

Products Liability Perspectives



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Notes From the Editors

Welcome to the First Edition of *Products Liability Perspective* for 2010. As we move beyond the challenges of 2008 and 2009, we look for clues to navigate the landscape for 2010 and ponder what changes may be expected this year. What will the fall out be from the Consumer Product Safety Improvement Act and how aggressively will it be enforced? Will the recalls recently undertaken in the auto industry result in new laws or stricter regulations for motor vehicles? How will the accountability of manufacturers evolve with the ever increasing globalization of our world economy? Since we cannot predict the answers, we will be monitoring the developments and keeping you apprised of the changes in our upcoming issues. In the interim, we

take this opportunity to do our annual “Year in Review,” recapping the landmark decision of *Wyeth v. Levine* along with other 2009 rulings from the highest State courts addressing product related issues. We hope these shed some light on the direction of product liability in 2010. As the new editors of *Products Liability Perspectives*, we look forward to working with ALFA International members and clients on publishing articles on industry changing topics and invite you to submit ideas or pieces for publication. Finally, we would like to thank former editors Steven Hamilton and Bryan Martin for their past service and contributions to the ALFA products liability newsletter.

- Colleen Murnane & Robert Smith

CASE NOTES

ALABAMA

Alabama Court Permits Negligence, Strict Liability Case to Proceed on Expert Testimony Bolstered by Circumstantial Evidence, Eyewitness Reports

Swanstrom. v. Teledyne Continental Motors, Inc., 2009 Ala. LEXIS 274 (Ala. Nov. 20, 2009)

John E. Swanstrom, Jr., was killed on May 28, 2002, when the single-engine Cirrus SR-20 he was piloting crashed and burned in a heavily wooded area outside Angel Fire, New Mexico. Mr. Swanstrom was the only person aboard the lightweight, two-passenger, propeller-driven aircraft, which was powered by a Teledyne IO-360-ES piston-driven engine and a Teledyne engine-driven fuel pump.

He was on his way from Phoenix, Arizona, to Duluth, Minnesota, and had stopped in Angel Fire to eat lunch and refuel the aircraft. Mr. Swanstrom's aircraft lifted off without apparent difficulty but crashed about five minutes into its flight. Witnesses said the plane appeared to have difficulty gaining altitude and began making sputtering noises immediately before the crash.

The day after the crash, New Mexico's Office of the Medical Investigator performed an autopsy on Mr. Swanstrom's body and determined that he died of multiple blunt-force injuries. Based on a lack of soot in Mr. Swanstrom's airways, the coroner concluded that Mr. Swanstrom was dead before flames fed by the nearly full fuel tank engulfed his aircraft. The National Transportation Safety Board investigated and ultimately determined that no mechanical or structural anomalies in the aircraft contributed to the crash. However, a Federal Aviation Administration laboratory in Oklahoma City, Oklahoma, examined blood and tissue samples from Mr. Swanstrom and found elevated levels of carbon monoxide and cyanide in Mr. Swanstrom's blood. This evidence led experts to conclude that, immediately before the crash, Mr. Swanstrom was distracted by an in-flight fire fed by a leaky fuel pump.

Mr. Swanstrom's heirs sued Cirrus and Teledyne, which is based in Mobile, Alabama, in the Mobile Circuit Court. The heirs alleged the aircraft's engine failed because of negligence by Teledyne and Cirrus in such things as the design, construction, manufacturing, assembly, testing, and inspection of the aircraft, its engine, and its engine-driven fuel pump. The complaint also contended that Cirrus had breached express and implied warranties to Mr. Swanstrom and future purchasers of the aircraft. The heirs also alleged Teledyne and Cirrus were strictly liable because the aircraft, its engine, and its fuel pump were defective and unreasonably dangerous. After the close of extensive discovery, the trial court granted Teledyne's and Cirrus's separate motions for summary judgment.

The Plaintiffs appealed, and the Supreme Court of Alabama considered five issues: (1) excluding the Federal Aviation Ad-

ministration's toxicology report; (2) excluding all testimony based on the excluded toxicology report; (3) excluding testimony by one of plaintiffs' expert witnesses; (4) entering summary judgment for Teledyne and Cirrus on all plaintiffs' claims; and (5) denying the plaintiffs' pretrial motion to amend the complaint to conform with the evidence. The Court affirmed the trial court on four of the issues but reversed and remanded on a fifth, holding that the trial court improperly granted summary judgment to Teledyne and Cirrus on the heirs' negligence and strict liability claims.

The Alabama high court held that the toxicology report was properly excluded because the Plaintiffs could not establish that proper chain-of-custody rules were followed from the time the blood and tissue samples were collected until the time of testing. Once the toxicology report was ruled inadmissible, all testimony based on it was also inadmissible under Alabama law. The expert's testimony was properly excluded because he planned to testify about an in-flight fuel fire but had no specific expertise in fires. Finally, Plaintiffs' motion to amend their complaint to conform to the evidence was properly rejected because it was brought before trial, when no evidence had been entered into the record, and after the deadline for amendment of the pleadings.

The case ultimately was remanded because the trial court improperly overlooked evidence that would have supported plaintiffs' claims. That evidence included testimony by a second expert that a faulty fuel pump led to an in-flight fire; eyewitness reports that the plane sputtered before it crashed; good weather conditions the day of Mr. Swanstrom's flight; and Mr. Swanstrom's years of experience as a pilot. Based on this and other evidence, a jury could have found Teledyne and Cirrus negligent or strictly liable, so summary judgment should not have been granted.

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CONNECTICUT

Connecticut High Court Permits Manufacturer to Recover Cost of Repair From Maker of Defective Component

Sylvan R. Shemitz Designs, Inc. v. Newark Corp.,
967 A.2d 1188 (Conn. 2009)

Sylvan R. Shemitz Designs, Inc., makes commercial and residential lighting fixtures that include parts manufactured and sold by the Defendants. Beginning in mid-2004, the Plaintiff began getting reports that its fixtures were failing, sometimes within two weeks of being installed. The Plaintiff investigated and discovered that a part it obtained from the Defendants was

defective. The Plaintiff repaired or replaced its customers' fixtures and then brought suit against Defendants seeking to recover its expenses in dealing with the defective parts.

The Plaintiffs alleged strict liability under the Connecticut Product Liability Act ("the Act") and a breach of the implied warranty of merchantability under the Uniform Commercial Code. The Defendants moved to strike, arguing that Plaintiff's costs in repairing the fixtures were commercial losses and not property damage cognizable under the Act. The Defendants also argued that the UCC claim was, first, barred by the Act's exclusivity provision and, second, foreclosed because the Plaintiffs did not allege privity of contract between the parties.

The trial court granted Defendants' motion and struck both counts. The court held that damage to the light fixtures was property damage with respect to the owners of the fixtures but

not to the Plaintiffs. Once the lights were sold, the cost to repair them was a monetary, and thus commercial, loss, in the trial court's view. The court also agreed that a lack of privity was fatal to the UCC claim.

The Connecticut Supreme Court took the case on direct appeal and overturned the trial court. The high court concluded that the Act's exclusivity provision barred the UCC claim, and in so deciding, rendered no opinion on the privity issue. The Court reversed the trial court on product liability, holding that the Plaintiffs' costs in repairing the defective fixtures were property damages cognizable under the Act. The court noted that nothing in the Act required Plaintiffs to own the property in

order to recover for damages to it. The high court also observed that an overly broad interpretation of the term "commercial loss" would nullify provisions of the Act permitting contribution among parties involved in a defective product's chain of distribution. The Court also determined that permitting a manufacturer that stands behind its products to recover repair costs imposed on it by a component maker's defective part supports the public policy rationale behind strict products liability laws.

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DISTRICT OF COLUMBIA

FCC Radiation Standards Pre-Empt Cell Phone Product Liability Claims

Murray v. Motorola, 982 A.2d 764 (D.C.C.A. 2009)

The Plaintiffs filed six separate suits against Defendant mobile phone manufacturers and retailers alleging they suffered illness and injury (including brain cancer or tumors or loss of consortium) as a result of using hand-held cellular telephones produced, sold or promoted by defendants. Defendants attempted to remove the suits from the District of Columbia Superior Court to the U.S. District Court for the District of Maryland. The matters were remanded to the Superior Court.

Defendants filed a motion to dismiss and argued that because the Plaintiffs' claims were preempted by federal law, Plaintiffs failed to state a claim upon which relief could be granted. The six suits were consolidated for purposes of oral argument.

The Superior Court dismissed the complaints with prejudice, ruling the claims set forth in them were precluded under the doctrines of express preemption, conflict preemption and field preemption. On appeal of the review of the dismissals, the Court of Appeals conducted a *de novo* review.

