IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
BLITZ U.S.A., Inc., *et al.*,[1]	Case No. 11-13603 (PJW)
Debtors.	Jointly Administered
	Related to Docket No. 2007 **Hearing Date: January 28, 2014 at 9:30 a.m. (ET)**

DECLARATION OF STEVE SNYDER IN SUPPORT OF CONFIRMATION OF DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITOR'S FIRST AMENDED JOINT PLAN OF LIQUIDATION

Steve Snyder, pursuant to 28 U.S.C. § 1746(2), under penalty of perjury, hereby declares as follows:

1. I am a Vice President with ACE North America, Excess & Specialty Claims. I have principal day-to-day responsibility for the Blitz account, as it involves claims made against Blitz USA, Inc. and it subsidiaries and affiliates. I submit this declaration in support of confirmation of the *Debtors' and Official Committee of Unsecured Creditors' First Amended Plan of Liquidation* (the "Joint Plan") [Dkt. No. 2007]. The Joint Plan incorporates the Insurance Settlement[2] approved by the Court by its order of December 20, 2013 [Dkt. No. 2011].

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: LAM 2011 Holdings (8742); Blitz Acquisition Holdings, Inc. (8825); Blitz Acquisition, LLC (8979); Blitz RE Holdings, LLC (9071); Blitz U.S.A., Inc. (8104); and MiamiOK LLC (2604). The location of the Debtors' corporate headquarters and the Debtors' service address is 309 North Main Street, Miami, OK 74354.

[2] Capitalized terms not defined herein have the meanings given to them in the Joint Plan.

Negotiation of Settlement and the
Terms of the Insurance Settlement

2. I was involved and participated in the settlement negotiations, by and between the Debtors, the Committee, the Participating Insurers, the Participating Blitz Personal Injury Claimants, and Wal-Mart. I also oversaw and reviewed the exchange of drafts of the Insurance Settlement Term Sheet among Westchester's counsel and the other parties. Representatives from and counsel for the Debtors, the Committee, the Participating Insurers, the Participating Blitz Personal Injury Claimants, and Wal-Mart participated in these discussions. And counsel and/or representatives for Kinderhook, Crestwood, and the officers, who are parties or signatories to the Insurance Settlement, participated in the later stages of Insurance Settlement discussions.

3. The Insurance Settlement resolved significant and longstanding disputes between the parties, most notably the valuation of the personal injury claims against Blitz. Initially in August 2012, Judge Kevin Gross was appointed by the court as mediator. After four mediation sessions in Delaware over the course of a few months, the mediation transitioned to New York when the Participating Blitz Personal Injury Claimants and later the Committee agreed to use the Hon. Richard Cohen (Ret.) as a mediator to pursue focused settlement discussions with the Debtors, the Participating Insurers, and Wal-Mart. Judge Cohen has significant mediation experience, having mediated large-scale mass tort cases, including multi-party construction defect and products liability cases with coverage issues. A copy of Judge Cohen's resume is attached as Exhibit A.

4. Judge Cohen held four all-day mediation meetings in New York between February and May 2013, to discuss settlement. The mediations took place on February 5, February 15, March 8, and May 17, 2013. Before and after the all-day mediation sessions, Judge Cohen spoke and corresponded with the Debtors, the Committee, the Participating Insurers, the

Participating Blitz Personal Injury Claimants, and Wal-Mart as they each worked towards a settlement.

5. Lawyers representing the members of the Committee attended and participated in the all-day mediation sessions. These lawyers included: Ken McClain, Humphrey, Farrington & McClain, P.C.; Diane M. Breneman, Breneman Dungan, LLC; Hank Anderson, Anderson Law Firm; and Dan Haltiwanger, Richardson, Patrick, Westbrook & Brickman. As is evident from the schedule that identifies the counsel for each claimant that is attached to the Settlement Term Sheet, the Participating Blitz Personal Injury Claimants constitute a supermajority of the Blitz personal injury claimants, and their claims are diverse as to type and value.

6. The Insurance Settlement Term Sheet was also vetted by Dan DeFranceschi and Marcos Ramos of Richards, Layton & Finger, who represent the USA Debtors. After the Court issued an order approving his retention,[3] Sean Beach of Young, Conaway, Stargatt & Taylor LLP reviewed the Insurance Settlement and the terms of the Joint Plan for the BAH Debtors.

7. I attended the mediation sessions in New York and participated in calls with the mediator. Multiple offers and demands were made over the course of the mediation process that were rejected until a compromise was finally reached.

8. The motion and order appointing a mediator were a matter of public record. No one filed an objection to the order appointing a mediator or the settlement process set out in the order. In multiple public filings thereafter, the fact of the mediation and its ongoing status were reported to the Court and made available to all interested parties. *See* Appendix A, attached hereto. The progress of the mediation was also reported in pleadings and at hearings where certain Blitz Personal Injury Claimants sought to lift the stay. *Id.*

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[3] *See* May 29, 2013 Order Authorizing Retention and Employment of Young Conaway [Dkt. No. 1473].

9. Based on my personal involvement in the Insurance Settlement, I attest that the terms of the Insurance Settlement Term Sheet and the Joint Plan that incorporates them are the product of extensive and comprehensive arm's-length negotiations, and they reflect true compromise on the issues by all of the parties thereto. There was no fraud, collusion, or unfair advantage in the negotiations of the Insurance Settlement. At all times relevant to the negotiations, the parties were represented by counsel of their own choosing, and the Debtors, the Committee, the Participating Blitz Personal Injury Claimants, and the Participating Insurers (including Westchester) negotiated the Insurance Settlement at arm's length and in good faith. The Insurance Settlement and the Joint Plan are the product of over a year of close negotiations and a mediation that was overseen first by Judge Gross and later by Judge Cohen.

10. Westchester is paying substantial consideration to the Blitz Personal Injury Trust in exchange for protections afforded to it by the Insurance Settlement.

11. Pursuant to, and subject to the terms and conditions of the Insurance Settlement Term Sheet and Joint Plan, Westchester has contracted to receive, among other things: (a) a channeling injunction; (b) the benefit of the releases to be delivered under the Joint Plan; (c) the benefit of the releases contained in the Insurance Settlement Term Sheet; and (d) the injunctive protection under Section 105(a) to effectuate the sale and buyback of the rights and interests in the Participating Insurer Policies, free and clear of all claims, liens, encumbrances and interests, pursuant to Section 363(f).

12. As a condition of the Insurance Settlement, Westchester will pay its share of the Insurance Settlement Amount but only if it can have certainty that Westchester will be released fully from, and have injunctive protection against, all claims, that may be based on, or derive from, the Participating Insurer Policies, as set forth in the Insurance Settlement Term Sheet.

Inherent in the Insurance Settlement is the assurance that the party settling will not have to pay twice on account of the same claim.

The Blitz Personal Injury Trust Claims

13. At the time that Blitz filed for bankruptcy, a known set of Blitz Personal Injury Claimants had filed lawsuits against Blitz. Some had also named distributors of Blitz's products, including Wal-Mart, or shareholders and officers of the Debtors as co-defendants in these lawsuits. *See Declaration of Rocky Flick in Support of the Second Omnibus Objection of the Debtors and Debtors in Possession to Motions of Personal Injury Claimants for Relief from Automatic Stay Pursuant to Section 362(d) of the Bankruptcy Code* [Dkt. No. 1218], at ¶ 3.

14. In general, these lawsuits seek money judgments for Blitz Personal Injury Trust Claims based on alleged design and manufacturing defects related to the personal consumer gasoline containers produced by Blitz and failure to warn in connection with fires or explosions that allegedly occurred when personal consumer gasoline containers manufactured by Blitz were used or stored in the vicinity of flames or other combustion sources. *Id.* at ¶ 4. Claimants have tried to give the impression that their ability to prevail in their tort cases and collect under the Participating Insurer Policies is a foregone conclusion. That, however, is not true.

15. Many of the Blitz Personal Injury Trust Claims arise from incidents where the pleading, testimony, and/or documents produced by the claimants show that the claimants poured gasoline directly onto open flames or other combustion sources. At the hearing on the Insurance Policy Buy-Back in December, which I attended, the Court admitted into evidence the expert report of Andrew Evans and Charles Mullin,[4] which presents the results of their analysis of the

[4] *See* Dec. 18, 2013 Hearing Tr. 60:2-8., Dkt. No. 2012, ("MR. DEMMY: Your Honor, John Demmy for Liberty again. I apologize. I referenced the Bates White report, which is Exhibit 89, but I neglected to formally move it into evidence, and I'd like to do that at this point. THE COURT: Okay, it's admitted.") attached hereto as Exhibit B.

Blitz Personal Injury Trust Claims. *See* Bates White Report Regarding the Participating Insurer Settlement, Oct. 30, 2013, Andrew R. Evans & Charles H. Mullin, Ex. 1. A true and correct copy of the Bates White expert report that was admitted into evidence.

16. Messrs. Evans and Mullin reported that 91.9% of Blitz Personal Injury Trust Claims arise from incidents where claimants poured gasoline directly onto open flames or other combustion sources or a spill that resulted in an explosion. *Id.* at 13 ("Only six of those [85] injured parties relate to events where the allegation involved the gas container spontaneously igniting as a result of a vapor trail, absent someone actively pouring gasoline on [a] heated element or a spill."). And it is possible with respect to these six claims that discovery would reveal that they also involved someone pouring gasoline onto an ignition source or a spill. The finding by the Bates White experts that virtually all of the Blitz Personal Injury Trust Claims arise from incidents where claimants poured gasoline onto open flames or other combustion sources is consistent with my analysis of the claims that I reviewed that fall in the periods during which Westchester is alleged to have issued coverage.

17. The fact that all or virtually all of the Blitz Personal Injury Trust Claims arise from incidents where gasoline was poured onto open flames or other combustion sources calls into question the contention that the bodily injuries for which damages are sought were caused by a design or manufacturing defect. The manner in which the claims arise also means that the claims are subject to various defenses to liability, including contributory negligence.

18. Blitz adamantly denied that its products are defective. A true and correct copy of "The Last Week: How Lawsuits Doomed an American Icon" is available at the URL http://www.youtube.com/watch?v=2wZD6_wwVFE. And Blitz and Wal-Mart defended vigorously against liability in the personal injury litigations to date. *See* Plaintiff's Offer of

Judgment, *Tillman v. Blitz U.S.A. Inc.*, No. 2011-C9-04-01200 (S.C. Ct. of Common Pleas, Anderson Cnty. Aug. 22, 2011), attached as Exhibit C hereto (Blitz rejecting offer of judgment of $150,000).

19. Blitz obtained a defense verdict in the *Green* case. Final Judgment, *Green v. Blitz U.S.A., Inc.*, No. 2:07-CV-372, ECF No. 191 (E.D. Tex. Nov. 10 2008). A true and correct copy of the *Green* judgment is attached as Exhibit D. Moreover, judges felt strongly enough about the defenses to liability to have awarded Blitz, and another gasoline container manufacture facing similar claims, summary judgment without a trial. *See Walker v. Blitz United States, Inc.*, 663 F. Supp. 2d 1344, 1366 (N.D. Ga. 2009) ("Plaintiff started a fire inside of the mobile home, and there is no evidence in the record to show that a gasoline container explosion, rather than this initial fire, was the cause of the tragedy");[5] *Puckett v. The Plastics Group, Inc.*, No. 1:11-cv-1120 (N.D. Ga. Jan 17, 2013) ("The question this case presents is whether he can shift to Plastics, the gas can manufacturer, the responsibility for the tragic consequences resulting from his own decision to splash gasoline on a fire. The Court finds that as a matter of Georgia law he cannot.").[6]

20. The strength of Blitz's defense to any claim that its product was defective has also been the subject of reporting by national news publications. *See* Clifford Krauss, *A Factory's Closing Focuses Attention on Tort Reform*, N.Y. Times, Oct. 4, 2012, attached as Exhibit G hereto; Editorial, *The Tort Bar Burns On: A Case Study In Modern Robbery: Targeting the Red Plastic Gas Can*, Wall. St. J., July 22, 2012, attached as Exhibit H hereto (suggesting that the claims are the result of "simple misuse of the product.").

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[5] A true and correct copy of the *Walker* decision is attached hereto as Exhibit E.

[6] A true and correct copy of the *Puckett* decision is attached hereto as Exhibit F.

The Alleged Westchester Policies

21. Up through July 2012, Blitz purchased varying amounts of primary, umbrella, and excess general liability insurance policies (each a "Policy" and together the "Policies"). The coverage potentially available under each Policy depends upon a number of factors, including, without limitation, satisfaction of conditions to coverage as set forth in or incorporated by each Policy, the number and amount of paid claims alleging injury in each Policy period; the dates of the claimants' injuries; the satisfaction of any applicable deductibles or self-insured retentions ("SIRs"); whether a particular Policy's coverage is primary, umbrella or excess; and, whether any underlying coverage has been exhausted by the payment of claims.

22. The Westchester policies under which Blitz claimed coverage were set forth in Exhibit 2 to the Insurance Settlement Term Sheet. The policy number and alleged period for each of the five Westchester policies is as follows:

Policy Number	Name of Alleged Insurer	Alleged Policy Period
CUW788371001	Westchester Fire Insurance Co.	07/31/05-07/31/06
G22053504001	Westchester Surplus Lines Ins. Co.	07/31/06-07/31/07
G22053504002	Westchester Surplus Lines Ins. Co.	07/31/07-07/31/08
G22053504003	Westchester Surplus Lines Ins. Co.	07/31/08-07/31/09
G22053504004	Westchester Surplus Lines Ins. Co.	07/31/09-07/31/10

23. As indicated in the chart above, four of the five Westchester policies that Blitz contended covered its liabilities were allegedly issued by Westchester Surplus Lines Insurance Company. The remaining excess policy is alleged to have been issued by Westchester Fire Insurance Company. Westchester's coverage in each policy year is excess to all underlying insurance and the SIRs for which the insured agreed to assume responsibility.

Westchester's Coverage

24. Even if a claimant was successful in securing a judgment against Blitz, he or she would face hurdles in obtaining any coverage from Westchester, because Westchester's policies sit above various SIRs for which Blitz agreed to assume responsibility.

25. Four of the Westchester policies, allegedly in effect from July 31, 2006, through July 31, 2010, are excess to primary policies that sit above $1 million per occurrence, un-aggregated SIRs. In disputing coverage, Westchester could argue that even if the primary policies sitting below the alleged Westchester policies had been exhausted, the $1 million SIRs would remain in effect.

26. The three Westchester policies allegedly in effect from July 31, 2007, through July 31, 2010, have other insurance provisions providing that "[w]hen this insurance is excess over other insurance, we will pay only our share of the 'ultimate net loss' that exceeds the sum of . . . [t]he total of all deductible and self-insured amounts under all that other insurance." Because the $1 million SIR is a self-insured amount under the primary policy, the language of the "other insurance" provisions in these policies specifically provides that Westchester is only liable for amounts in excess of the $1 million SIR amount.[7]

27. The Westchester policy allegedly issued for the July 31, 2009, through July 31, 2010 policy period has a $500,000 maintenance SIR, which Westchester could contend applies in *addition* to the $1 million SIR sitting beneath the primary policy. Therefore, for the claims

[7] The "other insurance" provision in the Westchester policy allegedly in effect from July 31, 2006, through July 31, 2007, provides that "[i]f there is any other collectible insurance available to the 'Insured' (whether such insurance is stated to be primary, contributing, excess or contingent) that covers a loss that is also covered by this policy, the insurance provided by this policy will apply in excess of, and shall not contribute with, such insurance." In a coverage dispute, Westchester would argue that the $1 million SIR beneath the primary coverage qualifies as "other insurance," and that Westchester is only liable for the excess of the amount of the "other insurance," in this case the $1 million SIR.

falling within the 2009-2010 policy period, it would take an even more catastrophic claim to reach the Westchester policy.

28. In addition, courts have held that where an insured cannot satisfy its SIR (even when it is because of its bankruptcy), the insurer is not liable to pay defense or indemnity costs until the insured pays the SIR limit. *Pak-Mor Mnfg. Co. v. Royal Surplus Lines Ins. Co.*, No. SA-05-CA-135-RF, 2005 U.S. Dist. LEXIS 34683, at *11 (W.D. Tex. Nov. 3, 2005). In *Pak-Mor*, the district court reasoned that the unambiguous language of the SIR makes the insurer's obligations under the policy conditional on the insured satisfying the SIR, regardless of whether the insured is bankrupt or insolvent. *Id.* at *13-14. The court construed the SIR solely by the language in the policy. Because the SIR stated that the insurer had no obligation to pay any defense or indemnity costs until the SIR had been satisfied, the court gave effect to that provision.

29. Here, the $1 million SIRs beneath Westchester's policies provide that the "[the insured] shall pay the Self-Insured Retention before [the insurer] has any obligation to pay loss or damages or participate in any investigation or defense." The SIR also states that "[the insured's bankruptcy, insolvency, or inability to pay the Retention Amount shall not increase [the insurer's] obligation under this policy." These policy provisions are nearly identical to those considered by the *Pak-Mor* court. Based on the *Pak-Mor* holding, Westchester could contend in any coverage dispute that it has no obligation to pay defense or indemnity costs on behalf of the insured until the SIR is satisfied.

30. As a result, the Westchester policies would have been among the last to respond to any claims because the size of an individual claim is a driving factor as to whether Westchester would have any defense or indemnity obligations under its alleged policies.

Further, the Westchester policies would only have been impaired by proof of truly massive individual claims (well in excess of $1 million) given the levels at which the alleged Westchester policies incept.[8] Finally, there is an argument that Westchester would have no obligation whatsoever under its policies if Blitz was unable to satisfy the SIRs underlying the Westchester policies.

31. At his deposition, Kenneth McClain, one of the attorneys representing Committee members, explained various difficulties in obtaining coverage from the Participating Insurers, noting that "there [were] problems regarding how much [coverage] was actually available":

- There was a major problem with the SIRs . . . . Because the self-insured retentions had not been paid as far as we could tell many of [the policy periods], if any, there was defense to any coverage during those years that it had not yet been triggered. That was problem number one. Particularly in Texas, ***there was a terrible decision which held that unless the insurer itself pays the self-insured retention, you can't collect anything.*** So that was a major issue that we were confronting. Deposition of Ken McClain, October 25, 2013, attached as Exhibit E to Texas Claimants' Objectors' Aff. 78:1-12.

- $65 million of the coverage between '08 and '09 was in jeopardy because of the unauthorized buy-back that occurred during those years to Nautilus and Liberty. *Id.* 134:13-17.

- [T]here were policy defenses that were available -- to the insurers of noncooperation by Wal-Mart and also a defense of willful acts towards Wal-Mart in those years, which would have to be defended, further eroding the coverage. *Id.* 134:21-135:3.

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[8] Westchester does not agree with all of the conclusions reached by Jill Berkeley, the coverage expert retained by the Texas Claimants. Nonetheless, her expert report supports the general conclusion that Westchester's policies are not impaired absent very large individual claims. Expert Report of Jill B. Berkeley ¶ 3 ("In my opinion, there are fewer impediments to coverage under the Subject Policies in effect from July 31, 2010 through July 31, 2012 than under the Subject Policies in effect prior to July 31, 2010 due to the self-insured retention ("SIR") provisions in the primary pre-July 31, 2010 Subject Policies."); ¶ 14 (noting that coverage would be "subject to a $500,000 per occurrence "maintenance" SIR under the 2009-2010 Westchester Surplus insurance policy [sic], and this SIR is not subject to an aggregate limit.").

- In addition, we had the problem of the fronting policies in 2011 and 2012, which were alleged not to be really insurance and, therefore, the excess policies sold above them could never be triggered. *Id.* 135:4-9.

I agree with Mr. McClain that these and other defenses could have presented substantial barriers to the claimants obtaining coverage from the Participating Insurers.

32. In Westchester's case, Blitz and/or the Blitz Personal Injury Trust would also have had to go through extra hurdles to implicate the bulk of Westchester's coverage given its placement early in the coverage chart. And, of course, all of this assumes that claimants would have prevailed in the underlying tort litigation which was in doubt.

Integration of the Insurance Settlement,
Insurance Policy Buy-Back, and Joint Plan

33. The Joint Plan provides for the establishment of a Blitz Personal Injury Trust to be funded with $161,320,000 in proceeds from the sale of the Participating Insurer Policies by the Debtors to the Participating Insurers, contributions from Wal-Mart, and an assignment of the insurance policies of the Non-Participating Insurers. The Joint Plan provides that all Blitz Personal Injury Trust Claims against the Debtors, Wal-Mart, and other retailers and distributors, as well as the Debtors' insurers, will be channeled to a Blitz Personal Injury Trust for review, resolution, and payment in accordance with trust distribution procedures to be implemented upon consummation of the Joint Plan. In addition, the Debtors and third parties, including Participating Insurers, will receive releases from the holders of Blitz Personal Injury Trust Claims. The Blitz Personal Injury Trust distribution procedures provide for distribution of the assets held by the Blitz Personal Injury Trust to claimants asserting Blitz Personal Injury Trust Claims.

