IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

TOMMY MURRAY,	)	
	)	
Plaintiff	)	CIVIL ACTION
	)	
vs.	)	FILE NO. 04C04014-2
	)	
LAKELAND INDUSTRIES, INC.,	)	
	)	
Defendant	)	

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW LAKELAND INDUSTRIES, INC., Defendant in the above-styled civil action and submits the following Brief in Support of its Motion for Summary Judgment. **For purposes of this Motion only**, the facts are set forth in a light most favorable to the Plaintiff.

Statement of Facts

Plaintiff Tommy Murray has sued Defendant Lakeland Industries, Inc. for burn injuries he sustained as a result of exposure to the chemical methyl iodide at his work place at Ajay North America LLC on or about April 15, 2002. At the time of Murray's exposure, he was wearing a Tychem SL suit provided to him by his employer to protect him from exposure to the methyl iodide vapors and liquid. The Tychem SL suit was designed and manufactured by Lakeland Industries using fabric manufactured by DuPont and was sold to Ajay through a distributor.

Methyl iodide is a hazardous chemical that can cause burns if absorbed into the skin and serious injury and/or death if inhaled. Plaintiff's immediate supervisor knew

this before plaintiff's injury, as did the plaintiff. As did their supervisor, Richard Griffin. Methyl iodide vapors are heavier than air so will accumulate near the floor. At room temperature, liquid methyl iodide will quickly evaporate.

The Tychem SL suit is a full-body suit that covers the user from head to toe with a space cut out for the user's face. The suit has a hood, attached footings, and a zipper that extends from the neckline to the waistline. It was Gene Millians' responsibility to be sure Plaintiff was properly wearing the personal protective equipment (PPE) including the Tychem SL suit, on the date of the injury. Griffin, Millians' immediate supervisor, did not know whose responsibility it was at Ajay to be sure Gene Millians knew how to properly wear the PPE.

Lakeland includes its Level B Chemical Clothing Technical Manual in each box of the Tychem SL garments shipped to Ajay. There were also telephone numbers on the warning label on the garment to make it easy to call with any questions. Also, the Du Pont Permeation guide was on the Internet that could have been looked up and reviewed as well as Du Pont's 24/7 800 call service. There was also a warning label in the garment which contained the warning, "WARNING: There are uses, environments and chemicals for which theses garments are unsuitable. It is the responsibility of the user to review available data and verify that the garment is appropriate for the intended use and meets all specified government and industry standards." There was a similar warning on the box in which the garment was packaged.

Months or years prior to April 15, 2002, the protective suit provided to Plaintiff by Ajay had no built in feet. Ajay's procedure at that time required employees to wear boots and tape the bottoms of the pants legs of the suit to the boot tops and to tape the

garment at the wrists to protective gloves. Months or years prior to April 15, 2002, the protective suit provided to Plaintiff by Ajay changed to one which had built in feet. Ajay's procedure at that time did not change. Nevertheless, Plaintiff and his immediate supervisor, Gene Millians, decided that there was no longer any need to wear boots over the built in feet of the suit and, instead, wore their shoes or boots inside the built in feet of the suit.

Prior to April 15, 2002, Griffin, their immediate supervisor, knew that overboots should be worn with the suit. And Griffin did not consider wearing shoes on the inside of the Tychem SL suit to be a normal use. Prior to April 15, 2002, Plaintiff's employer knew that this was an unsafe practice. Prior to April 15, 2002, Plaintiff's employer knew that boots should still be worn on the outside of the suit. Prior to April 15, 2002, Plaintiff's employer knew that holes could develop in the built in feet of the suits if shoes or boots were worn on the inside. Prior to April 15, 2002, Plaintiff's employer knew that if holes did develop in the built in feet of the suits, then the worker would be provided no protection by the suit.

Plaintiff claims that his injuries are a direct and proximate result of Lakeland's alleged failure to provide instructions and warnings regarding how to don and doff and wear the Tychem SL suit. Plaintiff claims that Lakeland breached its duty by 1) failing to inform and warn customers that the built in feet of the Tychem SL suit should be worn inside the wearer's boots and not over the wearer's boots and 2) by failing to inform and warn customers that the Tychem SL suit may increase the risk of injury if holes develop in the suit and chemicals enter the suit and become trapped between the suit and the wearer's skin. Yet, the undisputed evidence demonstrates that Plaintiff's employer was

already aware that the built in feet of the Tychem SL suit should be worn inside the wearer's boots and not over the wearer's boots AND that the Tychem SL suit will not protect the wearer if holes develop in the suit and chemicals enter the suit and become trapped between the suit and the wearer's skin.