The Court of Appeals affirmed in part and reversed in part and remanded the matter for further proceedings. The Court of Appeals held the Plaintiffs' claims for bodily injuries resulting from cell phone use are not federally preempted if they arise from the use of cell phones that do not meet the radio frequency ("RF") radiation standards adopted by the FCC, or if the cell phones were manufactured before the FCC promulgated those standards in 1996. At the same time, tort claims for damages against cellular phone businesses and industry associations were held to be impliedly preempted insofar as they seek to hold the defendants liable for bodily injuries from cell phones that did meet the FCC's RF radiation standards. The Court further held that state court consumer protection statutes were not preempted as the FCC did not establish a process requiring manufacturers to submit customer instructions for approval. There was no

evidence the federal government purported to occupy entirely the field of consumer disclosures to cell phone purchasers.

The Court invoked the doctrine of conflict preemption where "compliance of both federal and state regulations is a physical impossibility" or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 771.

The Court of Appeals concluded that the Telecommunications Act language stating "...no state or local government . . . may regulate . . . personal wireless services facilities on the basis of environmental radio frequency emissions . . ." does not create express preemption. However, the Court held because cell phones that are sold in compliance with current FCC rules nevertheless may be deemed "unreasonably dangerous" under state law, and thus subject wireless carriers and equipment manufacturers to civil liability, such complaints were barred by the doctrine of conflict preemption because if successful, they would stand as an "obstacle" to the accomplishment of federal objectives.

The Court of Appeals further held that such preemption was not necessary for cell phones acquired prior to the FCC's adoption of regulations requiring testing. Preemption was also not necessary for cell phones that did not comply with FCC regulations regarding RF frequency. Further, claims under consumer protection statutes are not preempted under the language of the FCC RF regulations.

The impact of this case is to provide protection against claims of excessive RF radiation for FCC certified cell phones. Preemption is not available to pre-1996 cell phones, non-FCC compliant cell phones, and some state court claims where affirmative misrepresentations or omissions have been made.

While this decision affirms the authority of preemption and seemingly raises the bar for plaintiffs, it also provides additional routes for parties seeking damages from cellular telephone businesses and industry associations.

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ILLINOIS

Products Liability and the Protection of Lawful Commerce in Arms Act (PLCAA)*Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009)

The parents of a boy who was killed when his friend accidentally shot him with a service handgun belonging to the friend's father, a correctional officer, brought a wrongful death and product liability action against the county sheriff and the gun manufacturer. Following discovery, the trial court granted summary judgment in favor of the county sheriff (Sheahan) and the gun manufacturer (Beretta U.S.A. Corporation). The appellate court affirmed in part and reversed in part. Following the appellate court's ruling, both Sheahan and Beretta appealed to the Supreme Court of Illinois, and the Plaintiffs filed a cross appeal.

Billy Swan, a 13-year-old boy, was home alone on May 5, 2001 when he invited his friend, Josh Adames, to come over. While waiting for Josh, Billy found an unlocked box in his parents' closet which contained three guns. When Josh arrived, Billy showed Josh the guns and the boys began playing with them. Billy removed a clip containing several bullets from one of the guns, but did not realize that one bullet remained in the chamber. Billy pointed the gun at Josh, believing it to be unloaded, and pulled the trigger. The gun discharged, firing a bullet which struck and fatally wounded Josh.

The gun was a Beretta 92FS handgun owned by Billy's father, David Swan. David worked for the Cook County Sheriff's office as a correctional officer, and used the gun for routine training required by the sheriff's department. Although David graduated from the police academy and had been trained in the use of firearms, David's position was mainly administrative and he was not required to carry a weapon as part of his job duties.

In the complaint, the Plaintiffs alleged that Sheahan exercised control over David Swan as an employee and servant with

regard to the safe and secure storage of David's firearm, and, therefore, Sheahan was liable for Josh's death pursuant to the theory of *respondeat superior*. The complaint also contained claims against Beretta for product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability.

Guided by *Gaffney v. City of Chicago*, 302 Ill. App. 3d 42, 706 N.E.2d 914 (1998), the appellate court found that David Swan was acting within the scope of his employment, and that Sheahan could be held liable for David's allegedly tortious acts. The appellate court also ruled that Beretta could be held liable for its failure to warn about the foreseeable use of the gun by unauthorized persons, including children. Accordingly, the appellate court reversed the trial court's order granting summary judgment on the issues of *respondeat superior* and failure to warn.

The Supreme Court of Illinois determined that this case was factually distinguishable from *Gaffney*, and that David Swan was not acting "within the scope of employment" according to the applicable provision set forth in the Second Restatement of Agency. The Court also determined that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 through 7903 (2006), a federal statute barring qualified civil actions against gun manufacturers resulting from criminal or unlawful misuse of their products, barred the Plaintiffs' claims against Beretta. Accordingly, the Supreme Court of Illinois affirmed in part and reversed in part the appellate court's judgment, affirming the trial court's order granting summary judgment in favor of Sheahan and Beretta.

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INDIANA

Indiana Supreme Court Clarifies Extent of Heeding Presumption, Finds Proof of Causation Lacking*Kovach v. Caligor Midwest*, 91 N.E.2d 193 (Ind. 2009)

After undergoing sinus surgery, nine year old Matthew Kovach was prescribed 15 milliliters of a liquid pain medication (acetaminophen with codeine) while still in the hospital recovery room. The nurse administering the medication used a measuring device familiar to most parents – a small plastic cup with translucent markings for measuring. The nurse had used this type of cup frequently at this and other hospitals and testified

that she had no problems reading the markings on the cup. This particular cup held approximately 30 milliliters, and the 15 milliliter level was marked half-way up the cup. The nurse testified that she gave Matthew a dose of one-half of this cup; however, Matthew's father testified that he watched the nurse administer the dosage and that he saw her give Matthew a full cup of the medication. Matthew was subsequently discharged, but took no further medication. Several hours later, Matthew went into respiratory arrest and eventually died. An autopsy revealed the presence of more than twice the recommended level of codeine in Matthew's blood.

Plaintiffs sued the manufacturers and distributors of plastic measuring cups, alleging that these cups are not appropriate for precise measuring. They asserted claims of design defect and defective warnings, arguing the cups should bear a warning that

they are not appropriate for precise measuring and the failure to do so was a cause of Matthew's death. Plaintiffs' expert testified that the plastic cups did not provide precise measurements, and that a margin of error of 20-30% was possible. The product defendants argued that summary judgment was appropriate because the evidence showed Matthew's death was clearly not caused by "imprecise" measurement, but by a mistake in administering more than twice the prescribed amount of medication. The trial court granted summary judgment in favor of the product defendants finding the cause of Matthew's death to be a serious mistake in administering more than twice the proper amount of medication, not a measuring error caused by either the design of the plastic cup or the lack of warnings about it. The appellate court reversed.

On appeal to the Indiana Supreme Court, the Plaintiffs argued that the "heeding presumption" supplied the necessary causation to avoid summary judgment. Applying the "heeding presumption" here (where there were no warnings at all) would result in the presumption that a user would have read and followed an adequate warning in the use of the product. The warning message that Plaintiffs argued was lacking was that the plastic cups were "not proper for precision measurements". While

recognizing that previous cases had, in effect, held that the heeding presumption also operated as a "presumption of causation", the Court held that the presumption only dispensed with the need for Plaintiffs to offer proof that a warning would have been read and followed, had one been given. The Court still required Plaintiffs to show that the hazard that would be addressed by following the "presumed" warning was the hazard that actually caused the injury. In re-instating summary judgment for Defendants, the Court held that the hazard addressed by the missing warning (precise measuring) was *not* the cause of Matthew's death; rather, the cause was dispensing a double-dose of medication. Specifically, Matthew's death did not occur because of the difficulty in dispensing a one-half cup of medication, as opposed to a full cup, even assuming the 20-30% margin of error found by Plaintiffs' expert. Applying the same logic to Plaintiffs' design defect claims, the Court also found that summary judgment was warranted as there was no evidence to suggest the cup's design played any role in the dispensing of a full cup instead of a half cup.

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Iowa Reverses Course on "Enhanced Injury" Product Liability Claims: Plaintiff Need Only Prove the Defect was a Substantial Cause of an Enhanced Injury

Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009)

On October 9, 2009, the Iowa Supreme Court handed down an opinion with sweeping changes under Iowa law concerning product liability claims involving "enhanced injury." The Court overruled *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992), and held that in an enhanced injury case, the plaintiff has the burden of showing the fact of the enhanced injury, which is met by offering evidence that the design defect was a substantial cause of injury above that which would have occurred without the design defect. Under this decision, a plaintiff no longer needs to prove a divisible injury. In addition, the Court ruled that Iowa's joint and several liability statute applied in enhanced injury cases.

This case arose out of an automobile accident. Grace Burke drove her car through a stop sign at an intersection and struck a Hyundai Elantra driven by plaintiff Glen Jahn. After impact, the front driver-side airbag on the Hyundai Elantra failed to deploy, and Jahn sustained multiple serious injuries. Jahn reached a settlement with Burke before suing Hyundai Motor America. In the suit against Hyundai, Jahn alleged that the failure of the airbag to deploy upon impact caused

"enhanced injuries" that could have been avoided absent the product defect.

