

COURSE SYLLABUS
BUSINESS LAW 508
Professor Zucker
Fall 2009

Office: JH 4235
Telephone: (818) 677-3964
Office Hours: tba

MBA Program

The MBA program prepares students for professional growth integrating current business theory and practices with their own experiences. Designed to be accessible to the fully employed student, the interdisciplinary program emphasizes analytical thinking, communication, effective teamwork, a global perspective and practices. A spirit of collegiality among the students, faculty, and community is fostered through social and professional activities.

Objectives of the Course

Business Law 508 (3 units) is designed to provide students with an understanding of the legal environment in which business decisions are made. The course will cover the topics of the court system and procedure. We will analyze how the legal system has been created, and how it is modified to address changing concerns. We will study the law of torts, contracts, agency and business organizations. You will analyze how law applies to factual settings. You will read court decisions, prepare written briefs of the decisions, orally defend your interpretations of the cases, and answer hypothetical questions in open class discussion. You will learn to distinguish the application of rules depending on changing circumstances in various cases and hypotheticals. You will learn to argue alternate sides of a dispute regardless of personal belief. You will learn to identify the functions, policies, and trends in the law, and to consider social, economic and ethical influences on the law.

Exams are composed of one or more essay questions which require you to analyze factual situations, identify legal issues and apply the law in determining the outcome of hypothetical cases. Exams may include multiple-choice questions.

Course topics

- I. The Legal System (5% of class time)
 - A. Purposes of law
 - B. Historical background
 - 1. Common law: flexibility of system designed to find remedies for evolving notions of fairness and rights
 - a. Courts of law
 - b. Courts of equity
 - 2. Constitutional law
 - 3. Statutory law
 - C. Legal Reasoning
 - 1. Case law analysis, role of precedent
 - 2. Statutory Interpretation
 - a. plain meaning
 - b. legislative history
 - c. public policy
 - d. precedent
 - D. Distinction between state and federal law

- E. Distinction between civil and criminal law
 - F. Procedural (sufficient to understand cases studied)
 - 1. Court structure
 - a. jurisdiction
 - b. trial courts distinguished from appellate courts
 - 2. Stages of lawsuit
 - a. pleadings
 - b. discovery
 - c. trial
 - d. appeal (NB: importance of distinguishing questions of law from questions of fact)
- II. Remedies (5% of class time) and Dispute Resolution
- A. Damages
 - 1. Compensatory: purpose, duty to mitigate
 - a. actual
 - b. general
 - 2. Punitive damages: purpose
 - 3. Liquidated damages: purpose, enforceability
 - B. Equitable remedies: Extraordinary relief
 - 1. Specific performance
 - C. Dispute Resolution
- III. Torts (20% of class time)
- A. Intentional: applicability of punitive damages
 - 1. Related to intangibles: reputation, privacy
 - a. defamation
 - b. invasion of privacy
 - 2. Related to property rights
 - a. trespass
 - b. conversion
 - c. nuisance
 - d. fraud/misrepresentation (coordinated with later discussion in contracts)
 - B. Negligence
 - 1. prima facie case
 - 2. defenses
 - C. Strict liability
 - 1. products liability
- IV. Contracts (30% of class time)
- A. Agreement: offer, acceptance, including applicability of UCC
 - B.. Consideration
 - C. Reality of consent
 - 1. Misrepresentation/fraud
 - 2. Mistake
 - 3. Duress
 - 4. Undue influence
 - D. Capacity
 - E. Legality
 - F. Writing: Statute of Frauds
 - G. Rights of third parties

- H. Performance, remedies, quasi-contract (coordinated with earlier discussion)

- V. Agency (15% of class time)
 - A. Creation & Operation of Agency relationship
 - 1. Duties of Agent to Principal
 - 2. Duties of Principal to Agent
 - 3. Termination of Agency
 - B. Third-party Relations of the Principal and the Agent
 - 1. Contract liability of Principal and Agent
 - 2. Tort liability of Principal and Agent
 - a. Lender/broker liability for independent contractors

- VI. Employment Law (10% of class time)
 - A. Workers' compensation
 - B. Legislation protecting wages, pensions and benefits
 - C. Title VII
 - D. Employment at will