Ajay was aware prior to April 15, 2002 that it was responsible for selecting personal protective equipment (PPE) suitable for use with methyl iodide and for training its own employees on how to don and doff the PPE. Ajay did not rely on Lakeland to tell them what suits were suitable for use with methyl iodide nor how the suits should be donned and doffed.

Overboots were available to Murray for his use on April 15, 2002. If Murray had to order a larger size, Ajay would usually receive the boots the same day.

The undisputed evidence is that Lakeland's Level B Chemical Clothing Technical Manual put in each box of the Tychem SL garments shipped to Ajay, specifically warned and instructed users as follows:

> . . .THERE ARE USES AND CHEMICALS FOR WHICH LAKELAND SUITS ARE NOT APPROPRIATE. THE SUIT WILL PERFORM AS DESIGNED ONLY IF IT IS USED AND SERVICED ACCORDING TO THE INSTRUCTIONS. IT IS THE RESPONSIBILITY OF THE USER TO SELECT A SUIT WHICH IS APPROPRIATE FOR THE INTENDED USE AND WHICH MEETS ALL NATIONAL, STATE AND LOCAL HEALTH AND SAFETY REGULATIONS.
>
> . . .UNDER NO CIRCUMSTANCES SHOULD THE PRODUCT BE USED EXCEPT BY QUALIFIED, TRAINED PERSONNEL . . . ANY PERSON WHO READS THIS MANUAL AND IS STILL UNCERTAIN ABOUT HOW TO SAFELY OPERATE OR SERVICE THIS SUIT SHOULD CONTACT LAKELAND INDUSTRIES FOR MORE INFORMATION.
>
> . . . ***Putting on your Lakeland protective garment (Donning)***
>
> Make sure the correct suit has been selected for the intended use. . .

1. Tuck pant cuff into socks to make donning a suit leg and sock boot easier.
2. While seated place both legs into the suit, pull the suit up until both feet are touching the bottom of the sock boots if applicable, or are through the leg openings of the garment.
3. Place both feet into outer work boots, and pull the boot flaps down over the top of the outer work boots if applicable. The work boots you have selected should be one to two sizes larger than a normal "street" shoe to allow for the sock boot. . . .

In the Permeation Guide for DuPont Tychem fabrics, available on the Internet, methyl iodide is listed as immediately permeating the Tychem SL suit thereby indicating this suit provides no protection whatsoever from exposure to methyl iodide. The chemical Plaintiff was handling at the time in question was methyl iodide and the only suits that were appropriate with this chemical were Tychem LV, BR, or TK and NOT Tychem SL. As Plaintiff was wearing a Tychem SL style suit, the methyl iodide would have permeated at any point of the garment and the suit was being misused. In addition, Plaintiff was required to wear protective boots and failed to do so.

Murray was warned just the work day before his injury that a suit with holes in the bottom would not protect him from methyl iodide. Murray's employer, Mr. Basinger, gave this warning to Murray because he saw Murray's tennis shoes hanging out of the bottom of the protective suit. Murray was walking on shale rock which is extremely sharp and could easily puncture the suit. Mr. Basinger thought that it was very odd that Mr. Murray was wearing tennis shoes on the inside the suit. Mr. Basinger's practical sense was, what's the point in wearing a suit that has boots in it if the bottoms are out….if you've worn the bottoms out.

Murray's employer was aware prior to April 15, 2002 that there is a limited lifetime for transference through that barrier in the protective suit so you shouldn't come

back in and put the same suit on because they are deposable suits. Yet Murray and Gene Millians would wear the suits multiple times before disposing of them. Reuse of chemical protective garments is discouraged by all disposable manufacturers because once a suit is exposed to a chemical and permeation begins, there is not way of knowing if it can be reversed, decontaminated, or otherwise brought back to it original condition in terms of anticipated breakthrough times.

Through Mr. Basinger, Plaintiff's employer was aware prior to April 15, 2002, that there is a NIOSH accepted procedure for those classes of suits. Mr. Basinger's background expertise is in chemistry, and so when he runs into something like the safety and the handling of chemicals, NIOSH has an exceedingly large database on how to deal with these exposures and how to deal and how to not be exposed and how you should wear your suits and so he would rely on that to tell him how the employees should be protected.