The case made its way to the Iowa Supreme Court through certified questions from the trial court. The two certified questions were as follows:

1. Will the Iowa Supreme Court adopt sections 16 and 17 of the Restatement (Third) of Torts: Products Liability governing liability for enhanced injury, specifically, including rules of joint and several liability and comparative fault of joint tortfeasors under sections 16(d) and 17, and defining burdens of proof under sections 16(b) and 16(c)?
2. Under the Iowa Comparative Fault Act, may the fault of a released party whose negligence was a proximate cause of the underlying accident and of the plaintiff's injuries be compared by the jury on plaintiff's enhanced injury claim against the product defendant?

The Court analyzed the history of the "enhanced injury" theory through a number of cases nationwide. The Court found the *Fox-Mitchell* approach to be the prevailing majority view in the United States. Under the *Fox-Mitchell* approach, the plaintiff must prove only that the product defect was a "substantial factor" in creating damage greater than that attributable solely to the underlying accident. If the fact finder is unable to segregate the harm caused by the initial collision from the harm caused by

the product defect, the manufacturer is liable for the entire injury. The rationale of the *Fox-Mitchell* approach is generally that injuries are often indivisible. The *Fox-Mitchell* approach is at odds with the minority viewpoint known as the *Huddell* approach, where the plaintiff has the burden of showing not only the fact of enhanced injury, but the extent of enhanced injuries attributable to the design defect. Under *Huddell*, if the plaintiff cannot identify what portion of the injury occurred as a result of the design defect by a preponderance of the evidence, the enhanced injury claim fails. The *Fox-Mitchell* approach imposes a less stringent proof requirement on plaintiff and produces the opposite result of *Huddell* in the event of an indivisible injury. The Court noted that the Restatement (Third) of Torts, Section 16(c), expressly adopts the *Fox-Mitchell* approach to indivisible harm. The Court found that the *Fox-Mitchell* approach to causation and the rejection of a requirement that plaintiff show a divisible harm is the soundest approach because it was the most consistent with established Iowa law regarding individual injuries of successive tortfeasors.

As to comparative fault and joint and several liability issues arising in the enhanced injury context, the prior Iowa case law embodied in *Reed v. Chrysler* stood for the proposition that comparative fault concepts in Iowa did not apply in enhanced injury cases. The Court decided to abandon *Reed* in favor of the approach set forth in the Restatement (Third) of Torts. Additionally, Iowa Code, Chapter 668, codifies comparative fault principles, and expressly states that the fault of all parties is to be compared in cases of negligence, recklessness and strict liability as interpreted by other Iowa cases. The legislature did not provide for any exception to the application of comparative fault principles for enhanced injury cases. Accordingly, the Court expressly ruled that the comparative fault provisions of Iowa Code, Chapter 668, apply to any enhanced injury case, whether the injuries are divisible or indivisible. The Iowa Supreme Court answered both certified questions with a “yes.”

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IOWA

Subsequent Remedial Measures Inadmissible in Iowa Design Defect Claim

Scott v. Dutton-Lainson Co., 774 N.W. 2d 501 (Iowa 2009)

Stephen Scott filed suit against the manufacturer of a jack on a boat trailer, alleging both defective design and improper warnings. Before the trial, the manufacturer filed a motion *in limine* seeking to exclude evidence of subsequent remedial measures to the jack pursuant to Iowa Rule of Evidence 5.407. The trial court sustained the motion and excluded the evidence. Following a defense verdict, Mr. Scott appealed. The Iowa court of appeals found the evidence was admissible and that the trial court erred in excluding it. The manufacturer appealed to the Iowa Supreme Court.

Plaintiff Stephen Scott, a boat dealership employee, was injured when the jack on a boat trailer collapsed, crushing his foot. Mr. Scott sued the manufacturer of the jack, the Dutton-Lainson Company, alleging “defects in [the jack’s] design and manufacturing and the negligence of the Defendant.” Mr. Scott intended to present evidence that the manufacturer subsequently modified the tooling for the jack pin which allowed it to move further into the pin hole and that a corporate officer of Dutton-Lainson admitted this modification was undertaken as a result of Mr. Scott’s injury.

Iowa Rule of Evidence 5.407 prevents admission of subsequent remedial measures to prove negligence or culpable conduct, but allows admission of such evidence in strict liability or breach of warranty claims. The rule states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The Plaintiff attempted to introduce the evidence of subsequent remedial measures based on Rule 5.407’s categorical provision for admissibility in strict liability and breach of warranty claims. The Plaintiff argued that the exception for strict liability should be read to apply to design defect claims, The Court, however, disagreed, citing *Wright v. Brooke Group Ltd.*, 652 N.W. 2d 159 (Iowa 2002). The Court found that “[t]he standards for design defect and failure to warn claims - as recognized by the Third Products Restatement and *Wright* - require consideration of reasonableness and therefore incorporate negligence principles. Third Products Restatement §2(b), (c), at 14. Although the drafters of Rule 5.407 intended to create a distinction between strict liability claims and negligence, Iowa tort law no longer supports this distinction in the context of design defect and failure to warn claims. Scott seeks to introduce evidence of a subsequent remedial measure to do exactly what the rule forbids: prove negligence or culpable conduct.”

The Court further held that “[t]he plain language of Rule 5.407 specifically prevents introduction of subsequent remedial measures to show negligence, but exempts claims brought in

strict liability. Therefore, evidence of subsequent remedial measures is inadmissible in design defect claims, failure to warn claims, and breach of warranty claims brought under either of those theories, unless the evidence is offered to prove ownership, control, feasibility or impeachment.”

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MARYLAND

Maryland Disallows a Superceding Cause Defense to a Product Manufacturer

Pittway Corporation v. Collins, 973 A.2d 771 (Md. 2009)

On June 12, 2009, the Court of Appeals of Maryland issued an opinion that disallowed a superceding cause defense to a product and component part manufacturer on a motion to dismiss. The trial court had granted the product manufacturers’ motion to dismiss, but the Court of Appeals of Maryland found that the motion to dismiss should not have been granted because the facts alleged in the Plaintiff’s complaint admitted of more than one inference regarding proximate cause and superceding cause.

This case arose out of a house fire on June 14, 1998, at a residence in Gaithersburg, Maryland. The smoke detector that had been installed in the residence did not have a backup battery system, and was not activated by the smoke or fire. Nine years before the fire, the home builder had installed the smoke detector in an unfinished basement of the home. At the time of installation, the smoke detector was in compliance with all applicable codes and standards, even though it did not have a battery backup. Thereafter, the owner remodeled the basement and rented the property to occupants who were present at the time of the fire. The occupants allowed their children to use the basement rooms as bedrooms, even though the rooms did not have windows for egress in the event of a fire or other emergency. On the day of the accident, there was a power failure resulting from a severe thunderstorm. The occupants’ children and their two friends were sleeping in the basement with a lit candle providing the only light. The smoke detector was not working because of the power failure. The candle being used by the children in the basement started the fire. The children’s two guests died in the fire, while the occupants’ children suffered severe burns and other injuries. The plaintiffs filed suit against the manufacturer of the smoke detector, along with various component part manufacturers for the smoke detector. The plaintiff claimed that the smoke detector was defective in that it (i) did not have a battery backup system, and (ii) failed to provide consumers with adequate warnings on the limitations of the smoke detector. Claims for breach of warranty were also asserted.

The manufacturer defendants brought a motion to dismiss at the trial court on the ground that the acts of other defendants amounted to a superceding cause of the injuries alleged, thereby relieving the manufacturers from liability. The manufacturer

argued that the injuries and fatalities occurred not because of any defect in the design of the smoke detector, but because the children were sleeping in an illegally enclosed, windowless basement bedroom which lacked adequate emergency egress facilities. The trial court agreed with the manufacturers and dismissed the claims based upon the superceding negligence of others. On appeal to the Court of Special Appeals, the trial court’s decision was reversed. The Court of Special Appeals said that in order for a motion to dismiss to be granted, superceding causation, which is normally reserved for the trier of fact, must be determined as a matter of law. To do so, the facts alleged in the complaint must “admit of but one inference, and the same must be true of the acts of negligence asserted to be causes which supercede that of negligence of the manufacturers.”

This appeal followed to the Maryland Court of Appeals. The Court found that a superceding cause arises primarily when “unusual and extraordinary” independent, intervening negligent acts occur that could not have been anticipated by the original tortfeasor. An intervening third person’s negligence is not a superceding cause to another when the original tortfeasor should have realized that the third person might so act, when the act of the third person was not considered “highly extraordinary,” or when the intervening act is a normal consequence of the situation created by the original tortfeasor’s conduct. At the motion to dismiss stage, because the facts alleged in the complaint admit of more than one inference, it is improper to determine whether an intervening negligent act or omission was highly extraordinary and, hence, the superceding cause. The reasonable inference of the facts alleged in the complaint is that because the smoke detector did not go off, the children may have had less time to escape the fire. Based upon the claims alleged in the Plaintiff’s complaint, under the circumstances presented, the motion to dismiss should not have been granted.