34. Under the Insurance Settlement, the Participating Insurers and Wal-Mart will collectively pay the Insurance Settlement Amount (i) within the specified time period after the

Confirmation Order has become final and non-appealable and (ii) when the conditions to effectiveness of the Joint Plan have been satisfied (or are satisfied concurrently with the payment, as the case may be). Subject to those same conditions being met in accordance with the Insurance Settlement Term Sheet, Wal-Mart will waive its pre-petition claims and release the additional $1.54 million.

35. Effective upon a Participating Insurer's payment of its share of the Insurance Settlement Amount to the Blitz Personal Injury Trust, and upon the Effective Date of the Debtors' confirmed Joint Plan, each Participating Insurer will purchase its Participating Insurer Policies back from the Debtors free and clear of all claims, liens, interests, and encumbrances. At that time, the Debtors and any additional named insureds on the Participating Insurer Policies, on the one hand, and each of the Participating Insurers, on the other hand, will be mutually released from Blitz Personal Injury Trust Claims and any other claims that have been or may be asserted under the Participating Insurer Policies, except for any claims based on the obligations arising under the Insurance Settlement. In general, such mutual releases include the released parties' respective past, present and future officers, directors, stockholders, principals, partners, subsidiaries, predecessors, successors, attorneys, agents and assigns, in their capacity as such.

36. In general, the carriers for the pre-2007 Policy Years chose not to participate in the settlement negotiations. Prior to 2007, there was only a relative handful of claims and they are distributed so that there is only one claim or less per year. The bulk of claims fall within the period of 2007 to 2012. All of the insurers with coverage in the 2007 to 2012 period are participating in the Insurance Settlement. None of the insurers that issued coverage prior to 2005 are participating in the Insurance Settlement. Thus, none of the pre-2005 insurance policies are subject to the Insurance Policy Buy-Back.

37. Westchester is the only insurer that issued policies during the 2007 and 2012 period that is also alleged to have issued policies before 2007. Westchester Fire Insurance Company is alleged to have issued Policy No. CUW788371001 for the period July 31, 2005, through July 31, 2006. Westchester Surplus Lines Insurance Company is alleged to have issued Policy No. G22053504001 for the period July 31, 2006, through July 31, 2007. Under the terms of the Insurance Settlement Term Sheet and Joint Plan, these two pre-2007 policies are subject to the Insurance Policy Buy-Back except that they carve out two claims (*Calder and Bosse*) that fall in their relevant policy periods. *See* Insurance Settlement Term Sheet ¶ 28. Upon the settlement or adjudication with finality of each of these claims, Westchester is to receive for each of its pre-2007 policies the remainder of the injunctive, release and other protections that are afforded to the other Subject Policies. *Id.*

38. The *Calder* claim is one of the two Blitz Personal Injury Claims that falls between 2005 and 2007. The *Calder* claim, unlike all other Blitz Personal Injury Claims, was tried to judgment with a jury making an award against Blitz. Blitz appealed that judgment and, as a condition to the appeal, Blitz and its carriers posted bonds fully securing the jury verdict. Thus, *Calder*, unlike all the other claims, is fully secured. Mr. Calder agrees to reduce his fully secured jury verdict in exchange for Blitz dismissing its appeal and satisfying certain other conditions. *See* Insurance Settlement Term Sheet ¶ 29. Upon satisfaction of these conditions, *Calder* has agreed to drop his claim against Blitz and any claim to any portion of the Insurance Policy Buy-Back proceeds. *Id.*

39. The claim of Christopher Bosse is the other of the two Blitz Personal Injury Trust Claims that fall between 2005 and 2007. It was the only claim that incepts in its policy year. By agreeing to resolve this claim through settlement or final adjudication, Westchester is providing

consideration in addition to the Settlement Amount. Pursuant to paragraphs 28 and 29 of the Insurance Settlement Term Sheet, it is also offering funding corresponding to a major portion of the bond it posed for appeal as part of the consensual resolution of the *Calder* claim. *Id.*

40. If the *Calder* and *Bosse* claims are not settled (and it is contemplated, pursuant to paragraph 28 and 29 of the Insurance Settlement Term Sheet, that *Calder* will be settled), all rights that the Debtors and/or that the plaintiffs in the *Calder* or *Bosse* cases have or may have to pursue coverage for the *Calder* and *Bosse* claims shall be fully preserved and assigned to the Blitz Personal Injury Trust and all defenses, if any, that Westchester Fire Insurance Company or Westchester Surplus Lines Insurance Company, as the case may be, may have with respect to these claims shall also be fully preserved. *See* Insurance Settlement Term Sheet ¶ 28. Upon the resolution of the *Calder* and *Bosse* claims with finality either by compromise or adjudication, Westchester Fire Insurance Company or Westchester Surplus Lines Insurance Company, as the case may be, shall receive the remainder of the release and protections for Policies bearing Nos. CUW788371001 and G22053504001 that are afforded to the other Participating Insurer Policies. *Id.*

41. Westchester negotiated to have Policies Nos. CUW788371001 and G22053504001 become entitled to the same full protections afforded to the policies of the other Participating Insurers once the *Calder* and *Bosse* claims are fully resolved. The additional funding provided to resolve *Bosse* and *Calder* benefit the other Blitz Personal Injury Trust Claimants, as neither *Bosse* nor *Calder* will draw from the Insurance Settlement Amount.

42. It was my observation from participating in the settlement negotiations that the Debtors and the Committee had the benefit of advice from experienced and competent counsel, and worked vigorously to represent the interests of their constituents. The Debtors and

Committee also were incentivized to reach a settlement that was beneficial to the interests of the estate.

43. The process employed by the parties that negotiated the settlement has been disclosed. Claimants deposed the representatives of the Committee and the Debtors about the terms of the Insurance Settlement[9] and were permitted to question one of the mediators, Hon. Richard Cohen (Ret.) at a meeting organized by the Committee. In addition, before agreeing to withdraw their objections, claimants had the opportunity to question the Committee's representative at length about the Committee's analysis of the insurers' contributions towards the Settlement Amount.[10]

The Consideration Provided By Westchester Warrants Its Receipt of the Benefits of the Channeling Injunction and Releases

44. The Joint Plan provides significant funding from the Participating Insurers and Wal-Mart for the Blitz Personal Injury Trust to compensate Blitz Personal Injury Trust Claimants under the Joint Plan, avoids protracted litigation between and among, the Debtors, the Participating Insurers, Wal-Mart, and Blitz Personal Injury Claimants that inevitably would delay payments to them—likely for several years—and resolves the uncertainty about potential liabilities and recoveries of interested parties arising from the Participating Insurer Policies.

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9 *See generally* Depositions of Ken McClain and Diane Breneman, October 26, 2013, attached as Exhibits E and F to Texas Claimants' Objectors' Aff. and Deposition of Rocky Flick, attached as Exhibit G to Objectors' Aff., Dkt. No. 1915.

10 *See* Deposition of Ken McClain, October 25, 2013, attached as Exhibit E to Texas Claimants' Objectors' Aff. 99:13-20 ("Q.[D]id the unsecured creditors committee at the time that it approved the term sheet know the precise dollar contributions by each one of the participating insurers? A. I don't know what you mean by 'precise.' I know in general what they were, yes."). Later, when asked to explain what the carriers were contributing, the Committee's representative answered "Any way that you look at this, we got ten million dollars of the primary policy, all of it; we got 71 of the lead umbrella -- that's $81 million -- plus we got $80 million from the first layers of excess out of 90. Anything else is at such a high level of excess you're never going to reach it in our lifetime. And those are the people that didn't participate in the settlement. We got all the settlement money." *Id.* at 137:12-22.

45. Under the terms of the Insurance Settlement, the Settlement Amount to be paid by Westchester will be paid within thirty (30) days after entry of a Confirmation Order (i) which has become non-appealable, or (ii) if any appeals from the Confirmation Order have been filed, either (x) such appeals have been fully and finally concluded consistent with the material terms of this Insurance Settlement, or (y) the Participating Insurers and Wal-Mart, each in their sole discretion, agree to waive final resolution of such appeal(s) as a condition to the Payment Date. *See* Insurance Settlement Term Sheet at 3.

46. The claim process effectuated through the Blitz Personal Injury Trust fosters the interests of efficiency in avoiding long, disjointed litigation in state and federal courts for Blitz Personal Injury Trust Claimants. The Insurance Settlement embodied by the Joint Plan will allow for a streamlined and vetted process to identify, substantiate and pay-out Blitz Personal Injury Trust Claims. In addition to conserving a significant amount of resources, which would otherwise be dissipated in litigating Blitz Personal Injury Trust Claims, confirmation of the Joint Plan will also minimize the risk associated with litigating Blitz Personal Injury Trust Claims on a one-off basis potentially producing significant uncertainty among tort recoveries, and instead injecting uniformity and predictability for Blitz Personal Injury Claimants.

47. Coverage litigation against the Participating Insurers would involve complex choice of law and insurance law issues concerning the interpretation and application of the terms, conditions, limitations, and exclusions of the Participating Insurer Policies—as to all of which there is substantial dispute. Protracted coverage litigation would also require the Debtors and/or the Committee to incur the costs and expenses associated with that litigation, including substantial fees and expenses of counsel, expert witnesses and other professionals.

48. In assessing the reasonableness of the Insurance Settlement and the benefits granted to Westchester under the Joint Plan, I ask the Court to take into consideration the complexity of the coverage litigation involved if the case had not been settled, and the expense, inconvenience, and delay necessarily attending it. I also ask the Court to take into consideration the fact that Westchester had available to it the various claims identified in its proof of claim had the parties not entered into the Insurance Settlement Term Sheet. Thus, if Westchester did not settle, it would have litigated not just the issues discussed above but also issues unique to Westchester's claims. The issues unique to Westchester would have lengthened the time needed to resolve coverage disputes and would have required additional expert and fact witnesses. Westchester would have vigorously litigated these issues if it did not settle.

49. Even if the Debtors were to prevail on coverage issues with respect to the Participating Insurer Policies—and even if judgments in the Debtors' favor survived all appeals—fact-intensive issues would remain (such as the exhaustion of any underlying primary coverage) which would have to be resolved before coverage could be determined for, and payments made on account of Blitz Personal Injury Trust Claims under the Participating Insurer Policies.

50. Resolution of the parties' disputes under the Participating Insurer Policies and confirmation of the Joint Plan will avoid complex and lengthy coverage litigation with an uncertain outcome—and therefore will facilitate earlier and more certain payments to claimants. Moreover, by providing needed funding for the Blitz Personal Injury Trust to be established under the Debtors' Chapter 11 Plan for the benefit of Blitz Personal Injury Trust Claims, confirmation of the Joint Plan presents an opportunity to achieve a successful liquidation. When measured against a possible uncertain recovery after trial and possible appeals in the individual

tort actions and separate coverage litigation, the Insurance Settlement embodied in the Joint Plan is fair and reasonable, falling well above "the lowest point in the range of reasonableness."

The Third-Party Releases and Injunctions are Warranted

51. The release and injunction provisions for vendors, officers, directors, and shareholders were negotiated at arm's length by the Participating Insurers with the Committee and Debtors, and the contribution being made by the Participating Insurers is substantial and provides fair value in exchange for the protections afforded the Participating Insurers.

a. There is an identity of interest between the Debtors and the non-debtor third-parties.

52. It is possible that vendors, officers, directors, and shareholders could assert claims against the Participating Insurers or someone attempting to qualify as an "insured" under the Participating Insurer Policies.[11] Westchester would not have agreed to participate in the Insurance Settlement if the finality and certainty that flows from inclusion of such parties in a comprehensive third-party release could not be obtained.

b. A substantial contribution is being made on behalf of each non-debtor to the reorganization.

53. The Participating Insurers' contribution to the Personal Injury Plan Trust is being made not only on their behalf, but also on behalf of all named insureds, insureds, and additional insureds under Participating Insurer Policies.

54. At the December 18, 2013 hearing on the motion to approve the Insurance Settlement, the Court admitted into evidence the Participating Insurers' econometric and claim

[11] I understand that others have also asserted that inclusion of the officers, directors and shareholders was also necessary because it is possible that officers, directors, and shareholders of the Debtors could have direct or indirect indemnification rights against Debtors in connection with, among other things, fees and expenses, and alleged liability in connection with personal injury suits against Blitz. Any such indemnification claims would deplete the limited assets of the Debtors.

valuation experts' report.[12] In this report, Messrs. Mullin and Evans attested to the fact that the consideration being contributed collectively by the Participating Insurers and Wal-Mart is more than the anticipated tort system value of all Blitz Personal Injury Trust Claims, without regard to Blitz's share of the liability therefor.

55. Accordingly, whether such claims are asserted against Blitz, a vendor, an officer, a director, a shareholder, or a co-defendant, the funds that will become available to the Blitz Personal Injury Trust pursuant to the Insurance Settlement and confirmation of the Joint Plan are sufficient, and thus substantial, contributions justifying the releases to the Participating Insurers and to all named insureds, insureds, and additional insureds under the Participating Insurer Policies.

c. The essential nature of the injunction in favor of the third parties.

56. The Insurance Settlement, and the feasibility of the Joint Plan, is contingent upon all of the named insureds, insureds, and additional insureds under the Participating Insurer Policies receiving the comprehensive benefit of the Channeling Injunction and Release.

57. Only after a Confirmation Order has been entered and becomes final, and which confirms a plan that includes releases of the Participating Insurers and all named insureds, insureds, and additional insureds under the Participating Insurer Policies, will Participating Insurer make their contribution to the Blitz Personal Injury Trust.

58. Westchester (as well as each of the other Participating Insurers) would not be willing to buy-back the Participating Insurer Policies for nearly $138 million without the release and injunction protecting all named insureds, insureds, and additional insureds under the Participating Insurer Policies.

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[12] Dec. 18, 2013 Hearing Tr. 60:2-8.

I hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. I am aware that if any of the statements contained herein are willfully false, I am subject to punishment.

Executed on: January 28 2014

Steve Snyder

EXHIBIT A

HON. RICHARD S. COHEN, J.A.D. (Ret.)
Counsel, Busch and Busch
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Mediation, arbitration and neutral case management of complex commercial, insurance coverage, construction, employment, and professional liability disputes.

Mediated three successive-owner environmental disputes; more than 45 multi-party asbestos liability insurance coverage cases and multi-party, multi-site environmental liability insurance overage cases; 17 multi-party construction defect and products liability cases with coverage issues; shareholder disputes; business and professional firm breakups; employment disputes; disputes between a developer and a municipality over a large-scale development plan; and a class action against a telecommunications company.

Arbitrated two unrelated licensing disputes between inventors and major medical hardware manufacturers; 30 Lanham Act claims in telecommunications and pharmaceutical industries; two accounting malpractice claims (one as court-appointed special master); eight multi-party construction disputes, involving, e. g., a public school for autistic children, a hospital, a sewer system, a residence, a private school improvement and a new college classroom building; disputes arising out of the sale of a subsidiary by a major international corporation; three real estate partnership breakups; seven medical group breakups; five liability insurance coverage disputes; a three-municipality dispute over sharing of sewage disposal facilities; and a dispute between the N.J. Administrative Office of the Courts and the State's court reporters.

Court appointed Allocation Master in four asbestos-liability or environmental liability coverage cases. Special Discovery Master in 14 varied complex cases. Special Master in the Diet Drug litigation to hear and decide *Daubert* motions. From April 1, 2000, to December 31, 2004: Trustee, National AHP (Fen Phen) Settlement Trust. Member, Management, Budget, and Financial Committees, and Special Working Group.

New Jersey "Super Lawyer" 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013

PROFESSIONAL BACKGROUND

	Currently, counsel to Busch and Busch. Formerly Hoagland Longo Moran Dunst & Doukas.
1984-94	Judge of the Superior Court, Appellate Division. Author of 140-150 opinions per year. Retired from judiciary.
1973-84	Trial Court Judge; 1980-84, Presiding Judge of Superior Court, Chancery Division. Individually disposed of 400-500 cases yearly.
1960-73	Private Practice, 1963-66 Part-time Ass't. County Prosecutor
1959-60	Law Clerk to Hon. Haydn Proctor, N. J. Supreme Court

OTHER PROFESSIONAL ACTIVITIES

1998 Administrative Supervisor of HIP of New Jersey, a 195,000 member HMO, by appointment of the NJ Commissioner of Banking and Insurance.

1997: Representative of Chief Justice on Governor's Commission on Treatment of the Criminally Insane

1996-97: Special Master of New Jersey Supreme Court to report on validity of statistical evidence of racial bias in the imposition of the death penalty.

1988 to 2002: Member, N.J. Supreme Court Committee on Civil Practice. Chair, Subcommittee on Publication of Opinions; Chair, Subcommittee on Settlement of Prerogative Writ Actions; Chair, Subcommittee on Summary Judgments; Chair, Subcommittee on Real Estate Practice.

1980-83: Chair, N.J. Supreme Court Committee on Civil Model Jury Instructions

TEACHING:

1980-2002	Annual New Jersey Judicial College. Various lecture topics.
1995	Seton Hall Law School: "Remedies", three credits, Spring term.
1984-94	Harvard Law School. "Trial Advocacy Skills", team teaching.
1961-62	Rutgers School of Engineering, "Law for Engineers"

PUBLICATIONS:

"Automobile Liability Insurance: Public Policy and the Omnibus Clause", 15 Rutgers L. Rev (1961) (With W. R. Cohen); "Settling Land Use Litigation While Protecting the Public Interest: Whose Law Suit Is This Anyway", 23 Seton Hall Law Rev. 844 (1993) (With Douglas Wolfson and Kathleen M. DalCortivo); "Conversations with Morris Schnitzer", Rutgers Law Rev. Summer 1995 issue (With Sylvia Pressler and Howard Kestin)

142 signed published opinions. See, e. g., Miranda v. Fridman, 276 N.J. Super 20, 647 A.2d 167 (App. 1994); Matter of Comm'r of Ins.'s 3/24/92 Order, 256 N.J. Super 158, 605 A.2d 851 (App. Div. 1992); Crowe v M&M Mars, 242 N.J. Super 592, 577 A.2d 1278 (App. Div. 1990); Princeton Cablevision, Inc. v. Union Valley Corp., 195 N.J. Super 257, 478 A.2d 1234 (Ch. Div. 1983)

EDUCATION:

BA	Woodrow Wilson School of Public and International Affairs, Princeton Univ., Cum Laude 1956
LLB	Yale University Law School, Cum Laude 1959

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
BLITZ U.S.A., INC.,	)	Case No. 11-13603
et al.,	)	(PJW)
	)	
Debtors.		(Jointly Administered)

Wilmington, Delaware
December 18, 2013
11:05 a.m.

TRANSCRIPT OF AN ELECTRONIC RECORDING
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors Blitz U.S.A., Inc. Blitz RE Holdings, LLC, MiamiOK, LLC, and Blitz Acquisition LLC	MICHAEL J. MERCHANT, ESQ. MARCOS A. RAMOS, ESQ. ROBERT C. MADDOX, ESQ. AMANDA R. STEELE, ESQ. RICHARDS LAYTON & FINGER, P.A.
For the Debtors Blitz U.S.A., Inc.	ERIC M. SUTTY, ESQ. ELLIOTT GREENLEAF (Special Litigation Counsel)
For the Debtors Blitz Acquisition Holdings and LAM 2011 Holdings	SEAN M. BEACH, ESQ. YOUNG CONAWAY STARGATT & TAYLOR
For the Official Committee of Unsecured Creditors	KEVIN J. MANGAN, ESQ. WOMBLE CARLYLE SANDRIDGE & RICE -and- JEFFREY D. PROL, ESQ. LOWENSTEIN SANDLER

testimony.

THE COURT: Okay.

MR. DEMMY: Your Honor, John Demmy for Liberty again. I apologize. I referenced the Bates White report, which is Exhibit 89, but I neglected to formally move it into evidence, and I'd like to do that at this point.

THE COURT: Okay, it's admitted.

MR. DEMMY: Thank you, Your Honor.