Mr. Basinger knew the workers should always wear boots on the outside of the suit. He would always wear gloves and would always tape them regardless. Mr. Basinger felt it was just logical because this suit is not proof against the liquid so if you get liquid down your boot or if you are standing in methyl iodide liquid if you say you have this bootie on and you have shoes on inside of it, the liquid can permeate the suit even if the vapor can't. Mr. Basinger knew that if you have the boots on the outside of the suit and it's taped then there's no way for the liquid to either one, to get inside the boot and inside the suit or for you to stand in the methyl iodide.

On the day of Murray's injury, the suits were worn for three hours because the filters needed to be changed. This exceeded the 45 minutes of time that they usually

wore the suits and the normal exposures encountered at Ajay. While changing the filters, the filter canister broke and charcoal beads fell into the bottom of the housing. Gene Millians and Murray used a shop-vac to clean out the filter canister. The shop-vac was vented to the open room This activity would significantly increase the concentration of methyl iodide vapor in the air even to levels exceeding those of a chemical spill. Reducing pressure on the surface of a chemical through use of a vacuum increases the volatility of the chemical and causes more vapor to enter the air stream or atmosphere. Use of a shop-vac would not be standard and would be an unsafe practice.

On the day of the accident Gene Millians and Murray went outside 3-4 times to cool off and walked across a gravel area and wore holes in the suits. Gene Millians thought the gravel was probably not as bad as the cement which would cause abrasions on the bottoms of the feet from you dragging your feet across the floor.

Gene Millians knew that if there was a large spill inside the building you are to leave the room. On April 15, 2002, Gene Millians did not consider the exposed liquid methyl iodide to be a "spill" as it was just a little bit of liquid methyl iodide that got on to the floor as he was changing the filter. He did not consider this small quantity of methyl iodide a "spill" and felt even if the same thing happened today the room would not be evacuated.

Millians was aware that Ajay had both Level A suits and Level B suits. The Level A suit was more protective. Millians knew to use the Level A suit if there is a leak and you have to go in to repair it. When asked why he didn't wear a Level A suit to deal with the spill on the floor on the day of the accident, Millians said he had no idea it was

going to happen and it was just impossible to unload with the Level A suit on. He can't answer, he doesn't know, "that's a good question".

Gene Millians knew that methyl iodide was hazardous because he was familiar with the Material Safety Data Sheet (MSDS) prepared by Ajay. The MSDS from Ajay dated March of 2002 relating to methyl iodide says that if the methyl iodide is "spilled or released", the area is to be evacuated. Millians did not feel that this applied to what occurred on the day of the accident. If methyl iodide spilled on the floor, the room should have been immediately evacuated per company policy.

Murray's exposure was extremely long because unloading methyl iodide is a long process. The amount of damage that you do to the skin surface is very much proportional to the amount of time and concentration of methyl iodide vapors that is in that room. Typically, there should be a fairly low concentration of vapors in that room (between zero and 50 ppm) but in Murray's situation there had the added effect of having the filters on the floor that were supposed to be in closed containers.

Ajay knew methyl iodide was highly dangerous. And they were required to make sure that the protective equipment was the correct material. Mr. Basinger consulted a DuPont list on a DuPont website and a NIOSH website that had the permeabilities of different types of materials and on there was Methyl iodide. And so he selected Tyvek fabric at that time years before Murray's exposure. Mr. Basinger does not recall what that list of DuPont fabrics indicated as to the Tychem fabric in terms of its ability to protect a worker from Methyl iodide exposure. He just knows that there was an acceptable time barrier for gas permeation. And it was the only material that was rated for Methyl iodide that he could find. Basinger believed the DuPont website had a rating

listed for methyl iodide within an acceptable time period of breakthrough. This list of DuPont fabrics did not rate the Tyvek fabric as acceptable in terms of the time for permeability to liquid methyl iodide. There was no fabric listed that was rated for liquid methyl iodide exposure.

In Mr. Basinger's mind, an acceptable time limit for gas permeation would be a minimum of six to eight hours because there's no operation that goes longer than that in that room and there's nothing that they do that takes them that long and these are disposable suits so basically, if you are finished with an operation and you're coming back out you take the suit off, you dispose of it.