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MISSOURI**Mention of Excluded Evidence Grants Plaintiff a New Trial (a.k.a learning to leave well enough alone)**

Newton v. Ford Motor Company,
282 S.W. 3d 825 (Mo. 2009)

Highway Patrol Trooper Michael Newton stopped Michael Nolte for a traffic violation. Paul Daniel, driving a Trade Winds Distributing, Inc. truck, ran into the highway patrol car manufactured by Ford where Newton and Nolte were sitting. The patrol car exploded. The trooper died and Nolte sustained serious injuries.

The Plaintiffs claimed that the patrol car was unreasonably dangerous. Ford asserted it had remedied a defect in the original gas tank system design before manufacturing Newton's patrol car. The issue at trial was whether the Plaintiffs would be allowed to show other instances of gas tank explosions. The trial court ruled that four prior incidents of gas tank explosions would be admissible to show that Ford had notice of explosions even after it had remedied a defect in the car's fuel system. But, all evidence of explosions that occurred after the Newton accident was inadmissible because these would not constitute notice.

Despite this ruling, Ford, in its own case at trial, presented evidence that, including the Newton explosion, there had been eleven such incidents; four occurring before the explosion and six after the Newton explosion. In closing argument, the trial court barred Plaintiffs' counsel from referring to the other six explosions. Ford's counsel capitalized on the prohibition by arguing the sole defect in the fuel system had been remedied.

The jury found for Ford and against co-defendant, Trade Winds Distributing, Inc. In post-trial motions, the trial court

acknowledged its error during closing argument in prohibiting Plaintiff's counsel from mentioning the other incidents, but overruled the motion for a new trial by determining that the error was not prejudicial to Plaintiffs.

The Missouri Supreme Court found that the trial court erred in determining Plaintiffs did not suffer prejudice by being prohibited from mentioning the six post-Newton accident incidents in closing. The Court commented:

The determination of prejudice rests largely within the discretion of the trial court as the referee at the scene of the contest. There are cases, however, where a replay of the scene, in an appellate court far removed from the heat of the contest, shows that the error was, indeed, prejudicial. When evidence admitted during trial is excluded from being discussed in final argument, the appellate court presumes that the exclusion was prejudicial. This later appellate review also is influenced by whether the party benefiting from the trial court's mistake leaves well enough alone or uses the mistake to its advantage. Here, Ford did not leave well enough alone. There does not appear to be a sufficient basis to rebut the presumption of prejudice. The trial court's determination that the plaintiffs did not suffer prejudice gives way to this Court's conclusion that the error in excluding argument as to the evidence of the other explosions denied Plaintiffs a fair trial against Ford. *Id* at 826-827.

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MONTANA**Materials Filed for Purpose of Opposing Motion to Exclude Experts Held 'On File' With Court to Defeat Manufacturer's Summary Judgment**

Hopkins v. Superior Metal Workings Systems,
203 P.3d 803 (Mont. 2009)

Charles Hopkins suffered serious injury when a chuck, a device designed to hold large, heavy pieces of metal for cutting in an industrial lathe, accidentally released and dropped a piece of metal on his arm. The chuck, which Superior Metal Workings Systems (SMW) manufactured and sold, was designed with a separate foot control for opening and closing it. As designed, the chuck could release metal with a single touch of the foot pedal. Hopkins was cleaning metal shavings from beneath the lathe when his foot touched the chuck release lever and dropped a piece of heavy metal onto his arm.

Hopkins filed a strict liability suit against SMW claiming the chuck was unreasonably dangerous because it could release metal with a single touch of the foot pedal. Hopkins also asserted SMW failed to warn chuck installers that users should incorporate a system requiring multiple inputs before the chuck could be released. The parties conducted discovery, including the production of expert reports. SMW deposed Hopkins' design and warnings experts.

SMW then simultaneously filed a motion for summary judgment and motions to exclude the opinions of Hopkins' experts. Hopkins opposed both motions. In his opposition to the motion to exclude the experts, Hopkins included the experts' depositions and reports as exhibits. But, Hopkins failed to incorporate by reference or re-file the expert materials in his opposition to SMW's motion for summary judgment. The trial court granted SMW's motion for summary judgment finding Hopkins did not establish, by expert testimony, a genuine issue of material fact as to the existence of a product defect or failure to warn because he failed to incorporate or re-file the expert materials. The trial court also reviewed the expert materials and

made specific findings that they did not contain opinions that the chuck was defective or failed to warn users of the risk of release with a single touch of the foot pedal.

Hopkins appealed the trial court's grant of summary judgment to the Montana Supreme Court. Reviewing the summary judgment *de novo*, the Court held the expert witness materials were properly "on file" with the trial court to allow it to consider those materials, even though they were not presented directly with his opposition to SMW's summary judgment motion. Summary judgment should be denied when the "pleadings, depositions, answers to interrogatories, and admissions *on file*" show a genuine issue of material fact. The Court held the expert witness materials were "on file" because they were presented in response to Hopkins' opposition to SMW's motion to exclude experts and, thus, were contained within the record before the

court. The fact that they were not technically being presented in opposition to the motion for summary judgment did not matter.

After reviewing the expert witness materials, the Court found the experts' opinions were sufficient to create a genuine issue of fact as to whether the chuck's release mechanism was unreasonably dangerous and did not contain adequate warnings. The Court reversed the judgment and remanded the case to the trial court.

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MONTANA

Evidence of FMVSS Compliance is Relevant Only to Punitive Damage Defense, Where Claim is Based on Strict Liability

Malcolm v. Evenflo Company, Inc.,
 217 P.3d 514 (Mont. 2009)

The Malcolms were on their way home from grabbing a pizza when, after swerving to avoid an oncoming car in their lane, their 1996 Suburban rolled several times before coming to rest in a ditch. The child safety seat holding 4-month-old Tyler was ejected from the car after the plastic seatbelt hooks on the base of the seat had broken. As a result, Tyler died from severe brain injuries. The parents filed suit against the manufacturer of the seat, Evenflo Company, Inc., under a strict liability, defective design theory.

The trial court disallowed the Defendant's evidence of the seat's compliance with FMVSS 213 for purposes of either compensatory or punitive damages. The court, however, allowed Plaintiffs to present evidence regarding the recall and test failure of a similar model of car seat produced by the Defendant. It also allowed Plaintiffs to present expert evidence that the seat in question had "failed" some aspects of the FMVSS 213 testing, when it actually conformed to the regulation overall.

Defendant urged the Supreme Court to adopt the *Restatement (Third) of Torts: Products Liability* §4 (1998). Section 4 provides that compliance with regulations is admissible in a defective design case. Montana already allowed use of such evidence in the defense of a negligence case. The Court refused to adopt this section, however, since Montana draws a "bright line" between cases based in strict liability and those based in negligence. The Court noted that it would "improperly inject into strict products liability analysis the manufacturer's reasonableness and level of care. . . ."

The trial court allowed the Plaintiffs to present an expert's examination of the individual FMVSS 213 test results themselves to show evidence of cracking in the shell of the seats. The Defendant argued, based on fairness, that because Plaintiffs used the actual test results, Defendant should be able to present the fact that even with these cracks, the seat complied overall with FMVSS 213. The appellate court denied this argument as well, stating that the trial court had been quite liberal in allowing questions and arguments to the effect that no testing agency "found that the [seat] did not pass the test."

The Supreme Court did, however, reverse the ruling of the trial court, which did not permit the seat's compliance with FMVSS 213 to be offered in defense of the punitive damages claim. The Court held that the Defendant's state of mind is at issue in assessing punitive damages, and the fact that it complied with the mandatory governmental safety standard tends to prove the absence of fraudulent intent or malice. The Court noted that allowing this evidence on the trial of one claim, but not another, although complicated, can be resolved by proper limiting instructions to the jury.

In a lengthy decision including one concurring and three dissenting justices, the Court affirmed the trial court's holding in all matters regarding the compensatory damages, but reversed the trial court's disallowance of the use of FMVSS compliance in defense of the punitive damages claim. The case was remanded for a retrial on the punitive damages issue only.

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NEVADA

Nevada Rejects Presumption That if a Warning Had Been Given, it Would Have Been Heeded*Rivera v. Philip Morris, Inc.*, 209 P.3d 271 (Nev. 2009)

The Nevada Supreme Court exercised its discretion to answer the certified question of whether Nevada law recognizes a rebuttable presumption that allows a fact-finder to presume the plaintiff would have heeded an adequate warning if one had been given. The Court answered the “heeding presumption” certified question in the negative.

Plaintiff Joe Rivera brought a wrongful death action against Philip Morris, for the death of his wife, Pamela. Pamela began smoking in 1969 before the federal government required health warnings on cigarette packages in 1985. She smoked until she died in 1999 allegedly from smoking-related causes.

