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Products Liability Perspectives

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Notes From the Editors

Welcome to the Spring/ Summer Edition of PLP. We again bring you domestic articles on pertinent topics and continue with our international series of articles with a great overview of products law from the ALFA firm of Kochhar & Co. in India.

We'd like to thank this Edition's contributors, and encourage attorneys, risk managers, safety directors and in-house counsel to submit articles, case summaries and recent victories.

As we begin to look forward to the Fall Edition of PLP, we are considering a variety of product-related topics for the issue. Now is the time to give us your comments, feedback and suggestions for the Fall and other future editions.

We hope you enjoy your summer.

-Dennis B. Keene & Krsto Mijanovic

Successor Liability in South Carolina

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The general rule for successor liability in products liability cases distinguishes between successor entities that result from mergers and successors in interest from sales of assets. This rule maintains that "a mere sale of corporate property by one company to another does not make the purchaser liable for the liabilities of the seller not assumed by it." *Shane v. Hobam, Inc.,* 332 F.Supp. 526, 527-8 (E.D.Pa. 1971). South Carolina recognized this general rule in 1924 in *Brown v. American Ry. Express,* 123 S.E. 97 (1924).

There are several significant exceptions to this rule that successor companies are not liable for injuries from products where those companies merely purchase assets from a predecessor. Four of these exceptions are widely-recognized, while two more recent trends toward successor liability have gained less momentum. Traditionally, liability might pass through to a successor where: (1) the transaction agreement provides that the successor will assume such liability; (2) the transaction results from a fraudulent conveyance to avoid liability; (3) the

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transaction is essentially a merger or consolidation of the two corporations; or (4) the successor company is a mere continuation of the predecessor. *Brown* (recognizing these four exceptions to the traditional successor liability rule in South Carolina).

In the past approximately thirty years, two other theories by which a successor company might be held liable for harms caused by a predecessor's products have emerged. These theories have been termed the "product line" exception and the "continuity of enterprise" exception. Jeffrey Zager and David L. Johnson, *Successor Liability Law in Products Liability Actions*, FOR THE DEFENSE, December 2005. The "product line" exception, as laid out by the California Supreme Court in a 1977 case, imposes strict liability on the purchasing company only where three inclusive criteria are met: when (1) the virtual destruction of the plaintiff's remedy against the original manufacturer was caused by the successor's acquisition of the business; (2) the successor company has the ability to spread the loss just as the predecessor manufacturer could, and (3) holding the successor would be fair because it enjoys the benefits of the goodwill associated with the predecessor's name and business. *Ray v. Alad Corp.,* 19 Cal.3d 22, 560 P.2d 3 (1977). The "continuity of enterprise" exception, meanwhile, might apply where there is a basic continuity of the predecessor corporation's business, including retention of key personnel, assets, predecessor's name, etc.; the seller corporation ceases ordinary business operations and dissolves after the transaction; the buying corporation assumes liabilities and obligations ordinarily necessary for the continuation of the seller's business operations; and the purchaser holds itself out as the effective continuation of that business. *Turner v. Bituminous Cas. Co.,* 244 N.W.2d 873 (Mich. 1976). Courts that apply this theory have held that all of these criteria must exist to warrant an exception to the rule of no liability for successor corporations. *Id*.

South Carolina has rejected the "product line" exception and has hesitated to accept the "continuity of business" exception as anything new. Debate on the application of the two theories in this state was sparked in large part by the case of *Holloway v. John E. Smith's Sons Company,* 432 F.Supp. 454 (D.S.C. 1977). The key factual features of *Holloway* were the virtually identical names of the predecessor and successor entities (John E. Smith's Sons Company and John E. Smith's Sons Company, Division of Hobham, Inc., respectively), the retention of almost all previous employees at the same address, the continued responsibility for maintenance and repairs on products sold by the predecessor company, and the continued manufacture of the same products by the successor. In light of these facts, the district court held the successor corporation liable for injuries incurred from one of the predecessor's machines.

In a very recent case, the South Carolina Supreme Court, while not disagreeing with the result in *Holloway*, insisted that "[w]e did not find that the *Holloway* court established a new test of successor liability. Although the court in *Holloway* did not cite the test established in *Brown,* it applied the mere continuation exception." *Simmons v. Mark Lift Industries, Inc.,* 622 S.E.2d 213, 215, n.1 (2005). Further, the Court upheld *Brown*, stating "[o]ur opinion in *Brown* sets forth the proper test to determine, in a products liability action, whether there is successor liability of a company which purchases assets of an unrelated company." *Id.* at 215.

Meanwhile, the facts and holding in *Simmons* are instructive, if not comprehensive, in terms of a final analysis. The case involved an alleged injury resulting from the collapse of an elevated scissorlift aerial work platform in 1999. The platform had been designed, manufactured, and sold to a distributor by Mark Industries, a California corporation. The distributor sold the scissorlift to the end user, which provided it for use on the construction site. In 1991, Mark filed for bankruptcy, and the bankruptcy court subsequently entered an order granting Mark's motion to sell certain assets.

Terex Corp. won the bid for the assets, and the two companies entered into a purchase agreement, which provided: "Nothing herein shall be construed as the assumption of or by Buyer of any liabilities of the Seller, including, without limitation, any liability for products manufactured or sold by Seller." *Id*. at 214. The bankruptcy court then issued an order authorizing the sale of Mark's estate to Terex "on terms and conditions consistent with the Purchase Agreement and related attachments." Id. Terex set up a wholly-owned subsidiary to receive Mark's assets and to continue operations at Mark's plant before moving the operations to another state a little over a year later. Three Mark employees continued with Terex following the closing of the original plant, and the new corporate entity continued to market and to distribute Mark's equipment using the Mark trade name from 1992 until 2001.

In addition to determining that the appropriate law in successor liability cases is that articulated in *Brown*, the Court in *Simmons* also held that recovery from a successor company would not be precluded simply because another entity might be available to satisfy a plaintiff's demands. "The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action." *Id.* at 215. Unfortunately, since the Supreme Court in *Simmons* was called upon only to establish the applicable test in the particular situation, there was no final decision or discussion on the record regarding the application of the law to the facts of that case. Now that the South Carolina Supreme Court has clarified the law, it will be interesting to see how the analysis plays out in the trial court.

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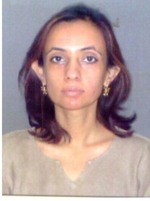

Product Liability Law in India

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Product liability has acquired immense importance in the last 50 years. Many product-caused injuries are governed by liability rules/laws. In India, product liability falls within the ambit of inter alia, the Consumer Protection Act, 1986 (the "CP Act") and the Sale of Goods Act, 1930 ("Sales Act").

Initially, the law of consumer protection is based on the "caveat emptor" (let the buyer beware), which imposes the burden of proof and responsibility regarding the purchases on the buyer himself. But, this condition changed as the law recognized the inability and imperfect knowledge of the purchaser in the economic affairs. The consumer protection law that was actually developed from the law of torts achieved the statutory form due to the enactment of various consumer protection acts in various countries such as the CP Act in India.

Concept of Consumer

The case of *Donogue v. Stevenson* gave rise to remedy for the consumer. Here, the appellant and her friend went to a café where the friend bought a bottle of beer and gave it to her. After she had consumed the contents, they realized that there is a decomposed snail in the bottle and she suffered from shock and severe gastro enteritis. Though the appellant was not a party to the contract i.e., as a purchaser of goods, the manufacturer was held liable on the ground that he owed a duty of care to the ultimate consumer. Thus, the term consumer was held to have wider connotation covering not only the purchaser but also the ultimate consumer. This principle applies not only to the manufacturers, but also to the suppliers, distributors, retailers, assemblers, packagers, bottlers and repairers of the goods.