- VII. Business Organizations (15% of class time)
 - A. Sole proprietorships, partnerships, joint ventures, limited partnerships, LLCs, LLPs, & Corporations defined and distinguished
 - B. Liability consequences of various forms of business organizations
 - C. Tax consequences of various forms of business organizations
 - D. Operational characteristics of various forms of business organizations

Course Text

The text for the course is BUSINESS LAW: THE ETHICAL, GLOBAL AND E-COMMERCE ENVIRONMENT, 14th ed., Mallor *et al.*, (2010). The textbook is available hardcopy at the campus bookstore and elsewhere. It is also available at a discount online at <https://ebooks.primisonline.com/eBookstore/CustomEBooks.jsp>. Select "Business Law 508".

Class Preparation, Attendance, and Case Briefs

It is absolutely vital that you prepare each assignment in advance for each class meeting. Every assigned case must be briefed in writing and on separate paper. Directions on briefing cases will be given during the first week of class.

You will be called at random throughout the semester to discuss your briefs. It is crucial that you are prepared to discuss your brief. At the end of each class session, I will tell the class which case brief(s) will be discussed in the next class session.

You must attend class. You will not be able to learn the course material or develop the skills needed unless you attend regularly.

Ten percent (10%) of your final course grade is based upon class attendance and professionalism. In addition, if you miss more than four class sessions, your final grade in the course will be reduced one level. For example, if your total points equate to a "C" for the semester (including the 10% component for participation/attendance), it will be reduced to a "C-" if you miss more than four class sessions. **If you miss more than 50% of the total class sessions, you will receive an "F" in the course.**

Briefing Cases

To brief cases, case problems and questions, use the following "IRAC" format:

Issue: What question must be answered in order to reach a conclusion in the case? This should be a legal question which, when answered, gives a result in the particular case. Make it specific (e.g. "Has there been a false imprisonment if the plaintiff was asleep at the time of 'confinement'?") rather than general (e.g. "Will the plaintiff be successful?") You may make it referable to the specific case being briefed (e.g. "Did Miller owe a duty of care to Osco, Inc.?") or which can apply to all cases which present a similar question, (e.g. "Is a duty owed whenever there is an employment relationship?") Most cases present one issue. If there is more than one issue, list all, and give rules for all issues raised.

Rule: The rule is the law which applies to the issue. It should be stated as a general principal, (e.g. A duty of care is owed whenever the defendant should anticipate that her conduct could create a risk of harm to the plaintiff.) not a conclusion to the particular case being briefed, (e.g. "The plaintiff was negligent.")

Application: The application is a discussion of how the rule applies to the facts of a particular case. While the issue and rule are normally only one sentence each, the application is normally paragraphs long. It should be written debate - not simply a statement of the conclusion. Whenever possible, present both sides of any issue. Do not begin with your conclusion. The application shows how you are able to reason on paper and is the most difficult (and, on exams, the most important) skill you will learn.

Conclusion: What was the result of the case?

With cases, the text gives you a background of the facts along with the judge's reasoning and conclusion. When you brief cases, you are basically summarizing the judge's opinion. With case problems, the editors have given you a summary of the facts of an actual case, but have not given you the judge's opinion. Your job is to act as the judge in reasoning your way to a ruling, again using the IRAC format. While most of these case problems are followed by a question, ignore the question and instead brief the problem.

Most briefs are one page long. They must be brought to class on the day they are to be discussed. Once an assignment has been discussed, you no longer need to bring it to class. Since the briefs are not normally turned in, they may be either handwritten or typed.

Exams and Grade Distribution

Exams

There will be a midterm and final. The final exam will be given on the day and at the time and place listed in SOLAR.

Semester Project

This assignment will be distributed separately.

Grade Determination

Your final grade in the course will be decided as follows:

Midterm	30%	
Final exam	40%	
Semester project		20%

Participation//Professionalism	10%
<hr/> TOTAL	100%

Except in the most extraordinary circumstances, there will be no make-up exams. If for some reason you must miss an exam, you should arrange to take this course another semester.

Grades are determined by a careful process designed to ensure fairness. Therefore, grades will not be changed unless there has been a clerical or computational error.