In cross-motions for summary judgment, “Philip Morris argued that Rivera could not prove that the alleged failure-to-warn caused Pamela’s injuries because the record was void of any evidence that Pamela would have acted differently had Philip Morris provided additional information or warnings. In opposition, Rivera argued that the federal district court should apply a heeding presumption.”

The federal district court granted Rivera’s motion in part “by recognizing that Philip Morris cigarettes have been and are addictive and that they have caused and do cause cancer. The order also denied Philip Morris’s motion for summary judgment, finding that Philip Morris had failed to overcome the pre-

sumption that Pamela would have heeded additional information and warnings had Philip Morris provided them.” The parties then joined in a motion to certify the heeding presumption question to the Nevada Supreme Court.

After determining that certification was appropriate, the Court began its analysis of the question by noting “when bringing a strict product liability failure-to-warn case, the plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries.” The Court held the heeding presumption is contrary to Nevada law because it shifts the burden of proof from the plaintiff to the manufacturer.

The Court further held that public policy supports rejecting the heeding presumption. The Court stated that while the jurisdictions that have adopted the heeding presumption assert it “provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings,” the better public policy is not to encourage a reliance on warnings because it ensures manufacturers will continue to strive to make safe products. Further, the Court held it is not logical to presume warnings will be heeded as they are everywhere, and often go unheeded or ignored.

Therefore, because neither Nevada law nor public policy supported adopting a heeding presumption in strict product liability failure to warn case, the Court rejected the heeding presumption.

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NEW YORK

Occasional Seller of Used, Surplus Equipment Does Not Constitute a Regular Seller Subject to Strict Products Liability in New York*Jaramillo v. Weyerhaeuser Co.*, 906 N.E.2d 387 (N.Y. 2009)

Plaintiff Mario Jaramillo injured his hand while operating a box-making machine that his employer purchased sixteen years earlier – in a used and “as is” condition – from defendant Weyerhaeuser Company. Weyerhaeuser, which manufactures cardboard boxes as part of its business, sold the machine to Jaramillo’s employer through a company division devoted to selling obsolete or unneeded company equipment. After his injury, Jaramillo filed an action in state court alleging a strict products liability claim against Weyerhaeuser.

After removing the case to federal court, Weyerhaeuser moved for summary judgment on the basis that it was only a “casual” seller of the box-making machine and, as such, was not subject to a claim for strict products liability. New York law

makes a distinction between “regular” or “ordinary” sellers, who sell the product on a regular basis through the ordinary course of business, and “casual” or “occasional” sellers, who sell the product in sporadic transactions that are incidental to their business. “Regular” sellers are strictly liable for manufacturing, design or warning defects, but “casual” sellers are not. The district court granted summary judgment in Weyerhaeuser’s favor. When Jaramillo appealed, the Second Circuit acknowledged the existing debate about “where to draw the line between ordinary and occasional sellers.” It certified the question of whether Weyerhaeuser constituted a regular seller of used box-making machines under New York law to the Court of Appeals of New York.

The Court answered the certified question in the negative, holding that Weyerhaeuser did not constitute a “regular seller” of the machines for purposes of strict products liability. In rendering its opinion, the Court emphasized the policy considerations underlying the distinction between the two types of sellers. Strict liability is only imposed upon “regular” sellers because of their “continuing relationships with manufacturers” and their “special responsibility” to buyers, who expect regular sellers to stand behind their goods. The Court found no evidence of that

“special responsibility” here and noted Weyerhaeuser had only a general relationship with the manufacturer. Essentially, the Court concluded that buyers of Weyerhaeuser’s used, surplus equipment would not anticipate Weyerhaeuser to stand behind its occasional sale of such equipment, particularly when those sales amounted to only 0.15% of Weyerhaeuser’s net sales at the time Jaramillo’s employer purchased the machine. Moreover, a contrary finding would likely result in Weyerhaeuser ending any further sales of its used machinery, thus depriving small busi-

nesses of the ability to purchase otherwise unaffordable equipment.

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PENNSYLVANIA

Summary Judgment for Defendant Affirmed; Plaintiff’s “Malfunction” Theory Did Not Overcome Several Years of Prior Use Without a Problem

Barnish v. KWI Building Company, 980 A.2d 535 (Pa. 2009)

Defendant KWI Building Co. was repairing a catwalk guardrail on the outside of Defendant Allegheny Particleboard, Inc.’s factory. Plaintiffs alleged that a spark from this repair work entered the interior of the factory igniting material used in the manufacture of particle board. This smoldering material was spotted on a conveyer belt equipped with spark detection sensors that are designed to detect such things and trigger a fire suppression system. The fire suppression system was not triggered and subsequently the factory caught fire, killing two employees and severely injuring three others. Plaintiffs (the decedents’ estates, the injured employees and their spouses) filed suit against numerous Defendants and settled their claims against all except GreCon Electronics, Inc., the manufacturer of the spark detection system. The remaining claim against GreCon was based on a theory of strict liability for a defective product. Because the actual product had been destroyed in the fire, Plaintiffs pursued a “malfunction” theory, which allows the use of purely circumstantial evidence to prove a defect where the product has been destroyed or is otherwise unavailable.

In its motion for summary judgment, GreCon challenged the Plaintiff’s ability to establish that the product’s allegedly defective condition existed when it left the manufacturer’s con-

trol. Plaintiffs admitted that the product had been used successfully at the factory for ten years, and GreCon argued that the wear and tear caused by ten years of use was the cause, not a product defect. The Pennsylvania Supreme Court in *Kuisis v. Baldwin-Lima-Hamilton Corp.*, had examined the same issue, and in a plurality opinion suggested that twenty years of prior successful use of the product “doomed the malfunction theory claim.” *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751 (Pa. 1989) (citing *Kuisis*, 319 A.2d 914 (Pa. 1974)). Plaintiffs argued that *Kuisis*, as a plurality opinion, was not controlling and it was not their burden to offer proof that would negate the potential secondary cause of wear and tear from the prior ten years of successful use. Plaintiffs also urged that if that was Defendant’s theory, it was an issue of fact to be resolved by the fact-finder at trial.

The Court declined to follow the holding in *Kuisis*, instead concluding “that a plaintiff’s admission of prior successful use is relevant to the analysis because it is in direct conflict with the inference to be drawn from the occurrence of a malfunction.” The Court held that in such a scenario, in order for the plaintiff’s malfunction case to survive summary judgment, the plaintiff need not completely negate the theory that the wear and tear was a cause, but must produce *some* circumstantial evidence of how the “product could be defective when it left the manufacturer’s control and yet still function properly for a period of time.” Since the Court found that the Plaintiffs produced no such evidence, it affirmed the lower court’s granting of summary judgment to the defendant.

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TEXAS

Texas Supreme Court Addresses Discoverability of Jury Deliberations and Claims for Breach of Settlement Agreement

Ford Motor Co. v. Castillo, 279 S.W.3d 656 (Tex. 2009)

Plaintiff Ezequiel Castillo (“Castillo”) and other occupants of his 2001 Ford Explorer sued Defendant Ford Motor Company

(“Ford”) in connection with their vehicle accident, asserting two claims that the vehicle was defectively designed. After several days of jury deliberations, the presiding juror sent a note to the court asking, “What is the maximum amount that can be awarded?” The parties promptly settled.

The judge released the jurors and advised them they could discuss the case with the parties. Although the presiding juror left immediately, other jurors stayed and voluntarily talked to Ford. During those conversations, the jurors indicated they had decided the liability question in Ford’s favor and were deliberating on the second liability question when the presiding juror

sent the note. Ford learned that several jurors were unaware of the presiding juror's note and that she had sent it over some jurors' objections.

Ford filed a Motion to Delay Settlement whereby it requested "it be allowed to take discovery . . . on the issue of outside influence in the drafting of [the] note." *Ford*, 279 S.W.3d at 659. The motion was supported by several juror affidavits, which described the course of the jury deliberations and behavior of the presiding juror. The trial court denied Ford's motion and refused to "disturb the jury" absent specific evidence of misconduct. *Id.* at 660.

Subsequently, the court entered an order directing Ford to pay the settlement. Ford filed a motion asking the court to reconsider that order under the theory of mutual mistake because both parties acted under the mistaken belief that the presiding juror sent the note on behalf of the jury and that they had reached the issue of damages. The court denied Ford's motion.

After refusing to fund the settlement, Castillo filed a motion for summary judgment for breach of contract. Ford responded that before moving for summary judgment, Castillo must first plead a claim for breach of contract and proceed through the traditional course of litigation on that claim. Ford also urged that it was entitled to conduct discovery to "determine the motivation of the presiding juror's actions and any outside influences that possibly swayed her." *Id.* The trial court disagreed and granted Castillo's motion.