Statutory Enactment

The CP Act is the main statute which takes into account product liability issues in India. The Act covers within its purview concepts such as deficiency in services / goods (Section 2 (1) (O)) which is any fault, imperfection or short coming in the quality, quantity, potency, purity or standard which is required to be maintained. The CP Act, however, excludes from its purview the services rendered free of charge and services that are rendered as a part of the services of the sovereign authority. This principle of excluding the sovereign authority is one of the principles of the law of torts but if they render the services that can also be rendered by any other private authority that will come within the purview of the CP Act.

Law of Torts

Various provisions of the CP Act have been codified into the law of torts. Some of the tort law principles developed into the international principles of consumer protection.

For a tort, first of all there must be a breach of the legal duty leading to the violation of a legal right. To enable a consumer to bring an action he must have availed the services for consideration, which may be either paid or promised or partly paid, or under any system of deferred payment.

A complaint can be made by a consumer if there is:

1. An unfair trade practice (Sec 2 (c) (i))
2. Defect in the goods (Sec 2(c) (ii))
3. The goods or services suffer from deficiency of the standards stated (Sec 2(c) (iii))
4. Excess price is charged than was stated
5. Hazardous goods when offered for sale in contravention of law (Sec 2(c) (iv))

The above conditions of complaint deal with the aspects of fraud, negligence, and recklessness that are tort law principles.

Negligence

Negligence is a breach of duty caused by the omission to do something, which a prudent and reasonable man would not do. This principle of tort law is inserted into CP Act under Sec.14 (1) (d).

The consumer must show that:

1. He had suffered from the negligence of the producer;
2. There must be a nexus between the loss/injury suffered and the negligence of the goods/ service provider;
3. The damage suffered must not be too remote a consequence of the negligence of the defendant; and
4. There should be no contributory negligence by the consumer.

Where a person is guilty of negligence *per se*, no further proof is required. For example, where a homeopathic doctor practices in the allopathy, without being qualified in that, it is negligence *per se* and he is liable in consonance with the maxim *sic utero tuo ut alienum non leodas* (a person is held liable at law for the consequences of his negligence). The burden of proving the negligence is always on the consumers. They have to establish that:

1. the defect was present when it left the hands of the manufacturers or any other party who is a defendant;
2. The defect was due to the negligence of the above said parties; and
3. The defendant has a duty of care.

By proving the above, the consumer can seek remedies under Section 14 of CP Act and the defendant can be made liable for negligence both in services and goods.

Unfair Trade Practices

The CP Amendment Act, 1993 incorporated a complete definition of "unfair trade practice" in Section 2(1)(r) of CP Act. The same definition is contained in Section 36 (a) of the Monopolies and Restrictive Trade Practice Act, 1969. It means 'a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice'. For example, false representation of the particular standard, quality, quantity, grade, composition etc. of the good, giving such warranty or guarantee of the performance, efficacy or the life of the product which is not based on the proper test etc., representing that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have or making a false or misleading representation concerning the need for, usefulness of, any goods or ser-

vices or gives false or misleading facts disparaging the goods, services or trade of another person etc., are all unfair trade practices.

Unfair trade practice is based on the tort law principle of fraud for which the person can be made liable, i.e., the intention to mislead the public or the consumer is important. In such cases, under the provisions of Section 14 of CP Act, the forum can order the defendant to stop such unfair trade practice. The provisions of CP Act will be in addition to and not in derogation of the provisions of any law for the time being in force.

Compensation for Product Liability

Compensation and the payment of damages, in order to place the consumer in the same position as he was before, is the basic principle of tort. There are various kinds of damages: Exemplary, ordinary, nominal and contemptuous damages.

Damage alone on its own will not suffice until it is a consequence of a legal right (*damnum sine injuria*). Loss is a generic term. Injury too means invasion of any legally protected interest of another. Mere loss or injury without negligence is not contemplated under Section 14. Loss for which the compensation is claimed should be caused due to the negligence of the person. Section 14 of CP Act, 1986 talks about the remedies to the consumer in case of violation of his rights. According to Section 14 the consumer redressal forum can ask the producer or the manufacturer:

1. to remove the defect;
2. to replace the goods with new goods;
3. to return the price or the charges paid;
4. to pay the compensation for loss or injury;
5. to remove the deficiencies in the goods or services;
6. to discontinue the unfair trade practice;
7. to cease the manufacture or not to offer or withdraw the hazardous goods from the market;
8. to issue corrective advertisements; or
9. to provide adequate costs to the parties' etc.

On a complaint of the consumer the respective Consumer Forum may pass an order to the opposite party, for instance, to remove the defect, to replace the goods, to return to the complainant the price and/or charges, to pay compensation, to discontinue unfair trade practice, not to offer hazardous goods for sale, to withdraw the hazardous goods, or to provide for adequate costs to parties. Further, under the principles of product liability the holder of a trademark, who is identified as manufacturer of a product by his trademark, may be held liable for paying compensation to others under certain circumstances.

Redressal forums can now assess and determine damages based on facts and also on the inconvenience and mental agony caused on account of negligence of the opposite party. It is not mandatory or obligatory on part of the complainant to ask for specific relief and forums are not debarred from granting relief not prayed by the complainant if they can be justified on merit.

Conclusion

Product liability claims have increased significantly in recent times. There are several reasons for this trend. Technological advances have made it easier to pinpoint defects and prove that the harm was caused by the product. Social attitudes towards claims have changed thanks to better awareness of the public's right to press liability claims. The increased awareness has been fueled by solicitors' advertisements and extensive media coverage.

Companies need to manage product liability risks in a proactive way since the real damage is often to the brand name and the company's reputation. Careful planning and reflection can help them to avoid faulty design, defective raw materials and inadequate safety mechanisms. Documented quality control procedures such as ISO 9000 can pinpoint the gaps, which exist in product design, development and manufacture.

In pursuance of the recommendations of the Central Consumer Protection Council, the Central Government, [Ministry of Consumer Affairs, Food & Public Distribution, Department of Consumer Affairs (Consumer Protection Unit)] on January 16, 2004, constituted a Working Group to consider amendments in CP Act and formulate new Acts for protecting the interests of consumers including a Product Liability Act.

Till such time, the CP Act is reasonably protecting the consumer against the unreasonable terms and conditions under the standard form contract (which often puts the supplier of goods or services in a dominant marketing position). Moreover, today no company wants to be seen as an entity responsible for unjust business practices. But many times the consumer chooses to suffer injustice and exploitation in silence. The need of the hour is a well-informed consumer and consumer movements willing to espouse causes aggressively.

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Washington State Motor Vehicle Product Liability Law Overview

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Automotive defect claims typically involve allegations by a plaintiff against a dealer, manufacturer and/or seller of a vehicle, where the plaintiff claims that he or she suffered injuries (or enhanced injuries) as a result of some defect in design, manufacture, or adequacy of warning in the vehicle. These cases are often document intensive, and involve important and time consuming discovery battles. Nevertheless, since about 1960, there has been a dramatic increase in the number of these types of cases filed. 42 A.L.R. 560.