MR. RYAN: Your Honor, Jeremy Ryan of Potter Anderson on behalf of Wal-Mart. I rise not to proffer an additional witness, but only that the Texas objectors asked me to confirm on the record what Mr. Bowden related to you, Your Honor, earlier with respect to the additional 650,000, that that money is committed from the settling parties, and we'll, we'll -- is raised and is there, and that we can give the Texas objectors assurances that that money will be funded.

THE COURT: Okay.

MR. BOWDEN: Your Honor, again for the record, Bill Bowden of Ashby & Geddes for the Texas claimants.

Thank you, Mr. Ryan, for that representation.

Your Honor, as I had mentioned in

EXHIBIT C

AUG 2 2 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	C/A #: 2011-C9-04-01200
	)	
DONALD TILLMAN	)	
Plaintiff,	)	
	)	OFFER OF JUDGMENT
vs.	)	
	)	
BLITZ U.S.A., INC.	)	
Defendant.	)	

TO: RANDELL C. STONEY, ESQ., ATTORNEY FOR DEFENDANT BLITZ USA, INC.:

Please take notice that Plaintiff Donald Tillman, pursuant to S.C. Code Ann. §15-35-400 and Rule 68, SCRCP, hereby makes an Offer of Judgment in favor of Plaintiff against Defendant Blitz USA, Inc. in the amount of $120,000.00.

By: _____

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August 18, 2011

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 18 day of August, 2011, Barnwell, S.C.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

RENE GREEN INDIVIDUALLY AND AS HEIR OF JONATHAN EDWARD BRODY GREEN,	§	
PLAINTIFF,	§	
	§	**CIVIL ACTION NO. 2:07-CV-372**
VS.	§	
	§	
BLITZ U.S.A., INC.,	§	
DEFENDANT.	§	

FINAL JUDGMENT

In accordance with the unanimous jury verdict returned on October 20, 2008, the Court ORDERS and ADJUDGES that Plaintiff RENE GREEN INDIVIDUALLY AND AS HEIR OF JONATHAN EDWARD BRODY GREEN take nothing from Defendant, BLITZ U.S.A., INC.

It is further ORDERED, ADJUDGED and DECREED, that court costs will be paid by the party incurring the same. All pending motions are DENIED as moot.

It is so ORDERED.

SIGNED this 10th day of November, 2008.

T. John Ward

T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

GRANT & FLANERY, P.C.

/s/_____
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ATTORNEYS FOR PLAINTIFF

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ATTORNEY FOR DEFENDANT, BLITZ U.S.A., INC.

EXHIBIT E

NANCY C. WALKER, Individually and as the Natural Parent of Dinesica Walker, a Deceased Minor, and in her capacity as the Personal Representative of the Estate of Dinesica Walker, a deceased minor, Plaintiffs v. BLITZ USA, INC., Defendant

CIVIL ACTION NO 1:08-CV-121-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

663 F. Supp. 2d 1344*; *2009 U.S. Dist. LEXIS 94840*; *80 Fed. R. Evid. Serv. (Callaghan) 1266

September 30, 2009, Decided
September 30, 2009, Filed

COUNSEL: [1]** For PLAINTIFF: Gant Grimes, Esq., Hank Anderson, Esq., Anderson Law Firm, Wichita Falls, TX; Robert Cape Buck, Esq., The Buck Law Firm, Atlanta, GA.

For DEFENDANT: James Scott Murphy, Esq., Garrity, Graham, Murphy, Garofalo & Flinn, Montclair, NJ; Michael Jay Goldman, Esq. And Kim M. Jackson, Esq., Hawkins & Parnell, Atlanta, GA.

JUDGES: ORINDA D. EVANS, UNITED STATES DISTRICT JUDGE.

OPINION BY: ORINDA D. EVANS

OPINION

[*1346] *ORDER*

This products liability case is before the Court on Plaintiff's motion to compel discovery [Doc. 114], Defendant's motion for summary judgment [Doc. 120], Plaintiff's motion for leave to file an amended complaint [Doc. 138], Plaintiff's motion to exclude the expert opinion testimony of Vytenis Babrauskas [Doc. 139], Defendant's motion to strike the expert report of Andrew Armstrong [Doc. 155], Defendant's motion to strike the expert report of Arthur Stevens [Doc. 157], Defendant's motion to strike the expert report of Jason Mardirosian [Doc. 158], and Defendant's motion for leave to respond to Plaintiff's motion to compel discovery [Doc. 163].

For the reasons stated below, Plaintiff's motion for leave to file an amended complaint is DENIED. [Doc. 138], and Defendant's motion for summary judgment **[**2]** is GRANTED. [Doc. 120]. Defendant's motions to strike the expert reports of Armstrong, Stevens, and Mardirosian are GRANTED IN PART and DISMISSED IN PART AS MOOT. [Docs. 155, 157, 158]. Plaintiff's motion to exclude the expert opinion testimony of Vytenis Babrauskas is DISMISSED AS MOOT. [Doc. 139]. Plaintiff's motion to compel discovery is DISMISSED AS MOOT [Doc. 114] and Defendant's motion for leave to respond to Plaintiff's motion to compel discovery is DISMISSED AS MOOT [Doc. 163].

I. OUTLINE OF THE CASE

Plaintiff Nancy C. Walker, individually and as the natural parent of Dinesica Walker, [1] a deceased minor and in her capacity as the personal representative of the Estate of Dinesica Walker filed this **[*1347]** case against

Defendant Blitz USA Inc. and other defendants [2] in the State Court of Fulton County, Georgia. The case was removed to this Court. Diversity jurisdiction exists because Plaintiff is a Georgia citizen; Defendant Blitz is incorporated in Oklahoma and has its principal place of business in Oklahoma. The matter in controversy exceeds the sum of $ 75,000, exclusive of interest and costs.

1 In the Complaint originally filed, the decedent was identified as "Dicease Walker," which **[**3]** was a typographical error. [Doc. 1-2, at 3]. The correct name of Plaintiff's daughter is "Dinesica Walker." [Doc. 31-10, at 5].

2 A11 defendants other than Defendant Blitz USA, Inc. ("Defendant" or "Blitz") have since been dismissed from the action without prejudice. [Docs. 37, 134].

Plaintiff seeks damages for injuries to herself and for the wrongful death of her daughter. According to her complaint, the injuries and death were caused by a defect in a gasoline container manufactured and sold by Defendant. Plaintiff contends that the gasoline container was defective because it did not include a "flame arrester." In the case of Defendant's product, this would be a metal mesh or perforated metal device within the spout of the container. The purpose of such a device is to keep flames from entering the container in the event of ignition of gasoline vapor emanating from the spout. For purposes of the instant motion for summary judgment the Court assumes that these devices work for their intended purpose.

The evidence of record shows without dispute that Plaintiff accidentally set her clothing on fire while she was trying to light a wood stove using gasoline as an accelerant. She ran out of **[**4]** the mobile home in which the wood stove was located and ran past a Blitz brand gasoline container on the front porch. The Blitz container had no flame arrester in it. According to Plaintiff's testimony, the container held about 5 ounces of gasoline. There is no eyewitness testimony that the gasoline container exploded. The mobile home was totally consumed by the fire originating at the wood stove. Plaintiff's daughter was asleep inside the mobile home and died in the fire. Plaintiff was badly burned. Her theory, which is totally a function of expert testimony, is that as she ran by the gas container her flaming clothing ignited gas vapor emanating from the gas container's spout, causing a flashback inside the container and the explosion of the container. Plaintiff theorizes that the alleged container explosion cast gasoline and flames onto her as she ran by the container. She also theorizes that the alleged explosion cast gasoline and flames back into the interior of the mobile home, thereby causing or contributing to her daughter's death.

Plaintiff has made the following claims against Defendant: negligence in the design of the container and failure to provide adequate warnings (Count **[**5]** I), [3] strict liability for a defective product (Count II), strict liability for failure to warn (Count III), strict liability for failure to test (Count IV), wrongful death (V), damages for pre-death **[*1348]** injuries and pain and suffering (Count VI), and punitive damages (Count VII).

3 Plaintiff has included 36 separate allegations of negligence within Count I. (Compl., Doc. 1-2, PP 25 (a)-25 (jj). A large number of these allegations relate to Defendant's failure to design the gas container with a flame arrester or Defendant's failure to include an adequate warning on its gas container. The remaining allegations in Count I are related to Defendant's business of manufacturing gasoline containers. [*See, e.g., id.* at P 25 (o) ("[Defendants] failed to actively seek data and information and maintain a library documenting incidents in which consumers, users, and bystanders are injured and/or killed when encountering such defective portable gasoline containers," or P 25(aa) ("[Defendant] failed to request that the ASTM International F15.10 Subcommittee consider a standard to include flame arresters and/or explosion suppression materials in portable gasoline containers").

Because the Court finds that **[**6]** there is no evidence that a gasoline container explosion caused the injuries to Plaintiff or the death of her daughter to survive summary judgment, it is unnecessary to recite all of Plaintiff's remaining claims of negligence here.

Plaintiff and Defendant have stipulated to the facts that the content of the warning on the container was adequate, and that Plaintiff makes no claim as to the content of the warning. [Doc. 136].

Defendant's motion for summary judgment argues that (1) the Blitz gas container is not defective on account

of the lack of a flame arrester in its spout, (2) the labeling and warnings on the product are adequate, and (3) there is no evidence that Defendant's product was the actual cause of injury to Plaintiff or her daughter. Plaintiff has responded to all of these arguments. Because the Court finds that argument (3) is meritorious, summary judgment will be granted on this ground alone and the other arguments will be dismissed as moot.

II. FACTS

The following facts are undisputed by the parties or alternatively represent the version of the evidence favorable to Plaintiff: [4]

> 4 Because the parties largely dispute the admissibility and credibility of the expert opinions **[**7]** in this case, any "facts" drawn from expert reports and deposition testimony will be set forth only in the Court's legal analysis as to the admissibility of those opinions.

On the morning of December 8, 2006, Plaintiff Nancy Walker and her 23-month-old daughter Dinesica Walker arrived at the mobile home of Plaintiff's mother in Rochelle, Georgia around 7:00 in the morning. Plaintiff would stay at her mother's mobile home when she had days off and her other children had to go to school, because her children could catch the school bus at her mother's home. [Walker Dep., Doc. 122, at 62-64]. The bus arrived at around 7:00 a.m. [*Id*, at 52]. Her mother had already gone to work when Plaintiff arrived. [*Id*. at 72].

The front of the mobile home faced south, and a screened-in porch extended along almost the entire front side. The front door to the mobile home was located in the middle of the trailer, and it opened onto the screen porch. [*Id*, at Ex. 4]. If facing the front door of the mobile home from the outside, the door knob was located on the right side of the door and the door swung onto the porch to the left. [*Id*. at 43-44, Ex. 1]. The door to enter the screened in porch from outside the **[**8]** trailer was located at the east end of the porch. Someone exiting the front door of the mobile home would be required to turn left before proceeding toward the screen door and walking outside. [*id*, at Ex. 4]. Upon entering the mobile home through the front door, two bedrooms and a bathroom were on the west end. The living area was in the middle. The wood stove was located at a mid-point in the living area with its back close to the north wall. [T. Cheese Dep., Doc. 128, Ex. 1]. The wood stove had a metal stack which presumably vented through the roof. The kitchen area was to the right (east) of the wood stove; there was no wall or other partition between the living area and the kitchen area.

After they arrived at the mobile home, Plaintiff's daughter Dinesica Walker went to sleep on a sofa to the left (west) of the wood stove. [Walker Dep., Doc. 122, at 108-109; Killiebrew Dep., Doc. 147, at 17]. Available portable electric space heaters may (or may not) have been in use. The propane-generated gas heater and gas cooking stove were not in use; the propane tank had not been refilled in a couple of months. The outdoor temperature that day was around 32 [degree] Fahrenheit, possibly less. **[**9]** [Doc. 165-5 at 2]. Plaintiff decided to light a fire in the wood stove. [Walker Dep., Doc. 122, at 38]. Plaintiff's mother rarely used the wood stove; she explained **[*1349]** that she had experienced a problem with birds in the vent stack. [E. Cheese Dep., Doc. 124, at 16].

Plaintiff initially used charcoal lighter fluid in her attempt to ignite the wood in the stove, but she found there was insufficient lighter fluid in the container to start a fire. [Walker Dep., Doc. 122, at 37-38, 70-72, 74-76], She testified that prior to the day of the accident, she had never used gasoline to start a fire in the wood stove; she had only used lighter fluid. [*Id*. at 39].

Plaintiff had seen a gasoline container located next to a lawnmower on the screened-in porch. During her deposition, Plaintiff identified a red Blitz model 50810 plastic gasoline container, with a capacity of approximately two gallons, as the type of container that was sitting on her mother's front porch that day. [*Id*. at 64, 111, Ex. 5]. [5] Plaintiff recalled seeing the Blitz logo on the container. [*Id*. at 64-66]. [6] She also recalled that either the word "inflammable" or "flammable" was written on the container, and that there was additional **[**10]** writing on the container that was difficult to read. [*Id*. at 64, 66-68]. She did not attempt to read this additional writing. [*Id*. at 67-68].

> 5 Exhibit 5 depicts a plastic two gallon and 8 ounce container (7.81 liters). It has a "jug" type plastic handle on one side of the top of the container. The plastic handle is an integral part of the container. On the other side of the top of the container is a twist-off plastic cap from which a narrow plastic spout protrudes. In other words, the

spout is an integral part of the twist-off cap. The model depicted in Exhibit 5 is a "self-venting" model, meaning that there is no separate vent on the top of the container which may be opened to facilitate pouring. Instead the spout itself contains a separate channel for air.

6 Plaintiff's half-brother testified that his father purchased this gasoline container from a Fred's store in Hawkinsville, Georgia in 2004. [T. Cheese Dep., Doc. 128, at 29-30]. He also recalled that the container was a Blitz container. [*Id*.].

Plaintiff testified in her deposition as follows: She retrieved a small empty vegetable can, about the size of a twelve ounce soda can, from her mother's garbage. [*Id*. at 38, 79]. She took this **[**11]** can out to the porch, set it down, and poured a small amount of gasoline from the container into the small can while standing on the porch. [*Id*. at 38, 79, 106-108]. Plaintiff testified that when she lifted the gasoline container, it was very light, and she was able to lift it with one hand. [*Id*. at 80]. Plaintiff initially poured all of the gasoline that was in the container into the can. This filled the can about halfway full with gasoline. [*Id*. at 84]. She thought that she had poured too much gasoline into the can and that "it might explode" if she used that much gasoline, so she then poured most of the gasoline back into the gasoline container. [*Id*. at 82, 84-87]. She testified that after pouring the excess back into the gasoline container, there was still a "little bit" of gasoline left in the small can, about "half of a big... spoon." [*Id*. at 86-87]. She screwed the cap-and-spout unit back onto the container. [*Id*. at 83, 107]. There was no cap on the outer end of the spout. [*Id*. at 62, 111]. Plaintiff then set the gasoline container down on the porch to the right of the front door into the mobile home (if facing north, entering the mobile home), with the spout facing toward the **[**12]** door. [*Id*. at 106-107, Ex. 4].

Plaintiff testified that when she re-entered the home, she poured the gasoline in the small can onto the top of the wood that was in the wood stove, [*Id*. at 89]. She then reached into the stove and put a lit match on the wood. She heard a "whoosh," and her right leg and foot caught on fire below her knees, [*Id*, at 90-92]. Walker does not know if she had gotten any gasoline on her clothing. [*Id*. at 90]. She first tried to beat the fire out **[*1350]** and then ran out the main door of the mobile home yelling "Help, help". [*Id*. at 90, 91, 110]. Her legs were on fire as she ran outside. She does not recall whether her pants above her knees were on fire, or whether her shirt was on fire. [*Id*. at 92-93].

Plaintiff initially stated in her deposition that she did not know whether any part of the room was on fire when she exited the mobile home, and that she did not know whether anything else in the home was on fire when she ran out. [*Id*. at 94]. Plaintiff later stated that there was nothing else on fire inside the mobile home when she ran outside. [*Id*. at 143].

At some point, a "boom" occurred. Plaintiff gave varying statements in her deposition as to where she was when she **[**13]** heard this "boom." She initially testified that as she was running: "when I got to the screen door, I heard a boom." [*Id*. at 91]. She later testified that she heard a "boom" before she got to the screen door [*Id*. at 103], and also that when she heard the "boom," she was on the ground outside. [*Id*. at 117]. She also stated that she was unsure exactly how long she had been outside on the ground before she heard the "boom." [*Id*. at 118]. Still later, she said that she did not hear a "boom" when she was outside, but rather before she went outside. [*Id*. at 119]. Plaintiff also testified that she did not know where the "boom" came from. [*Id*. at 117].

Plaintiff does not know whether she knocked over the gasoline container as she ran out of the house. [*Id*. at 109-10]. She admits she did not see the gasoline container explode. [*Id*. at 135, 137]. She does not recall whether she saw any additional fire or whether she was hit by any additional flames or gasoline when the "boom" happened, or whether the porch caught on fire at that point. [*Id*. at 139-40].

Mamie Grace, a neighbor living next to Plaintiff's mother, was standing in her kitchen when she looked out her kitchen window and saw a large amount **[**14]** of white smoke pouring out of the front screen porch area of Plaintiff's mother's mobile home. [Grace Dep., Doc. 148, at 16-17]. The smoke was coming out of the entire front porch screen area. [*Id*. at 17]. She then went to her living room, picked up her telephone, and called 911. [*Id*. at 18]. After telling the 911 operator the address of the house on fire, Grace walked to her own front porch. [*Id*. at 18-19].

Grace testified that she heard a "boom" at about the same time that she got to her front porch [*Id*. at 20-21]. She did not know where the boom came from [*Id*. at 12],

and does not know where Plaintiff was located when the "boom" occurred. [*Id*. at 6, 7, 20]. Grace did not see any flames prior to hearing the "boom". [*Id*. at 17]. When the "boom" occurred, Grace could see flames coming out of the front porch. [*Id*. at 29-30]. The flames were so strong that they caught a car adjacent to the mobile home on fire. [*Id*. at 29, 36]. Grace did not see Walker running out of the mobile home. [*Id*. at 19, 35].

Shortly after Grace heard the "boom," she heard Walker screaming and saw her standing outside next to the doorstep. [*Id*. at 19-22, 25]. Walker was screaming "my baby." [*Id*. at 24, 25, 28]. **[**15]** Plaintiff appeared burned and she had no clothing on other than her underwear. [*Id*. at 24]. It is unclear whether Plaintiff's clothes were burned off or whether she had removed them.

At 9:27 a.m. police officer John Killiebrew was notified by the 911 call center of Grace's call. He was about one quarter mile from the fire scene at that time. He saw an intense smoke cloud coming from that direction. It took him about one minute to get there. [Killiebrew Dep., Doc. **[*1351]** 147, at 6]. The mobile home was totally engulfed in flames when he arrived, and no one was able to enter. [*Id*. at 14]. He observed that Plaintiff was intensively burned on the front part of her body. [*Id*.]. He testified that the body of Plaintiff's daughter was found on the north side of the mobile home, just outside the structure of the house. [*Id*. at 25-26]. Killiebrew spoke to Plaintiff at the scene, and he wrote in his police report: "According to Nancy Walker she was starting a fire in a wood burning heater in the mobile home with gasoline. When she tried to light the wood the gasoline exploded burning Mrs. Walker and setting the mobile home on fire," [*Id*. at 21-23, Ex. 1]. Killiebrew stated during his deposition that **[**16]** he could not remember whether "explosion" was the exact term she used. Plaintiff never said anything to him about a second explosion. [*Id*. at 23]. Killiebrew stated Plaintiff was "very distraught" when he spoke with her. [*Id*. at 2 8].

Bruce Gourley, an arson investigator with the Georgia Office of Insurance Commissioner, inspected the scene on the day of the accident with a K-9 dog trained to detect the presence of ignitable liquids by sniffing for hydrocarbon. [Gourley Dep., Doc. 129, at 9-11]. Gourley first determined that the fire's origin was in front of the wood stove, inside the mobile home, and that the specific point of origin was at a point where he located gasoline in front of the stove. [*Id*. at 23, 32]. After determining the location of origin he brought the K-9 dog to the location, and the dog "alerted" on the area in front of the wood stove, [*Id*. at 29]. Gourley himself smelled the area and noted a heavy gasoline odor. [*Id*. at 33-34]. Gourley testified that there was enough gasoline in front of the wood stove that it "had saturated into the carpet padding." [*Id*. at 55-56]. He determined this was the area of origin of the fire and sent a carpet sample to the Georgia Bureau **[**17]** of Investigation ("GBI") laboratory. [*Id*. at 31-32, Ex. 3]. The resulting GBI report revealed the presence of gasoline in the carpet sample. [Doc. 136-2]. Gourley testified that there were other spots to the right of the stove where the K-9 alerted, which also smelled of gasoline. [*Id*. at 52-54]. To save time and money, he did not take samples from these areas because they were not as strong as the sample in front of the stove, [*Id*. at 53]. He did not use the dog to thoroughly search the location of the porch. [*Id*. at 58].