Ford appealed and the court of appeals affirmed, holding that Ford waived any error regarding both the trial court's denial of its motion to delay and the request to conduct discovery included in its response to Castillo's motion for summary judgment. The court of appeals also concluded that even if Ford had not waived error, any error would be harmless because Ford conducted its own investigation and gathered virtually all the evidence it sought to discover and failed to identify any evidence it would have uncovered through additional formal discovery. Ford disagreed, arguing that (1) the court of appeals erred by holding that Ford waived error as to its discovery requests, and (2) the trial court erred in denying Ford the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures.

The Texas Supreme Court agreed with Ford and reversed and remanded the case. First, the Court held that Ford's presentation of the requested discovery and the trial court's response was sufficient to preserve error. According to the Court, although Ford was allowed to interview jurors, there is a significant difference between interviewing witnesses and taking sworn testimony from them as is allowed in discovery. Because the trial court denied Ford's request, Ford was unable to obtain discovery by compulsory process from the presiding juror whose conduct was directly at issue.

Second, the Court held that Ford was entitled to conduct discovery regarding Castillo's breach of contract claim just as it would have been allowed to do for any breach of contract claim. *See Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) (like any other breach of contract claim, a claim for breach of settlement agreement is subject to the procedures of pleading and proof); *Able Supply Co. v. Moye*, 898 S.W.2d 766, 773 (Tex. 1995) (parties are "entitled to full, fair discovery" and to have their cases decided on the merits). Because the trial court denied discovery, Ford was unable to develop its defense. Thus, the trial court abused its discretion by denying Ford the right to conduct the requested discovery.

Third, although Castillo argued the trial court did not abuse its discretion in denying Ford's discovery request because the evidence Ford sought to develop was immaterial as it did not bear on any proper defense to the breach of contract action, the Court disagreed, holding that a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery. Rather, a party may obtain discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action." Tex. R. Civ. Proc. 192.3. The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts or material to support or lead to evidence that would support a defense to Castillo's breach of contract claim. The record did not support such a situation.

Fourth, while Castillo argued that Texas law prohibited Ford from conducting discovery on jury deliberations, the Court disagreed, holding that such discovery is allowed if it is limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve. Moreover, it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003).

Finally, the Court held that the trial court's errors were not harmless. The Court reasoned that, although Ford interviewed some of the jurors, it did not have the opportunity to question the presiding juror while she was under oath. Moreover, when discovery is denied and the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal. According to the Court, the lack of direct evidence about whether the presiding juror was subjected to outside influence prevented Ford from properly presenting its case on appeal, and the trial court's abuse of discretion in denying discovery was harmful.

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TEXAS

Texas Supreme Court Throws Out \$14 Million Judgment After Detailed Review of Expert Testimony

Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009)

In a case closely watched for reasons of the venue (the Texas Rio Grande Valley) and also because of the experts involved (who are familiar to most companies that face fire litigation throughout the southwest United States), the Texas Supreme Court issued what many consider a landmark opinion on expert testimony in the waning days of 2009.

On February 10, 2003, a fire at the Camacho home killed their teenage son. The fire was investigated by local authorities, experts hired on behalf of the family, and experts hired by Whirlpool, who manufactured a dryer the Camachos had purchased (used) from their daughter in October of 2002. Mrs. Camacho had checked the dryer shortly before the fire and noticed nothing unusual, although she could not recall if it was still running. Some time later, she smelled smoke and saw flames coming from the rear and inside of the dryer.

Only the Camachos expert linked the dryer to the cause of the fire, claiming it was defectively designed because it used a corrugated tube in the air circulation system. The expert argued the corrugated tube allowed lint to catch on the inside of the tube, eventually backing up to the point that it was pushed into the dryer's blower assembly through a gasket-like seal and into the dryer cabinet. From there, the expert surmised, the lint was forced into the heater box, where it was ignited by the heating element, with the fire then spreading to the drum and its contents. The fire had destroyed the corrugated tube and blower assembly of the Camachos' dryer, so there was no direct evidence of this occurring. In order to propagate the fire, the expert assumed that the lint smoldered in the clothes until the door was opened, introducing sufficient oxygen to increase the flames, which allegedly spread out the back of the dryer box. The expert proposed two alternative designs to address the situation: (1) the use of smooth tubing, which would prevent the "accumulation" of lint; and (2) the use of a mesh lint filter over the entry to the heater box to prevent the backwards flow of lint to the heater coils.

Despite a strenuous challenge as to the reliability of these opinions, they were admitted and the jury found the dryer defective, returning a \$14 million dollar verdict against Whirlpool. On appeal, Whirlpool challenged both the reliability of the opinions and the sufficiency of the evidence to support a finding of defect. The judgment was affirmed by the intermediate appellate court.

In this widely anticipated ruling, the Texas Supreme Court conducted an in-depth review of the expert opinions regarding defect and found them lacking. The Court observed that it was

required to "rigorously examine the validity of facts and assumptions on which the testimony [was] based, as well as the principles, research, and methodology underlying the expert's conclusions" and the "manner in which [they] were applied" to confirm that "each material part" of the theory was reliable. *Id.* at 637. The Court also noted that, while the general standard of reviewing a challenge to the reliability of expert opinions involves an "abuse of discretion" standard, a party may also assert that the unreliability of an opinion renders it insufficient to support a verdict. This distinction was critical because it allowed the Court to independently review the evidence in detail to determine whether it was sufficient to enable a "reasonable and fair-minded juror" to reach the verdict, not just whether the trial court abused its discretion in admitting the opinions.

The Court noted that an appellate review of whether Whirlpool conclusively disproved Plaintiffs' theory of defect is not the same as determining that Plaintiffs' evidence of a defect was sufficient in and of itself to support the verdict. The Court stated that "[t]he proponent must satisfy its burden regardless of the quality or quantity of the opposing party's evidence...and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong." *Id.* at 639. Thus, the Court confirmed that expert testimony must be reviewed not only in light of the often-cited factors of reliability announced in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), but also to determine whether there was an "analytical gap" between the methodology and the opinion.

Applying the framework discussed above, the Court found that there was insufficient evidence to support the verdict against Whirlpool. One of the key areas noted by the Court was the complete absence of any testing by Plaintiffs' expert of the theory advanced. The expert not only did not test his own theory, he was unable to point to any testing by others that addressed it. Although the expert referred to CPSC tests concerning lint ignition, those tests were conducted under substantially different conditions and parameters than existed in the use of the subject dryer. The Court also noted, in painstaking fashion, the extent to which Whirlpool tested the theory and rebutted it with tests more closely resembling the conditions in the Camacho home. While the Court did not assume that Whirlpool's tests conclusively negated Plaintiffs' theory, it considered these efforts as a strong indication that the theory was at least capable of being tested by Plaintiffs' expert, but was not, an important factor supporting the attack on reliability. The Court also noted other factors, such as the theory being developed for litigation purposes, rather than after general scientific/engineering research efforts. At its core, the Court held that the mere fact that a fire involved a dryer did not mean that the dryer caused the fire, no matter how creative an effort was made to link the two. Accordingly, the Court reversed and rendered a take nothing judgment in Whirlpool's favor.

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TEXAS

In the Context of an Obvious Risk, the Duty to Warn of Defects is Distinct From the Duty to Design Safe Products

Timpte Industries, Inc. v. Gish, 286 S.W.3d 306 (Tex. 2009)

Plaintiff/Respondent Robert Gish, a long haul trucker, arrived at a plant in Texas to pick up a load of fertilizer. Mr. Gish was driving a Peterbilt truck hauling a forty-eight foot trailer, which was manufactured by Defendant/Petitioner Timpte Inc., a subsidiary of Timpte Industries, Inc. (collectively "Timpte"). The trailer was a standard open-top, twin hopper trailer, that is loaded from above through use of a downspout and is emptied through two openings on its bottom. A ladder and observation platform are attached to the front and rear of the trailer to allow the operator to view its contents. Mr. Gish, on this occasion, had difficulty lowering the downspout in the typical manner so he climbed atop the trailer (as he had on several previous occasions when the downspout would not lower) and attempted to lower the downspout by hand while standing on the trailer's top rail. This rail is made of aluminum and is approximately five inches wide and is nine-and-a-half feet above the ground. While standing on the rail, a gust of wind caused Mr. Gish to fall to the ground. The fall resulted in fractures to Mr. Gish's legs and ankles and a ruptured Achilles tendon. Mr. Gish was in a wheel chair for six months subsequent to this incident and continued to have difficulty walking and standing thereafter.

Mr. Gish sued Timpte asserting causes of action for marketing, manufacturing, and design defects, misrepresentation, and breach of warranty. Specifically, Mr. Gish claimed that the warning labels on the trailer were insufficient to warn him of the danger of climbing on top of the trailer and that the trailer contained two design defects: (1) the top two rungs of the ladder allow a person to climb atop the trailer; and (2) the top rail of the trailer is too narrow and slippery and contains too many tripping hazards for a person to walk safely along it. The Court noted, however, that just below the middle rung of the ladder Timpte had placed a rectangular warning label warning of the dangers in climbing the ladder and specifically warning never to climb over the top of the trailer.