Washington's Products Liability Law

Automotive defect cases are litigated under Washington's Products Liability Act, which is codified at RCW 7.72 and governs claims for injuries sustained as a result of any product. In general, the Act is intended to preempt all other causes of actions for these types of claims. The primary focus of the Act is the liability of manufacturers for their products. Retailer liability can only be premised on the retailer's (1) failure to use reasonable care, (2) intentional misrepresentation or concealment of information about the product, or (3) issuance of an express warranty concerning the product. RCW 7.72.040

Three main types of cases are brought under the Products Liability Act: (1) design defect (2) manufacturing defect (3) failure to warn. In addition to these, a breach of warranty claim may be available. RCW 7.72.030 (manufacturing defect, failure to warn, and warranty cases).

RCW 7.72.050 allows for the introduction of evidence of industry custom and government standards in products liability cases. This section of the Act provides:

> *Relevance of industry custom, technological feasibility, and non-governmental, legislative or administrative regulatory standards.*
>
> (1) Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.
>
> (2) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design or warnings, this compliance shall be an absolute defense. When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a specific mandatory government specification relating to design or warnings, the product shall be deemed not reasonably safe under RCW 7.72.030(1).

In connection with its analysis of the proper role of this type of evidence, our Supreme Court has stated, "it may be unreasonable for a consumer to expect product design to depart from legislative or administrative regulatory standards, even if to do so would result in a safer product." *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 (1999). Despite this reality, standards such as these amount to just one more factor for the jury to consider and are not dispositive. *Id.* (compliance with relevant codes did not foreclose finding that the window was not reasonably safe).

Washington has implemented a statute of repose for products cases. It is codified at RCW 7.72.060, and provides that a manufacturer is not liable for causes of action accruing after the useful safe life of the product has expired. The useful safe life is the amount of time a product would normally be likely to perform or to be stored in a safe manner, which in Washington, it is presumed to be twelve years. *Id. Garcia-Munoz v. Recovery Systems Tech., Inc.*, 128 Wn. App. 256, 259 (2005). This presumption is rebuttable, however, provided that plaintiff is able to prove by a preponderance of the evidence that the useful safe life exceeded twelve years. *Martin v. Goodyear Tire & Rubber Co.*, 114 Wn. App. 823, 833 (2003); *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212 (1994). As a practical matter, statutes of repose defenses are very rare in automotive cases.

A. Design Defect Cases

To successfully prosecute a design defect claim, plaintiff must prove that a (1) manufacturer's product was (2) not reasonably safe as designed and (3) that the design defect proximately caused harm to the plaintiff. RCW 7.72.030(1). *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 208 (1995); *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 154 (1975).

In order to prove that a product was not reasonably safe as designed, the plaintiff must satisfy either a risk-utility or a consumer expectation test. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326-327 (1999); *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299 (2003) (plaintiff's claim properly dismissed when plaintiff could satisfy neither the risk utility nor consumer expectation test for design defect). Under the risk-utility test, a plaintiff can prove a design defect if he or she can show that the risk posed by a product is greater than the cost to make it safer. *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821 (2004). The risk-utility test can also be satisfied by demonstrating that a different product would have more safely satisfied the same need or served the same function. *Ruiz-Guzman v. Amvac Chemical Corp.*, 141 Wn.2d 492 (2000) (plaintiff could attempt to establish defectiveness of pesticide by showing that another pesticide would have been preferable).

The consumer expectation test is different, but may include a risk-utility type inquiry. To successfully prosecute a design defect claim under this test, the ultimate burden on the plaintiff is to

prove that the product was more dangerous than the ordinary consumer would expect. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 837 (1995). Under this test, the focus is on the reasonable expectation of the consumer. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326-327 (1999). In evaluating whether a plaintiff has satisfied this standard, the finder of fact may consider the intrinsic nature of the product, its cost, the gravity of the potential harm, and the cost and feasibility of eliminating or minimizing the risk. *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 154 (1975). Additionally, as discussed above, the finder of fact may consider applicable governmental safety standards, and whether they were followed. *Falk v. Keene Corp.*, 113 Wn.2d 645 (1989) (safety standards relevant to what the reasonable consumer may expect in terms of product safety).

In evaluating whether a product was reasonably safe as designed, it is important to also be aware that this inquiry is made with reference not only to the product's intended uses, but also with respect to its unintended uses that are reasonably foreseeable. For instance, in the automotive context, Washington courts have recognized that it is reasonably foreseeable, even inevitable, that vehicles will be involved in collisions. *See, e.g., Baumgardner v. Am. Motors Corp.*, 83 Wn.2d 751, 753, 757-758 (1974) (damages available for design or manufacturing defects that proximately cause enhanced injuries, even when those defects do not cause or contribute to the original collision). As such, in determining whether a particular vehicle is reasonably safe as designed, the finder of fact must necessarily consider what happens when that vehicle is involved in a collision.

Normally, the parties to products liability cases will want to retain experts to support their positions. Much of products liability litigation will involve a discussion of not only the product itself but also whether the product was misused. Experts can assist the finder of fact with all of these inquiries. Having an expert is essential in the automotive defect case, considering the complexity of the decisions involved in designing and manufacturing automobiles. Nevertheless, it is interesting to note that Washington cases exist that hold that expert testimony is not necessarily required for all products liability cases. *See Potter v. Van Waters & Rogers, Inc.*, 19 Wn. App. 746, 755-756 (1978) (non-expert circumstantial evidence may be admitted to prove defective rope).

The *Potter* Court cited *Brownell v. White Motor Corp.,* 260 Or. 251 (1971), with approval. *Brownell* was a tire defect case where plaintiff did not offer any expert testimony of any defect in the tire. *Id.* at 254. Defendant moved for a directed verdict, which the trial court denied. *Id.* On appeal, the denial was upheld, based on the theory that plaintiff had offered evidence eliminating driver negligence as a cause of the accident. *Id.* at 256 and 259. According to the *Brownell* Court, the elimination of driver negligence as a cause, together with evidence that the product's condition had not changed since its sale, created a plausible inference that a defect had therefore caused the accident. *Id.* at 256.

More recently, in *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28 (2000), citing *Potter*, Division III of the Court stated that while expert testimony is usually "valuable assistance," it is not always required in design defect cases. *Id.* at 37-38.

That said, conflicting authority does exist. For example, *Bruns v. PACCAR, Inc.,* 77 Wn. App. 201 (1995), involved claims for injury caused by airborne particulates in truck cab interiors. There, the Court stated that the Defendant was correct in its assertion that Plaintiff must offer "reliable and specific expert testimony to establish the nature of the alleged dangerous condition in a products liability case." *Id.* at 210 (citing *Wagner v. Flightcraft, Inc.*, 31 Wn. App. 558, *review denied*, 97 Wn.2d 1037 (1982). As a practical matter, each side should have expert testimony available to support its theories.

B. Manufacturing Defects

Manufacturing defect cases involve claims by Plaintiff that, while the design was acceptable, there was a flaw in the product created during the manufacturing process. The Plaintiff must prove that the product was "not reasonably safe in construction":

> *A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.*

RCW 7.72.030(2)(a).

In these cases, if there is no evidence available to prove the exact manufacturing flaw, the Plaintiff may still prevail under the consumer expectation test discussed above. Plaintiff's proof that a product failed to meet the reasonable expectations of the consumer gives rise to an inference that there was some sort of defect, the precise definition of which is unnecessary. Put another way, our Courts have ruled that if the product failed under conditions which an average consumer of that product could have fairly definite expectations, then the jury has a basis for determining that a defect existed. *See, e.g., Bombardi v. Pocel's Appliance and TV Co.*, 10 Wn. App. 243, 247 (1973).

