intermediary doctrine is a question of fact that should be determined by the jury. That argument is contrary to this Court's opinion in *Jeffs* as well as this Court's other precedent that has carved out duties from suppliers when a sophisticated intermediary is involved. Even assuming that the sophisticated intermediary doctrine is a fact determination, under the undisputed facts of this case, this Court can decide this issue as a matter of law.

The parties agree that the sophisticated intermediary doctrine has three elements: (1) the gravity of the risk posed by the boat, (2) the likelihood the owner/operator will convey the information to passengers, and (3) the feasibility and effectiveness of warning passengers.[75] The only dispute is the application of these factors in this case.

1. The gravity of risk posed by the boat.

The parties agree that the "magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result."[76] This factor must also consider "the reasonableness of the supplier's conduct" considering the potential severity of the harm and the nature of the materials provided. Feasel claims that the magnitude of the risk is high because the "seriousness of the harm is at its highest—the circle of death phenomenon has led *to numerous* deaths that

[74] Opp., p. 57.
[75] Opp., p. 57, citing Restatement (Third) of Torts: Prod. Liab. § 2 cmt, i.
[76] *Id*.

could have been prevented by the driver's use of a kill switch lanyard." [77] He also claims that the burden of providing a placard to passengers is a minimal burden on manufacturers.

First, Feasel's characterization that "the circle of death has led to numerous fatalities and injuries" is not supported by the record.[78] The record states that between 1966 and 2016 there have been a reported 70 injuries and fatalities caused by the circle of death in the boating industry in general.[79] This amounts to less than 1.5 injuries/fatalities a year. Given that there are likely millions of boats on the water a year, the chance that some harm may result from this phenomenon can hardly be characterized as "numerous." Nor is it clear whether any of these 70 reported injuries/fatalities involved boats that had lanyards. In this case, it is undisputed that Martinez's boat had a lanyard. It is also undisputed that, if Martinez had worn the lanyard, the accident in this case would not have occurred. The gravity of the risk under the circumstances does not preclude application of the sophisticated intermediary doctrine.

2. The likelihood that the owner/operator will convey the information to passengers.

Feasel argues that the likelihood that the owner/operator will convey information about the lanyard to passengers weighs against ruling that the sophisticated intermediary rule applies, because Tracker and Brunswick allegedly knew that operators of their products did not understand either 1) the boat's tendency to enter a circle when unmanned

[77] Opp., p. 58, citing R.4130 (emphasis added).
[78] Opp., p. 58, citing R.4130; R.3900, 3969-70.
[79] R.4130.

and under power, or 2) the related need to wear the lanyard."[80] This statement is not supported by the record. Nowhere on record cite R.4235 does it state that boat operators do not understand the risk of a boat's tendency to enter a tight circle if undermanned or underpowered. Nor does this record cite stand for the proposition that "drivers of [Tracker and Brunswick] products did not understand the need to ensure that the driver wore the lanyard."[81] Rather, this cite pertains to why boaters in general might not use the lanyard.[82]

Moreover, the presumption is that when given an adequate warning, a boat operator will follow it.[83] Under Utah law, as with the Restatement (Second) of Torts § 402A, comment j, the presumption is that "where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed is not in defective condition, nor is it unreasonably dangerous."[84] Therefore, it is presumed that if the operator has been adequately informed regarding how to safely operate the boat, he or she will follow those instructions. The converse is likewise true and benefits a plaintiff—if the instructions are inadequate, it is presumed that the operator would have followed adequate instructions and not been injured.[85] But instructions on how safely to operate a machine or equipment are intended for the operator of the machine or equipment, not for passengers or bystanders. The reason is because it is

[80] Opp., p. 58, citing R.4235.
[81] Opp., p. 58.
[82] R.4235.
[83] Restatement (Second) of Torts, § 402A, cmt j.
[84] Restatement (Second) of Torts, § 402A, cmt j.
[85] *House v. Armour of America, Inc*., 929 P. 2d 340, 347 (Utah 1996).

the operator who has control over the machinery's use and operation, not any passenger or bystander. The presumption thus properly applies to the operator.

Further, this case is more compelling than a typical supplier/employer situation where the sophisticated intermediary is not present. As in most cases involving a passenger, the owner/operator is at the helm and is available to present the necessary information to passengers when needed. Moreover, there is only one lanyard, which can only be worn by the operator. The associated warnings and instructions for its proper use are meant for the boat's operator, who controls its functioning.

3. The feasibility and effectiveness of warning passengers.

Feasel argues that Tracker and Brunswick "venture into the absurd" when they argue that there is no way to "directly warn every passenger that might venture onto a boat during the boat's lengthy period of useful life."[86] Feasel then suggests that the solution is simple: "Petitioners could easily and inexpensively place additional warnings" regarding the circle of death, telling all occupants that this risk is magnified if the operator does not wear the lanyard.[87]

Feasel's argument misses the point. Passengers do not operate boats. In many situations they are neither capable of operating the boat nor capable of requiring a boat operator to comply with all of the warnings and instructions for safe use of a boat (in the case of children, for example). There are numerous safety protocols that a boat operator must follow to safely operate and maintain a boat. Requiring manufacturers to directly

[86] Opp., p. 58.
[87] Opp., pp. 58-59.

convey warnings for safe operation of the boat to all passengers is not feasible and is illogical. The Tracker and Brunswick operator manuals are 125 and 96 pages long respectively. There are a number of operating and maintenance instructions that can lead to death or injury if an operator does not follow them.

Placarding a boat with multiple warnings for passengers is not a simple or efficient way to ensure that the operator of the boat follows instructions provided on the boat itself and in the operator's manual. This Court should find that Tracker and Brunswick do not have an independent duty to warn Feasel as a boat passenger, that the duty to warn in this case ran solely to Martinez as the owner and operator of the boat, and that Tracker and Brunswick provided adequate warnings to Martinez.

CONCLUSION

This Court should reverse the decision of the Utah Court of Appeals and affirm the order of the district court.

DATED this 27th day of January, 2021.

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of January 2021, a copy of the foregoing **REPLY BRIEF OF PETITIONERS TRACKER MARINE, LLC AND BRUNSWICK CORPORATION** was emailed to the following and then two true and correct copies were mailed, first-class postage prepaid, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(g), Counsel for Petitioners hereby certify that the foregoing brief contains a proportionally spaced 13-point typeface and contains 6,140 words, as determined by an automatic word count feature on Microsoft Word for Office 365, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

Pursuant to U.R.A.P. 21(g), Counsel for Petitioners hereby certify that the foregoing brief contains no non-public information.

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