SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF BRONX, APPELLATE DIVISION

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HARDIE BREWER, and BERTHA BREWER,

Plaintiffs-Appellants,

-against-

MCCUMBER AIR BRAKE COMPANY, NO. _____

Defendant-Appellee.

APPELLANTS' BRIEF

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QUESTIONS INVOLVED

I. Whether there was an issue of fact presented regarding whether the conduct of the injured Plaintiff-Appellant (hereinafter "Plaintiff") was the sole proximate cause of the harm or whether the conduct of the Defendant-Appellee (hereinafter "Defendant") was a substantial factor in causing the injury. The Supreme Court of the State of New York, County of Brooklyn, Trial Division, answered this question in the negative by granting the Defendant's motion for summary judgment.

II. Whether there was an issue of fact presented regarding whether the Defendant is liable for failing adequately to warn the injured Plaintiff about the dangers inherent in the Defendant's product. The Supreme Court of the State of New York, County of Brooklyn, Trial Division, answered this question in the negative by granting the Defendant's motion for summary judgment.

III. Whether there was an issue of fact presented regarding whether the Defendant manufactured the product that caused the Plaintiff's harm. The Supreme Court of the State of New York, County of Brooklyn, Trial Division, answered this question in the negative by granting the Defendant's motion for summary judgment.

IV. Whether there was an issue of fact presented regarding whether the Plaintiff's use of the product at the time of the injury was reasonably foreseeable to the Defendant, so as to render the Defendant potentially liable for the harm suffered by the Plaintiff. The Supreme

Court of the State of New York, County of Brooklyn, Trial Division, answered this question in the negative by granting the Defendant-Appellee's motion for summary judgment.

STATEMENT OF THE CASE AND OF THE FACTS

This is a products liability case. On November 29, 1990, Plaintiff Hardie Brewer suffered a traumatic amputation of his right thumb when it became caught in the nip point created at the junction of an air compressor's belt and pulley. At the time of his injury, Brewer was assisting Richard Morgan, the owner of Adams Towing and Recovery, Inc., Brewer's employer, in transporting the air compressor for use in Morgan's garage. Morgan had just purchased the air compressor used from Compressed Air Equipment Company. The purchase invoice stated that the compressor was a "McCumber." Brewer later examined the compressor and found a name plate reading: "McCumber Air Brake Company, Type Y, Serial Number 228110." The Defendant, McCumber Air Brake Company (MABCO), conceded below that it manufactured a compressor, Type Y, matching the description of the compressor purchased by Morgan. Morgan identified the compressor shown on the cover of a McCumber brochure as being substantially identical to the compressor at issue. The evidence before the Trial Division on MABCO's motion for summary judgment indicated that the serial number on the subject compressor matched the serial numbers for MABCO Type Y compressors. The evidence also showed that the serial number of the specific unit involved was within the range of serial numbers listed by MABCO for compressors of the type involved in this case. In addition, MABCO's records contained a part number indicating

that the compressor at issue would have contained a pulley identical to the one actually found on the unit at the time of Brewer's injury.

At the time of his injury, Brewer was attempting to assist Morgan in unloading the air compressor from a truck. Morgan backed up the truck to a hoist within the garage. The compressor was slid to the edge of the gate of the truck so that it was partially off the gate. A chain from the hoist was secured around the compressor, and a pump jack and a spare tire were placed under the protruding part of the compressor. As Morgan pulled the truck forward in order to remove the compressor, the compressor began to fall. Brewer tried to prevent it from falling and, in the process, unintentionally placed his right hand at the nip point formed by the compressor's pulley and belt. The evidence before the Trial Division showed that the compressor was designed, manufactured, and sold without a guard, such that the pulley and belt were exposed to any person coming into contact with the compressor. Brewer presented expert testimony that the compressor was defectively designed because it did not have a guard to prevent a person from contacting the nip point created at the junction of the compressor's belt and pulley.