Grading System

<u>Grade</u>	<u>Weighted Grade Points</u>
A	93-100
A-	90-92
B+	87-89
B	83-86
B-	80-82
C+	77-79
C	73-76
C-	70-72
D+	67-69
D	63-66
D-	60-62
F	0- 59

This grading system utilizes plus/minus grades.

Policy on Cheating

Cheating (or any form of academic dishonesty) on exams, homework assignments, or in relation to any aspect of the grading process will not be tolerated. Please read and familiarize yourself with the section of the CSUN Catalog entitled "Student Conduct" prior to the next class session. Unless I state otherwise, everything that you turn in for course credit (i.e., exams, briefs, courtroom visit write-up) should represent your own work.

Class Sessions

Class sessions will typically include:

- An opportunity for questions regarding material from the previous class session
- Lecture
- Discussion

Learning objectives for class sessions:

In presenting case briefs and answering the professor's questions regarding the case, students will develop their oral communication skills as well as their ability to apply concepts learned in the course to situations arising in the business environment. In-class group exercises are designed to increase students' understanding of the course material, and to develop the ability to make effective decisions in business that will prevent liability and enforce rights.

Assignments

	Readings	Work due
Aug. 27	Legal system, court system, procedure, remedies, court system & civil procedure. Read ch. 1 & 2	None.
Sept. 3	Defamation, invasion of privacy, trespass to real & personal property, conversion. Read 181-99.	<i>DeNardo, Martinez</i> (attached) <i>Fleming</i> (attached) & <i>Bhattal</i> (attached). PC 7, 10 & 12
Sept. 10	Negligence: read 205-14, 221-28, 232-34.	<i>Raleigh & Gonzalez</i> (attached). PC 1, 2, 7, 8, 9
Sept. 17	Products Liability: No readings	WA ¹ : Using Lexis, locate <i>Intel v. Hamidi</i> , 94 Cal. App. 4 th 325 (2001). Brief it. Purposes: 1. To learn to use Lexis; 2. to brief cases in their entirety; 3. to learn California law. Submit your brief along with the first page of the case at the start of class. Credit/no credit Brief <i>Smith v. U.S. Gypsum</i> (attached),
Sept. 24	Contracts, offer: read ch. 10	<i>Grunden-Martin</i> (attached). PC 1, 4, 5 & 7
Oct. 1	Contracts Acceptance: read ch. 11 Consideration: read ch. 12	Ch. 11: brief <i>Finnin, Standard Bent Glass, Okosa</i> . PC 1 & 4 Ch. 12: brief <i>Gottlieb</i> . PC 1 & 7
Oct. 8	Contracts Reality of Consent: read ch. 13 Legality: read ch. 15	Ch. 13: brief <i>Jordan</i> , PC 2 & 4 Ch. 15: brief <i>McCune & Circuit City</i> . PC 2
Oct. 15	Quasi-contract: read 300-304 Statute of Frauds: read ch. 15 (responsible for sale of goods ≥\$500 and sale of interests in land) Capacity: read ch. 14	
Oct. 22	Midterm	Midterm
Oct. 29	Agency: read ch. 35 & 36 Midterm review	Ch. 35: brief <i>Eisenberg</i> . PC 1, 5, 6 Ch. 36: brief <i>Treadwell</i> . PC 2, 8, 9, 10
Nov. 5	Employment Law Read ch. 51	Brief <i>Darco</i> PC 3 & 4 and PC 3, p. 910 (ch. 35) WA: Using Lexis, locate <i>Miller v. Dept. of Corrections</i> (2005) 36 Cal. 4 th 446. Brief it. Turn in your hardcopy brief along with the first page of <i>Miller</i> . Credit/no credit.
Nov. 12	Employment Law	Ch. 51: brief <i>TBG & Cisco</i> , PC 6, 10, 11

¹ “WA” refers to writing assignments. These are due, hardcopy at the start of class or as designated. They are credit/no credit.