Mr. Basinger did not know what kind of fabric the level B suits were made out of. So, he doesn't know whether it was rated for liquid methyl iodide exposure or not. Nor does he know whether the level B suits were rated for gas methyl iodide exposure.

The Tychem SL suit worn by Murray on April 15, 2002 was not suitable for use where the employee may be exposed to methyl iodide liquid or vapors. The Tychem SL suit is not rated for use with methyl iodide.

There was a machine or device at Ajay that was suppose to measure the level of methyl iodide vapors in the production room. It did not always correctly measure the level of vapors. It had to be calibrated. And whenever it was calibrated it measured accurately. And once it got off scale, like for instance when they pulled the filters out, it is the employees' responsibility to check it if it's off scale.

Mr. Basinger was aware prior to Murray's injury that methyl iodide vapor is heavier that air and so it sits on the floor and if it migrates, it migrates slowly up and so

that's the reason why you don't get body burns you get leg burns. So, however far it migrates in your suit is how far it is typically going to give you a burn or rash.

Murray's injuries could have been prevented if he would have listened to the warning Mr. Basinger had given him just the work day before he was injured. It was something that was extremely preventable.

Ajay learned after Murray's injury that Tychem SL suits are not suitable for use with methyl iodide liquid and there is no data for methyl iodide vapor exposure. After Murray's injury, Ajay checked and determined that no PPE suits protected against methyl iodide except the Level A suit, which Ajay had on hand on April 15, 2002. Yet today Ajay continues to provide the Level B Tychem SL suits to its employees working in the methyl iodide area.

There is no competent admissible evidence that Murray's burns were due to the holes in the feet of his suit or by his failure to wear overboots. He and his employer simply make that assumption with no competent evidence. The fact of the matter is the Tychem SL suit Murray was wearing was not rated for use with methyl iodide liquid or vapor and the methyl iodide vapor may just as easily permeated the fabric of the suit whether it had holes or not and burned Murray.

ARGUMENT AND CITATION OF AUTHORITY

I. SUMMARY JUDGMENT STANDARD.

The standards applicable to motions for summary judgment generally are announced in Lau's Corp. v. Haskins, 261 Ga. 491 (1991) and O.C.G.A.§ 9-11-56. Summary judgment is appropriate whenever a party can demonstrate there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law:

> A Defendant who will not bear the burden of proof at trial need not affirmatively disprove the non-moving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the non-moving party's case. If the moving party discharges this burden, the non-moving party cannot rest on its pleadings but rather must point to specific evidence giving rise to a triable issue.

O.C.G.A.§ 9-11-56(c). Applying this standard, Defendant Lakeland should prevail on the present Motion because there is no genuine issue of material fact sufficient to create a jury issue on whether Lakeland manufactured a defective product and there is no competent admissible evidence of proximate cause. Additionally, Lakeland is entitled to summary judgment because it did not owe a duty to warn of the alleged danger associated as it was not foreseeable that the Plaintiff would use its product in this manner and the danger posed by methyl iodide was obvious and generally known. Even if the product was somehow found to be defective, Plaintiff's assumption of the risk would completely bar recovery. In addition, Plaintiff's negligence was at least equal to or greater than that of Lakeland thereby barring Plaintiff's recovery.

II. PLAINTIFF CANNOT RECOVER BECAUSE THERE IS NO EVIDENCE OF PROXIMATE CAUSE

Plaintiff's claim also fails due to a lack of proximate cause. Whether proceeding under a negligence theory or strict liability theory, proximate cause is a necessary element for the claim. Hall v. Scott USA, Ltd., 198 Ga.App. 197, 400 S.E.2d 700 (1990). In an action for negligence, the plaintiff must prove a reasonably close causal connection or proximate cause between the defendant's conduct and the injury.

> "The requirement of proximate cause constitutes a limit on legal liability; it is a policy decision that, for a variety of reasons, e.g., intervening act,

> the defendant's conduct and the plaintiff's injury are too remote for the law to countenance recovery. For this reason, before any negligence, even if proven, can be actionable, that negligence must be the proximate cause of the injuries sued upon. To establish proximate cause, a plaintiff must show a legally attributable causal connection between the defendant's conduct and the alleged injury. Conversely, no matter how negligent a party may be, if his acts stand in no causal relation to the injury, it is not actionable."

Lewis v. Georgia Department of Human Resources, 255 Ga. App. 805, 808, 567 S.E.2d 65 (2002); Bacon v. Mayor, 241 Ga. App. 211, 212-213, 525 S.E.2d 115 (1999).