Timpte moved the trial court for a no-evidence summary judgment, which was granted. The court of appeals affirmed the trial court's judgment as to all claims against Timpte except the design defect claim. Timpte appealed the ruling to the Texas Supreme Court.

In Texas, to recover for a products liability claim alleging a design defect, a plaintiff must prove that (1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery. To determine whether a product was defectively designed so as to render it unreasonably dangerous, Texas courts apply a risk-utility analysis which weighs the risk of using a

product against its utility. Texas has specifically rejected the "open and obvious danger rule" as determinative in these types of cases.

In this case, the Court found that there was no evidence that the top rail of the trailer was unreasonably dangerous in light of its use and purpose. Further, the Court found that the corresponding risk of someone being injured in the same manner as Mr. Gish is extremely low. In determining whether the risk of injury is common knowledge, the Court considered whether an average user of the product would recognize the risks entailed by the use of the product as-is. The Court then determined, as a matter of law, that the risk of falling from the top of the trailer while trying to balance on a five-inch strip of extruded aluminum was obvious to an average user of the trailer. However, because Texas does not apply the "open and obvious danger rule," and instead considers the duty to warn of defects to be distinct from the duty to design safe products, the Court did not consider this finding to be determinative under the risk-utility analysis.

Therefore, the Court then looked at whether Timpte had met its duty to design a safe product. The Court considered whether there was a reasonable alternative design that, at a reasonable cost, would have reduced a foreseeable risk of harm. In applying the risk-utility analysis, the Court concluded that the design of the trailer was not defective as a matter of law. The Court found that users were warned regarding safe use of the ladder and that these warnings, had they been heeded by Mr. Gish, would have prevented his accident from occurring. In addition, the Court found that widening the top rail so as to convert it to a safe walkway, as proposed by Mr. Gish's expert, would have increased the cost and weight of the trailer while decreasing its utility. In weighing the risk of injury from use of the ladder, the Court found that Mr. Gish had ignored both the posted warnings by Timpte and the obvious nature of the risk of climbing onto the top rail, which the Court found negated any need for additional warnings. The Court concluded that any risk from the ladder itself stemmed only from the risk that a user will ignore both the warnings and the open and obvious dangers. The Court then reinstated the trial court's summary judgment in favor of Timpte.

This case confirms the continuing application by Texas courts of the risk-utility analysis in product defect and design claims. Merely showing that a defect is open and obvious is not sufficient to show that a product has been safely designed and the Court specifically rejected Timpte's request to revisit this rule. Therefore, in the context of an obvious risk, the duty to warn of defects is separate and distinct from the duty to design safe products. Nevertheless, the obvious nature of the risk is certainly a factor the court will consider in applying the risk-utility analysis to product defect and design claims.

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TEXAS

Revival Statute Granting Exception to Statute of Limitations Defense Does Not Rescue Claim From Statute of Repose

Galbraith Engineering Consultants, Inc. v. Pochuca,
290 S.W.3d 863 (Tex. 2009)

Plaintiffs Sam and Jean Pochuca purchased a home from Chase Manhattan Mortgage Corporation in April 2003. Bill Cox Constructors, Inc. had built the house about eight years before the Pochuchas' purchase. After moving into their new home, the Pochuchas noticed that moderate to heavy rainfall would cause water damage in the lower rooms. An investigation revealed a problem with the french drain system.

The Pochuchas thereafter sued the builder, Bill Cox, for negligence and violations of the Texas Deceptive Trade Practices Act. In response, the builder answered and filed a motion for leave to designate Galbraith Engineering Consultants, Inc. and Swientek Construction Company as responsible third parties for purposes of proportionate responsibility under Chapter 33 of the Texas Civil Practice and Remedies Code. According to the builder, Galbraith had designed and inspected the installation of the french drain system, while Swientek had performed the actual installation.

After the trial court approved Galbraith's and Swientek's designation as responsible third parties, the Pochuchas amended their pleadings to join them as defendants. Galbraith responded by moving for summary judgment under the applicable statute of repose, contesting its joinder because more than ten years had elapsed since the completion of the improvement. The trial court granted Galbraith's motion, severed the Pochuchas' claims against Galbraith, and dismissed that part of the case with prejudice. The court of appeals, however, reversed the summary judgment and remanded the case against Galbraith for further proceedings.

Section 33.004(e) is a part of Chapter 33, the statutory scheme for the apportionment of responsibility in tort and deceptive trade practice actions. Chapter 33 provides, among other things, that a defendant in such an action may seek to designate a person, who has not been sued by a claimant, as a responsible third party. A responsible third party may include any person who is alleged to have caused in any way the harm for which the claimant seeks damages and, when such a designation is made, a claimant may also be able to join that person as a defendant. If joined within sixty days, a statute of limitations cannot be raised as a bar. Because the Pochuchas joined Galbraith as a defendant within the sixty-day window, the Court of Appeals concluded that the claim had been revived.

The Supreme Court of Texas reversed, noting that the language of Section 33.004(e) purports to revive claims otherwise "barred by limitations" under certain limited circumstances. It concluded that the Legislature did not intend for this statute to revive claims extinguished by a statute of repose, as distinguished from a statute of limitations. The Court noted that unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action. Repose then differs from limitations in that repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue. Further, while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time. Thus, the purpose of a statute of repose is to provide "absolute protection to certain parties from the burden of indefinite potential liability."

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U.S. SUPREME COURT

Bad Facts Make Bad Law: FDA Approval of Drug Labeling Does Not Preempt State Tort Law Claims

Wyeth v. Levine, 129 S.Ct. 1187 (2009)

Diana Levine, a right-handed professional musician, suffered from migraines. On April 7, 2000, Levine went to a local Vermont clinic for migraine treatment. She received by intramuscular injection Demerol for pain and Phenergan for nausea caused by the Demerol. The drugs did not relieve her pain, so she returned to the clinic later the same day. A physician assistant administered the drugs by the IV-push method. Phenergan entered Levine's artery, either directly or by perivascular aspiration. As a result of Phenergan coming into contact with arterial

blood, Levine developed gangrene and her right arm was eventually amputated at the elbow.

Procedural History. Levine sued the clinic, physician assistant, and Wyeth, the manufacturer of Phenergan, for damages including substantial medical expenses and loss of income. The healthcare providers settled. In her claim against Wyeth, Levine relied on state product liability theories, and, particularly, that Wyeth's failure to warn through defective labeling caused her injuries. She argued the FDA-approved label was defective because it failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method. The Vermont jury agreed with Levine's attorney, who argued during closings, "Thank God we don't rely on the FDA to make the safety decision. ... [Y]ou do." The jury awarded Levine \$7.4 million in damages after finding Wyeth's label

failed to warn of the risks of IV-push because it did not unequivocally tell healthcare providers to not use that method of administration, and the failure to warn proximately caused her injuries.

The trial court entered judgment for Levine after denying Wyeth's motion for judgment as a matter of law, which argued Levine's state-law product liability claims were preempted by the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. s. 301, *et seq.* The Vermont Supreme Court affirmed. The United States Supreme Court granted certiorari to decide whether the FDA's drug labeling judgments "preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use."

The Supreme Court (STEVENS, J.) held the FDCA did not preempt Levine's state-law failure-to-warn and other product liability claims. Contrary to Wyeth's argument, the FDA's approval process for a drug's label does not constitute both a "floor" and "ceiling" for the content of the label. The FDCA does not contain an express preemption provision, so Wyeth argued the FDA's approval of the label impliedly preempted state-law claims because (1) it would be impossible for it to comply with the state-law duty to modify the label without violating federal law; and (2) recognition of the state-law tort action creates an unacceptable obstacle or conflict to the accomplishment and execution of Congress' objectives. The Court denied both arguments and held the FDCA did not preempt state-law tort claims.

"The purpose of Congress is the ultimate touchstone in every pre-emption case," the Court first explained. To assess the intent of Congress, the Court started by summarizing the history of federal regulation of drugs and drug labeling. The first significant public health law was enacted in 1906, and in the 1930s, Congress enacted the FDCA, which required premarket approval of new drugs. The 1962 amendments to the FDCA shifted the burden of proof of a drug's safety to the manufacturer. Before then, the FDA had to prove harm to keep the drug off the market. After the amendments, the manufacturer was required to demonstrate the drug was safe for use as prescribed, recommended, or suggested in the manufacturer's proposed labeling. Additionally, the Court noted Congress declined to include an express preemption provision in its amendments to the FDCA, despite enacting such a provision for the regulation of medical devices. The choice not to include an express preemption provision also showed the intent of Congress. The Court stated the long-standing position of the FDA was that state law tort actions supplemented and complemented the regulation of drugs.