The fire was determined to be accidental. [*Id*. at 61]. No Blitz container was found at the scene of the fire. [*Id*. at 61-62]. Neither is there any evidence that anyone ever looked for such a container.

Plaintiff testified repeatedly during her deposition that she understood the dangers of using gasoline on the day of the accident. Plaintiff testified that she knew only to use a little bit of gasoline so as not to cause a big fire and "not to get it out of control." [Walker Dep., Doc. 122, at 79]. She stated that she understood that gasoline would "cause a big fire" and could "whoosh," or "might blind you, it might mess you up badly... it might mess up your face." [*Id*. at 26]. **[**18]** She testified that she had understood these dangers since she was a little girl. [*Id*. at 26-27].

Plaintiff testified that she put gasoline into a small can on the day of the accident because she knew she should not take the jug into her mother's house, because "I know that would cause an explosion." [*Id*. at 38, 88]. She also testified that she knew on the day of the accident that she should use less gasoline than lighter fluid because gas is "more powerful" than lighter fluid, and that "if you use a lot of gas, it might explode." [*Id*. at 78]. She stated repeatedly that her concern that the gas would explode was the reason that she did not use much gasoline on the day of the accident. [*Id*. at 78, 82]. She also testified, **[*1352]** however, that on the day of the accident she did not know that gasoline could cause an

explosion. [*Id*. at 79].

Plaintiff was admitted to the Joseph M. Still Burn Center on December 8, 2006, and remained there until March 20, 2007. [Mullins Dep., Doc. 143, at 10-11]. She had severe burns on her ankles, legs, front torso, right arm and armpit, the right side of her face and the top of head. She had burns on 43% of her body. [*Id*. at 11, 19, 22, 23, unmarked photographs].

III. **[**19]** DISCUSSION

A. *Motion to Amend Complaint*

"The Court DENIES Plaintiff's motion. Discovery in this case ended on February 6, 2009, and Defendant's motion for summary judgment was filed February 26, 2009. [Doc. 44, 120]. Plaintiff's motion to amend the Complaint was filed on March 3, 2009. [Doc. 138]. Plaintiff states that she seeks to amend the Complaint to reflect the dismissal of the allegations against those defendants that have been previously dismissed from this suit, to correct a typographical misspelling of Dinesica Walker's name, to reflect stipulations of fact agreed to by the parties, to "conform" the allegations in the Complaint to the evidence obtained during discovery, and to add an alleged act of negligence under Count I of the Complaint. According to Plaintiff, the amendments are not intended to alter the claims that Plaintiff asserted in her original Complaint or to circumvent any of Defendant's arguments in the pending summary judgment motion.

Given Plaintiff's delay in amending the Complaint, Plaintiff's motion for leave to file an amended complaint is DENIED. [Doc. 138].

B. *Plaintiff's Expert Witness Testimony*

As support for her theory that the defective design of Defendant's **[**20]** gas container caused her injuries and the death of her daughter, Plaintiff has presented the testimony of expert witnesses. Defendant argues that the opinions of these expert witnesses fail to meet the standard for expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and thus that they should be ruled inadmissible. The Court must therefore determine whether the testimony of these experts is admissible under *Daubert* and the Federal Rules of Evidence.

In reviewing the proffered testimony of Plaintiff's experts, it is important to keep Plaintiff's theory of causation in mind. Her theory is not that the gas container, after becoming engulfed in flames from the fire which began at the wood stove, became superheated and exploded. Her theory is as follows: as she was running past the gas container on the front porch, her burning clothes caused vapor allegedly emanating from the spout of the container to ignite. Then, the flaming vapor entered the container's spout due to its defective design (lack of a flame arrester) causing a flashback inside the container. This flashback allegedly caused the container to explode. The explosion allegedly threw **[**21]** gasoline and flames onto Plaintiff as she ran by, exacerbating or adding to her already sustained injuries. Also, Plaintiff theorizes that when the gas container exploded, gasoline was sprayed into the interior of the mobile home, reinforcing or spreading the existing fire. Thus, she alleges that a gasoline container explosion was the cause in fact and a proximate cause of her injuries and of the death of her daughter.

Defendant's response is that there is no evidence that the gas container exploded and no evidence that a flashback occurred. Alternatively, if the gas container exploded, it happened after the interior fire overtook the porch and engulfed the gas container **[*1353]** in the flames, causing an explosion due to expanding vapor pressure within the container.

The only evidence in Plaintiff's own testimony that supports her theory is that she heard a "boom" either as she was running across the porch or after she had left the porch. She does not know where the boom came from. She did not see or perceive flames or spewing gasoline coming from the container and did not see a breakup of the container. Therefore, testimony that the container actually exploded before the porch became engulfed **[**22]** in flames must necessarily come from others. There are no eyewitnesses to an explosion of the gas container. Plaintiff has presented expert testimony seeking to fill this void.

Federal Rule of Evidence 702 authorizes the admission of expert opinion testimony "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Fed. R. Evid. 702*. "*Rule 702* lays the foundation for the trial

court's *Daubert* analysis." *McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1237 (11th Cir. 2005)*. Under *Daubert*, expert testimony is admissible if: (1) the expert is competent and qualified to testify regarding the subject matter of his testimony; (2) the methodology by which the expert reached his conclusions is sufficiently reliable; and (3) the expert, through scientific, technical or specialized expertise, provides testimony that assists the trier of fact to understand the evidence or determine a fact in issue. *509 U.S. at 589-96*.

The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, **[**23]** who must show by a preponderance of evidence that the testimony is admissible. *Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999)*. However, the proponent must only prove that the expert testimony is reliable, not that it is scientifically correct. *Id. at 1312*. To aid in this inquiry, the Court in *Daubert* identified several non-exclusive factors which a district court may consider. These factors include: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. *509 U.S. at 593-94*.

These factors are not limited in application to solely scientific testimony, but also apply to testimony based on "technical" or other "specialized" knowledge. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The factors are not intended to be a "definitive checklist"; a district court has the flexibility to narrowly tailor the factors to the specific situation presented. *Daubert, 509 U.S. at 593*. Regardless of what factors are specifically relied upon, **[**24]** however, the district court's ultimate responsibility is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho, 526 U.S. at 152*.

Plaintiffs have offered the testimony of three expert witnesses: Andrew Armstrong, Ph.D., Jason Mardirosian, and Arthur Stevens. Stevens did not evaluate the issue of causation in fact, so his expert report and testimony will not be discussed in this Order.

[*1354] Plaintiff asked Armstrong "to evaluate the conditions necessary for an explosive environment to be produced in a two gallon plastic container and to determine if a flame arrester would prevent the explosive vapors from forming". Mardirosian was asked: (1) "What was the source of the 'boom' noise?" and (2) "Which of the two fire incidents at the subject structure: the initial ignition of gasoline vapor at the wood burning stove or the subsequent explosion was the most likely cause of Dinesica Walker's death?" Armstrong and Mardirosian each prepared a written expert report which is in evidence. [Armstrong Report, Doc. **[**25]** 58-3; Mardirosian Report, Doc. 58-2 at 2-29; Amended Mardirosian Report, Mardirosian Dep., Doc. 130, Ex. 3]. Each was deposed concerning his opinions.

Armstrong conducted tests which successfully created flashbacks in plastic containers holding gasoline but which did not cause the container to rupture or explode. Having done this, he noted that work done by Dr. Lori Hasselbring had shown that "it is possible for plastic gasoline containers to violently explode". [Doc. 58-3 at 3]. Armstrong did not offer his own opinion that the Blitz container on the porch probably exploded.

Mardirosian concluded that "the only logical cause of the boom" was an explosion of the gasoline container on the front porch, which he said occurred just after Plaintiff ran by. He assumed that a flashback within the gas container was the cause. In his deposition, Mardirosian explained that in answering question (2) he had relied on work done by Dr. Lori Hasselbring, in particular a video of her "Michigan Fire Test No. 10" which is in the record. [Armstrong Dep., Doc. 132, Ex. 29]. Hasselbring's article, *Case Study: Flame Arresters and Exploding Gasoline Containers*, is listed as a reference source in Mardirosian's **[**26]** expert report. Thus, Mardirosian based his assumption that a flashback occurred in the container and that the container actually exploded on work done by Hasselbring, not on his own education, training or experience.

The dynamic of a flashback, and the circumstances under which it might cause a violent explosion of the type described by Mardirosian, is not within the experience of average jurors. It is not intuitive. It requires expert testimony. As stated previously, Plaintiff's defective product claim is not based on a theory that the Blitz container exploded after it became engulfed in flames and became superheated. To be viable as a defective product claim, Plaintiff's theory necessarily must be that a

flashback (that would have been prevented by a flame arrester in the spout of the container) occurred which caused the container to explode.

Both sides agree that gasoline has certain basic physical properties, as follows: Gasoline in its liquid state does not burn; only gasoline vapors burn. Gasoline vapors are created when gasoline evaporates. The density of gasoline vapor is about 3.4 times that of air. In a closed static environment (for example, a closed container sitting still) **[**27]** containing gasoline vapors and air, gas vapors sink to the bottom. This relationship may be changed by introducing a state of disequilibrium; for example, by shaking the container.

Also, the parties agree that the flammable range for gasoline vapors is between 1.4% and 7.6% volume of vapor in air. Above the upper flammability limit, there is too great a concentration of vapor in the air to permit a flame to propagate; below the lower flammability limit, there is not a sufficient concentration of vapor in the air to permit propagation of a flame. Altering the ratio of air to vapor changes the flammability level.

[*1355] The parties also agree that "The term 'explosion' has no fixed ordinary or scientific meaning. One accepted definition is 'a release of energy creating a sudden outburst of gas'" (internal cite omitted). "This broad definition includes chemical, atomic, and physical explosions. Physical explosions can occur due to overpressures of boilers or pressure vessels . .

In combustion science, an explosion is any rapid, high-temperature combustion . . . ." Vytenis Babrauskas, *Ignition Handbook* 14 (2003).

Consistent with the foregoing, the amount of gasoline vapor in air which will exceed **[**28]** the upper flammability limit in a two gallon container is surprisingly small. Indeed, the amount of gas vapor which will produce a ratio below the upper flammability limit in a two gallon container is fairly characterized as tiny - a small fraction of the vapor which would be produced by the five ounces of gasoline that apparently was in the Blitz container on the porch. This presents an obstacle to Plaintiff's theory of causation, because while a tiny amount of gasoline mixed with a vastly larger amount of air can vaporize and can produce a "flash" in a container when vapor at the end of spout is ignited, the "flash" in the container is of a modest nature, making an explosion of the container unlikely.

1. *Expert Testimony of Andrew Armstrong*

Dr. Armstrong is the owner of Armstrong Forensic Laboratory, Inc., which he founded in 1980. Armstrong has a Ph.D. in physical chemistry and is a professional chemist certified by the American Institute of Chemistry. He is the author of many publications regarding the identification of ignitable liquid in fire scenes and frequently provides consultation in cause and origin investigations. [Armstrong Dep., Doc. 132, Ex. 46].

To carry out his assignment **[**29]** Armstrong performed certain tests, some of which used Blitz two gallon plastic containers. Videos of these tests are in the record. [Armstrong Dep., Doc. 132, Ex. 17, DVD titled "A8-4133, File Production"]. Armstrong did not attempt to duplicate conditions existing on the day of the fire. In the three tests using two gallon Blitz containers holding very small amounts of gasoline, Armstrong achieved "flashbacks" inside the container after repetitive ignition efforts. He elected to call these flashbacks (literally seen as a "flash" in the container) "flashback explosions". He noted that "although the observed explosions did not rupture the container, it has been shown in work done by Dr. Lori Hasselbring that it is possible for plastic gasoline containers to violently explode and rupture". [Armstrong Report, Doc. 58-3, at 3]. The report lists various "video-documented demonstrations of Dr. Lori Hasselbring" as among the materials reviewed by Armstrong in preparing his expert report. The video disks are exhibits to the transcript of Armstrong's deposition. [Armstrong Dep., Doc. 132, Ex. 28, DVD titled "9 Fire tests Series Human Pour"].

Some of Armstrong's tests used metal one-gallon paint **[**30]** cans which had been rigged with large add-on spouts and holes for tubing to be inserted. The tubing was used to pump a constant flow of air of 1.28 liters per minute into the paint cans. Small amounts of gasoline were inserted using hypodermic needles. Then, a flame was touched to the end of the spout. If nothing happened after an interval of time, the flame would be touched to the spout again. This sequence was repeated until something happened - a flash (referred to in Armstrong's report as an "explosion") and in several cases a flame inside the metal can. In some cases, the lid of the container popped off. These tests, in the Court's opinion, were so dissimilar to the known facts in the instant case that the test results prove nothing of value concerning the causation issue in this case.

[*1356] Armstrong performed additional tests using actual Blitz plastic gasoline containers, both one gallon and two gallon sizes. Again, gasoline was injected into the container by hypodermic needle. The amounts of gasoline were small, 3 to 10 milliliters (2/3 teaspoon to 2 1/4 teaspoons). Again, he injected a constant flow of air into each container of 1.28 liters per minute. [Armstrong Dep., Doc. 132, **[**31]** at 89]. These elements were intended to create (and in some cases did create) a gasoline vapor-to-air relationship in the container within the flammability range. Again, a flame was touched to the tip of the spout at intervals until some reaction occurred. [7] In several instances a flash occurred inside the container, which Armstrong elected to call an explosion. No flames were generated and there was no gasoline thrown from the container. No gasoline was left in the container at the end of this test; evidently, all of the gasoline vaporized. In two instances the container jolted when the flash occurred; in one case, it jumped up and fell over on its side. None of the containers exploded or ruptured. Armstrong's expert report states:

> Although the observed explosions did not rupture the container, it has been shown in work done by Dr. Lori Hasselbring that it is possible for plastic gasoline containers to violently rupture.

[Doc. 58-3 at 3].

> 7 In the three runs using the two gallon plastic containers (Demonstration 4, Runs 3, 4, and 5) it took the following numbers of ignition efforts before achieving a flashback: two, ten, six. In the two runs using one gallon Blitz containers, the plastic **[**32]** spout melted and either folded shut or fell off.

The Court is looking for evidence which would support Plaintiff's claim that an explosion of the container on the porch actually occurred following a flashback. Armstrong's tests do not supply that evidence. As Armstrong himself admitted, the conditions for his tests were markedly different from those existing on the day of Plaintiff's accident. He used an artificial air stream and minute quantities of gasoline so as to create a vapor-to-air ratio below the upper flammability level. Also, his many unsuccessful efforts to ignite the vapor demonstrate the very unpredictable nature of vapor ignition.

As is discussed below in connection with Jason Mardirosian's testimony, Plaintiff's reliance on Dr. Hasselbring's tests to supply evidence of causation in this case is misplaced. The Court certainly accepts the general proposition that plastic containers (containing gasoline) can rupture or explode. But that is not germane to the causation issue in this case. The question in this case is whether the gasoline container on the porch exploded on account of a flashback which occurred through the spout of the container. For the reasons discussed below, **[**33]** the results of Hasselbring's tests are inadmissible and even if they were, they do not illuminate this issue.

While Armstrong's expert report did not state that a gasoline container explosion caused Dinesica Walker's death, he opined during his deposition that if the fire had not been exacerbated by the alleged explosion of the container, "there may have been time for either the neighbor or Ms. Walker to get back into the house and crawl low, do the standard fire low approach things and get the child that was sleeping . . ." [Armstrong Dep., Doc. 132, at 175]. This testimony is not based on Armstrong's specialized knowledge or expertise, is not based on specific facts, and would not be helpful to a trier of fact. It is just speculation. Therefore, Armstrong's opinion as to the cause of Dinesica Walker's death is inadmissible. [8]

> 8 It is unnecessary to reach the admissibility of Armstrong's other conclusions as to the feasibility of designing a gas container with a flame arrester or the prevention of explosions using a flame arrester. Defendant's *Daubert* motion as to these additional opinions is DISMISSED AS MOOT.

[*1357] 2. *Expert Testimony of Jason Mardirosian*

Mardirosian is a fire investigator **[**34]** with the Office of Fire Investigations for the Chicago Fire Department, a private investigator, and a part-time police officer. [Mardirosian Dep., Doc. 130, at 100, 104, 107-109, Ex. 6]. He is a certified fire and explosion investigator with the National Association of Fire Investigators, among other certifications, and has a significant amount of experience in the investigation of fire scenes. [Mardirosian Dep., Doc. 130, Ex. 6].

Mardirosian did not examine the scene of the fire. [Mardirosian Dep., Doc. 130 at 38, 78]. The fire was on December 8, 2006 and he was hired by Plaintiff's counsel in 2008. He based his expert report on deposition

transcripts, fire investigative reports, and scene photographs. [Amended Mardirosian Report, Mardirosian Dep., Doc. 130, Ex. 3 at 1]. The reference material for the report included the article by Hasselbring as well as a video of "Michigan Fire Test No. 10," which Mardirosian had viewed.

Mardirosian's conclusion that the *only* logical source of the "boom" is an explosion of a gas container on the porch is not reliable because his attempts to rule out other sources of the "boom" were too cursory. His expert report merely stated that the boom could not **[**35]** have been caused by an exploding can of vegetables or a popping tire on the lawnmower (the lawnmower tires were solid rubber and even if they had been the inflated type they would not cause a boom). Having ruled out these two sources, the report then stated that "testing performed on gasoline containers and their propensity to explode when exposed to flaming combustion shows that the 'boom' described at the scene and the flame propagation which followed was most likely the Blitz brand container exploding on the porch." [*Id.* at 12]. The only tests referenced in Mardirosian's expert report are tests done by Hasselbring, discussed below.

After Mardirosian's expert report was turned in and his deposition taken, Mardirosian submitted an affidavit ruling out additional causes of the "boom," specifically aerosol cans, falling debris, and a "BLEVE" [9] event, in which a gas container becomes engulfed in flames and explodes when the gasoline boils. [Doc. 185]. [10] This still is too cursory an effort. The photographs of the fire scene offer no close-up views of the debris at the site [Mardirosian Dep., Doc. 130, Ex. 12]. The depositions of Plaintiff and her mother (which Mardirosian reviewed) offered **[**36]** practically no information concerning the contents of the home. Mardirosian did not have enough information to decide that the gas container on the porch was the *only* logical source of the "boom" noise, rather than one possible source of the boom. He also did not consider other possible explanations based on the information he did have.

9 BLEVE is an acronym which stands for "boiling liquid, expanding vapor explosion".

10 A BLEVE could be the explanation for the boom, if the "boom" occurred after the porch caught on fire and heated up the gas container. However, this would not support Plaintiff's theory that the absence of a flame arrester on the container caused her injuries. A flame arrester would not have kept the container from exploding once it became engulfed in flames and it became superheated. A flame arrester only would have kept flames from entering the spout of the container, assuming Plaintiff's flaming clothing contacted the spout and ignition occurred.

[*1358] Mardirosian testified about his conclusions in his deposition. For his assumption that the gas container on the porch probably exploded and threw burning gas into the interior of the mobile home, he relied on Hasselbring's Michigan **[**37]** Fire Test No. 10, a video of which had been provided to Mardirosian by Plaintiff's counsel. The video of Michigan Fire Test No. 10 is available in the record as an exhibit to Plaintiff's Response to Defendant's Motion for Summary Judgment. [Doc. 165, Ex. S]. [11]

11 The video is on a DVD labeled "Walker v Blitz 1:08-cv-0121, Exhibit 'S' to the Memorandum of Law in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment." Though the actual DVD is labeled Exhibit S, on Plaintiff's exhibit index it is listed as Exhibit M. [Doc. 165-3]. Another copy of the Michigan Fire Test No. 10 video is located in the record as Exhibit 29 to the transcript of Dr. Andrew Armstrong's deposition. [Doc. 132].