Additionally, even if it were somehow found that the suit was manufactured in a negligent manner, "the general rule is that if, subsequent to an original act, a new cause intervened, of itself sufficient to stand as the cause of misfortune, the former must be considered too remote." Ont. Sewing Mach. Co. v. Smith, 275 Ga. 683, 686, 572 S.E.2d 533 (2002). Here, Plaintiff did not receive any direct information from Lakeland on which type of suit to wear or whether the Tychem SL suit was appropriate for use with methyl iodide. Plaintiff was given instructions on which suit to wear and how to use the suit by his employer, Ajay North America. Ajay was aware that Plaintiff should be wearing overboots with the suit. Ajay was aware that if the suit had holes, it would provide the employee no protection. And Ajay was aware this it was its responsibility as the employer to select appropriate PPE for its employees. Yet, even though the Tychem SL suit was not rated for exposure to methyl iodide, Ajay provided this suit (rather than the more cumbersome Level A suit) to its employees to use. As such, there was not an unbroken chain of causal connection between the suit provided by Lakeland and its final use (or misuse) at Ajay. Plaintiff's negligence theory therefore fails as a matter of law.

In addition, Ajay has learned sometime AFTER Murray's incident, that both DuPont and Lakeland assert that the Tychem SL fabric is not suitable and will not

provide protection in an environment in which the wearer may be exposed to methyl iodide liquid or vapors, yet Ajay continues to provide the Tychem SL suit to its employees to wear in the production of methyl iodide. Thus, even after this tragic accident, when everyone now is aware that the Tychem SL suit is not suitable and will not provide protection in an environment in which the wearer may be exposed to methyl iodide liquid or vapors, Ajay continues to provide the Tychem SL suit to its employees to wear in the production of methyl iodide. Thus, any alleged warnings or instructions Lakeland should arguably have provided before April 15, 2002, would clearly not have been heeded as they are clearly being ignored at the present time!

Finally, Plaintiff has produced no competent admissible evidence that Murray's burns were due to the holes in the feet of his suit or by his failure to wear overboots. He and his employer simply make that assumption with no competent evidence. The fact of the matter is the Tychem SL suit Murray was wearing was not rated for use with methyl iodide liquid or vapor and the methyl iodide vapor may just as easily have permeated the fabric of the suit whether it had holes or not and burned Murray. See deposition C. Roberson at pages 75, 77, 85-99. Thus, even if the warnings and instructions had been provided which Plaintiff claims should have been provided to 1) wear overboots and 2) don't wear a suit with holes in it, and Plaintiff had, in fact, been wearing a suit with no holes with overboots, he STILL would have been burned regardless! The employees' normal time working in the methyl iodide production area was 45 minutes. On April 15, 2002, they worked in the area at least for three hours. While changing the filters, the filter canister broke and charcoal beads fell into the bottom of the housing. Gene Millians and Murray used a shop-vac to clean out the filter canister. The shop-vac was

vented to the open room This activity significantly increased the concentration of methyl iodide vapor in the air even to levels exceeding those of a chemical spill. Reducing pressure on the surface of a chemical through use of a vacuum increases the volatility of the chemical and causes more vapor to enter the air stream or atmosphere. In addition, while changing the filters, the filters were placed in the open on the floor when they were supposed to be in closed containers. This exposure further increased the amount of methyl iodide vapors in the area.

III. LAKELAND WAS NOT NEGLIGENT IN THE DESIGN OF THE TYCHEM SUIT.

In Georgia, the essential elements of a cause of action for negligence are: (1) a legal duty; (2) a breach of this duty; (3) an injury; and (4) a causal connection between the breach and the injury. Mekossock v. Giraux, 272 Ga. App. 499, 612 S.E.2d 827 (2005); Vaughan v. Glymph, 241 Ga. App. 346, 526 S.E.2d 357 (1999). Plaintiff has alleged that Lakeland breached its duty of care by failing to inform and warn consumers that the attached footings of the Tychem SL suits should be worn inside the wearer's boots and further failed to inform and warn consumers that the suits may increase the risk of injury if holes develop in the suit and chemicals become trapped between the suit and the wearer's skin. (Amended Complaint, ¶ 27). It is well-established that a manufacturer has no duty to warn of a danger that is obvious or generally known. Vickery v. Waste Management of Georgia, Inc., 249 Ga. App. 659, 549 S.E.2d 482 (2001); Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981). "There is no duty of a manufacturer to warn of obvious common dangers connected with the use of a product. Where the product is vended to a particular group or profession, the manufacturer is not