The court below granted MABCO's motion for summary judgment. The court held, as a matter of law, that Brewer's conduct was the sole proximate cause of his injury and that there was no issue of fact regarding the design of the product as a possible cause of the harm. The court also concluded that the absence of a guard was obvious, that Brewer should have known that the compressor lacked a guard, and that, therefore, MABCO was under no duty to warn Brewer or others of the danger involved in allowing one's hands to come into close proximity with the nip point. In addition, the court held that there was no genuine issue of

fact presented with respect to whether the compressor was being used in a reasonably foreseeable manner at the time of the Plaintiff's injury. Finally, although the court did not rule directly on this issue, there was ample documentary evidence indicating that the compressor had been manufactured by MABCO. Accordingly, there was at least an issue of fact presented with respect to the Defendant's identity as the manufacturer of the product. The Plaintiff will prove herein that the evidence before the Trial Division presented genuine issues of material fact on these points and that the court below erred in granting MABCO's motion for summary judgment.

ARGUMENT

I. THE TRIAL DIVISION ERRED IN GRANTING MABCO'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS A GENUINE ISSUE OF FACT PRESENTED REGARDING WHETHER THE PLAINTIFF'S CONDUCT WAS THE SOLE CAUSE OF HIS HARM.

Under New York law, a product manufacturer is liable to a person injured by the product if (1) the product was defective because it was not reasonably safe as marketed, (2) the product was used for a normal purpose, (3) the defect was a substantial factor in causing the plaintiff's injuries, (4) the plaintiff by the exercise of reasonable care would not have both discovered the defect and apprehended its danger, and (5) the plaintiff would not have otherwise avoided the injury by the exercise of ordinary care. *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 423 N.Y.S.2d 95 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 768, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980); *Urena v. Biro Manufacturing Co.*, 114 F.3d 359 (2d Cir. 1997).

A plaintiff may assert that a product is defective because of a mistake in the manufacturing process, because of improper design, or because the manufacturer failed to provide adequate warnings regarding the use of the product. *Voss v. Black & Decker Manufacturing Co.*, 59 N.Y.2d 102, 450 N.E.2d 204, 463 N.Y.S.2d 398 (1983). In order to establish a prima facie case based upon a design defect, a plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing the plaintiff's injury. 463 N.Y.S.2d at 402. The applicable standard in a defective-design case is whether, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner. *Id.*; *Urena*, 114 F.3d at 364.

In order to recover, a products liability plaintiff must show that a defect in the product was a substantial factor in causing the plaintiff's injury. *E.g.*, *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1973). When the issue of the plaintiff's conduct in causing the harm is involved, the substantial factor standard does not preclude a manufacturer's liability unless the plaintiff's conduct is found to be the *sole* cause of the injury. *Schafer v. Standard Railway Fusee Corp.*, 200 A.D.2d 564, 606 N.Y.S.2d 332 (2d Dep't 1994) (jury could find that manufacturer's highway flare was defective, despite injured plaintiff's alleged misuse of flare by lighting it while facing into the wind). Whether a plaintiff's conduct in using a product was the sole cause of the plaintiff's harm is an issue of fact to be decided by the trier of fact. *See Kriz v. Schum*, 75 N.Y.2d 25, 549 N.E.2d 1155 (1989) (plaintiff's conduct in sliding headfirst down pool slide was not unforeseeable, as a matter of law, so as to relieve

seller of liability for plaintiff's injuries); *Denkensohn by Denkensohn v. Davenport*, 144 A.D.2d 58, 536 N.Y.S.2d 587 (3d Dep't 1989) (issue of fact, precluding summary judgment, existed as to whether act of plaintiff in diving from slide into pool was so unforeseeably reckless that it constituted sole proximate cause of the plaintiff's harm; there was evidence that son of pool owner and another guest had previously dived safely from slide and that son was unaware that plaintiff could not see relative depth of water in pool); *Nuttig v. Ford Motor Co.*, 180 A.D.2d 122, 584 N.Y.S.2d 653 (3d Dep't 1992) (issue of fact, precluding summary judgment, was presented as to whether causal connection existed between defect that caused vehicle to stall and automobile accident that resulted when vehicle drifted into path of oncoming car when driver was attempting to cope with stalled engine at highway speed). Likewise, the issue of superseding cause in a products liability case is generally one for the jury. *Parsons v. Honeywell, Inc.*, 929 F.2d 901 (2d Cir. 1991) (applying New York law). Only in rare instances can the issue of superseding cause be decided as a matter of law. *Id.* at 905. The Court of Appeals in *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980), cited by MABCO in support of its motion for summary judgment in the Trial Division, held that the issues of proximate cause and intervening cause are for the finder of fact.