Nov. 19	Business Organizations Partnerships, sole proprietorships LLPs, LLCs, Ltd. Partnerships: read 946-62	Ch. 37: Brief PC 2, 7, 8, 9, 10 Ch. 38: Brief <i>Moren</i> , PC 4 Ch. 39: Brief <i>Schwartz</i> , PC 8 Ch. 40: PC 3
Dec. 3	Business Organizations Corporations: read Chapters 41-44	Ch. 41: PC 8 & 9 Ch. 42: No writing assignment Ch. 43: PC 7 Ch. 44: Brief <i>Dodge, Brodie</i> , PC 9
The final exam will be given on the day, time and at the location listed in SOLAR		

Supplemental Cases & Case Problems

Bhattal v. Hyatt

Mr. and Mrs. Bhattal checked into the Hyatt Hotel in New York, checked in, had their luggage brought into their room and went out. When they returned, they discovered that their luggage was missing. As a result of a computer error, their luggage was sent to JFK International Airport with the luggage of a Saudi Arabian flight crew who had previously been staying in the Bhattal's room. In their conversion suit against the hotel, what result? Discuss fully.

Fleming v. Benzaquin

Benzaquin, a local radio personality, was stopped by Fleming, a police officer, and cited for not having a front license plate, not having an inspection sticker on the windshield and having an expired registration. Fleming did not allow Benzaquin to proceed in his car but allowed him to leave the car in a car dealer's parking lot. On his radio show that night, Benzaquin prefaced his remarks with the comment that he was depressed, angry and liable to be prejudiced. He then went on to call Fleming "a little monkey," "a dictator and a Nazi," "an absolute barbarian," "a lunkhead," "a meathead," and "a nut." He called Fleming's conduct "unconscionable," reprehensible," "merciless," and "an absolute outrage." In Fleming's defamation suite against Benzaquin, what result? Discuss.

Gonzalez v. Garcia

Gonzalez, Garcia and Longest were co-workers at a power plant who carpooled to work. One day after work, when Garcia was driving, they went to a nearby boat landing and drank beer and tequila for three hours. They then went to nearby liquor store and, over Gonzalez's protests, bought more tequila. Gonzalez called his wife to come pick him up, but she was not home. They then went to a bar where Garcia and Longest drank tequila and Gonzalez drank a beer. Gonzalez then insisted on driving Garcia's car, and drove Longest home. After helping Longest into his house, he returned to the car to find Garcia in the drivers seat. Garcia refused to allow Gonzalez to drive. Gonzalez got into the passenger seat and fell asleep. Garcia then got into a one-car accident, injuring Gonzalez. Garcia's blood alcohol rate was .20%. In the case of *Gonzalez v. Garcia*, what result? Discuss fully.

Grunden-Martin v. Fairmount

On April 20, Grunden-Martin wrote to Fairmount, in part: "Please advise us the lowest price you can make us on our order for ten carloads of Mason green jars...state terms and cash discount." On April 23, Fairmount replied by letter: "Replying to your favor of April 20, we quote you Mason fruit jars....pints \$4.50, quarts \$5.00, half-gallons \$6.50, per gross, for immediate acceptance." On April 24, Grunden-Martin sent a telegram ordering ten carloads of quarts. On that same day Fairmount responded by

telegram, "Impossible to book your order. Output all sold." Grunden-Martin claims that there is a contract. Is there?

Lanuzzi v. Phillip Morris

Mrs. Lanuzzi began smoking in 1951 when she was fifteen. She smoked two packs a day until her death from lung cancer in 1984. She had tried several times, unsuccessfully, to quit. Her family brought a wrongful death and products liability suit against the cigarette manufacturer, Phillip Morris. The evidence showed that there was some suspicion that cigarette smoking could cause cancer as early as the 1950's. Some internal documents of Phillip Morris indicated that they knew that there was some evidence of the causal connection between cigarette use and illness, but that they did not warn consumers of this information. The FDA did not require that warnings of the risk of illness be placed on packages until the 1960s. Phillip Morris did so at that time, in compliance with federal law. In the Lanuzzi's suit against the defendant, what result? Discuss fully.