C. Failure to Warn Cases

Plaintiff may also pursue a products liability claim on a failure to warn theory. RCW 7.72.030(b) provides:

> *A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.*

Liability for failure to provide adequate warnings is independent from any liability based on design or manufacturing defect. As a practical matter, in real world practice, plaintiffs typically plead more than one theory of liability, but a failure to warn claim can theoretically stand on its own. *Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149, 155 (1977).

As with other products cases, a plaintiff can prove these cases utilizing the risk utility test or the consumer expectation test. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829 (1995). Because there is practically no cost to provide warnings, our courts have ruled that a manufacturer is expected to warn on even remote risks. *Ayers v. Johnson Baby Prods. Co.*, 59 Wn. App. 287 (1990). The obligation to issue a warning can arise either pre-sale due to foreseeable risks, or post-sale. The post-sale duty arises once a manufacturer has sufficient notice about a specific danger associated with its product. *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 935

(2000), *review denied*, 144 Wn.2d 1004 (2001).

An important check on this seemingly broad requirement does exist. In a failure to warn case, the plaintiff must show that the absence of a particular warning was actually the proximate cause of the claimed injury. When plaintiff cannot make this showing, the claim fails as a matter of law. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319 (1999) (claim properly dismissed where lack of warning did not cause child's injury).

Moreover, because strict liability is not absolute liability, and a manufacturer is not an insurer of its product, where the danger is obvious or known, a warning need not be given. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 144 (1986); *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 479 (1978); *Kimble v. Waste Sys. Int'l, Inc.*, 23 Wn. App. 331, 339 (1979).

D. Breach of Warranty

Finally, a plaintiff can make a claim under the Products Liability Act for breach of express or implied warranty. *Fortune View Condominium Ass'n v. Fortune Star Dev. Co.*, 151 Wn.2d 534, 545-546 (2004).

An express warranty is actionable under the Products Liability Act if:

> *it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.*
> RCW 7.72.030(2)(b).

Generally, a buyer and seller must be in contractual privity or plaintiff will not have a breach of warranty claim. *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299 (2003). However, this requirement is relaxed if the manufacturer makes express representations in advertising, or in some other form, to the plaintiff. *Id.* Moreover, our courts have ruled that while express warranties may be in words, they may also take the form of pictures, samples, or models that create an expectation on the part of the consumer that the product is safe for use in the manner depicted. *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 110 Wn. App. 197 (2002).

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1 RCW 7.72.010 defines a product as: (3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

Automobiles, therefore, are a type of product, subject to the Products Liability Act.

2. Nevertheless, the Products Liability Act expressly does not preempt claims based on fraud, intentional injury, or the Consumer Protection Act. RCW 7.72.010. Nor does it preempt the rescue doctrine. *McCoy v. American Suzuki Motor Co.*, 86 Wn. App. 107 (1997) (rescuer of vehicle occupant injured while attempting the rescue was entitled to assert claim against vehicle's manufacturer).

3. In other limited circumstances, primarily if a manufacturer is unable to answer for its liability, a retailer may be held liable. *See* 7.72.040.

4. There are two main types or product liability/warranty claims in Washington. The first is for pure economic loss, and is governed by the Uniform Commercial Code. The second is for personal injury or property damage, and is governed by the Products Liability Act. Only the second type will be addressed in these materials.

Case and Statute Analyses

FLORIDA

Florida Statute Repeals Joint & Several Liability for Economic Damages

On April 26, 2006, Governor Jeb Bush signed into law House Bill 145, which amended Section 768.81, Florida Statutes to eliminate the doctrine of joint and several liability for economic damages in negligence actions. Previously, defendants in such actions were liable for *non-economic damages* on the basis of their percentage of fault, but were subject to joint and several liability with respect to *economic damages* for a certain capped amount (which depended on the parties percentages of fault in a given case). Thus, a defendant typically was required to pay more than his or her apportioned share of the total amount of economic damages. The amendment to § 768.81 has eliminated this disparate treatment of economic and non-economic damages, and defendants are now only responsible for their own percentage of fault for any and all damages awarded in negligence actions. Notably, the amendment only applies to causes of action which accrue on or after its effective date of April 26, 2006.

In addition to making Florida a strict comparative negligence state, the amendment to § 768.81 will impact negligence actions in several other ways. First, it appears that the amendment has abrogated the use of the concepts of contribution and set-off. The contribution statute is predicated upon two or more persons being jointly and severally liable in tort for the same injury to person or property. § 768.31(2), Fla. Stat. Likewise, the statutes permitting set-off of any amounts paid in settlement presuppose the existence of multiple defendants jointly and severally liable for the same damages. *See* §§ 46.015(2), 768.041(2), 768.31(5)(a), Fla. Stat.; *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So. 2d 249, 253 (Fla. 1995). As defendants will never be jointly and severally liable for any portion of a judgment in a negligence action under the amended version of § 768.81, the express language of the contribution and set-off statutes suggests that neither concept will continue to be viable. Moreover, the changes to § 768.81 may factor into a plaintiff's decision in determining which potentially liable persons or entities to name as defendants in a case. Because defendants will now only be responsible for their own pro rata share of liability, plaintiffs can no longer rely on a defendant to satisfy an amount of economic damages apportioned to a non-party and, therefore, may be more likely to name additional defendants in order to increase their chances of recovering the total amount of their damages.

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MAINE

Differential Diagnosis Testimony of Osteopathic Physician Satisfies Daubert
Roney v. Wendy's Old Fashioned Hamburgers of New York Inc., D. Maine, No. 2:05-cv-109-GZS, 3/17/06

A Maine woman's claims that E. coli bacteria contaminated an undercooked cheeseburger she purchased at a popular fast-food chain, causing her to suffer acute renal failure and a reduced platelet count, were allowed to proceed in *Roney v. Wendy's Old Fashioned Hamburgers of New York Inc.*, D. Maine, No. 2:05-cv-109-GZS, 3/17/06. Although the woman discarded the burger and doctors did not perform a timely stool culture that would show E. coli contamination, the court found that her expert could conclude through differential diagnosis the likely cause of her injury.

Wendy's sought to exclude the expert's opinion, but the Court found differential diagnosis to be a reliable methodology, even if it did not constitute conclusive proof of a casual connection between an incident and the alleged injury. To prove her claims, Roney offered the expert testimony of Dr. Owen Pickus, an osteopathic physician specializing in internal medicine and hematology-oncology. In Dr. Pickus's opinion Roney, developed hemolytic uremic syndrome (HUS), most likely caused by E. coli contamination of the undercooked hamburger she ate at Wendy's. Pickus based this opinion on his review of Roney's medical records, his own treatment of Roney, his education, training and experience, and the fact that there was no more persuasive circumstantial evidence of any other cause.

Noting that the methodology Dr. Pickus employed—differential diagnosis—generally satisfies the requirements of *Daubert* if performed adequately, the Court explained that the proponent of expert evidence need only establish that the testimony is reliable. "The proponent is not required to prove that the expert's opinion is correct." Finding the testimony admissible, the Court found that Dr. Pickus's assessment, coupled with his exclusion of the various alternative causes raised by Wendy's experts, demonstrated that the conclusion he arrived at through differential diagnosis was reliable.