In the case at bar, the evidence before the Trial Division on MABCO's motion for summary judgment presented a question of fact regarding whether Brewer's conduct was the sole proximate cause of his harm. The court below concluded, as a matter of law, that the air compressor was not being used in a foreseeable manner at the time of the Plaintiff's injury. Based upon that conclusion, the court held that the Plaintiff's conduct was the sole

proximate cause of his harm. The Trial Division erred, however, in finding the evidence to be so overwhelming that it would support only one conclusion: that the Plaintiff's actions were the sole proximate cause of the harm. In order to hold a manufacturer liable for harm caused by a defective product, the product, at the time of the injury, must have been used for the purpose and in the manner normally intended *or in a manner reasonably foreseeable*. *Amatulli v. Delhi Construction Corp.*, 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337 (1991). In *Amatulli*, the Court of Appeals held that there was an issue of fact presented as to whether the act of the plaintiff in diving into a four-foot pool that was installed partially underground was so reckless as to have constituted an unforeseeable, superseding event relieving the manufacturer of liability. A manufacturer is liable when it is responsible for a product defect and it could have foreseen the injury. *Robinson v. Reed-Prentice Division of Package Machinery Co.*, 49 N.Y.2d 471, 403 N.E.2d 440 (1980). A manufacturer is obligated to design its products to be reasonably safe for unintended yet reasonably foreseeable uses. 403 N.E.2d at 444. It is not necessary that a manufacturer foresee the precise chain of events preceding the misuse of its product in order to require the manufacturer to guard against the consequences of that misuse. *Del Cid v. Beloit Corp.*, 901 F. Supp. 539 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 1393 (2d Cir. 1996). The evidence before the Trial Division established that Brewer suffered the amputation of his right thumb when he inadvertently placed his hand in the unguarded nip point created by the air compressor's belt and pulley. The fact that the injury occurred when the Plaintiff was assisting his employer in moving the air compressor did not render the occurrence so unforeseeable that the issue of proximate cause became one for the court to decide as a matter of law. MABCO designed

the compressor without a guard to protect persons who might come into contact with the nip point between the belt and the pulley. The injury suffered by Brewer was precisely the type of harm that could have been prevented by designing the product with a guard at the correct location. Brewer or another person coming into contact with the product could just as easily have suffered harm by touching the nip point while the compressor was stationary and running instead of being moved. A substantial factor causing the harm was the absence of a guard and not merely the fact that the compressor was being transported at the time of the injury. In the court below, MABCO attempted to confuse the issue by claiming that the transporting of the compressor when the injury occurred was an unforeseeable act that constituted the sole proximate cause of the harm suffered by Brewer. The claim that MABCO could not, as a matter of law, have foreseen that its air compressors would be transported to locations where they would be used and that such compressors would be handled in the process of transportation defies logic and common sense. In the present case, the transportation of the compressor provided the *occasion* for the Plaintiff's hand to slip into the unguarded nip point just as a person's inadvertently standing too close to a running compressor might also have provided an occasion for such an event. The transportation of the compressor was not, however, the *sole* proximate cause of the injury any more than an employee's inattentive proximity to a running compressor would be the sole cause under other circumstances. Rather, the lack of a guard over the nip point was a substantial factor in causing Brewer's harm. It was MABCO's negligence in failing adequately to guard the nip point that was substantially responsible for that harm. Accordingly, the Trial Division erred in holding that, as a matter of law, the Plaintiff's conduct was the sole proximate cause of his

harm and in granting summary judgment to MABCO. Therefore, the judgment of the Trial Division should be reversed.