Manning v. Grimsley

David Manning was a spectator at Fenway Park in Boston for a baseball game between the Baltimore Orioles and the Boston Red Sox. Ross Grimsley was a pitcher for Baltimore. During the first three innings, Grimsley was warming up by throwing a ball from a pitcher's mound to a plate in the bull pen located near the right field bleachers. The spectators in the bleachers continuously heckled Grimsley. On several occasions immediately following the heckling, Grimsley looked directly at the hecklers, not just into the stands. At the end of the third inning, Grimsley, after his catcher had left his catching position and was walking over to the bench, faced the bleachers and wound up or stretched as though to pitch in the direction of the plate. Instead, the ball traveled from Grimsley's hand at more than 80 miles per hour at an angle of 90 degrees to the path from the pitcher's mound to the plate and directly toward the hecklers in the bleachers. The ball passed through the wire mesh fence in front of the bleachers and stuck Manning. Manning sued Grimsley for battery. When the trial judge directed a verdict for Grimsley, Manning appealed.

Wyzansky, Senior District Judge. We, unlike the district judge, are of the view that for the evidence that Grimsley was an expert pitcher, that on several occasions immediately following heckling he looked directly at the hecklers, not just into the stands, and that the ball traveled at a right angle to the direction in which he had been pitching and in the direction of the hecklers, the jury could reasonably have inferred that Grimsley intended (1) to throw the ball in the direction of the hecklers, (2) to cause them imminent apprehension of being hit, and (3) to respond to conduct presently affecting his ability to warm up and, if the opportunity came, to play in the game itself. The foregoing evidence and inferences would have permitted a jury to conclude that Grimsley committed a battery against Manning. This case falls within the scope of Restatement (second) of Torts section 13 (1965) which provides:

An actor is subject to liability to another for battery if

- a. he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- b. a harmful contact with the person of the other directly or indirectly results.

Although we have not found any Massachusetts case which directly supports that aspect of section 143 at issue in this case, we have no doubt that it would be followed by the Massachusetts Supreme Judicial Court. Section 13 has common law roots that precede the American Revolution. The whole rule and especially that aspect of the rule which permits recovery by a person who was not a target of the

wrongdoer embody a strong social policy including obedience to the criminal law by imposing an absolute civil liability to anyone who is physically injured as a result of an intentional harmful contact or a threat thereof directed either at him or a third person.

Martinez v. Democrat-Herald

Martinez was a junior high school student. The Democrat-Herald, a newspaper, published a story on drug use among youth. It ran a picture of Martinez in what the newspaper called “an apparent drug transaction.” Martinez sued for invasion of privacy, alleging both that the newspaper placed her in a false light and that they used her likeness for a commercial purpose without consent. At the trial, the court allowed evidence to be introduced that Martinez was an occasional smoker of marijuana and that the newspaper ran the story in their “People” section (rather than in the hard news section) of the paper and that the newspaper’s circulation had been declining. What outcome on both allegations?

SMITH v. UNITED STATES GYPSUM COMPANY 612 P.2d 251 (Okla. Sup. Ct.1980) (edited for classroom use)

PRIOR HISTORY:

Appeal from the District Court of Pittsburg County, Oklahoma Honorable Robert A. Layden, Trial Judge. In an action based on manufacturers' products liability, defendants appeal from a jury verdict in favor of plaintiff, injured in a fire and explosion from vapors emitting from the adhesive he was using to panel his bathroom.

DISPOSITION: AFFIRMED.

OPINION: This is an appeal from a plaintiff's verdict in a manufacturers' products liability action. Defendants, appellants herein, are the manufacturers and distributors of Wal-lite, a solvent based adhesive used to install paneling.

Plaintiff and his wife, intending to panel their bathroom, purchased two gallon cans of Wal-lite. The paneling was to be placed over the bathroom window, consequently it was closed and sealed. The directions on the can were as follows:

"DANGER

EXTREMELY FLAMMABLE

VAPORS MAY CAUSE FLASH FIRE

VAPORS HARMFUL

See cautions on back panel"

Back label carried following admonitions:

"CONTAINS HEXANE. Vapors may ignite explosively. Prevent buildup of vapors--open windows and doors--use only with cross ventilation. Do not smoke, extinguish all flames and pilot lights; turn off stoves, heaters, electric motors, and other sources of ignition during [*253] use and until all vapors are gone. Do not take internally. Avoid prolonged contact with skin and breathing of vapor. Keep away from heat, sparks, and open flame. Close container after each use."