MISSISSIPPI

Hammond v. Isle of Capri Casinos Inc., S.D. Miss. No. 5:06-CV3-DCB-JMR, 4/26/06

A Mississippi Federal court held that an agreement giving an elevator company sole responsibility for the care and maintenance of elevators at a casino did not shield the casino from possible liability for a guest's injuries. In *Hammond v. Isle of Capri Casinos Inc.*, S.D. Miss., a guest at an Isle of Capri Casino hotel was injured while entering an elevator maintained by ThyssenKrupp Elevators. Hammond filed suit in state court in Mississippi against Isle of Capri, ThyssenKrupp Elevator Corp. and ThyssenKrupp Elevator Manufacturing, seeking compensation for her injuries. Hammond alleged, among other things, that the defendants failed to warn her of the elevator's dangerous condition.

ThyssenKrupp removed the action to the federal district court for the Southern District of Mississippi on the basis of diversity jurisdiction. ThysenKrupp claimed removal was proper because Isle of Capri was fraudulently joined as a defendant in the matter. It maintained that recovery against Isle of Capri was impossible for Hammond because the two companies had a service agreement which vests in ThyssenKrupp sole responsibility for the maintenance and care of the casino's elevators. Thus, ThyssenKrupp argued, Isle of Capri had no responsibility to service or maintain the elevator. Rejecting this argument, the court noted that Isle of Capri admitted it had a duty to notify ThyssenKrupp of any problems with the elevator. The court further noted that it was ThyssenKrupp's burden to demonstrate that the plaintiff could not maintain any of her claims against the resident defendant. Finding the elevator company had failed to carry this burden, Bramlette ruled Isle of Capri was not improperly joined and the case lacked complete diversity. Accordingly, the matter was returned to the state court.

OREGON

Revival of Certain Products Liability Claims Violates Due Process Clause

In *McFadden v. Dryvit Systems, Inc.*, the U.S. District Court for the District of Oregon held that a provision in a 2003 amendment to ORS 30.905(2) violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The statutory provision at issue revived certain products liability claims following the Oregon Supreme Court's decision in *Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 26 P2d 817 (2001). The *Gladhart* court construed the then-existing statute of limitations in certain products liability actions as beginning to run when the damage occurs, not when the plaintiff discovers it. Following *Gladhart*, the legislature amended ORS 30.905(2) to include a discovery rule. In so doing, the legislature also included a provision that permitted the "revival" of certain claims dismissed by final judgment based on *Gladhart*, which otherwise would have been timely under ORS 30.905(2) as amended.

Plaintiffs in *Dryvit* filed their original products liability action in 2001. At the time of filing, ORS 30.905(2) required an action to be commenced within two yeas of the date of the death, injury, or damage. The case was dismissed under *Gladhart* and the prior version of ORS 30.905(2). Following *Gladhart* and the subsequent amendment of ORS 30.905(2), plaintiffs re-filed their claims in federal court. Defendant moved for summary judgment, arguing that the provision of ORS 30.905(2) allowing for the revival of claims dismissed based on *Gladhart* violated the "separation of powers" provisions of the Oregon Constitution. The District Court certified the state constitutional question to the Oregon Supreme Court, which found no violation.

Defendant then filed a second motion for summary judgment, arguing the amended statute violated the Fourteenth Amendment Due Process Clause because it attempted to set aside a final judgment. According to defendant, the 2003 judgment constituted a property right under the "vested-rights doctrine," of which the prevailing party cannot be deprived without due process. The court agreed with defendant and concluded the 2003 judgment was a final adjudication on the merits for purposes of the vested-rights doctrine. The court held that, to the extent the amendment to ORS 30.905(2) allowed for the reinstatement of plaintiff's claims, it violated the Due Process Clause. According to the court, the statutory provision impermissibly attempted to retroactively set aside a federal court judgment.

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RHODE ISLAND

Rhode Island's Work Product Exception to Written Communications Between Attorney and Testifying Expert Witness

Crowe Countryside Realty Associates, Co., LLC v. Novare Engineers, Inc., 891 A.2d 838 (R.I. 2006)

In this recently decided Rhode Island Supreme Court case, the Court carved out an exception to the work product privilege as explained in the United States Supreme Court landmark decision, *Hickman v. Taylor*, 329 U.S. 495 (1947).[1] In *Crowe*, the Court held that R.I. Civ. P. Rule 26(b)(3), allows for the full discovery of "factual" work product exchanged between a testifying expert and an attorney without the requisite showing of "substantial need" or "undue hardship". However, communications constituting "opinion" work product remain absolutely immune from discovery.

Defendant served subpoenas duces tecum upon plaintiff's three testifying expert witnesses and requested "any and all records relating in any way to [their] review, evaluation and formation of opinions in connection with the * * * litigation." *Crowe*, 891 A.2d at 839. Subsequently plaintiff filed motions for protective orders alleging that the subpoenas sought materials protected from discovery by the work-product privilege. On certiorari, the Rhode Island Supreme Court determined to what extent under Rule 26, subdivisions (b)(3) and (b)(4), the work-product doctrine applied to documents and other materials reviewed by expert witnesses expected to testify at trial.

The Court was not influenced by the proposition that full discovery may reveal that the attorney unfairly prejudiced the testifying expert. The Court stated, "we agree ... that any value that may result from revealing how an attorney has influenced a testifying expert does not override the strong policy against disclosure of attorneys' innermost thought processes." *Id.* at 847.

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[1] R.I. Civ. P. R. 26(b)(3) embodies the work product doctrine in *Hickman.*

SOUTH CAROLINA

Clarification of the Use of Injunctions and Arbitration Rules
Resources Company v. BCS Life Insurance Company, 367 S.C. 540, 627 S.E. 2d 687 (2006)

In the recent case of *Strategic Resources Company v. BCS Life Insurance Company*, the South Carolina Supreme Court reversed the lower court decision and held than an injunction was an improper remedy because the Respondents in the case at hand had an adequate remedy at law.

The underlying facts of the case demonstrated that BCS Life Insurance Company and BCS Insurance Company (Appellants) brought a lawsuit in an Illinois state court against Strategic Resources, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company (Respondents) after a business deal went astray. The Illinois court required the parties to arbitrate the matter pursuant to the parties' prior written agreement. The agreement provided that any dispute would be submitted to a panel of three arbitrators, two of which would be selected by the parties (party arbitrators) and a third (neutral arbitrator) to be selected by the party arbitrators. While the party arbitrators were selected, Appellants and Respondents were unable to agree on a neutral arbitrator to serve on the panel. Appellants then declared that the party arbitrators were deadlocked and sought assistance from the American Arbitration Association (AAA) to make the decision for them. The trial court found that Appellants unilaterally made this request in an attempt to obtain an unfair advantage by having the neutral arbitrator selected from a favorable list of arbitrators. Once the Respondents became aware that Appellants sought assistance from the AAA, a disagreement arose as to which set of AAA rules was applicable. Appellants argued that the AAA's Supplementary Rules for the Resolution of Intra-Industry United States Reinsurance and Insurance Disputes (Supplementary Rules) applied. However, the Respondents contended that the AAA's Commercial Rules applied.

A list of proposed arbitrators was provided by the AAA according to the Supplementary Rules and required the parties to "strike and rank" those candidates listed on the list by July 18, 2003. Respondents objected to the list provided by the AAA and the parties were unable to reach a compromise. One day before the "strike and rank" deadline, July 17, 2003, Respondents initiated these proceedings.

The trial court found that Appellants had engaged in a variety of wrongful conduct, including, but not limited to, manipulating the AAA, violating the rules of the AAA, improperly communicating with the AAA, and making inconsistent statements to the trial court at hearings and in documents filed with the court. As a result, the trial court enjoined the AAA from following the Supplementary Rules and directed the AAA to devise a list of arbitrators according to the Commercial Rules. Appellants appealed.