II. THE TRIAL DIVISION ERRED IN GRANTING MABCO'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS A GENUINE ISSUE OF FACT PRESENTED REGARDING WHETHER MABCO ISSUED AN ADEQUATE WARNING ABOUT THE DANGERS IN THE AIR COMPRESSOR.

A product manufacturer is under a duty to warn of dangers associated with reasonably foreseeable misuses of its product. *E.g.*, *Trivino v. Jamesway Corp.*, 148 A.D.2d 851, 539 N.Y.S.2d 123 (3d Dep't 1989); *see Urena*, 114 F.3d at 366. A manufacturer is not responsible, however, for failing to warn of product dangers of which the plaintiff is aware at the time of the injury. *Banks v. Makita, U.S.A.,* 226 A.D.2d 659, 641 N.Y.S.2d 875 (2d Dep't 1996). A duty to warn of a product's danger does not arise if the injured party is already aware of the specific hazard or the danger is readily discernible. 641 N.Y.S.2d at 877. In order to establish the causation element of a failure-to-warn claim, the plaintiff must prove that, if adequate warnings had been provided, the product would not have been misused. *Id.*

The adequacy of a warning in a products liability case is usually a question of fact to be determined at trial. *Stone v. Sterling Drug, Inc.*, 111 A.D.2d 1017, 490 N.Y.S.2d 468 (3d Dep't 1985). Similarly, the issue of whether the plaintiff is a sufficiently knowledgeable user of the product so that the manufacturer is relieved of its obligation to warn is a question of fact for the jury. *Bellinger v. Deere & Co.*, 881 F. Supp. 813 (N.D.N.Y. 1995). In addition,

the obviousness of the dangers inherent in a product is an issue of fact that should be decided by the factfinder. *Id.* at 816; *see also Smith v. Minster Machine Co.*, 233 A.D.2d 892, 649 N.Y.S.2d 257 (4th Dep't 1996) (extent of plaintiff's knowledge of product danger and obviousness of danger are issues of fact, precluding summary judgment for manufacturer).

In the case at bar, the Trial Division erred when it held that, as a matter of law, Brewer's handling of the compressor at the time of the injury constituted an unforeseeable misuse of the product such that MABCO was relieved of its duty to warn regarding the dangers posed by the unguarded nip point. As discussed above, except in the most extreme circumstances the issues of the foreseeability of product misuse, the knowledge of the plaintiff regarding product dangers, and the obviousness of such dangers are questions of fact to be decided by the jury in a failure-to-warn case. It cannot be said as a matter of law that MABCO could not have foreseen that its compressors would be transported and would be handled in that process. Because such an occurrence was reasonably foreseeable, it was equally foreseeable that a person's hand might come into contact with an unguarded nip point during transportation of a compressor. If the finder of fact were to determine that the use or misuse to which the compressor was being put at the time of Brewer's harm was objectively foreseeable, then MABCO was under a legal duty to warn against the harm that might result from contact with the nip point. Although, as MABCO contended below, there may have been evidence to suggest that Brewer should have been aware of the danger posed by the unguarded nip point, there was also evidence that Brewer may not have known of that danger and that the danger was not obvious, especially during the transportation of the compressor. In sum, the evidence regarding the Plaintiff's knowledge of the danger, the obviousness of

that danger, and the Defendant's duty to warn was conflicting and did not lend itself to adjudication as a matter of law. *See Trivino*, 539 N.Y.S.2d at 124 (mother's use of cosmetic puffs to make costume for her eight-year-old daughter was not unforeseeable misuse as a mater of law so as to relieve seller of duty to warn of flammable nature of puffs). For these reasons, the court below erred in granting MABCO's motion for summary judgment, and that judgment should be reversed.

III. THERE WAS A GENUINE ISSUE OF FACT PRESENTED REGARDING WHETHER MABCO MANUFACTURED THE PRODUCT THAT CAUSED THE PLAINTIFF'S HARM.