required to warn against risks generally known to such group or profession." Exxon Corporation v. Jones, 209 Ga.App. 373, 375, 433 S.E.2d 350 (1993); Stiltjes v. Ridco Exterminating Co., 178 Ga.App. 438, 441, 343 S.E.2d 715 (1986). Here, based on his experience in working with chemicals, Plaintiff knew that methyl iodide was an extremely hazardous chemical which can cause serious injury or death if absorbed into the skin or inhaled. Deposition of Tommy Murray at pages 29-30. The undisputed evidence is that Plaintiff's employer was aware prior to the incident that the Tychem SL suit should be worn inside the wearer's boots. Deposition of Richard Griffin at pages 149-150, 190. Prior to April 15, 2002, Plaintiff and his employer knew that holes could develop in the built in feet of the suits if shoes or boots were worn on the inside. See deposition Alan Shipp at page 112; affidavit of William Basinger at paragraph 4; deposition Murray at page 29. Prior to April 15, 2002, Plaintiff and his employer knew that if holes did develop in the built in feet of the suits, then the worker would be provided no protection by the suit. See deposition Alan Shipp at page 51; affidavit of William Basinger at paragraph 5; deposition Richard Griffin at page 156, 163-164; deposition Murray at page 29. These dangers were generally known, especially to this industry and the workers in same. As such, Plaintiff's negligence theory that Lakeland breached a duty to warn fails as a matter of law.

Plaintiff's claim also fails as to the failure to warn that holes could develop in the built in feet of the suits if shoes or boots were worn on the inside or that if holes did develop in the built in feet of the suits, then the worker would be provided no protection by the suit because Plaintiff already knew these things, so any warning would not have told Murray something he did not already know. See, e.g., Farmer v. Brannan Auto

Parts, Inc., 231 Ga.App. 353, 356, 498 S.E.2d 583, 586 (1998), cert. denied; Exxon Corp. v. Jones, 209 Ga.App. at 375-376, 433 S.E.2d 350 (plaintiff's injuries from LP gas explosion were not caused by defendant's negligent failure to warn of dangerous propensities of LP gas, as plaintiff was already aware of those dangers). "There is no duty to warn of the obvious, or of that which the plaintiff already knew or should have known. [Cits.]" Roberts v. Bradley, 114 Ga.App. 262, 263, 150 S.E.2d 720 (1966).

IV. THE TYCHEM SL SUIT PROVIDED TO PLAINTIFF WAS NOT A DEFECTIVE PRODUCT.

Under Georgia law, a manufacturer is not an insurer that its product is, from a design standpoint, incapable of producing injury. Greenway v. Peabody International Corporation, 163 Ga. App. 698, 294 S.E.2d 541 (1982). Georgia has adopted a risk-utility analysis for the determination of whether a manufacturer acted reasonably in choosing a particular product design. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994); Moore v. ECI Management, 246 Ga. App. 601, 542 S.E.2d 1155 (2000). In applying the risk-utility analysis, the Court considers numerous factors. These factors include: (1) the usefulness of the product (2) the gravity and severity of the danger posed by the design; (3) the likelihood of that danger; (4) the avoidability of the danger, i.e. the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; (5) the user's ability to avoid danger; (6) the state of the art at the time the product was manufactured; (7) the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and (8) the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance. Banks, at 735. Banks does not