This case was certified from the Court of Appeals pursuant to Rule 204(b), SCACR, and the issue on appeal was whether the trial court erred by enjoining the AAA. The South Carolina Supreme Court found that it did.

For a preliminary injunction to be granted, a party must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law. *Scratch Golf v. Dunes West Residential Props., Inc.,* 361 S.C. 117, 603 S.E.2d 905 (2004).

In its order granting the injunction, the trial court held that Respondents should not be required to wait until the arbitration has concluded before challenging the proceedings, because it would be wasteful to arbitrate pursuant to inapplicable rules and with an improperly selected neutral arbitrator. Appellants argued the trial court erred by granting injunctive relief because the Respondents had an adequate remedy at law according to South Carolina common law. Respondents contended that, despite South Carolina common law, Section 5 of the Federal Arbitration Act (FAA) granted the trial court the authority to enjoin the AAA upon parties reaching an impasse in deciding on an arbitrator. The Supreme Court disagreed however noting that the statute specifically limited the scope of the court's authority to appoint an arbitrator upon parties reaching an impasse. The Court further noted that it did not need to decide whether the parties ever reached an impasse as even upon an impasse, the injunction was beyond the scope of authority granted to the trial court by the FAA.

The Supreme Court's decision was based on the fact that the Respondents were not entitled to an injunction because they had the right to appeal the results of the arbitration, which was an adequate remedy at law. The right to appeal, the Court noted, provided the Respondents with an adequate remedy at law, a protection of their rights, and an opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator. Accordingly, the Supreme Court held that the trial court erred by granting the injunction.

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Contribution Actions and Statutes of Repose
Capco of Summerville, Inc. v. J.H. Construction Company, Inc.
368 S.C. 137, 628 S.E. 2d 38 (2006)

The South Carolina Supreme Court very recently addressed the issue of the interplay between the statute of limitations for contribution actions provided for in the 1988 Uniform Contribution Among Tortfeasors Act ("Contribution Act") and the statute of repose for contribution actions based on claims of defective or unsafe condition of improvement to real property under *S.C. Code Ann. § 15-3-640(6) (1986).* In the case of *Capco of Summerville, Inc. v. J.H. Construction Company, Inc.*, 368 S.C. 137, 628 S.E. 2d 38 (2006) heard in January 2006, the Court held that *§ 15-3-640(6)* was controlling where it dealt with contribution in the specific context of improvements to real property and actions arising therefrom. 2006 S.C. LEXIS 56 (2006).

Capco involved a suit brought by plaintiffs who had been injured in a car accident that took place in a shopping center parking lot on May 19, 1996. In August 1998, the plaintiffs filed suit against both the owner of the shopping center and the construction company that had built the lot. The lot had been substantially completed on November 1, 1986. On June 13, 2003, the lot owner settled with the plaintiffs for $500,000.00, expressly releasing both the owner and the construction company from any liability to the plaintiffs. On September 22, 2003, within a year of settling the claims, the lot owner filed a contribution action against the construction company.

The construction company moved for summary judgment on the grounds that the contribution action, commenced seventeen years after substantial completion of the parking lot, was time-barred by *§ 15-3-640*. This statute provided for a 13-year statute of repose for actions "based upon or arising out of the defective or unsafe condition of an improvement to real property," including "an action for contribution or indemnification for damages sustained on account of an action described in this section."

In response, the parking lot owner argued that the later 1988 Contribution Act impliedly repealed § 15-3-640(6). Section 15-38-40(D) of the Contribution Act provided that a tortfeasor's right of contribution is not barred where he agrees "while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution." Having settled the liability claims against it and the construction company and having filed the contribution action within a year of doing so, the parking lot owner maintained that its right of contribution was not barred.

The Court disagreed, pointing out that "[r]epeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." *Capco*, 2006 S.C. LEXIS at 61. Adhering to long-standing principles of statutory construction and interpretation, the Court held that the more general Contribution Act did not repeal but was in fact qualified by the terms of § 15-3-640, which address specifically, and exclusively, actions based on defective or unsafe condition of improvement to real property. The Court also pointed out that § 15-3-640 had been amended in 2005 without changes to the same language of subsection (6), "clearly indicating the legislature did not intend to repeal this subsection." *Id.*, at 63.

Nonetheless, it may be noteworthy that the Court acknowledged that "where a lawsuit is filed on the eve of the running of the statute of repose, but is not resolved until after the statute has run, the contribution action will be barred before the right has even accrued, placing an undue burden on a single tortfeasor." In light of this unfairness and the concomitant common law prohibition against contribution, the Court all but appeals to the Legislature to sew up the loophole and relieve this "undue burden" in keeping with the intent of the Contribution Act.

In the meantime, the holding in *Capco* is not only informative for claims based on defective or unsafe condition of improvement to real property but instructive for reading the Contribution Act together with any other statute that has incorporated a statute of repose.

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United States District Court For The District Of South Carolina
(Greenville Division)
Plaintiff's Verdict – Vehicle Defect

Following an eight-day trial in United States District Court in Greenville, South Carolina, a jury recently awarded $7 million to a former Furman University soccer player who was injured in an early morning crash on October 11, 2002 while a passenger in a Mitsubishi Montero Sport (the authors defended the co-Defendant trucking company, and were able to negotiate a very reasonable settlement on the evening prior to jury selection).

The facts of the case demonstrated that the Plaintiff and three friends were returning from a concert in Charlotte, North Carolina during the early morning hours of October 11, 2002 in a Mitsubishi Montero Sport being driven by Gray Griffin. The Plaintiff was a front seat passenger in the Mitsubishi Montero Sport. Mitsubishi contended that this accident involved alcohol, sleep deprivation, and speed, and argued that Griffin, the driver who died in the accident, fell asleep at the wheel and then came to, making a series of extreme steering maneuvers to avoid rear-ending a tractor-trailer. The Plaintiff contended that the Mitsubishi Montero Sport was defective in its handling and stability. Expert testimony demonstrated that the Mitsubishi Montero Sport experienced approximately 5 and ¾ rolls during the accident sequence.

Of the individuals that survived, the Plaintiff was the most seriously hurt among the three Furman University freshman, having sustained a stomach puncture wound, a broken pelvic bone, a fractured shoulder blade, a separated shoulder, a severely dislo-

cated knee, nerve damage in his left foot and ankle, and scrapes to his face. He incurred over $275,000.00 in medical expenses. The jury found that the Mitsubishi Montero Sport had a design defect which caused it to be unreasonably dangerous and that the defect was the proximate cause of the Plaintiff's injuries. Additionally, the jury found that Mitsubishi Motors was negligent in failing to properly test the Mitsubishi Montero Sport.

While Griffin was not legally intoxicated at the time of the accident, as contemplated by traffic laws in the state of South Carolina, given that his blood alcohol level was .042 at the time of his death, Mitsubishi nonetheless contended that that evidence was relevant regarding his potential impairment in operating the Mitsubishi Montero Sport. However, during pre-trial motions in limine, the trial judge excluded any evidence regarding the purchase or consumption of alcohol by any of the individuals in the Mitsubishi Montero Sport reasoning that while it may have been relevant to the Plaintiff's own comparative negligence or to an intervening or superseding cause of the accident, under Rule 403, Federal Rules of Evidence, the probative value of the same was substantially outweighed by the danger of unfair prejudice. Additionally, while a large component of the Plaintiff's claim was based on future lost wages due to his inability to pursue a professional soccer career in the United States and/or Europe, deposition expert testimony propounded by the Plaintiff's experts, namely his sports agent, exercise physiologist, and economist, appeared subjective and speculative. Furthermore, the Plaintiff's experts' testimony was apparently in contravention of Federal Rule of Evidence 702 and *Daubert, et. al. v. Merrell Down Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) in that the testimony was not based upon sufficient facts or data, the testimony was not the product of reliable principles and methods, and the expert witness had not applied the principles and methods reliably to the facts of the case. Nonetheless, the trial judge denied the *Daubert* motions as related to the Plaintiff's experts and allowed them to testify. Thus, the jury heard testimony from the Plaintiff's economist that in having to forego his promising professional soccer career, Plaintiff experienced a past and future loss of earning capacity of $4,538,495.00.