Under the law of New York, the identity of the manufacturer of a defective product may be established by circumstantial evidence. *Healey v. Firestone Tire & Rubber Co.*, 87 N.Y.2d 596, 663 N.E.2d 901, 640 N.Y.S.2d 860 (1996). Circumstantial evidence of the identity of a product manufacturer must establish that it is reasonably probable, and not merely possible or evenly balanced, that the defendant was the source of the offending product. 640 N.Y.S.2d at 862; *see also Ambers v. C.T. Industries, Inc.*, 170 A.D.2d 349, 566 N.Y.S.2d 51 (1st Dep't 1991) (identity of product manufacturer is issue of fact capable of proof by circumstantial evidence). The issue of the identity of a product manufacturer is one of fact, precluding summary judgment. *Raymond v. DiStefano*, 22 A.D.2d 810, 634 N.Y.S.2d 564 (3d Dep't 1995) (fact issue, precluding summary judgment, was presented regarding which of two lumber suppliers for construction project had supplied defective board; evidence showed that both suppliers had delivered quantity of lumber of same size

as subject board, even though it was impossible positively to identify supplier of board that was involved in accident); *Ruble v. Eli Lilly & Co.*, 1991 WL 29895 (S.D.N.Y. 1991) (identity of manufacturer is ordinarily a question to be decided by the trier of fact). When the evidence before the court on a motion for summary judgment creates at least a 50% probability that a particular manufacturer made the product at issue, and the manufacturer fails to demonstrate that it did not make the product, then a factual issue exists and the manufacturer's motion for summary judgment should be denied. *See Treston v. Allegreta*, 181 A.D.2d 470, 581 N.Y.S.2d 289 (1st Dep't 1992).

In the present case, the Trial Division suggested that there was insufficient evidence to allow the trier of fact to decide whether MABCO was the manufacturer of the air compressor involved in this case. As discussed above, the invoice under which Morgan purchased the compressor stated that the compressor was a "McCumber." In addition, the name plate found on the product itself listed McCumber as the manufacturer and gave a specific type and serial number for the product. MABCO's promotional materials showed a compressor strikingly similar to that involved here, and the Defendant's records confirmed that the serial number on the compressor matched the serial numbers of MABCO Type Y compressors that were admittedly manufactured by the Defendant. The Defendant's records also contained a part number indicating that its compressors would have contained a pulley identical to the one actually found on the unit at the time of Brewer's injury. This is not a case in which there was an insufficiency of evidence upon which it could be determined that the Defendant manufactured the product at issue. Rather, any reasonable view of the record shows that there existed substantial evidence linking MABCO to the manufacture of the

product. In light of such evidence, the issue of the identity of the compressor's manufacturer should have been presented to a jury to be decided as an issue of fact.

IV. THE TRIAL DIVISION ERRED IN GRANTING MABCO'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS A GENUINE ISSUE OF FACT PRESENTED REGARDING WHETHER THE PLAINTIFF'S USE OF THE PRODUCT AT THE TIME OF HIS INJURY WAS REASONABLY FORESEEABLE TO MABCO.

The Trial Division also based its award of summary judgment to the Defendant on its conclusion that the air compressor was not being used as intended at the time of the Plaintiff's injury and that, therefore, any default on the part of MABCO was not the proximate cause of Brewer's harm. As discussed above in Section I, a manufacturer may be held liable for harm caused by a defect in its product if the defect was a substantial factor in causing the plaintiff's harm. The conduct of a plaintiff is not sufficient to bar his recovery unless such conduct was the sole proximate cause of the plaintiff's harm. *Schafer*, 606 N.Y.S.2d at 333. The mere fact that the Plaintiff was assisting his employer in moving the air compressor when the injury occurred is insufficient to support a holding that, as a matter of law, the product was not being used in a reasonably foreseeable manner. There are many cases in which a products liability plaintiff has been allowed to recover despite the fact that the product at issue either was not being used at the time of the injury or was being used for other than its intended purpose. For example, in *Beardsley v. Rockwell International Corp.*, 1993 WL 87717 (N.D. Ill. 1993), the United States district court denied the defendant manufacturer's motion for summary judgment based upon an argument that the plaintiff had