No written test protocol for Michigan Fire Test No. 10 is in the record, except to the extent that the beginning of the video shows a flash card which states:

> Fire Test # 10
>
> 2 cups gasoline
>
> 40% evaporated
>
> No flame arrester
>
> *shake gas can

The video shows a mechanical arm advancing a dark red plastic container to a position above a metal cylinder sitting on the ground. The cylinder has an ignited flue poking out of one side. Once the container is in position above the flue, [12] the arm turns **[**38]** it over so the spout is pointed downward. Liquid gasoline (apparently

two cups) is seen pouring onto the ignited flue from the spout. The distance between the end of the spout and the ignited flue appears to be several inches. When the gasoline hits the flue large flames leap upward, engulfing the container in flames. The container bounces around in the flames. It is possible that some flames are coming out of a break in the side of the container. The container did not explode. Near the end of the video it is seen sitting on the floor some distance from the camera while flames continue to burn on the ground in front of the container. The container is not displayed for the viewer at the end of the video.

12 While it is not totally clear, it appears that a flame is lit at the end of the container's spout just before it comes to rest above the cylinder.

Mardirosian also stated in his deposition that he relied on an article authored by Hasselbring entitled "Flame Arresters and Exploding Gasoline Containers," published in the *Journal of Hazardous Materials* in 2006. [Mardirosian Dep., Doc. 130, Ex. 5]. The thrust of the article is that flashbacks can generate explosions of plastic gasoline **[**39]** containers in a wider variety of circumstances than one might expect; therefore, plastic gasoline containers should have flame arresters. This article had been supplied to him by Plaintiff's counsel.

The article begins with the proposition that a flashback phenomenon can cause an "explosion" in a plastic gasoline container where the correct ratio of gas vapor to air exists and an ignition source is applied at the pour opening or spout. While the title to the article may imply otherwise, the text of the article clarifies that by "explosion", Hasselbring does not mean the breakup or rupture of the container. Rather, "For purposes of this article, an explosion refers to the rapid release of burning gasoline from a gas container accompanied by a loud noise." The article later refers to the "loud noise" as a "whooshing noise". [*Id*. at 66].

After stating the basic properties of gasoline, the article describes static tests and gasoline spill tests conducted by Hasselbring **[*1359]** in 2002 and an account of an incident in which a boy was severely burned while either pouring or attempting to pour gasoline on a fire.

According to the article, the static tests roughly confirmed the expected flammability **[**40]** range for gasoline. 13.5 milliliters (three teaspoons) of gasoline placed in an empty 5 gallon gasoline container [13] did not ignite upon application of a flame; [14] the mixture was too rich to burn. 2.25 milliliters (one-half teaspoon) of gasoline placed in an empty gasoline container did not ignite upon application of a flame; the mixture was too lean to burn. Intermediate amounts of gasoline, from 4.5 to 9 milliliters (one to two teaspoons), ignited and produced what Hasselbring classified as an explosion in those cases where there was not a flame arrester at the opening of the container. According to the article, "these explosions consisted of a whooshing noise as flames and gasoline spewed out the pour opening." [*Id*.]. No video or audio recordings were made of the static tests.

13 The containers had no spout. Each had an open vent and an open pour opening.

14 A wick soaked in gasoline was the ignition source. The part of the wick which extended outside the container was lit and allowed to burn down into the container.

The facts pertaining to the gasoline spill tests are unclear in the article. In the three tests which are potentially most pertinent to the causation issue in this case **[**41]** (because of the amount of gasoline involved), varying amounts of gasoline (two cups, one cup, 1/2 cup) in a 5 gallon plastic container were spilled "near a fire contained in a dirt pit." [*Id*.]. Liquid gasoline "was poured near burning paper or propane". [*Id*.]. In two of the three instances this "resulted in spraying burning gasoline outside the dirt pit." The article did not state that any of these tests resulted in a broken or ruptured container.

Videos (with no audio component) were made of the five gallon gasoline spill tests. These videos are in the record. [Armstrong Dep., Doc. 132, Ex. 28, DVD titled "9 Fire tests Series Human Pour"]. The procedure each time was to hold a plastic container holding a specified amount of gasoline over a flame. In tests 1 and 2 the container had a spout and an open vent; in test 3 it had a pour opening on the top and an open vent but no spout. A small fire was created in the middle of a circular configuration of rocks and dirt on the ground. The individual holding an extender fastened to the plastic container would slowly rotate it downward until it was upside down over the fire. At this point gasoline came pouring out of the container's spout (or **[**42]** pour opening) onto the fire below. Nothing happened until the gasoline hit the flame. This caused a flare-up of flames

which, each time, surrounded the container. While the article contended that flashbacks (called explosions in the article) occurred inside the container in the tests involving two cups and one cup of gasoline (but not with one-half cup), the flashbacks cannot be visually confirmed due to the dark red coloration of the containers. In two cases (two cups, one cup) a momentary spurt of flaming vapor came out of the container's spout a distance of 2-3 feet after the individual holding the can pulled it back to an upright position. No explosions or ruptures of the containers occurred.

Finally, Hasselbring's article relates an incident involving a fourteen-year-old boy who was burned when he was either pouring or attempting to pour gasoline on a small flame in a fire pit. [Mardirosian Dep., Doc. 130, Ex. 5 at 64]. There was about one gallon of gasoline in a five gallon plastic container. [*Id*. at 67]. While the boy was tipping the container to pour gas **[*1360]** on the flame, something catastrophic occurred which is not expressly identified in the article. As a result of whatever occurred **[**43]** the boy lost consciousness. He woke up on the ground, with his legs burning. A neighbor heard an explosion and rushed outside. An enormous fire was burning, with flames up to ten feet high. The neighbor found remnants of the gas container some distance away from the fire pit. According to the article, the fire department described the cause of the incident as: "Accidental flammable ignition of a gas can to exposed flame causing the can to explode spattering the victim with gas and flame". The article states that the police investigation revealed that the fire was started "by a vapor fumes explosion", [*Id*. at 64]. Hasselbring appears to assert that the cause of the incident was a flashback inside the gasoline container; she asserts that although the ratio of gas vapor to air in the container considerably exceeded the upper flammability limit for gasoline, the ratio was sufficiently altered by the tilting of the container to bring about a potentially explosive condition in the gas container [*Id*. at 67]. She appears to assert that when sparks or flame from the fire pit reached the gas vapor coming out of the spout of the container, a flashback occurred inside the container which caused **[**44]** it to explode.

In the summary section of her article Hasselbring states, "There are a number of variables that contribute to whether or not a gasoline container will explode," and there are a number of "known ignition variables" including the percentage of gasoline vapors in the atmosphere in the container, temperature, humidity, wind speed, winter versus summer blends of gasoline, and whether or not gasoline is being poured out of the can. "With all these variables," Hasselbring concludes, "it is difficult to determine combinations of them that may lead to a gas container explosion." [*Id*.].

Hasselbring's theory about the incident involving the fourteen year old boy is not clearly supported by the facts set forth in her article. The facts described would equally support a theory that the boy poured gasoline on the fire, creating a flare up which caused him to drop the container into the fire, causing the container to explode. In this scenario, dumping a large amount of gasoline on a fire likely would cause a huge flare up which would heat up the gasoline and cause the container to explode after it hit the ground.

While the article's title suggests that it is about "exploding containers" **[**45]** which could be avoided with a flame arrester, in fact the article contains no clear information concerning an explosion of a container caused by a flashback. The tests described in the article did not result in any exploding containers at all. Also, anecdotal events, such as the one involving the fourteen year old boy, are a questionable basis for scientific conclusions. There is no reliable information that a flashback caused the boy's injuries. This fact, plus the disclaimer in the summary section of the article, leads the Court to question whether Mardirosian read the article before deciding to rely upon it.

The Court notes that Hasselbring has acted as litigation consultant and expert witness for Plaintiff's counsel in the past in numerous product liability cases involving alleged explosions of plastic containers containing gasoline. While that fact alone does not discredit her work, it does call for extra scrutiny because of possible bias.

The fact that there is no sworn testimony in the record concerning the conditions under which Hasselbring conducted her tests renders her test results inadmissible. *Federal Rule of Evidence 703* does allow an expert to rely on facts and data not **[**46]** independently admitted in evidence under **[*1361]** certain circumstances, [15] but only where "their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect". For all of the reasons previously stated, the Court cannot make that determination in this case. In addition, as noted,

Hasselbring's article and her tests do not "fit" the circumstances in this case. The main point of her article was to urge that plastic gasoline containers have fire arresters, not to state formulas for proving causation in cases where the containers did not have fire arresters. Hasselbring's article and tests have been mis-used to try to prove a point she did not directly address in her article.

> 15 Reliance on facts and data outside the evidentiary record may be invoked "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . ." *Rule 703*. It seems doubtful that this requirement is met here; in any event Plaintiff has not addressed it.

Mardirosian's conclusion that a gas container explosion was the most likely cause of the death of Plaintiff's daughter is sheer speculation. His report stated **[**47]** that the explosion of the gas container on the porch "violently propelled burning gasoline omni directional, including back inside the living area of the subject structure." [Doc. 58-2 at 14]. It stated that although the large gasoline spot in front of the wood stove probably came "from the initial incident," the spots of gasoline to the right of the wood stove "were most likely the result of burning gasoline being propelled from the ruptured container to that area of the kitchen." As stated previously, Mardirosian's conclusions are simply based on an assumption that an explosion of the container on the porch occurred. These conclusions are not based on his own training and experience, but are drawn from his reading of Hasselbring's article and Michigan Fire Test No. 10.

In summary, the testimony of Armstrong and Mardirosian on the issue of causation is inadmissible under *Daubert*. It would confuse the jury, does not fit the facts of this case, and is unreliable in the respects previously discussed. Neither expert was asked to directly address the issue of causation regarding possible explosion of the container on the porch. The key question is, given the circumstances existing on the **[**48]** day of Plaintiff's accident, is it likely that a flashback through the spout of the container occurred? If it did occur, is it likely that the container exploded? Secondly, the expert opinions which were provided would not aid the trier of fact because they are not sufficiently tied to the actual circumstances which existed on the day of Plaintiff's accident. The expert testimony Plaintiff has presented nibbles around the edges of the key question: whether the container on the porch likely exploded. Neither Armstrong nor Mardirosian were asked to opine whether given the actual facts (two gallon plastic container with narrow spout containing about five ounces of gasoline, sitting on a porch [16]) a flashback would likely have occurred when Plaintiff ran by with her clothing in flames, assuming that the flames came near enough to the spout. [17] **[*1362]** Further, if a flashback occurred would it have caused an explosion of the container?

> 16 Plaintiff's brief indicates her belief that other facts are relevant: the outdoor temperature was 32 [degrees] Fahrenheit or less, the gasoline was "weathered, "Plaintiff had poured gas out of and back into the container a few minutes before Plaintiff ran by with **[**49]** her clothing in flames. Plaintiff may well be right that these are relevant considerations. However, this does not solve the basic problem that no expert witness was asked the essential causation question, either with or without Plaintiff's add-ons.
>
> 17 The issue of whether Plaintiff's pathway came close enough to the spout to permit ignition of any existing vapor trail would be a jury question at trial. Of course, Plaintiff's own testimony at trial would have to supply this evidence. Her deposition testimony does not supply it.

C. *Defendant's Motion for Summary Judgment*

1. *Standard of Review*

The Court will grant summary judgment when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly probative." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. *Id. at 248*.

The moving party "always bears the initial responsibility of **[**50]** informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a

genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (quoting *Fed. R. Civ. P. 56(c)*). When the non-moving party bears the burden of proof at trial, the moving party's initial burden is to negate an essential element of the non-moving party's case or to show that there is no evidence to prove a fact necessary to the non-moving party's case. *See Clark v. Coats & Clark, Inc., 929 F.2d 604, 606-08 (11th Cir. 1991)*. When the moving party bears the burden of proof at trial, it "must demonstrate that 'on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.'" *Irby v. Bittick, 44 F.3d 949, 953 (11th Cir. 1995)* (quoting *United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991))*.

Only after the moving party meets this initial burden does any obligation on the part of the non-moving party arise. *Celotex Corp., 477 U.S. at 323*; **[**51]** *Chanel, Inc. v. Italian Activewear of Florida, 931 F.2d 1472, 1477 (11th Cir. 1991)*. At that time, the non-moving party must present "significant, probative evidence demonstrating the existence of a triable issue of fact." *Id.* If the non-moving party fails to do so, the moving party is entitled to summary judgment. *Four Parcels of Real Prop., 941 F.2d at 1438*.

All evidence and justifiable factual inferences should be viewed in the light most favorable to the non-moving party. *Rollins v. TechSouth, Inc., 833 F.2d 1525, 1532 (11th Cir. 1987)*; *Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987)*. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Four Parcels of Real Prop., 941 F.2d at 1438* (quoting *Anderson, 477 U.S. at 248*). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson, 477 U.S. at 248*.

2. *Analysis*

Defendant seeks summary judgment as to all of Plaintiff's claims, arguing that: (1) Plaintiff **[**52]** has no evidence that the design of its gas container is defective and (2) there is no evidence that an explosion of a Blitz gas container caused any of Plaintiff's injuries or the death of her daughter. Because there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law on argument (2), Defendant's **[*1363]** motion for summary judgment will be granted on that ground. It is unnecessary to reach the issue of whether Defendant's gas container is defective because it lacks a flame arrester.

a. *Requirement of Causation*

Causation is an essential element in both strict liability and negligence cases involving alleged design defects or inadequate warnings. Georgia's strict liability statute states:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold *is* **[**53]** *the proximate cause of the injury* sustained.

Ga. Code Ann. § 51-1-11 (b) (1) (emphasis added) ; [18] *see Davenport v. Ford Motor Co., Case No. 1:05-CV-3047-WSD, 2007 U.S. Dist. LEXIS 91245, at *6-*7 (N.D. Ga. Dec. 12, 2007)* (unpublished opinion). "Unless the manufacturer's defective product can be shown to be the proximate cause of the injuries, there can be no recovery." *Jonas v. Isuzu Motors Ltd., 210 F. Supp. 2d 1373, 1377 (M.D. Ga. 2002)* (quoting *Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264, 269 (1981))*.

> 18 Claims brought under Georgia's product liability statute, *O.C.G.A. § 51-1-11 (b)*, fall into one of three categories: (1) design defects, (2) manufacturing defects and (3) packaging/ labeling defects. *Banks v. ICI Americas, Inc., 264 Ga. 732, 733, 450 S.E.2d 671 (1994)*. While this statute imposes strict liability, it does not convert manufacturers into insurers of their products. *Id. at 737*. In order to succeed on a design defect claim, a plaintiff must establish that the risk associated with a product exceeds the product's utility. *Id. at 738*. And a plaintiff alleging a

> manufacturing defect or a packaging/labeling defect will not succeed if the product was "properly prepared, manufactured, packaged **[**54]** and accompanied with adequate warnings and instructions . . . ." *Id. at 733* (internal citations and quotation marks omitted).

The element of causation is also required in negligence cases. "To recover damages in a tort action, a plaintiff must prove that the defendant's negligence was both the 'cause in fact' and the 'proximate cause' of [the] injury." *Ogletree v. Navistar Int'l Trans. Corp., 245 Ga. App. 1, 535 S.E.2d 545, 548 (Ga. Ct. App. 2000)* (internal citations omitted). "With respect to factual causation (often referred to as the causal 'link' or 'connection' between an act or omission and an event), we have held that '[t]he defendant's conduct is not a cause of the event, if the event would have occurred without it.'" *Id*. (internal citations omitted).

The plaintiff has the burden to prove causation. *Ogletree, 535 S.E.2d, at 550*. "As a general rule, issues of causation are for the jury to resolve and should not be determined by a trial court as a matter of law except in plain and undisputed cases." *Id. at 548*. However, "a reasonable inference sufficient to create a triable issue of fact cannot be based on mere possibility, conjecture, or speculation . . . Consequently, [t]he plaintiff must introduce **[**55]** evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result . . . ." *Id. at 548* (internal citations and quotation marks omitted).

Even if the expert reports and deposition testimony of the above experts were admissible, the evidence would be insufficient to allow a reasonable jury to **[*1364]** find causation under Georgia law given the speculative nature of the experts' conclusions. Where an expert's opinion testimony is founded on an unsupported premise, it gives rise to an inference that is based on speculation and has no evidentiary value. *Id. at 550* (citing *Grant v. Ga. Pacific Corp., 239 Ga. App. 748, 521 S.E.2d 868 (Ga. App. 1999))*. The Court in *Ogletree* stated the following:

> As we have held, ' [n]o inference of fact may be drawn from a premise which is wholly uncertain.'... And, inferences must be based on probabilities rather than mere possibilities... Moreover, when a party relies on inferences to prove a point, not only must those inferences be factually based, they must tend in some proximate degree to establish the conclusion sought and render less probable all inconsistent conclusions . . .

Id. (internal **[**56]** quotation marks and citations omitted). Because the opinions of Plaintiff's experts as to the cause of her injuries and the death of her daughter are based on speculation, they would not provide an adequate basis to survive summary judgment even if they were admitted into evidence. [19]

> 19 Plaintiff also submitted the deposition testimony of John Gillispie, Vice President of Engineering at Eagle Manufacturing Company. [Doc. 142]. Plaintiff designated Gillispie as an expert witness. Gillispie was subpoenaed to testify. Gillispie's testimony involved his own testing of flame arresters and the use of flame arresters in Eagle's products. [Doc. 142]. His testimony lends no support to Plaintiff's theory that the gas container on Plaintiff's front porch exploded and caused her injuries or the death of her daughter.

b. *Plaintiff's Remaining Evidence*

Other than the expert testimony proffered by Plaintiff, there is no evidence in the record that the container on the front porch of the mobile home actually exploded or likely exploded on the day of the accident or, if it did, that it caused Plaintiff's injuries or the death of Plaintiff's daughter. There are only two lay witnesses who reported hearing **[**57]** a "boom" - Nancy Walker and Mamie Grace. Neither of these witnesses actually saw the gasoline container on the front porch explode. Neither witness knows with any certainty where Plaintiff was located when the "boom" occurred. In order for Plaintiff to have been injured by an exploding gas container, she would have had to have been near the container when it exploded (assuming that it did explode). Even assuming that the Blitz gas container on the front porch of the mobile home exploded when Plaintiff ran past it, there is no evidence, other than the mere speculation of Plaintiff's experts, that such an explosion had anything to do with the death of Dinesica Walker.

The Court notes that one version of Plaintiff's testimony is that she heard a boom at around the time she

was in the vicinity of the container on the porch. The Court does not believe this is enough for her case to survive summary judgment, given that she did not see the container explode, did not see or perceive flames coming from the container, and did not know where the "boom" noise came from.

Plaintiff argues that Defendant's expert witness, Vytenis Babrauskas, author of a treatise on ignition and fire, offers some evidence **[**58]** that the gasoline container exploded. [20] The following passage appears in Babrauskas' treatise:

> Actual explosions of portable gasoline containers are rare, because this requires that the vapors inside be below the [upper flammability limit]. [21] This can happen in extremely cold climates. In temperate climates, explosions have **[*1365]** been known to occur while *emptying* a container. The process of emptying the liquid pulls air into the container and a region within the container can get created that is below the [upper flammability limit].

Babrauskas, *Ignition Handbook* 852 (2003) (emphasis in original).

20 Plaintiff has filed a *Daubert* motion to exclude the testimony of Babrauskas, which is discussed below.

21 Babrauskas' treatise describes flammability limits as follows:

> It is found experimentally that when a fuel gas is mixed with air, flame propagation cannot occur if the fuel gas concentration is too small or too great. The limiting concentration values are known as the *lower flammability limit* (LFL) and the *upper flammability limit* (UFL). They are normally expressed as a percent of fuel, by volume, in air, but occasionally are provided in other units, for instance, grams of fuel per m3 of mixture. **[**59]** In older literature, they are often identified as the LEL (lower explosion limit) and UEL (upper explosion limit). In a rough way, flammability limits can be understood to arise because flames need a minimum temperature to exist. Too much air or too much fuel dilutes the mixture enough that a sufficient temperature rise cannot be achieved. This explanation is extremely simplified and actual prediction of flammability limits from basic science concepts is very difficult...
>
> Babrauskas, *Ignition Handbook* 852 (2003) (emphasis in original).

Babrauskas published a corrigenda to his book on his website, which stated that the above claim about explosions occurring in temperate climates "is not supported by the published literature," and that there have been no case histories published documenting such an event and no experiments supporting this suggestion, and that, instead, experimental work has shown that containers do not explode. [Babrauskas Dep., Doc. 154, Ex. 21]. Babrauskas testified that he published this corrigenda when he realized that there was not substantive evidence to support the statement he had made in his book. [*Id*. at 102]. Plaintiff claims that Babrauskas only changed his mind **[**60]** regarding his statement in March of 2008 after he was contacted by counsel for Blitz. [Doc. 165-5, at 9; Babrauskas Dep., Doc. 154, at 96-97].