At the present time, this case is currently on appeal to the Fourth Circuit Court of Appeals in Richmond, Virginia.

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WISCONSIN

State Farm v. Toshiba, E.D. Wis., No. 04-C-359, 3/31/06

In March, a Wisconsin Federal Court ruled that expert testimony that a television set started a house fire is reliable and admissible, even if the expert did not follow every step of a prescribed scientific method. *State Farm v. Toshiba*, E.D. Wis., No. 04-C-359, 3/31/06). State Farm alleged a defective Toshiba television set started a fire in the home of its customers. The fire scene was first investigated by a Milwaukee Police Department fire investigator, who examined debris, but did not reach a conclusion as to the cause of the fire. Later, State Farm hired Paul Hansen, a Forensic Electrical Engineer with 21 years of experience in fire investigation, to investigate the possibility that the television had a design defect.

The court explained that because Hansen was not hired as an origin investigator, he did not perform all of the steps involved in investigations to determine the origin of a fire. Hansen investigated the home where the fire occurred, examining the exterior, transformer, service entrance, and basement electrical panel. He collected evidence including the remnants of a television set, a television cart, outlet strips, cables, and a VCR. These items were shipped to his laboratory in Minnesota, where he conducted testing, X-rayed the television, and performed "destructive testing" on the remains of the set's main circuit board. Hansen concluded that a manufacturing defect in the 120-volt portion of the Toshiba television's circuit board started the fire.

Toshiba filed a motion in limine to exclude Hansen's testimony as unreliable, arguing that his findings were not reached "through the application of any method which may be reliably considered 'scientific.' To succeed on its argument that Hansen's testimony had no scientific basis, the Court held that Toshiba had to characterize his X-rays of the television set and destructive testing of the set's main circuit board as only "observations." Rejecting the company's argument that the scientific method "requires some type of testing of the expert's hypothesis to determine its validity," the Court noted that Toshiba failed to clarify what testing was required, or why the actions Hansen took could not properly be considered testing. Because Toshiba failed to show that Hansen's methods or conclusions were unreliable, the Court denied its motion to exclude Hansen's testimony, and its motion for summary judgment premised on that exclusion.

"In the Trenches"
Notable Accomplishments of ALFA Attorneys

In a three week trial in the Circuit Court of Cook County this past October, ALFA members Skip Martin of the Los Angeles member firm Haight Brown & Bonesteel and Kevin Owens of the Chicago member firm Johnson & Bell, Ltd. successfully defended their client against an action in contribution arising out of a wrongful death case. Plaintiff plant owner sought contribution following its payment of a $14 million wrongful death settlement arising out of an industrial accident involving an acetone rectification vessel designed and manufactured by the client. Plaintiff sued the client in strict product liability and negligence, and sued a co-defendant maintenance contractor who was working on the vessel at the time in negligence. Prior to trial, plaintiff indicated to the court that it would take something in the "high millions" to resolve the case against the client. Messrs. Martin and Owens succeeded in establishing that the accident at issue was the fault of the plant owner's shoddy safety practices, and the jury found plaintiff plant owner 93% at fault, apportioning a mere 5% to the client. Plaintiff did not appeal the verdict against the client. However, not satisfied with the finding of 5% fault to their client, Messrs. Martin and Owens are pursuing an appeal to the Illinois Court of Appeals, as they were able to get both of plaintiff's liability experts to testify that the accident was not foreseeable and because of a substantial modification to the vessel. The appeal is pending.

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On April 28, 2006, after a two-week trial, a Jefferson County, MO Circuit Court jury returned a defense verdict in a product liability action against the Mercury Marine Division of Brunswick Corporation. Mark Verwys, of Plunkett & Cooney, PC, successfully defended Brunswick against plaintiff's claim that his 1973 Mercury Marine sterndrive was defective because its propeller was not surrounded by a mechanical cage-type propeller guard, and that Brunswick was negligent in failing to warn him to purchase an after-market guard.

In early May 1988, Robert Ard, an experienced boat owner and water skier, purchased a used 15 year-old Glastron 17' runabout equipped with a 140 hp Mercury Marine sterndrive. During several early outings, Ard discovered that the throttle / gear shift mechanism was out of adjustment, causing him to have to "hunt for neutral", but failed to have the problem repaired. In addition, the boat apparently had electrical problems that cause the engine to be intermittently difficult to start.

On May 29, 1988, Ard was water skiing behind his boat on the Lake of the Ozarks. When Ard dropped into the water, the boat's operator swung around to pick him up. Instead of turning the engine off, as is the universally-accepted safety rule when picking up a downed skier, the operator instead attempted to back up to Ard under power. However, because of the shifting malfunction, the operator was unable to get the sterndrive back into neutral before backing into Ard and causing laceration injuries resulting in amputation of his right leg.

During trial, plaintiff abandoned earlier claims that Mercury Marine had conspired with the federal and state governments, and with its competitors, to preclude development and implementation of feasible propeller guards. In response to plaintiff's remaining product liability and negligence claims, Mercury Marine established that despite the efforts of 97 patent holders over more than 100 years, no one has ever developed a feasible, commercially-viable mechanical propeller guard for recreational planing-type boats.

This verdict is the latest in an unbroken string of propeller guard trial and appellate victories for Brunswick since the late 1970's. Verwys has successfully represented Mercury Marine against product liability, negligence and warranty actions in the Midwest for 30 years.

Mark Verwys
Plunkett & Cooney, PC
Grand Rapids, Michigan

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A successful litigation tactic used by Peter J. Krembs of Hermann, Cahn & Schneider did much more than secure the dismissal of his client, a major manufacturer in the Cleveland area, from a products liability case. Krembs' tactic also served as the impetus for his client's new process in industrial manufacturing of developing a permanent photographic record of the condition of machinery when it leaves the client's control, and at other vital stages of the life of the machine. Under the program, the client's field service personnel take digital photographs of the industrial machines manufactured by the client at three specific intervals: at the time the machine leaves the manufacturing plant; after the machine is installed at the customer's facility; and at each service call. A brief history of the client's recent litigation showcases the usefulness of the digital photography program.

In March of 2004, Krembs' client was named a defendant in a personal injury lawsuit where the plaintiff suffered permanent injury to her right hand, including the amputation of part of her hand. In her lawsuit, the plaintiff claimed that the proximate cause of her injuries were defects in a machine manufactured by a company that had been acquired by Krembs' client several years before the accident occurred. Allegations were also made by plaintiff that several modifications had been made to the machine which made it dangerous to operate.

During the course of discovery, Krembs reviewed the manufacturing and general business files of the acquired company. In the files, he found Polaroid photographs of the subject machine. The Polaroid photographs were taken at the time the machine left the control of the acquired company, and clearly revealed that the defects and removal of safety devices the plaintiff claimed caused her injuries were not present at that time. Later, at his client's deposition, the Polaroids were authenticated and admitted as an exhibit. Following the deposition and because the evidence clearly showed that the machine was not defective or unsafe when it left the control of his client, Krembs convinced the plaintiff to dismiss his client from the lawsuit.