been injured during an unforeseeable use of the product. The defendant was the manufacturer of an axle that was incorporated into a Peterbilt truck. At the time of the Plaintiff's injury, the axle was not being used but was being disassembled by the plaintiff. The plaintiff struck the axle with a hammer, causing a splinter to fly off and hit him in the eye. The court rejected the defendant's argument that, as a matter of law, a defect in the axle did not proximately cause the plaintiff's harm. The court held that, under the circumstances, the issue of proximate cause could not be determined as a matter of law because reasonable persons could disagree as to the proximate cause of the plaintiff's harm. According to the court, the evidence suggested that the axle design required the use of a sledgehammer to dislodge the axle from the truck. Therefore, the question of whether the axle's design, as opposed to the plaintiff's "use" of the axle, was a substantial factor in causing the plaintiff's harm presented an issue of fact that could not be resolved on a motion for summary judgment. *See also Lilge v. Russell's Trailer Repair, Inc.*, 565 N.E.2d 1146 (Ind. Ct. App. 1991) (issue of fact was presented regarding cause of plaintiff's fall, precluding summary judgment; plaintiff was injured when standing on rear bumper of truck); *Cousineau v. Ford Motor Co.*, 363 N.W.2d 721 (Mich. Ct. App. 1985) (plaintiff could potentially recover against manufacturer of wheel that exploded while plaintiff's decedent was repairing wheel); *Reibold v. Simon Aerials, Inc.*, 839 F. Supp. 193 (E.D. Va. 1994) (evidence presented issue of material fact, precluding summary judgment, regarding whether manufacturer could rely on employer as knowledgeable user to warn employees about dangers of cooling fan in engine of aerial lift machine; plaintiff was injured when his hand came into contact with unguarded fan during attempt to repair aerial lift).

The issues of whether a plaintiff's conduct is foreseeable and of proximate cause are generally for the jury. *Peevey v. Burgess*, 192 A.D.2d 1115, 596 N.Y.S.2d 250 (4th Dep't 1993). It is an issue of fact as to whether the plaintiff's misuse of a product was foreseeable. *Johnson v. Johnson Chemical Co.*, 183 A.D.2d 64, 588 N.Y.S.2d 607 (2d Dep't 1992); *Darsan v. Guncalito Corp.*, 153 A.D.2d 868, 545 N.Y.S.2d 594 (2d Dep't 1989) (issue of fact, precluding summary judgment, was presented with respect to whether manufacturer of meat grinder could reasonably have foreseen misuse of grinder); *cf. Hesser v. LaPorte*, 171 A.D.2d 999, 567 N.Y.S.2d 944 (3d Dep't 1991) (questions of foreseeability are matters of law only when a single inference can be drawn from the evidence).

In the case at bar, the Trial Division erred in deciding as a matter of law the issue of whether the air compressor was being used in a reasonably foreseeable manner when Brewer suffered his injury. The court's implicit conclusion that MABCO could not, under any circumstances, have foreseen that its air compressors would be transported to locations where they would be used and that such compressors would be handled in the process of transportation flies in the face of common sense. Certainly MABCO was aware that its products would be transported to and installed at the sites of their intended use. While MABCO might be able to convince the trier of fact that such a use of its air compressors was not objectively foreseeable, this issue presents a question of fact that a jury should have been allowed to decide. Ultimately, the issue of proximate cause resolves itself into one of reasonableness. Under the evidence, reasonable minds could differ as to whether the use or misuse of the product at the time of Brewer's accident was objectively foreseeable. The transportation of the air compressor provided an occasion for the Plaintiff's hand to come into

contact with the unguarded nip point on the compressor. Such an occasion could have been provided by other circumstances as well. Whether the occurrence of the Plaintiff's injury during the moving of the air compressor was such an unlikely event that the Defendant could not have foreseen that a person might be injured by touching the unguarded nip point is an issue of fact that should not have been decided on a motion for summary judgment.

CONCLUSION

For all the foregoing reasons, the Plaintiffs-Appellants, Hardie Brewer and Bertha Brewer, respectfully request that this Honorable Court reverse the judgment of the court below and remand this case for further proceedings.

Respectfully submitted,

Hardie Brewer
Bertha Brewer

By:_____

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