Even disregarding the corrigenda, Babrauskas' statement in his book does not provide evidence tending to prove that the gas container exploded on the front porch on the day of the accident. First, Babrauskas states that explosions are rare and happen only under the correct conditions. Second, there still is no evidence in the record that taking into account all relevant conditions, a flashback likely occurred or that the container likely exploded in this case.

c. *Plaintiff's Inadequate Warning Claim*

To the extent that Plaintiff argues that an inadequate presentation of the warning on the gasoline container led to her injuries or the death of her daughter, her claim also fails. Plaintiff has stipulated that the content of the warning was adequate, so her claim is limited to the

allegation that the presentation of the warning was too hard for her to read or was not conspicuous enough. [Doc. 136].

Where a plaintiff is aware of the danger that the plaintiff claims he or she should have been warned against, the failure to warn is not the proximate cause **[**61]** of the plaintiff's injury. *Bodymasters Sports Ind., Inc. v. Wimberley, 232 Ga. App. 170, 501 S.E.2d 556, 561 (Ga. App. 1998)*; *Daniels v. Bucyrus-Erie Corp., 237 Ga. App. 828, 829-30, 516 S.E.2d 848 (Ga. App. 1999)*. Plaintiff stated several times during her deposition that she understood the dangers of gasoline and the potential for gasoline to ignite, cause severe injury, and cause an uncontrollable fire. Even if she had read the warning on the gasoline container, it would not have given her information that she did not already know. [22]

> 22 The parties have stipulated that the content of the warning was adequate. However, it does not appear that the parties have submitted the text of the warning to the Court other than in photographs of the Blitz gasoline container, which are illegible. [Walker Dep., Doc. 122, Exs. 5, 6].

[*1366] Plaintiff submitted an affidavit on March 23, 2009, claiming that although she understood that gasoline was dangerous on the day of the accident, she did not understand the danger of gasoline *vapors*. [Doc. 171]. She claims that if she had understood the danger of gasoline vapors she would have moved the gasoline container to the corner of the porch rather than leave it by the door or she would have stayed **[**62]** far away from the gasoline container while running across the porch. [Doc. 171].

It appears that Plaintiff seeks to undo a stipulation of fact entered into and filed by the parties on March 2, 2009 (that there is no claim that the warning on the gas container was inadequate). The Court will not allow the affidavit to effect this change, and will disregard it to this extent.

Second, even if the Court accepts Plaintiff's affidavit, it does not change the conclusion of this case. As the Court has held, there is insufficient evidence that a gas container explosion on the porch of the mobile home was either the cause-in-fact or the proximate cause of Plaintiff's injuries or the injuries and death of her daughter. Therefore, there is also insufficient evidence that if Plaintiff had read the warnings on the container and understood the dangers of gasoline vapors, and if she had heeded the warnings and stayed far away from the container, this tragedy would have been avoided. Plaintiff started a fire inside of the mobile home, and there is no evidence in the record to show that a gasoline container explosion, rather than this initial fire, was the cause of the tragedy.

For the above reasons, the **[**63]** Court GRANTS Defendant's motion for summary judgment as to all of Plaintiff's claims because Defendant has shown that Plaintiff has insufficient evidence to allow a reasonable jury to find that an explosion of the Blitz gas container caused the injuries to Plaintiff or the injuries and death of her daughter. Because Defendant does not bear the burden of proof at trial, pointing to Plaintiff's failure to produce any evidence in support of her claim is sufficient for summary judgment. *See Clark, 929 F.2d at 606-08*.

D. *Plaintiff's Motion to Exclude the Expert Testimony of Vytenis Babrauskas*

Plaintiff has moved to exclude the testimony of Defendant's designated expert Vytenis Babrauskas, Ph.D, and author of the *Ignition Handbook*. [Doc. 139]. Because the Court finds that, even absent Barauskas' testimony, summary judgment should be granted based on the absence of causation evidence in the record, Plaintiff's motion is DISMISSED AS MOOT. [Doc. 139].

E. *Motion to Compel Discovery*

Plaintiff has filed a motion to compel the deposition testimony of Defendant's corporate representative under *Federal Rule of Civil Procedure 30(b)(6)*. Plaintiff's motion also seeks sanctions and an extension of time **[**64]** in which to conduct discovery. [Doc. 114]. The Court DISMISSES AS MOOT Plaintiff's motion to compel and for sanctions. [Doc. 114]. The categories of testimony sought by Plaintiff consist solely of information pertaining to the technological and economic feasibility of designing a gas container with a flame arrester, such as the cost of manufacturing each of Defendant's models of gas containers. Defendant's gross receipts from sales of gas containers, and Defendant's sale price to retailers for each model of gas container. **[*1367]** [Doc. 114, at 53-54]. Because there is insufficient evidence to allow a reasonable fact finder to conclude that the design of the gas container caused the injuries and death in this case, any testimony regarding the feasibility of including a flame arrester in Defendant's

gas container design is irrelevant. Plaintiff's motion to compel Defendant's corporate representative to testify regarding the feasibility of flame arresters is DISMISSED AS MOOT. [Doc. 114].

IV. CONCLUSION

The Court has carefully considered the filings of the parties. In summary, Plaintiff's motion for leave to file an amended complaint [Doc. 138] is DENIED and Defendant's motion for summary judgment **[**65]** [Doc. 120] is GRANTED. Defendant's motions to strike the expert reports of Armstrong, Stevens, and Mardirosian [Docs. 155, 157, 158] are GRANTED in part and DISMISSED in part AS MOOT. Plaintiff's motion to exclude the testimony of Defendant's expert witness [Doc. 139] is DISMISSED AS MOOT. Defendant's motion for leave to respond to Plaintiff's motion to compel discovery [Doc. 163] is GRANTED, Plaintiff's motion to compel discovery [Doc. 114] and Plaintiff's Motion to Strike [Doc. 203] are DISMISSED AS MOOT.

SO ORDERED, this 30 day of September, 2009.

/s/ Orinda D. Evans

ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RALPH JAMES PUCKETT, III, Plaintiff, v. THE PLASTICS GROUP, INC., Defendant.	)	CIVIL ACTION FILE NUMBER 1:11-cv-1120-TCB

ORDER

I. Facts

Late Friday evening, January 16, 2010, Plaintiff Ralph James ("Jim") Puckett III and his wife were in their backyard in Cordele, Georgia, in order to observe an eclipse through their telescope. Puckett, who was an elementary school assistant principal, decided to light a fire in a portable fire pit. To start the fire, he placed two pieces of wood and some cardboard into the pit. However, he had trouble lighting the fire, managing to produce only about a one-inch flame on one end of the wood. At that point, he decided to use gasoline as an accelerant to build up the fire. He went to his

garage and got his five-gallon plastic gas can, which was manufactured by Defendant The Plastics Group, Inc. He then stood approximately three to four feet from the fire and splashed gas on the fire. The fire traveled from the pit into the can via the gasoline vapors, causing the can to explode, a phenomenon known as "flashback."

Puckett suffered severe burns on approximately fifty-five percent of his body as a result of the incident. The question this case presents is whether he can shift to Plastics, the gas can manufacturer, the responsibility for the tragic consequences resulting from his own decision to splash gasoline on a fire. The Court finds that as a matter of Georgia law he cannot.

II. Procedural Background

On April 7, 2011, Puckett filed this action, in which he asserts three claims: (1) failure to warn; (2) products liability design defect pursuant to O.C.G.A. § 51-1-11; and (3) negligence. He seeks compensatory damages, punitive damages, and attorney's fees.

After an extensive discovery period, on October 5, 2012, Plastics filed a motion in which it contends that it is entitled to summary judgment on all of Puckett's claims because (1) Puckett had actual knowledge of the danger

of splashing gasoline on an open flame and thus assumed the risk of his actions; (2) the danger of splashing gasoline onto a source of ignition is an open and obvious danger; and (3) Puckett was contributorily negligent when he splashed gasoline onto the fire.[1]

III. Plastics' Motion for Summary Judgment

A. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light

[1] That same day, the parties filed various motions in limine, including *Daubert* motions [114, 115, 116, 125, 128, 138]. Because the nature of these motions does not require that they be addressed first, the Court begins with the motion for summary judgment.

most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex*, 477 U.S. at 324). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex*, 477 U.S. at 323).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995) (quoting *Celotex*, 477 U.S. at 324).

B. Analysis

As stated earlier, Puckett has three claims: failure to warn, design defect, and negligence.

We begin with the elementary principle that even children are presumed to know the danger of fire, *see White v. Ga. Power Co.*, 595 S.E.2d 353, 356 ("The danger from fire or water is one that even young children may be said to apprehend.") (quoting *McCall v. McCallie*, 171 S.E. 843, 844 (1933)), and Puckett's admission that he knew splashing gasoline on a fire "could cause a fire to 'flare up.'"[2]

1. Failure to Warn

The gas can at issue is red. Embossed onto one side of the can is a warning that reads in pertinent part as follows:

GASOLINE
DANGER – EXTREMELY FLAMMABLE
VAPORS CAN EXPLODE OR CAUSE FLASH FIRE
. . .

CAUTION: . . . KEEP AWAY FROM FLAME . . . VAPORS CAN BE IGNITED BY A SPARK OR FLAME SOURCE MANY FEET AWAY.

[2] Puckett's brief in opposition to Plastics' motion [137] at 10. The Court finds that "flare up," which is repeatedly used by Puckett, is simply another way of saying combustible or flammable.

Puckett does not recall having ever read the warnings on the can although he testified at his deposition that he was fully able to do so and indeed read the warnings aloud during his deposition. He also testified that none of the warnings was ambiguous in any way, and that it did not surprise him that gas is flammable. Indeed, this characteristic of gasoline was why he splashed the gasoline on the fire. Puckett also testified that he stood a few feet away from the fire because he knew "there was a danger of the fire flaring up out of the top of the fire pit." Tragically for Puckett, the flare up ignited the vapors, which traveled into the can and caused it to explode.

Puckett contends that the danger at issue in this case is the gas can's exploding due to flashback because he held the can near the fire and splashed gas from the can onto the fire. He avers that even though he knew that splashing gasoline on a fire could cause the fire to flare up and burn him, he was not aware of the danger of the can's exploding, and consequently Plastics failed to adequately warn him of the relevant danger.

In a products liability case, "whether or not grounded in a strict liability or negligence theory, a manufacturer's duty to warn depends on the foreseeability of the use in question, the type of danger involved, and the foreseeability of the user's knowledge of the danger." *Jones v. Amazing*

Prods., Inc., 231 F. Supp. 2d 1228, 1247 (N.D. Ga. 2002) (applying Georgia law to plaintiff's failure-to-warn claims premised on negligence and strict liability).

A manufacturer breaches its duty to warn if it fails to (1) adequately communicate the warning to the ultimate user, or (2) provide an adequate warning of the product's potential risks. *Thornton v. E.I. Du Pont De Nemours & Co.*, 22 F.3d 284, 289 (11th Cir. 1994). The first type of failure-to-warn claim centers on issues such as location and presentation of the warning, while the latter focuses on the content of the warning, i.e., whether the warning informs the user of the relevant risks. *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1219 (11th Cir. 1999). In other words, the first type of failure-to-warn claim is based on the form of the warning, and the second is based on the substance.

Plastics contends that it is entitled to summary judgment on both types of failure-to-warn claims because (1) Puckett actually knew it was dangerous to splash gas onto a fire; (2) Plastics had no duty to warn of an open and obvious danger; (3) Puckett testified that he did not read the warnings; and (4) Puckett's ability to read the warnings at his deposition defeats his contention that the warnings were inconspicuous.

Some of these arguments apply to both types of failure-to-warn claims but not all of them. In addressing each argument, the Court notes which type of warning claim the argument applies to.

a. Assumption of the Risk

Plastics' first argument—Puckett's actual knowledge of the danger—applies to both types of a failure-to-warn claim. Plastics argues that it is "well-established in Georgia that there is no duty to warn when the person using the product knows of the danger, or should, in using the product, discover the danger." Relying on this premise, Plastics asserts that Puckett knew of the danger associated with splashing gas onto a fire, assumed the risk of his actions, and therefore should be barred from recovering on his failure-to-warn claim.

"In Georgia, a defendant asserting an assumption of the risk defense must establish that the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks." *Vaughn v. Pleasant*, 471 S.E.2d 866, 868 (Ga. 1996); *see also Teems v. Bates*, 684 S.E.2d 662, 666 (Ga. Ct. App. 2009). Indeed, it is well-established that "there is no duty resting upon a manufacturer or seller to warn of a product-connected danger . . . of

which the person who claims to be entitled to the warning has actual knowledge." *Whirlpool Corp. v. Hurlbut*, 303 S.E.2d 284, 288 (Ga. Ct. App. 1982). "Whether a party assumed the risk of injury is a jury question that should not be decided by summary judgment unless the defense is conclusively established by plain, palpable, and undisputed evidence." *Dean v. Toyota Indus. Equip. Mfg., Inc.*, 540 S.E.2d 233, 236 (Ga. Ct. App. 2000). Whereas the question of whether a danger is open and obvious is an objective one focused on the reasonable person, the determination of whether a plaintiff assumed the risk of his actions is subjective and focuses on what the plaintiff actually knew. *Weatherby v. Honda Motor Co.*, 393 S.E.2d 64, 67 (Ga. Ct. App. 1990), *overruled on other grounds by Ogletree v. Navistar Int'l Transp. Corp.*, 500 S.E.2d 570 (Ga. 1998).[3]

Puckett argues that he had "general knowledge of how introducing fuel to a fire could cause a fire to 'flare up,'" but that he was not aware that "ignition of vapors could cause a flame to flashback and cause the . . . can to explode." Thus, he contends that he had neither a particularized nor a

[3] The subjective inquiry makes irrelevant Puckett's contention that the risk of the gas can's exploding was not plain and palpable because Plastics' own engineers did not know of this risk until after his accident. Because the assumption-0f-the-risk defense looks to Puckett's subjective knowledge, the engineers' knowledge is immaterial.

subjective awareness of the actual danger of the gas can's exploding in his hands and therefore could not have assumed such a risk.

Accordingly, resolution of the applicability of Plastics' assumption-of-the-risk defense requires identification of the precise danger involved under the facts of this case.

Plastics contends that the danger of which Puckett had to have actual knowledge was being burned when mixing gasoline and fire, and that Puckett understood and appreciated this danger because he testified that he (1) stood three to four feet back from the fire to splash the gas, and (2) knew the gasoline could cause the fire to "flare up."

Puckett responds that case law requires that his knowledge of the danger be more specific than the general danger of mixing gasoline and fire. He contends that the gasoline is one product and the gas can a second, separate product. Thus, he argues that he had to know the danger of the fire igniting the gas vapors and causing the *can* to *explode*. Puckett asserts that he did not have actual knowledge of or appreciate the specific danger posed by the gas can (i.e., that it could explode) when he splashed gasoline on the fire. He thought at most the fire might flare up and possibly singe his eyebrows.

The Court finds *Whirlpool*, 303 S.E.2d at 288, instructive as to what Puckett had to know and appreciate in order to have assumed the risk of his actions.

In *Whirlpool*, the plaintiff was hired by a homeowner to replace the floor in her kitchen. The plaintiff began the project by removing the existing carpet, which left behind a glue residue. Scraping off the residue proved difficult, so the plaintiff applied mineral spirits to the residue. When he ran out of mineral spirits, he covered the residue with gasoline. Unfortunately for the plaintiff, the homeowner had a gas stove with burning pilot lights. One of the pilot lights ignited the vapors from the gasoline, the mineral spirits, or both and caused an explosion in which the plaintiff was burned.

The plaintiff sued, *inter alia*, the manufacturer of the stove, alleging (1) defective or negligent design of the stove because the manufacturer failed to isolate or protect the pilot light from contact with vapors or fumes and failed to include a pilotless ignition system; and (2) failure to sufficiently warn about the alleged latent dangers of the stove. The manufacturer moved for summary judgment, contending that the plaintiff had assumed the risk of his actions.

In determining what the plaintiff knew at the time of the incident, the court found that the plaintiff did not know that the stove was a gas stove with burning pilot lights or that the fumes from gasoline and mineral spirits could be ignited, but that the plaintiff did know that there was a stove; gas stoves use pilot lights; and the plaintiff should have kept sources of ignition away from combustible substances. The court also found based on what the plaintiff did know that he should have discovered the type of stove in the kitchen.

"Pretermitting the questions of whether the stove was defective in any particular, whether there was negligence in its manufacture, design, or lack of warnings, or whether appellee was 'using' the product in a foreseeable manner," the court held that the plaintiff had "assumed the risk of injury accruing from his contact with the stove under the circumstances." *Id.* The court explained that the plaintiff could not "hide behind his own sworn statement that he did not know the vapors or fumes from the substances could be ignited by the pilot lights" because he had actual knowledge that gasoline and mineral spirits are combustible and "the record repeatedly establishe[d] that he was aware that no source of ignition should have been

present in the kitchen while he was working with the mineral spirits and gasoline." *Id.*

The court's holding in *Whirlpool* focused on the combustibility of gasoline and mineral spirits near a source of ignition, the fact that gas stoves contain such sources, the danger of exposing gasoline to a source of ignition, and the plaintiff's knowledge thereof. Because the plaintiff knew that the substances he used on the floor were combustible and should be kept away from sources of ignition and that gas stoves have such sources, the court held that the plaintiff could not hide behind his alleged ignorance of the presence of the gas stove or the flammability of vapors. In reaching this decision, the court did not delve into the details of exactly what exploded, how it exploded, or the extent of the plaintiff's burns, as those details were irrelevant in light of the plaintiff's knowledge that gasoline and mineral spirits are combustible and should be kept away from a source of ignition that he should have known was present.

Applying *Whirlpool*, what Puckett had to know in order for Plastics' assumption-of-the-risk defense to prevail is that gas is combustible when splashed on fire. The key elements are the presence of gasoline and a

source of ignition and Puckett's knowledge that the two are dangerous when combined.

Puckett's argument that his knowledge had to be more nuanced, i.e., that the vapors could ignite and cause the can to explode, is a hair-splitter that Georgia law does not sanction. Puckett primarily relies upon *Bossard v. Atlanta Neighborhood Development Partnership, Inc.*, 564 S.E.2d 31 (Ga. Ct. App. 2002), which, he contends, requires the danger at issue to be "readily apparent upon visual inspection." However, *Bossard*, a premises-liability case involving overhead power lines, is distinguishable.

In *Bossard*, the plaintiff worked for a subcontractor that was hired to hang gutters at an apartment complex. Climbing up an aluminum ladder, his co-worker carried one end of a 58-foot section of gutter to the roof of a building. The plaintiff followed, holding the other end of the gutter. As the plaintiff climbed the ladder, the gutter hit a power line, causing "popping and arcing." The plaintiff fell off the ladder and was severely injured. He sued the apartment project owner, its management company, and the contractor with whom his employer had subcontracted, alleging that they were negligent in failing to warn him of the proximity of the live power line or to have the electrical current disconnected.

The defendants argued that the plaintiff was contributorily negligent and had at least equal knowledge that the power line was dangerous because he knew the power line was there, knew it could injure him, and deliberately tried to avoid it—yet struck it anyway.[4] The court of appeals rejected both arguments and reversed the trial court's entry of summary judgment to the defendants. It held that summary judgment was improper because there were multiple cables near the roof of the building and the plaintiff "did not know whether one or more of the lines were, in fact, power lines. Nor did he know, if there was a power line, whether it was energized and whether it was insulated." *Id.* at 802.

Most important to the present case is the fact that the court of appeals in *Bossard* did not address assumption of the risk. What a plaintiff has to know under the contributory-negligence doctrine and the equal-knowledge rule in order for his recovery to be barred is not synonymous with the knowledge requirement for assumption of the risk. *See Raymond v. Amada Co.*, 925 F. Supp. 1572, 1580 (N.D. Ga. 1996) (contributory negligence and equal-knowledge rule are "akin to but distinct from

[4] The defendants also argued before the trial court that they were entitled to summary judgment because the plaintiff had assumed the risk of his actions. The trial court disagreed and denied this portion of their motion. That ruling was not before the court of appeals.

assumption of risk"). Thus, *Bossard*'s language about what a plaintiff must know about a particular danger is neither controlling nor persuasive, and Puckett's reliance thereon is misplaced.