Based on his experience in the prior litigation, Krembs suggested to his client that it develop a new internal digital photogra-

phy program. Krembs and his client have worked together to that end, and a digital photography program was instituted by the client in the early part of 2006. The program has three elements, all of which work together to protect the interests of the client, the carrier that transports the client's machines to the client's customers, and the client's customers. First, the client purchased high resolution digital cameras for use at its Cleveland-area manufacturing facility. Once a machine is manufactured and readied for shipment to the customer, five specific photographs are taken: one from each of the four sides of the machine, and one of the name plate, which includes the serial number. Second, thirty-five additional high resolution digital cameras were purchased by the client, and one issued to each of its thirty-five field service personnel. The field service personnel travel around the world commissioning and servicing machines manufactured by the client. At the time of commissioning, the same five photographs are taken at the customer's facility. These commissioning photographs show more than the fact that the machine is free of damage at the time of commissioning. The photographs also show that the safety guards and safety warnings were properly installed at the time of commissioning, and that the machine was properly installed at the time of commissioning. Third, on a service call, field service personnel take photographs that document any modifications of the machine done either by the client or by any other users in the after-market. In addition, the field service personnel use the photographs to document any safety guard or warning deficiencies that users allowed to occur during the life of the machine.

Under the program, once any photograph of the machine is taken, the photograph is archived in the client's machine file for each particular machine. Once a safety deficiency is identified and photographed, a letter is sent to the user notifying it of the safety issue.

The client feels strongly that the digital photography program will help it defend itself against future litigation alleging injuries suffered in connection with the use of it machines because the digital photographs will show the condition of the machine when it left the control of the manufacturer. Carriers that ship the machines for the client are positive about the digital photography program because they feel it will prevent them from being named in every lawsuit that arises from an alleged defect in a machine simply because the carriers transported the machine. Customers are generally positive about the program because it will aid the fair and just adjudication of lawsuits stemming from alleged defects in machines. However, some of the client's customers attach specialty devices to their machines, the specifications of which are highly confidential and proprietary in nature. These particular customers are concerned that the digital photographs might breach the confidentiality of their specialty devices. In response, the client has developed alternatives for these particular clients, such as taking photographs from modified angles, obliteration of the proprietary devices in the photographs, and the use of special lighting.

Overall, the program that Krembs suggested and helped create is viewed as one that will assist the fair and just adjudication of lawsuits, drive down insurance premiums, avoid frivolous lawsuits, and help identify the true party at fault for any defects or impermissible modifications to machines that ultimately result in injury.

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Texas Supreme Court Tightens Expert Testimony Standards And Proof Required To Demonstrate Manufacturing Defects

On June 16, 2006, the Texas Supreme Court decided *Cooper Tire & Rubber Co. v. Mendez*, ___ Tex. Sup. Ct. J. ___ (Tex. 2006), which presented challenges to expert testimony and questions concerning the burden of proof in manufacturing defect cases. In reversing a multi-million dollar judgment in favor of the plaintiffs and rendering a take-nothing judgment in favor of Cooper Tire, the Court held that testimony from three expert witnesses was unreliable, inadmissible, and "no evidence" to support the judgment. The Court went on to explain that failure of a complex product, such as the tire at issue in the case, in itself is not even circumstantial evidence of a manufacturing defect. Moreover, the Court held it is not even enough to present expert testimony excluding other causes if that testimony does not also establish that the product did not have another type of defect, such as a design defect.

Cooper Tire arose out of a one-car accident involving a minivan traveling at highway speed and carrying seven adults. The minivan's left rear tire experienced a tread and top belt separation, but did not blow out. The driver of the minivan steered to the right and then steered hard to the left, causing the minivan to trip and roll over. Six of the seven adults in the van were not belted and were ejected. Four of the ejected passengers died. The driver and other two passengers were injured.

The tire in question had been on the vehicle for three years and had traveled more than 30,000 miles. Sometime before the accident, the tire was punctured by an object that went through to the inner liner, but was not repaired. Although punctures commonly cause tire failure, plaintiffs filed suit against Cooper Tire, alleging that the three-year-old tire failed because it was defectively manufactured. The trial court overruled Cooper Tire's challenges to the expert testimony plaintiffs offered in support of their contention that wax, which is an intended ingredient of various tire components, had contaminated the tire and caused it to fail. The court of appeals affirmed the trial court's judgment on the jury verdict in favor of the plaintiffs.

The Texas Supreme Court reversed, finding that the trial court should have excluded the testimony of all three experts. The Court found that Rex Grogan, who testified that the tire failure resulted from wax contamination, had no scientific support for his opinions. The Court reaffirmed prior cases holding that an expert's bald "say-so" cannot support a judgment. The Court also rejected testimony from Alan Milner as being conclusory and speculative. The last expert, Jon Crate, was found to be unqualified despite having advanced degrees in chemistry. The Court, after reviewing his education and work history, concluded that he lacked any experience or specialized training in tires and rubber chemistry.

Although the Texas Supreme Court has written a number of opinions in recent years dealing with expert testimony, the Court's discussion of the evidence in this case applies those opinions to a complex product that is frequently the subject of litigation. The Court also laid to rest the argument that defect can be inferred from the simple fact that a tire fails before its tread wears out. The Court explained that the plaintiff alleging a manufacturing defect in a tire must either provide direct evidence of a deviation from specifications or planned output *or* proffer reliable expert testimony that scientifically eliminates other possible causes of failure, including a design defect.

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Upcoming ALFA International Events

July 19, 2006
ALFA 2006 Construction Practice Group Seminar: Conquering Construction Claims - A Roadmap to Success
The Ritz-Carlton Chicago
Chicago, Illinois
Contact Info
Group Chair: Mark Nelson, nelsonm@hallevans.com
Program Co-Chairs: Mark Nelson; Darrell Whiteley, dwhiteley@lskdnylaw.com
ALFA Contact: Amy Sammon

September 7, 2006
ALFA International 2006 Insurance Off-Year Practice Group Seminar
Westin River North
Chicago, Illinois
Contact Info
Group Chair: George Fagan
gfagan@leakeanderson.com
Vice Chair: Kevin O'Brien, obrienk@hallevans.com
Program Chair: Jill F. Endicott, jendicott@whf-law.com
ALFA Contact: Jessica Zarosky

September 21, 2006
2006 ALFA Workers' Compensation Law Seminar
Four Seasons Hotel, Atlanta
Atlanta, Georgia
Contact Info
Group Chair:Dallas D. Jones,djones@baylorlaw.com
ALFA Contact: Amy Sammon

October 11, 2006
International Law Practice Group Seminar
Chicago, Illinois
Contact Info
Group Chair: Lawrence Watt,
laurie.watt@charlesrussell.co.uk
Group Chair: Harvey J. Cohen,
harvey.cohen@dinslaw.com
ALFA Contact: Matthew Share

October 12, 2006
ALFA International 2006 Annual Business Meeting
The Inverness
Denver, Colorado
Contact Info
ALFA Contact: Amy Sammon

March 8, 2007
2007 ALFA International Client Seminar
JW Marriott Desert Springs
Palm Springs, California
Contact Info
ALFA Contact: Amy Sammon

June 6, 2007
2007 ALFA International Insurance Law Practice Group Roundtable
Marriott Financial Center
New York, New York
Contact Info
ALFA Contact: Amy Sammon

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