hold or signify that summary judgment is no longer appropriate in a case in which a design defect is alleged. Sharpnack v. Hoffinger Indus., 223 Ga. App. 833, 479 S.E.2d 435 (1996). See example, Moore v. ECI Management, 246 Ga. App. 604, 542 S.E.2d 115 (2000) (where plaintiff was electrocuted while installing washers/dryers, the Court upheld summary judgment granted the washer-dryer manufacturer as the cord which came with the appliance was not defectively designed and there is an inherent danger in installing electronic appliances which the plaintiff's experience in this field should have alerted him to); Carmichal v. Bell Helicopter Textron, 117 F.3rd 490 (11th Cir. 1999) (where the court upheld summary judgment granted to the defendant manufacturer holding an adaptor gear shift in the engine of a helicopter was not defectively designed and the cord, even if it were defective, was not the proximate cause of the plaintiff's injuries; Sharpnack v. Hoffinger Indus., 223 Ga. App. 833, 479 S.E.2d 435 (1996) (where the court upheld summary judgment granted to the defendant pool manufacturer because the pool was not defectively designed and the sole cause of the plaintiff's injuries was from doing a back flip into the pool and no additional warnings or actions by the pool manufacturer would have prevented injury). Here, the Tychem SL suit is a useful product. It is designed for use with certain chemicals but is not designed to be used with methyl iodide as reflected by the Permeation Guide for Dupont Tychem fabrics. Plaintiff's employer was required by law to provide Plaintiff with personal protective equipment suitable for the chemical to which he may be exposed under the conditions and in the environment in which Plaintiff was working. See 29 CFR §§ 1910.119 and 1910.120. Plaintiff should have been wearing a Tychem LV, BR, or TK suit which would have protected against this particular chemical. Plaintiff's employer, not

Lakeland, controlled which suit Plaintiff was to use while working with chemicals and it selected a suit which was not rated for use with methyl iodide liquid or vapor. Under the second and third factors, there is no greater gravity or likelihood of danger posed by the design of the Tychem SL suit as this suit is not designed to be used with methyl iodide. Under the fourth factor, the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger, Plaintiff had years of experience working with chemicals, and knew methyl iodide was a hazardous chemical which could cause burns if absorbed in the skin and serious injury and/or death if inhaled. Additionally, Plaintiff was required to wear protective boots and failed to do so. Further, despite being warned on the work day prior to his injury that a suit with holes in the bottom would not protect him from injury related to the methyl iodide, Plaintiff walked on shale rock which is extremely sharp and which may have punctured holes in his suit. With respect to the state of the art at the time the product is manufactured, the Tychem SL suit worn by Plaintiff is the state of the art in this industry but such is irrelevant as the suit is not to be used with methyl iodide. Additionally, the ability to eliminate danger without impairing the usefulness of the product is likewise irrelevant due to this suit not being designed for use with methyl iodide. Plaintiff had the opportunity to use the proper PPE and failed to do so. The last factor, the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance, is not applicable to the current case.

V. PLAINTIFF'S CLAIM IS BARRED BY HIS ASSUMPTION OF THE RISK.

Even assuming the Tychem SL suit could somehow be found to be defective, Plaintiff has assumed the risk of injury. The standard to be applied in assessing an assumption of risk defense is a subjective one, geared to the particular plaintiff in his situation, rather than that of a reasonable person of ordinary prudence who appears in the completely separate defense of contributory negligence. Deere & Company v. Brooks, 250 Ga. 517, 299 S.E.2d 704 (1983). A defendant asserting an assumption of the risk defense must establish (1) that the plaintiff had knowledge of the danger; (2) understood and appreciated the risk associated with such danger, and (3) voluntarily exposed himself to those risks. Smith v. Ontario Sewing Machine Company, 249 Ga. App. 364, 548 S.E.2d (2001).

Here, Plaintiff was warned on the work day immediately before his injury that he had holes in the bottom of his suit and that a suit with holes in the bottom would not protect him from methyl iodide. Plaintiff was given this warning by Mr. Basinger when Basinger saw Plaintiff's tennis shoes hanging out of the bottom of the protective suit. Despite this warning, on April 15, 2002, Plaintiff walked two or three times on shale rock which is extremely sharp and could easily puncture the suit. Each time Plaintiff then re-entered the methyl iodide production area where he knew that methyl iodide vapor had been allowed to escape to the atmosphere when the filter housing was opened, the methyl iodide soaked housing was set on the floor, free to evaporate into the surrounding air, and a shop-vac was used to suck the beads out of the filter housing and the shop-vac was vented to the air in the room, thereby also greatly increasing the vapors to which Plaintiff was exposed. Plaintiff either entered this hazardous environment with a suit he knew

already had holes in it from the work day before, or he entered without checking to see if holes had developed after he'd walked on the sharp shale rock which he knew from the day before could cause holes to develop in the bottom of the suit. Plaintiff further misused the suit he chose to wear, Plaintiff's assumption of the risk is a complete bar to his recovery.