Pursuant to his reading of the instructions, plaintiff turned off the hot water heater and the pilot light on his kitchen stove and opened the front and back doors. He then opened the can and started the application. Several minutes later his wife turned on a fan across the hall from the bathroom. As she reentered the bathroom she testified she saw a blue flame erupt under plaintiff's trowel and [***3] the explosion occurred. Plaintiff was seriously injured.

Plaintiff filed the present suit based on manufacturers' products liability. Plaintiff claimed Wal-lite as sold in gallon cans was defective when it left the manufacturer's hands in such a way as to make it unreasonably dangerous to the ordinary consumer. He alleged warnings on the can were inadequate in that even if they were followed, the product was still unreasonably dangerous. The claimed defect was the rapid release of highly inflammable hexane vapors. Plaintiff sought actual damages and also punitive damages contending defendants' marketing the product with full knowledge of its dangers was wanton and reckless conduct.

Trial was held to a jury who returned a verdict of actual damages in the amount of \$600,000.00. It did not award punitive damages. Defendants did not file a motion for new trial but timely perfected this appeal.

Defendants claim the trial court erred in overruling their demurrers to the evidence and motions for directed verdict, arguing there was insufficient evidence to submit the case to the jury. In *Kirkland v. General Motors Corporation*, 521 P.2d 1353, 1363 (Okla. 1974) this court set out the elements of a cause of action in manufacturers' products liability.

"First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.

Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. (Citation omitted). If the action is against the retailer or supplier of the article, then the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.

Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term 'unreasonably dangerous ' is above defined."

Unreasonably dangerous is defined as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." n1 Defendants claim proof of the third element of the cause of action was missing.

There is no question the Wal-lite exploded, probably due to ignition of the vapors by the electric fan. But was the proximate cause an unreasonably dangerous product due to defective design and inadequate warnings, or was it plaintiff's ignoring the warnings on the can?

If a product is potentially dangerous to consumers, a manufacturer is required to give directions or warnings on the container as to its use. If these warnings cover all foreseeable use and if the product is not unreasonably dangerous if the warnings and directions are followed, the product is not defective in this respect. If warnings are unclear or inadequate to apprise the consumer of the inherent or latent danger, the product may be defective; particularly [*254] where a manufacturer has reason to anticipate danger may result from the use of his product and the product fails to contain adequate warning of such danger, the product is sold in a defective condition.

Although breach of a "duty to warn" on part of manufacturer is an element of a negligence action, it is not applicable in strict liability. The focus here is on the condition or defect existing *in the product itself* which may be defective because *product* does not contain proper instructions or warning. See *Ezagui v. Dow Chemical Corporation*, 598 F.2d 727 (2nd Cir. 1979); *Cooley v. Quick-Supply Company*, *supra*.

Foreseeability as applied to manufacturer's products liability is a narrow issue. A manufacturer must anticipate all foreseeable uses of his product. In order to escape being *unreasonably* dangerous, a *potentially* dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe. Foreseeability as used here is not to be confused with foreseeability involved in the concept of proximate cause under a negligence theory; see *Cooley v. Quick-Supply Company*, 221 N.W.2d 763 (Iowa 1974).

...[D]efendants in the present case should have known that some users would install paneling in a room without a window. If the jury found Wal-lite was designed in such a way that the vapors ignited easily, and that warnings and directions did not adequately warn of the dangerous conditions created, it was justified in finding a defect in the product. If jury found this defect made the product unreasonably dangerous to the consumer, *Kirkland's* third element is satisfied.

Expert testimony at trial indicated the hexane vapors contained in the adhesive were released at a rapid rate if applied as directed on the can. The label instructed the consumer to apply the adhesive with a saw-tooth trowel. The expert opined such use compounded the dangers as this type of application doubled the evaporative rate by making grooves in the mixture. He concluded the release of the vapors into an enclosed space was too rapid to be overcome or guarded against. Plaintiff and his wife both testified the instructions and warnings were read and followed to the best of their ability. They attempted to satisfy the "cross ventilation" instruction by opening the doors and using the fan.

Defendants claim the evidence shows plaintiff deliberately disregarded the instructions and warnings on the can, resting their case on the fact the bathroom contained no open window. This, they submit, caused the accident, not any defect in the Wal-lite. There is no evidence of such deliberate disregard of the instructions. To the contrary, testimony indicates every attempt was made to heed the warning.