Moreover, unlike the plaintiff in *Bossard*, the record evidence establishes that Puckett was fully aware of the relevant danger at issue—splashing gasoline on a fire. The gas can exploded because the gas inside it was exposed to an open flame, and there can be no disputing that Puckett had actual knowledge that gas, when exposed to an open flame, is highly combustible. Puckett even concedes in his brief in opposition to Plastics' motion that he understood the danger of gasoline and knew that splashing gasoline on the fire could cause it to "flare up." These facts make this case much more like *Whirlpool* than *Bossard*. Both this case and *Whirlpool* involve a plaintiff who knowingly used gasoline near a fire, whereas *Bossard* involved overhead cables that might or might not have included electrical lines, and if they did, those lines might or might not have been insulated—matters the plaintiff could not have known. Thus, *Bossard* is simply inapposite.

In toto, the record shows that Puckett knew that (1) it was dangerous to splash gas onto the fire pit; (2) there was a danger of the fire "flaring up

out of the top of the fire pit a little bit"; (3) he should not stand directly over the fire pit and pour the gas on the fire because the "fire would flare up and [he] would be too close to it"; and (4) the fire could come out of the fire pit and he did not "want to singe [his] eyebrows or anything." Nevertheless, Puckett still chose to splash gasoline onto the fire. Consequently, what Puckett knew and appreciated makes application of the assumption-of-the-risk doctrine even more appropriate than in *Whirlpool*.

In *Whirlpool*, the plaintiff did not know that the stove was powered by gas and had burning pilot lights, yet he was still held to have assumed the risk of his actions when he used combustible substances near a stove without verifying the type of stove. By contrast, Puckett knew that there was a fire present (because he had started it), chose gasoline for the *sole* purpose of making the fire larger, and then intentionally splashed the gasoline directly on the fire. He understood and appreciated the risks of his actions, as evidenced by his testimony that he knew he should not stand over the fire and that he stood several feet away when splashing the gasoline. Consequently, Puckett cannot hide behind his testimony that he did not know the "fire would go back in that can and explode." *See also First Pac. Mgmt. Corp. v. O'Brien*, 361 S.E.2d 261, 265 (Ga. Ct. App. 1987)

("A person cannot undertake to do what is obviously a dangerous thing and at the same time avoid the responsibility for the self-assumed risk.").

Further undermining Puckett's contention that he had to have actual knowledge and appreciation of exactly how the interaction of gasoline and fire would injure him is the additional explanation in *Whirlpool* that

> [i]t is not important whether [the plaintiff] knew the precise, physical nature of the hazard presented by his "use" of the product; it is sufficient if he is aware generally that the "use" being made of the product is dangerous. Under the facts of this case, appellee clearly knew that it was dangerous to soak the floor adjacent to a gas stove with gasoline and mineral spirits. Accordingly, he cannot recover from Whirlpool for the injuries sustained in the resulting explosion, either under a theory of strict liability or under a theory of negligence.

303 S.E.2d at 288-89 (internal citations omitted). The court explained that because the plaintiff's lack of knowledge went only to the fact that the kitchen contained a gas stove, he was not ignorant of "the claimed product defect, but rather ignoran[t] of the presence of the product itself, which we have held he had a duty to discover." *Id.* at 289. Thus, the court stated that the assumption-of-the-risk defense would not have applied if the plaintiff had been unaware that gas stoves used pilot lights or contained any other source of ignition. *Compare Tennison v. Lowndes-Echols Ass'n for Retarded Citizens, Inc.*, 433 S.E.2d 344, 346 (Ga. Ct. App. 1993) (finding

plaintiff knew stack of lumber could shift and cause forklift to tilt when he climbed on lumber and therefore assumed risk of his actions) *with Hillman v. Carlton Co.*, 522 S.E.2d 681, 683 (Ga. Ct. App. 1999) (finding plaintiff knew risk of falling if he stood on or was raised by forklift but lacked knowledge as to risk of forklift malfunctioning due to poor maintenance and dumping him from forks to ground).

Whirlpool, *Tennison* and *Hillman* show that Plastics is merely required to show that Puckett knew and appreciated the danger of splashing gasoline on the fire, not the exact manner in which this danger could harm him. Accordingly, the Court holds that Puckett assumed the risk of his conduct and cannot recover against Plastics on his failure-to-warn claim. *See Sharpnack v. Hoffinger, Indus., Inc.*, 479 S.E.2d 435, 436 (Ga. Ct. App. 1996) (plaintiff assumed risk of injuries when he dove into shallow, above-ground pool from trampoline—even though plaintiff testified that he thought his dive was safe—because he had swum in pool before on numerous occasions, knew it was at most four-feet deep, and knew hazards associated with diving into shallow water); *Davis v. Jones*, 112 S.E.2d 3, 6 (Ga. Ct. App. 1959) (plaintiff as timekeeper for wrestling matches was charged with knowledge of danger or harm that might result

from sitting at a table within three feet of ring, including harm caused by wrestlers intentionally jumping from ring onto plaintiff).

b. Open and Obvious Danger

The Court now turns to Plastics' second argument, which also applies to both types of a failure-to-warn claim: the danger was open and obvious. Plastics contends that (1) there is no duty to warn of a product's obvious or generally known danger; (2) it is obvious and generally known that it is dangerous to mix gasoline and fire; and (3) consequently, Plastics had no duty to warn about the danger of splashing gasoline onto a fire.

Again, Puckett responds that the danger is more specific than the general danger of mixing gasoline and fire. He insists that the danger is flashback causing the gas can to explode, and that this is a latent danger, i.e., not one that is open and obvious. In support of his contention, Puckett relies on the testimony of Plastics' engineer and president, each of whom testified that he did not know until several months after Puckett was injured that fire flashback could cause Plastics' gas can to explode.

Under Georgia law, "there is no duty resting upon a manufacturer or seller to warn of a product-connected danger which is obvious or generally known." *Whirlpool*, 303 S.E.2d at 288. Generally, the issue of whether a

danger is open and obvious is a question for the jury; however, the manufacturer is entitled to judgment as a matter of law in "plain and palpable cases." *Neal v. Toyota Motor Corp.*, 823 F. Supp. 939, 941 (N.D. Ga. 1993) (quoting *Coast Catamaran Corp. v. Mann*, 321 S.E.2d 353 (Ga. Ct. App. 1984)). If a "product is designed so that it is reasonably safe for the use intended, the product is not defective even though capable of producing injury where the injury results from an obvious or patent peril." *Coast Catamaran*, 321 S.E.2d at 847. In determining whether the danger that caused the plaintiff's injury is latent or patent, "the decision is made on the basis of an objective view of the product, and the subjective perceptions of the user or injured party are irrelevant." *Weatherby*, 393 S.E.2d at 66.

As already discussed, the parties disagree as to the particular danger at issue, but the Court has found that Plastics is correct in its identification of mixing gasoline and fire as the relevant danger. And the Court finds that this danger is both open and obvious. Consequently, Puckett's contention that the Court should adopt the holding in *Walker v. Blitz USA, Inc.*, 663 F. Supp. 2d 1344, 1354 (N.D. Ga. 2009), with respect to flashback is without merit.

In *Walker*, the plaintiff accidentally set her clothes on fire when trying to light a wood stove inside a mobile home, using gasoline as an accelerant. She then ran out of the mobile home and onto its front porch, where a gas can sat containing a small amount of gas. The plaintiff alleged that as she ran past the can with her clothes on fire, the vapors from the can ignited, causing flashback and the can to explode. She contended that the explosion spewed gasoline and flames into the mobile home and thus caused or contributed to her burns and her daughter's death.

In her action against the gas-can manufacturer, the plaintiff averred that the can was defective because it did not have a flame arrester, which would have prevented flashback and the can's exploding. The plaintiff did not have any eyewitness testimony that the can in fact exploded; consequently, she relied on expert testimony to prove this. In addressing whether the expert testimony was admissible, the court found that the "dynamic of flashback, and the circumstances under which it might cause a violent explosion . . . is not within the experience of average jurors. It is not intuitive."

Based on this language, Puckett urges the Court to hold that "the danger of flashback explosion of a plastic gas can is not an open and

obvious danger that would be obvious to a reasonable person." However, Puckett's argument shows his lack of understanding as to the relevant danger. The danger that must be open and obvious is not the "dynamics of a flashback, and the circumstances under which it might cause a violent explosion." Rather, the danger is mixing gasoline and fire, and the Court finds it would be intuitive to a reasonable person that this is an open and obvious danger.

A case actually on point is *Weatherby*, in which the plaintiff was riding an off-road motorcycle that did not have a cap on its fuel tank. "During the ride over uneven terrain gasoline splashed from the open tank and was ignited, causing severe burns" to the plaintiff. *Id.* at 65. The plaintiff sued the driver and the motorcycle manufacturer, Honda, and his claims against Honda were

> based on the absence of any device attaching the cap to the gasoline tank so as to remind a person to put it in place prior to operation; the absence of a safety device covering the spark plug which would prevent any contact with flammable objects; the absence of a device or foam lining which would prevent fuel spillage in the event the gas cap is not on the tank; and inadequate warnings of the defective nature of the motorcycle.

Id. The court held that the "peril at issue" was an "open fuel tank resting over the engine and its spark plug." *Id.* at 67.

Honda moved for summary judgment based upon, *inter alia*, the open and obvious rule, contending that there was clearly no gas cap on the tank and that the "danger attendant to riding a motor bike with an uncapped gas tank could not be more open and obvious." *Id.* at 65. The plaintiff responded that "the dangers of spilled gasoline coming into contact with an engine are not generally known." *Id.* at 67. The court disagreed, finding that gasoline is "well known as an extremely flammable substance which may be easily ignited when subjected to heat or electrical impulses such as found about the surface of an operating gasoline engine." *Id.* Thus, the court held that as a matter of law "the injuries at issue in this case resulted from an obvious or patent peril" and that the plaintiff was barred from recovering on his duty-to-warn claim. *Id.* at 68.

Guided by *Weatherby*, which focused on the danger of highly flammable gasoline being ignited when splashed onto a hot engine, the danger at issue in this case is similar: gasoline being ignited when splashed onto a fire. However, unlike *Weatherby*, where the gasoline was intended to stay in the tank and not splash on the hot engine as the plaintiff rode the motorcycle, Puckett intentionally splashed the gasoline onto the fire. Consequently, if the danger in *Weatherby* was open and obvious, the

danger is even more open and obvious in this case, where Puckett intended for the gasoline to make the fire larger.

Similar to *Weatherby*, in which the plaintiff argued that a hot engine was not an obvious ignition source for gasoline, Puckett argues that it is not obvious that gasoline vapors could ignite and ultimately cause the gas can to explode due to flashback. In support of this argument, Puckett relies on the deposition testimony of two Plastics employees—the president of Plastics, who testified that Plastics did not know that fire flashback could cause the can to explode, and another employee, who similarly testified that he was unaware the gas can could explode. Puckett contends that if Plastics was unaware of the danger, it "should be estopped from taking the position that the danger was open and obvious." However, the inquiry to determine whether a danger is open and obvious is an objective one, which means that the subjective knowledge of the parties is irrelevant. *Weatherby*, 393 S.E.2d at 66-67. Moreover, Puckett, who bears the burden of proving the danger is latent, has not cited any cases in which a court considered the knowledge of the manufacturer or its employees in identifying the danger and determining whether the danger was open and obvious.

Puckett also argues that he expected only a small flare-up that might singe his eyebrows when he splashed the gasoline on the fire. Consequently, he contends that a reasonable person would not consider the can's exploding as a result of flashback to be an open and obvious danger. However, Puckett wrongfully focuses on the manner in which the dangerous situation injured him.

In determining what danger must be open and obvious, courts look at what actually creates the danger and whether those circumstances were present. Thus, *Weatherby* focused on the fact that "[g]asoline is well known as an extremely flammable substance which may be easily ignited when subjected to heat." *Id.* at 67. The court rejected the plaintiff's contention that it was not obvious that a hot engine could ignite gasoline. Other cases apply a similar approach and do not focus on the exact manner in which the plaintiff was injured by the dangerous situation or whether the harm caused by the danger was greater than anticipated.

For example, in *Cochran v. Brinkmann Corp.*, No. 1:08-cv-1790-WSD, 2009 WL 4823854, at *7 (N.D. Ga. Dec. 9, 2009), the plaintiff was injured when he jumped down from a picnic table, and tripped on a hose connecting a propane tank to a turkey fryer, causing the fryer to tip over

and spill hot grease onto his back. In determining whether the situation involved an open and obvious danger, the court looked at the use of a turkey fryer as a whole, not whether it was open and obvious that the plaintiff could be injured in the precise manner that he was.

Similarly, in *Rivers v. H.S. Beauty Queen, Inc.*, 703 S.E.2d 416, 419 (Ga. Ct. App. 2010), the plaintiff suffered second-degree burns when she blew out a lit candle that had been heating scented oil. The flame became very large when the plaintiff blew on it and exploded in her face. Again, the court held that the open and obvious danger was "the danger of receiving a burn from the open flame of a candle." *Id.* The court did not focus on how the plaintiff received the burns (blowing out the candle as opposed to spilling hot oil on herself), the severity of the plaintiff's burns, or the size of the explosion.

By contrast, in *R & R Insulation Services, Inc. v. Royal Indemnity Co.* 705 S.E.2d 223 (Ga. Ct. App. 2010), a chicken plant suffered a fire that allegedly caused more damage than it should have because of the presence of fiberglass-reinforced plastic panels near the fire. The plant sued the manufacturer and installer of the panels, contending, *inter alia*, that the

manufacturer had failed to adequately warn the plant of the combustibility and flame-spread properties of the panels.

In its motion for summary judgment, the manufacturer argued that the danger of the panels igniting and burning in a fire was open and obvious. The appellate court "recognize[d] that being burned from a fire is often cited as an example of an injury from an open and obvious danger," *id.* at 234, but it disagreed that this was such a case. Essential to the court's holding was the fact that the manufacturer made panels with "various levels of fire retardant material, which are not necessarily apparent simply from looking at a piece of the material." *Id.* Thus, the court held that a reasonable person would not understand that "this particular product would burn in the manner and speed alleged by" the plant. *Id.*

At first blush *R & R* might appear to support Puckett's argument that the exact nature of the injury and severity of the danger are relevant, as the court stated that a reasonable person could not anticipate the "manner and speed" of the product's burning. However, *R & R* is actually consistent with *Weatherby*, *Cochran* and *Rivers*. In *R & R*, the alleged danger was the combustibility/flammability of fiberglass-reinforced plastic panels in the presence of a fire. As in the other cases, the court looked at the product

that interacted with the heat source—the panels—and determined that the amount of fire-retardant material on the panels—and thus the probable danger when exposed to a heat source—was not obvious to a reasonable person just looking at the panels. By contrast, the dangers of frying oil, scented oil, and gasoline in the presence of fire are manifestly apparent to a reasonable person.

Thus, the Court finds that splashing gasoline from a gas can onto a fire is an objectively open and obvious danger, and that no reasonable jury could conclude otherwise. *See also Floyd v. BIC Corp.*, 590 F. Supp. 2d 276, 278 (N.D. Ga. 1992) (disposable butane lighter that creates a flame is an open and obvious danger); *Biles v. Tyson Foods, Inc.*, No. 1:95-cv-777-WBH, 1996 WL 684134, at *3 (N.D. Ga. Aug. 21, 1996) (deep-frying with oil over open flame is open and obvious danger). Consequently, Puckett cannot recover on his failure-to-warn claim, and the Court will grant Plastics summary judgment on this claim.

c. Puckett's Failure to Read the Warning

In its third argument, Plastics contends that Puckett's failure to read the warning on the can defeats the second type of failure-to-warn claim. The Court agrees. Puckett essentially admits that he did not read the

warning (or at least that he cannot recall having done so), and this admission indeed bars his recovery under the second type of failure-to-warn claim. *Camden Oil Co. v. Jackson*, 609 S.E.2d 356, 358-59 (Ga. Ct. App. 2004). In addition, the Court's findings with respect to Plastics' assumption-of-the-risk and open-and-obvious-danger defenses also apply to this type of failure to warn claim.

Accordingly, the Court will also grant Plastics summary judgment on this basis for Puckett's second type of failure-to-warn claim.

d. Puckett's Ability to Read the Warning

Plastics' fourth argument—that because Puckett was able to read the warning during his deposition he cannot recover on this claim—appears to address the first type of failure-to-warn claim. This type of claim involves questions as to the conspicuousness of the warning, i.e., its location and appearance on the product. *Id.* at 359.

If the evidence shows that Puckett noticed the warning on the can but chose not to read it, he cannot recover on the basis that the warning was not properly communicated. *Henry v. Gen. Motors Corp.*, 60 F.3d 1545, 1548 (11th Cir. 1995); *see also Thornton*, 22 F.3d at 290 (failure-to-warn claim based on failure to communicate warning without merit where

plaintiff testified that he had used defective product at least twice and had opportunity to read label but never did so). But Plastics has provided no such evidence. Review of Puckett's deposition testimony shows that Plastics' counsel did not ask Puckett whether he saw the warning on the gas can prior to splashing the gas on the fire, how long he had owned the can, or how often he had used it. Rather, Puckett testified that he did not recall if there were any warning labels on the can, if he had read them, or if he had torn them off. Thus, Plastics has not shown that Puckett noticed the warning on the gas can but chose not to read it.[5]

Furthermore, Plastics has not provided any cases to support its argument that because Puckett was able to read the gas can's warning during his deposition he is barred from recovering on the first type of

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[5] In support of its argument, Plastics cites to Puckett's testimony the he probably did not read the gas can's instructions because he doubted he would have found it necessary to do so. Plastics contends that this testimony bars Puckett's recovery on the first type of failure-to-warn claim.

However, immediately after Puckett testified that doubted he read the instructions, Plastics' counsel distinguished between the gas can's *instructions* and its *warnings*. Counsel then asked Puckett about the gas can's warnings. Puckett testified only that he did not recall if there were warning labels on the can.

This testimony is not sufficient to entitle Plastics to summary judgment on this claim. *Cf. Thornton*, 22 F.3d at 290 (plaintiff testified that he had used defective product at least twice, had opportunity to read label but never did so); *Rhodes*, 722 F.2d at 1521-22 (Hill, J., dissenting) (based on plaintiff's testimony that he would not have read warning on car battery even if there was one, "any product manufacturer would have been hard pressed to bring its warning message home to" plaintiff).

failure-to-warn claim. And the Court's review of case law did not yield any case where a court held that a plaintiff was barred as a matter of law from recovering on this type of failure-to-warn claim if he was able to read the warning during his deposition. *Cf. Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1519-20 (11th Cir. 1984) (jury issue on whether warning adequately communicated where plaintiff testified that he had never seen warning label on automobile battery); *Camden Oil*, 609 S.E.2d at 359-61 (same except warning was on a pump at a gas station).

Consequently, the Court will deny Plastics' motion for summary judgment based on this argument for the first type of failure-to-warn claim.

2. Design Defect

Turning to Puckett's design-defect claim, Plastics argues that this claim is also barred by Puckett's assumption of the risk. Puckett brings this claim pursuant to Georgia's products-liability statute, O.C.G.A. § 51-1-11. Subsection (b)(1) provides:

> The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its

> condition when sold is the proximate cause of the injury sustained.

In 1975, the Georgia Supreme Court held that this statute imposes strict liability for defective products. *Ctr. Chem. Co. v. Parzini*, 218 S.E.2d 580, 582 (Ga. 1975). "There are three general categories of product defects: manufacturing defects, design defects and marketing/packaging defects." *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 672 (Ga. 1994).

In design cases, "the entire product line may be called into question," i.e., "whether the manufacturer acted reasonably in choosing a particular product design, given . . . the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk." *Id.* at 673. However, if a defendant can show as a matter of law that the plaintiff assumed the risk of his actions, it is entitled to summary judgment on the design-defect claim. *Sharpnack*, 479 S.E.2d at 436. In determining whether the defense bars such a claim, the Court's inquiry is the same for failure-to-warn, strict-liability and negligence claims. *See Whirlpool*, 303 S.E.2d at 289 (applying singular analysis when determining whether assumption of risk barred recovery under failure to warn, strict liability and negligence). As discussed above, the Court finds that Puckett assumed the risk of his

conduct. Consequently, he cannot recover against Plastics under the theory of design defect either.

3. Negligence

Puckett's negligence claim avers that Plastics had a "duty of reasonable care in its design, manufacture, assembly, marketing, distribution and sale" of the gas can. He contends Plastics breached this duty in a variety of ways, e.g., negligently designed and manufactured a defective gas can; placed the defective gas can into the stream of commerce without adequate warnings and unfit for its intended use; failed to recall the defective product; and failed to investigate or ignored other incidents involving exploding gas cans.