VI. LAKELAND WAS NOT NEGLIGENT IN THE MANUFACTURE OF THE PRODUCT AND EVEN IF IT WERE SOMEHOW FOUND TO BE NEGLIGENT, PLAINTIFF'S NEGLIGENCE EQUALED OR EXCEEDED DEFENDANT'S NEGLIGENCE.

O.C.G.A. § 51-11-7 reads:

> "If the plaintiff and the defendant are both negligent, the former can recover, unless his negligence was equal to or greater than the negligence of the defendant, except that this rule is further qualified by the provisions of this section, which provide that if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not in such event entitled to recover."

Atlantic Coast Line Railroad v. Mitchell, 157 F.2d 880 (5th Cir. 1946).

In Kull v. Six Flags Over Georgia II, LP, 264 Ga. App. 715, 592 S.E.2d 143 (2003), plaintiff's employer, Mahalo Advertising, was under contract to maintain an electronic scoreboard on the Six Flags property. In the course of maintaining the scoreboard, plaintiff did not turn off the power to the board and did not check the circuit because he believed that a fuse had blown. Due to a wiring defect in the nearby transformer box, however, the circuit remained energized. Plaintiff was in the process of replacing a light bulb when he broke the glass globe and used a pair of metal pliers in an attempt to grasp the metal base of the bulb and remove it. The still-energized circuit shocked plaintiff and threw him from the ladder, causing his injuries. The evidence

showed that plaintiff failed to lock out or tag the circuit energizing the part as required by OSHA regulations and NFPA standards, failed to use insulated tools, failed to use personal protective equipment properly rated for the voltage, and he acknowledged that he did not know the rating of his pliers other than that they were not high voltage rated. Id. at 717. The court found that "a plaintiff's contributory negligence bars any recovery whatsoever if his failure to use ordinary care for his own safety is the sole proximate cause of his injuries, even though such negligence concurs with the negligence of the defendant." Id. at 717. The defective wiring in the transformer box merely gave rise to the occasion which made plaintiff's injuries possible. Id. at 718. Had the plaintiff not violated the OSHA and NFPA requirements, plaintiff's injury would not have occurred. Id. at 718. As such, the court granted defendant's motion for summary judgment finding that plaintiff's contributory negligence barred his recovery.

Here, the Tychem SL suit was not rated to be used with methyl iodide. As such, there was no negligence on the part of Lakeland with respect to the design of the Tychem SL suit. Indeed, the labeling warned against the use of its suits with certain chemicals yet Plaintiff and Plaintiff's employer chose to ignore those warnings. As in the Kull case, Plaintiff's use of the Tychem SL suit in an environment in which methyl iodide liquid and vapors had been released into the atmosphere violated OSHA regulations. Plaintiff's actions in choosing a suit which was not to be used with methyl iodide and misusing the suit he was wearing by failing to wear overboots and continuing to wear the suit after it developed holes in it, equaled or exceeded any negligence on the part of Lakeland, if any. As such, Plaintiff's claims should be dismissed as a matter of law.

CONCLUSION

Plaintiff's claims fail because there is no evidence that anything Lakeland did or failed to do proximately caused Plaintiff's injuries. Lakeland was not negligent in the design of the Tychem SL suit nor is the suit a defective product. Additionally, Plaintiff's claims are barred by Plaintiff's assumption of the risk and Plaintiff's contributory negligence.

This _____ day of February, 2006.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS,
LLP

____
LYNN M. ROBERSON, ESQ.
Georgia State Bar No. 608047
MICHAEL P. CARESTIA
Georgia State Bar No. 109229
Attorneys for Defendant

Swift, Currie, McGhee & Hiers, LLP
The Peachtree
Suite 300
1355 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 874-8800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing Defendant's Brief in Support of its Motion for Summary Judgment upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

John C. Bell, Jr., Esq.
Leroy W. Brigham, Esq. ("Lee")
Bell, James & Bentley
P.O. Box 1547
Augusta, GA 30903-1547

Timothy J. Santelli
P.O. Box 19713
Atlanta, GA 30325

Karen Denise Fultz, Esq.
Cozen O'Connor
Suite 2200, SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, GA 30308-3264

This _____ day of February, 2006.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS, LLP

____
LYNN M. ROBERSON, ESQ.
Georgia State Bar No. 608047
MICHAEL P. CARESTIA
Georgia State Bar No. 109229
Attorneys for Defendant

The Peachtree, Suite 300
1355 Peachtree Street, N.E.
Atlanta, GA 30309-3238
(404) 874-8800