We hold there was sufficient evidence the warnings on the Wal-lite did not prevent the product from being unreasonably dangerous. Proof of the third element was sufficient to send the case to the jury.

Defendants ask us to hold as a matter of law that plaintiff misused the product and voluntarily assumed the risk of a known defect, defenses to a manufacturers' products liability action under *Kirkland v. General Motors, supra*. Use of Wal-lite as an adhesive, its sole purpose, cannot be misuse of the product even if plaintiff used it carelessly as alleged. n4 Evidence does not support defense that plaintiff knew the warnings were inadequate or that its application with a trowel would make the product more dangerous. The existence of the defenses is a jury question. Trial court properly overruled defendants' demurrers to the evidence and motions for directed verdict.

Defendants next suggest the issue of punitive damages should not have been submitted to the jury. They object to admission of reports of the financial worth of defendant United States Gypsum Company in support of an award for punitive damages, claiming this was prejudicial error.

Plaintiff sought punitive damages in his petition. If punitive damages are an issue, evidence of worth of the defendants may be considered. n6 In no appellate proposition do defendants claim the verdict was excessive due to bias on the part of the jury because its members knew one defendant had a "deep pocket." The jury did not award punitive damages. No prejudicial error was shown.

Defendants objected to the testimony of one of plaintiff's expert witnesses, a chemical engineer, that warnings appeared to him "to be inadequate," arguing this is testimony as to the ultimate fact. Also they objected to testimony of a psychiatrist warnings would be vague to a person such as plaintiff.

We feel this is well within permissible testimony of expert witnesses and is not reversible error. n7 Defendants had ample opportunity for cross-examination.

Defendants objected to two other instructions.

Instruction No. 8 provided:

"The plaintiff, James H. Smith, contends that the defect that is referred to in the previous instructions is what is called a design defect. A design defect includes the product itself or the information, the size or quantity of which it was supplied, and the instructions, warnings, and directions for its use. A design defect means that the product may be used for the purpose for which it was intended, but that through some characteristic thereof, latent and not readily apparent to the eye, may cause injury or harm to the user of the product. The plaintiff further

contends that the warnings are inadequate. A warning must adequately inform the ordinary user of the precautions, if any, he must take and the risk, if any, that he is exposed to in the use of the product. The warning must reasonably communicate the extent or seriousness of the harm that could result from the danger. The instructions may also be defective if the product, when used in accordance with the instructions create an unreasonable dangerous condition.

Where warning is given, the manufacturer and distributor may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Instruction No. 9 provided:

"The defendants contend that plaintiff, James H. Smith, misused the Wal-lite product. A misuse or abnormal use of a product is a use for some purpose other than that for which the product is intended.

To prove misuse or abnormal use as a defense in [**12] the present case, the defendants must prove by a preponderance of the evidence that:

- A. The purpose for which the plaintiff was using the product was improper; and
- B. The defendants could not reasonably foresee that the product would be used for such an improper purpose.

If the use of the product is one that defendant could reasonably foresee, it is not a misuse of the product. It is not a misuse of the product to use the product for a proper purpose, but in a careless manner. Thus, if plaintiff was using the Wal-lite product for a proper purpose, but in a careless manner, this is not a misuse and this is not a defense unless such action caused the accident. Further, if the plaintiff was using the Wal-lite product for a proper purpose but was negligent in a manner which was reasonably foreseeable by the defendants, this is not a misuse and this is not a defense. Finally, if the plaintiff did something which contributed to the alleged explosion and fire, but was reasonable foreseeable by the defendants this is not a misuse and this is not a defense, subject to prior instructions on adequacy of warnings and causation. It is not a defense that negligence on the part of some other person contributed to the alleged explosion and fire in the present case."

Defendants claim there was no evidence introduced at trial on which to base either of these instructions. Evidence, lay and expert, of the existence of warnings and their adequacy is found in the record as is evidence of use and purpose of the product. Under these circumstances the instructions adequately define the perimeters of a cause of action in manufacturers' products liability based on defective design and inadequacy of warnings, and defenses based on misuse. A judgment will not be disturbed on appeal by allegedly erroneous instructions where as a whole they fairly present the law applicable to the issues raised by pleadings and the evidence.

AFFIRMED.