To state a cause of action for negligence in Georgia, the plaintiff must show "(1) a legal duty to conform to a standard of conduct . . . ; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) loss or damage from the breach." *Davis v. Blockbuster, Inc.*, 575 S.E.2d 1, 2 (Ga. Ct. App. 2002) (citation and internal punctuation omitted). Plastics contends that this claim is barred by the defenses of assumption of the risk and contributory negligence.

As stated above, the Court finds that Puckett assumed the risk of his actions, which bars his recovery in negligence. Furthermore, even if Puckett had not assumed the risk of his actions, his own contributory negligence bars this claim.

"If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." O.C.G.A. § 51-11-7. "[O]ne who becomes aware of the negligence of another, or in the exercise of ordinary care should have become aware of it under circumstances where he could avoid it is himself guilty of negligence in failing to exercise ordinary care to avoid the negligence of the other party." *Anderson v. Williams*, 98 S.E.2d 579, 581 (Ga. Ct. App. 1957). Similar to the assumption-of-the-risk defense, questions of contributory negligence are generally for the jury except in "plain, palpable and undisputed cases where reasonable minds cannot differ as to the conclusions to be reached, [on] questions of negligence." *Quiktrip Corp. v. Fesenko*, 491 S.E.2d 504, 505 (Ga. Ct. App. 1997).

Here, it is plain, palpable and undisputed that Puckett failed to exercise ordinary care for his own safety when he intentionally splashed gasoline on a fire in order to make the fire larger. He knew that gasoline

could cause the fire to flare up and burn him, yet he splashed the gasoline on the fire anyway. As a matter of law, Puckett's failure to keep the gasoline away from the fire constituted failure to exercise ordinary care for his own safety, and Plastics' contributory-negligence defense bars his recovery on this claim. *See id.* at 505-06 (plaintiff failed to exercise ordinary care for her own safety when she failed to step away from flowing gasoline and instead held the pump with gasoline flowing therefrom over her head so that gas poured on her for several minutes); *Mullinax v. Cook*, 153 S.E.2d 924, 936-37 (Ga. Ct. App. 1967) (plaintiff contributorily negligent when he attempted to light pilot light for hot water heater even though he knew pit where heater was located was filled with gas from leaky valve); *Ennis v. Purchase & Sale Co.*, 160 S.E. 878, 878 (Ga. Ct. App. 1931) (plaintiff contributorily negligent where she held a lit match over a gas stove after she knew pilot lights had gone out but that gas still flowed).

Accordingly, the Court will grant Plastics summary judgment on Puckett's negligence claim.

IV. Punitive Damages and Attorney's Fees

Puckett also seeks punitive damages and attorney's fees. However, the disposition of the above claims precludes his requests for both.

"[P]unitive damages under O.C.G.A. § 51-12-5.1 cannot be awarded where no actual damages are awarded." *Morris v. Pugmire Lincoln Mercury, Inc.*, 641 S.E.2d 222, 225 (Ga. Ct. App. 2007); *accord OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1357 n.8 (N.D. Ga. 2008). Similarly, a "prerequisite to any award of attorney fees under O.C.G.A. § 13-6-11 is the award of damages or other relief on the underlying claim." *Morris*, 641 S.E.2d at 225 (citing *United Cos. Lending Corp. v. Peacock*, 475 S.E.2d 601, 602 (Ga. 1996)). Because the Court will grant summary judgment to Plastics on Puckett's underlying claims, resulting in no actual damages being awarded, Puckett cannot recover punitive damages or attorney's fees. Accordingly, the Court will grant summary judgment to Plastics on these claims.

V. Motions in Limine

The remaining motions before the Court are the parties' motions in limine in which they seek to exclude certain evidence and the testimony of certain witnesses. In light of the Court's ruling on Plastics' motion for summary judgment, the Court finds it unnecessary to address these motions, and they will be denied as moot.

VI. Conclusion

Defendant The Plastics Group, Inc.'s motion for summary judgment [130] is GRANTED. The remaining motions [114-129, 138][6] are DENIED AS MOOT. The Clerk is DIRECTED to close the case.

IT IS SO ORDERED this 17th day of January, 2013.

Timothy C. Batten, Sr.
United States District Judge

[6] Plastics initially filed ten motions in limine, not including its *Daubert* motions [117-124, 126, 127, 129]. Typically, the Court allows only one consolidated motion in limine not to exceed twenty-five pages. Consequently, the Court directed Plastics to file a consolidated motion in limine and enlarged the page limit to forty pages. Plastics complied with that instruction [138]. All of Plastics' motions remain pending, and this order denies them as moot.

EXHIBIT G

The New York Times

October 4, 2012

A Factory's Closing Focuses Attention on Tort Reform

By CLIFFORD KRAUSS

Crusading against what it considers frivolous lawsuits, the United States Chamber of Commerce has had no shortage of cases to highlight, like the man suing a cruise line after burning his feet on a sunny deck or the mother claiming hearing loss from the screaming at a Justin Bieber concert.

Now, the lobbying group's Institute for Legal Reform is showing a 30-second commercial that uses Blitz USA, a bankrupt Oklahoma gasoline can manufacturer, to illustrate the consequences of abusive lawsuits. The ad shows tearful workers losing their jobs and the lights going out at the 46-year-old company as a result of steep legal costs from lawsuits targeting the red plastic containers, according to the company and the institute.

The closing of the 117-employee operation this summer became a rallying point for proponents of tort reform. But the commercial ducks the complexities of the product liability cases surrounding Blitz by making no mention of the dozens of casualties linked to explosions while people used the cans in recent years. In interviews, the company and the lawyers suing it seek to frame the conflict in stark terms: devious lawyers with spurious claims piling on a valuable manufacturer, or a greedy company hurting consumers by refusing to fix a defective product.

The Blitz cases show the inherent conflicts "between makers of products that have some hazard or danger and consumers who on occasion are injured by those products," said Marshall S. Shapo, an expert on product liability at Northwestern University School of Law. "It is an ancient rivalry that will go on forever."

The suits generally make the claim that the cans were susceptible to "flashback" explosions caused when gasoline vapors outside the cans ignited and followed the vapor trail back into the container. The lawyers argue that the company should have installed "flame arrester" shields at the mouth of the containers to prevent explosions.

Blitz executives note that the company, which was the nation's leading gas can producer, sold more than 14 million cans a year over the last decade, with fewer than two reported incidents per million cans sold. The company said the most serious incidents usually involved obvious misuse of the cans, like pouring gasoline on an open fire.

Frank J. Vandall, an Emory University law professor, said there was probably no way Blitz could have avoided at least some of the lawsuits, although he questioned why the company paid settlements if it thought it could win in court.

"There is no way you can avoid liability for a can like this," Mr. Vandall said, "because there is going to be injury, and when there is injury, there is going to be lawsuits."

Blitz has been sued 62 times since 1994, according to the company. Only two cases have made it to court; the others were settled or dismissed, or were unresolved at the time of the bankruptcy. The company says the cases cost it $30 million in legal fees. Insurance companies paid well over $30 million more in settlements and other payouts.

The gas can explosions can be powerful. In one case, two emergency workers heard an explosion more than two miles away. In a 2010 test, a federal fire research laboratory found that a two-gallon gasoline container could produce a flame jet 13 feet long.

Chad Funchess, a volunteer firefighter from South Carolina, was seriously burned over half his body in 2007 when he was filling up a chain saw in the back of his convenience store and the can exploded. In his lawsuit, Mr. Funchess said there was no open flame to set off the blast. But the company said the store was razed before it could investigate what happened. Mr. Funchess said his fiancée left him when he was hospitalized. The case was stayed when the company filed for bankruptcy, and is one of 36 cases still open.

In the one case Blitz lost, in 2010, a Utah jury awarded more than $4 million to the father of a 2-year-old girl killed when a Blitz can exploded after the father, David Calder, tried to start a fire in a wood-burning stove in his trailer home by pouring gasoline on the flame.

Mr. Calder argued successfully that the explosion would not have happened had the can been equipped with a flame arrester, a piece of wire mesh placed at the opening of a container that blocks flames from entering. The company is appealing, claiming that the can was misused and that the child's death was a result of a gas explosion outside the can, not inside.

Blitz won the other case that went to trial, in 2008, involving a Texas man named Brody Green, who died in an explosion when he poured gasoline from a can onto a fire. But last

year, a Texas court forced the company to pay Mr. Green's mother $250,000 for failing to provide all the documents it had on flame arresters before the trial. The court also said its order must be provided to every other plaintiff who sued Blitz over the last two years. Again, the company is appealing.

Among the documents Blitz had neglected to disclose was a 2005 internal memo from Rocky Flick, the company's chief executive, titled "My Wish List" and "Expectations for Gas Cans." In it, Mr. Flick appears to request that in two years the company "develop and introduce device to eliminate flashback from a flame source."

United States District Judge T. John Ward ruled that, had the memo been disclosed in the original case, it "would have hurt, if not potentially eliminated, Blitz's defense that they did not add a flame arrester because it would not have been useful."

Diane Breneman, a lawyer who has been involved in several cases against Blitz, claims the company dropped its plan to add the flame arrester around the time it was acquired by the private equity firm Kinderhook Industries in 2007. The company, she said, was more concerned with saving money than lives, and was "guilty of greed and completely irresponsible corporate behavior."

Mr. Flick, the chief executive, countered: "We're not the evil empire. We just make gas cans. It helps their case to demonize us."

The "wish list," he said, "was a handwritten document that should have been produced in the Green trial but was stuck in a different file. It proves nothing."

He said that the list was not a definitive plan and that the company was never against adding arresters. But Blitz officials said that after conferring with experts, they decided the devices would lead to other safety issues, including giving consumers a false sense of confidence when pouring gas on fires.

"There was no proven device that we could get that we thought would prevent somebody from getting hurt when they elected to pour gasoline on a fire," Mr. Flick said.

Typically, businesses want to lessen government regulation. But Blitz and the trade group that represents manufacturers of portable gasoline containers have repeatedly asked the Consumer Product Safety Commission to regulate their products, requesting last year that the agency either prohibit or require use of the arresters. The commission denied the request on the ground that the petition did not provide supporting documentation.

“We are always in favor of any approach, including the use of flame arresters, that can provide additional safety protections for children and adults,” said Scott Wolfson, a spokesman for the commission.

Mr. Flick said Blitz was forced to settle cases, mostly against its will, by a series of insurance companies. “We’d get an insurance company that would insure us for one year, and they would settle and then drop us,” he said. “Then we’d have to get another insurance company, and they would do the same thing.”

Ms. Breneman countered that “insurance companies don’t settle when they can win in court, and they have no problem telling plaintiffs to take a hike.”

A decade ago, Mr. Flick said, the company would face one or two lawsuits a year. The number grew to six or seven a year, and finally to 25 or so last year when Blitz filed for bankruptcy.

Smaller companies that have taken Blitz’s place are now facing lawsuits, too.

“It’s the same thing with asbestos litigation, with 80-plus companies that have gone bankrupt because of asbestos litigation,” said Lisa A. Rickard, president of the Chamber’s Institute for Legal Reform. “They settle, they settle, they settle, and there is a feeding frenzy of lawyers.”

But the Blitz factory, in Miami, Okla., may be reopening soon. Scepter, a Canadian plastics manufacturer, bought the operation for $9.5 million and may rehire at least some of the laid-off workers. Philip Monckton, a Scepter vice president, said the company did not use flame arresters on the cans it made in Canada. But he said it might decide to use them on cans that it will produce in Oklahoma, depending on the results of technical studies. The company settled a lawsuit against it in the United States last year.

“We have concerns about expanding our presence,” Mr. Monckton acknowledged, “but we are going to make a product at the highest levels we know how.”

EXHIBIT H

3 of 3 DOCUMENTS

The Wall Street Journal Online

July 22, 2012

SECTION: OPINION

LENGTH: 479 words

HEADLINE: The Tort Bar Burns On;
A case study in modern robbery: Targeting the red plastic gas can.

BODY:

Like 19th century marauders, the trial bar attacks any business it thinks will cough up money in its raids. The latest victims are the people who make those red plastic gasoline cans.

Until recently, **Blitz USA**-the nation's No. 1 consumer gasoline-can producer, based in Miami, Oklahoma-was doing fine. It's a commoditized, low-margin business, but it's steady. Sales normally pick up when hurricane season begins and people start storing fuel for back-up generators and the like.

Blitz USA has controlled some 75% of the U.S. market for plastic gas cans, employing 117 people in that business, and had revenues of $60 million in 2011. The Consumer Product Safety Commission has never deemed Blitz's products unsafe.

Then the trial attorneys hit on an idea with trial-lawyer logic: They could sue Blitz when someone poured gas on a fire (for instance, to rekindle the flame) and the can exploded, alleging that the explosion is the result of defects in the can's design as opposed to simple misuse of the product. Plaintiffs were burned, and in some cases people died.

Blitz's insurance company would estimate the cost of years of legal battles and more often than not settle the case, sometimes for millions of dollars. But the lawsuits started flooding in last year after a few big payouts. Blitz paid around $30 million to defend itself, a substantial sum for a small company. Of course, Blitz's product liability insurance costs spiked.

In June, Blitz filed for bankruptcy. All 117 employees will lose their jobs and the company-one of the town's biggest employers-will shutter its doors. Small business owners have been peppering the local chamber of commerce with questions about the secondary impact on their livelihoods.

The tort-lawsuit riders leading the assault on Blitz included attorneys Hank Anderson of Wichita Falls, Texas; Diane Breneman of Kansas City, Missouri; and Terry Richardson of Barnwell, South Carolina. All told, they've been involved in more than 30 lawsuits against Blitz in recent years.

The rest of the plastic-can industry can't be far behind, so long as there's any cash flow available. The American Association for Justice's (formerly the Association of Trial Lawyers of America) annual conference in Chicago this month will feature, with a straight face, a meeting of the "gas cans litigation group."

The Atlantic hurricane season started June 1, and Blitz estimates that demand for plastic gas cans rises 30% about then. If consumers can't find the familiar red plastic can, fuel will have to be carried around in heavy metal containers or ad-hoc in dangerous alternatives, such as coolers.

Trial lawyers remain a primary funding source for the Democratic Party, but stories like this cry out for a bipartisan counter-offensive against these destructive raids that loot law-abiding companies merely because our insane tort laws make them vulnerable.

NOTES:
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Appendix A

APPENDIX A

Examples of Public Filings Disclosing and Reporting on the Ongoing Mediation to All Interested Parties

Docket Number	Date	Court Filing Discussing Ongoing Mediation	Illustrative Quote
666	8/13/2012	Order Appointing Mediator	Stating that "[a]t the request of the Mediator, appropriate representatives for [the Debtors, Committee, Wal-Mart, and the insurers] are encouraged and expected to attend the mediation" and "[n]otwithstanding the Local Rules, the Mediator may conduct the Mediation as he sees fit, establish rules of the Mediation, and consider and take appropriate action with respect to any matters the Mediator." *See* Affidavit of Service, Dkt. No. 673.
841	10/4/2012	Debtors' Third Motion Pursuant to Bankruptcy Rule 9006(b) for Order Extending The Debtors' Time to File Notices of Removal of Related Proceedings	Discussing the "Plan-Related Mediation" at pages 3-4 and stating that "[a]n initial mediation session was held on September 4, 2012," "attorneys representing personal injury and/or wrongful death claimants [were invited to attend the first mediation session]," and "[a] second mediation session was held on September 27, 2012." *See* Affidavit of Service, Dkt. No. 846.
882	10/18/2012	Debtors' Objection to the Thornton Relief Stay Motion	Reporting on September 4, 2012, and September 27, 2012 mediations sessions before Judge Gross and reporting that "mediation parties remain in discussion regarding the potential to develop a consensual plan" resolving issues surrounding "the treatment of personal injury claims and the disposition of the Debtors' available insurance proceeds…"

APPENDIX A

Docket Number	Date	Court Filing Discussing Ongoing Mediation	Illustrative Quote
1032	12/28/2012	Liberty's Objection to Larkin and Newby Lift Stay Motions	Discussing negotiations in the mediation and quoting Calder claimant stating that "mediation efforts where a potential settlement may be reached by the parties" were ongoing and that granting a motion for relief from stay "would effectively undermine the parties' ability to resolve this dispute in mediation and would chill any prospect for a consensual Chapter 11 plan…"
1115	01/08/2013	Chartis' Objection to Beadore Motion for Relief From Stay	Agreeing with assertions by Calder claimant that motions for relief from stay were "premature in light of the ongoing mediation efforts where a potential settlement may be reached by the parties…"
1119	01/09/2013	Liberty's Objection to Purvis Motion for Relief From Stay	Discussing negotiations in the mediation and quoting Calder claimant stating that "mediation efforts where a potential settlement may be reached by the parties" were ongoing and that granting a motion for relief from stay "would effectively undermine the parties' ability to resolve this dispute in mediation and would chill any prospect for a consensual Chapter 11 plan…"

APPENDIX A

Docket Number	Date	Court Filing Discussing Ongoing Mediation	Illustrative Quote
1123	01/09/2013	Liberty's Omnibus Objection to Motions for Relief From Stay	Discussing negotiations in the mediation and quoting Calder claimant stating that "mediation efforts where a potential settlement may be reached by the parties" were ongoing and that granting a motion for relief from stay "would effectively undermine the parties' ability to resolve this dispute in mediation and would chill any prospect for a consensual Chapter 11 plan…"
1129	01/09/2013	Continental's Objection to Motions for Relief from stay	Agreeing with assertions by Calder claimant that motions for relief from stay were "premature in light of the ongoing mediation efforts where a potential settlement may be reached by the parties…"
1135	01/09/2013	Debtors' January 9, 2013 Omnibus Objection to Stay Relief Motions	Reporting that "parties including the Debtors' insurers, Wal-Mart…the Committee…and others are engaged in discussions regarding the Debtors' cases and the possibility of an agreement between some or all of these parties that would facilitate the formulation of a plan for the Chapter 11 Cases."
1136	01/09/2013	Declaration of Rocky Flick in Support of Debtors' January 9, 2013 Omnibus Objection to Stay Relief Motions	Reporting that "the parties' discussions regarding a consensual plan of reorganization are ongoing."
1195	1/25/2013	Debtors' Motion to Compel Compliance with Rule 2019 of the Federal Rules of Bankruptcy Procedure	Discussing plan-related mediation at page 5 and stating that on August 13, 2012, the Court entered its *Order Appointing Mediator*…" *See* Affidavit of Service, Dkt. No. 1202.

APPENDIX A

Docket Number	Date	Court Filing Discussing Ongoing Mediation	Illustrative Quote
See 1394	4/11/2013	Minutes of Hearing Held on: 4/11/2013	April 11, 2013 Hearing Transcript (Jeffrey D. Prol, counsel for the Committee, explained that he was "happy to report that we've made significant progress with regard to that settlement.")
1217	02/06/2013	Debtors' Second Omnibus Objection to Motions for Relief from Stay	Reporting that "the Committee, certain of the Debtors' insurers, Wal-Mart and other parties in interest have continued discussions regarding the possibility of a consensual plan);
1218	02/06/2013	Declaration of Rocky Flick in Support of Debtors' Second Omnibus Objection to Stay Relief Motions	Reporting that "the parties' discussions regarding a consensual plan of reorganization are ongoing."
1287	03/01/2013	Declaration of Rocky Flick in Support of Debtors' Motion to Trevino Relief Stay Motion	Reporting that "the parties' discussions regarding a consensual plan of reorganization are ongoing."
1477	5/31/2013	Debtors' Fifth Motion for Order Extending The Debtors' Time to File Notices of Removal of Related Proceedings	Discussing plan-related mediation at page 3 and stating that "[o]n August 13, 2012, following a joint request from the Debtors and the Official Committee of Unsecured Creditors in the Chapter 11 Cases…the Court entered an order appointing a mediator to assist in resolving certain issues relating to the formulation and confirmation of a Chapter 11 plan." *See* Affidavit of Service, Dkt. No. 1482.
1537	07/24/2013	Debtors Motion for an Order to Approve Settlement	"The resulting Settlement was reached after months of extensive, arm's length, good faith negotiations between the Debtors, the Committee, the Participating Insurers, the Participating Blitz Personal Injury Claimants, and Wal-Mart."

APPENDIX A

Docket Number	Date	Court Filing Discussing Ongoing Mediation	Illustrative Quote
1574	08/07/2013	Debtor's Objection to Torres and St. John Motions for Relief From Stay	Reporting that the Term Sheet was the culmination of the parties negotiation efforts. These documents are publically available to the Texas Claimants.
1601	08/13/2013	Reply Brief in Further Support of Settlement Motions	Stating that the settlement was the product of utmost good faith and provides a path to resolve complex disputes on a fair and equitable basis).