"Impossibility" Implied Preemption. The Court then held the duties of complying with both federal labeling requirements and state tort law do not make compliance with both impossible. The "changes being effected," or "CBE," provision of the FDCA allows a drug manufacturer to unilaterally strengthen the

warnings on a previously approved label, and the manufacturer may make the change upon filing a supplemental application with the FDA. Because the manufacturer need not wait for FDA approval to strengthen the warnings on the drug's label, compliance with both a duty based in state law and a duty to adhere to the federal labeling requirements is not impossible. The Court stated, "Thus, when the risk of gangrene from IV-push injection of Phenergan became apparent, Wyeth had a duty to provide a warning that adequately described that risk, and the CBE regulation permitted it to provide such a warning before receiving the FDA's approval." Providing some room for future argument, the Court stated that state-law tort claims could have only been preempted if Wyeth had provided "clear evidence" that the FDA would not have approved a change to Phenergan's label made pursuant to the CBE regulation.

"Conflict" Implied Preemption. The Court also denied Wyeth's argument that requiring it to comply with a state-law duty to provide a stronger warning would obstruct or conflict with the purposes and objectives of federal drug labeling regulation. Wyeth argued once the FDA approved the label, a state-law verdict may not deem the label inadequate, regardless of whether any evidence exists showing the FDA has considered the stronger warning. The Court also dismissed this argument based on its analysis of Congressional intent and what it found to be an "over-broad" view of an agency's power to preempt state law.

Congress' intent to impose parallel federal and state-law duties is evident because, through all amendments, the FDCA has not been amended to provide a private right of action for violations of the statute. "Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers," the Court wrote. The Court also noted Congress has never adopted an express preemption provision in the FDCA, which is further evidence of Congressional intent.

In its argument that meeting a state-law duty of labeling obstructs Congressional intent, Wyeth relied heavily on the statement the FDA made in the preamble to a 2006 FDA regulation governing the content and format of prescription drug labels. The preamble asserted FDA approval of drug labeling was conclusive and preempted "conflicting or contrary State law, regulations, or decisions of a court of law for purposes of product liability litigation." In deciding what weight to accord the FDA's opinion, the Court entirely disregarded the preamble because the agency's explanation of state law's impact on the federal scheme lacked "thoroughness, consistency, and persuasiveness." The preamble finalized the regulation without offering States or other interested parties notice or opportunity for comment, yet it articulated a "sweeping" position on the preemptive effect of the FDCA.

Further, the Court noted the preamble was at odds with the FDA's "longstanding" position that state-law tort claims coexist with and even complement the federal regulatory scheme to protect patients. Prior to the unilateral enactment of the pream-

ble to the rule, the FDA “repeatedly disclaimed any attempt to preempt failure-to-warn claims” and cast the federal approval of the label as the “floor” on which states could impose additional, stronger labeling requirements.

The Court wrote, “State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. . . . Failure-to-warn actions, in particular, lend force to the FDCA’s premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times.” The Court also recognized the inadequacy of the FDA’s budget and staff to monitor the safety of post-market drugs while also assessing new drug applications, and, thus, placed the onus of safety on the manufacturer.

In a case with significant impact for many product manufacturers, and the pharmaceutical industry in particular, the Court summarized its holdings by stating Wyeth could comply with both state and federal obligations, and Levine’s common law claims did not stand as an obstacle to the accomplishment of Congress’ purposes in the FDCA. The judgment of the Vermont Supreme Court was affirmed.

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WASHINGTON

State of Washington Applies Product Liability Law Retroactively

Lunsford v. Saberhagen Holdings, Inc.,
208 P.3d 1092 (Wash. 2009)

Plaintiff, a mesothelioma sufferer, claimed that he contracted the disease as a result of 29 years of asbestos exposure, including non-occupational exposure through his father from 1948 to 1965. The Plaintiff’s father worked at a refinery. The Plaintiff claims his father brought asbestos fibers home on his clothing and tools. At the time of that exposure, the state of Washington did not recognize strict product liability. Therefore, the Defendant argued that it should not be liable pursuant to a strict product liability theory.

The Supreme Court of Washington disagreed. The case discussed, generally, how law is retroactively applied. The Court commented: “Judicial decisions may have retroactive, prospective, or selectively prospective application. (citation

omitted) Retroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule is ‘overwhelmingly the norm.’ (citation omitted). Prospective application affects only those cases arising after the announcement of the new rule. Selectively prospective decisions are applied to litigants before the court, but not those whose causes of action arose before the announcement of the new rule. *Id.* at 270-271.

The Defendant was, of course, arguing for a prospective application of strict product liability law. Unfortunately for the Defendant, the Court held that strict product liability applies retroactively to all claims against manufacturers and suppliers of products, unless they are barred by a procedural requirement, regardless of whether those claims arose prior or subsequent to the court’s adoption of §402A. The Court, therefore, found that strict product liability applied to Lunsford’s claim as well.

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WASHINGTON

Default Judgment Entered Against Auto Manufacturer as Sanction for Willful Failure to Respond to Discovery

Magaña v. Hyundai Motor America,
220 P.3d 191 (Wash. 2009)

On February 15, 1997, Jesse Magaña was a passenger in a 1996 Hyundai Accent, when an accident occurred that caused plaintiff to be thrown out of the rear window, landing approximately 50 to 100 feet from where the car eventually stopped. Plaintiff was rendered a paraplegic due to the accident.

Plaintiff filed suit against Hyundai, among others, alleging that his injuries were proximately caused by a design defect in

the car which allowed the seat to collapse. During discovery in 2000-2001, plaintiff requested numerous documents from Hyundai. Hyundai refused to directly answer plaintiff’s requests and re-worded and limited their scope. Hyundai never sought a protective order to narrow the scope of discovery, and plaintiff never sought a motion to compel Hyundai to answer the discovery requests before trial.

At trial, plaintiff prevailed and was awarded \$8 million in damages. The Court of Appeals reversed and remanded in 2004 as to Hyundai, determining that the trial court had committed reversible error in permitting one of plaintiff’s experts to testify as to an opinion the expert had not offered at deposition. The trial court set the re-trial for January 17, 2006. Before the second trial, plaintiff requested that Hyundai update its responses to plaintiff’s previous discovery requests from 2000-2001. Hyundai amended some of its responses, but still objected to the discovery on the grounds that it was not reasonably calculated to

lead to the discovery of admissible evidence. Hyundai never moved for a protective order. Plaintiff then filed a motion to compel Hyundai to produce all the previously requested discovery.

The trial court granted the motion to compel. As a result, Hyundai identified and produced numerous documents where it had previously indicated that no such responsive documents existed. In response, plaintiff moved for a default judgment against Hyundai, arguing that it would be impossible to prepare a proper case in light of the discovery that had just been produced by Hyundai, and that evidence was lost due to the delay. Plaintiff claimed Hyundai (1) failed to comply with production requests, (2) falsely answered interrogatories, (3) willfully spoliated evidence of other similar incidents, and (4) failed to produce documents related to rear impact crash tests. Plaintiff's experts argued that the information of other similar incidents would have been invaluable and useful during the first trial.

After an evidentiary hearing, the trial court imposed a default judgment against Hyundai supported by numerous findings of fact. The court found the discovery violations alleged by plaintiff were real and serious. The court found (1) there was no agreement between the parties to limit discovery, (2) Hyundai falsely responded to Plaintiff's request for production and interrogatories, (3) Plaintiff was substantially prejudiced in preparing

for trial, and (4) evidence was spoiled and forever lost. The trial court considered lesser sanctions but found that the only suitable remedy under the circumstances was a default judgment. Hyundai appealed.

The Court of Appeals reversed in a two-to-one decision and remanded the case for a new trial. The Court of Appeals majority found that Hyundai had willfully violated Plaintiff's discovery request, but there was no prejudice to Plaintiff's ability to retry his case. The Supreme Court of Washington, however, reversed, finding that the Court of Appeals could not substitute its own discretion for that of the trial court absent evidence of abuse. The Supreme Court found that the trial court properly imposed a default judgment against Hyundai for its willful and deliberate failure to comply with discovery, and that lesser sanctions would not have been appropriate to remedy the prejudice to both the Plaintiff and the judicial system.

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WASHINGTON

Strict Liability Applies Retroactively to Claims Arising Out of Asbestos Exposures Before the Adoption of Strict Liability

Lunsford v. Saberhagen Holdings, Inc.,
 2009 Wash. LEXIS 617 (2009)

Appellant Lunsford suffers from mesothelioma as a result of asbestos exposure over a 29 year period, including non-occupational exposure from his father from 1948 to 1965. Lunsford worked as an insulator in an oil refinery where he was directly exposed to asbestos insulation products in 1958. Lunsford claimed additional exposures to fibers brought home on the clothing of his father. As a result, Lunsford alleged causes of action in negligence and strict liability against Saberhagen, a successor in interest to the seller of the insulation products.

Washington adopted strict product liability as to manufacturers in 1969, and as to product suppliers in 1975.

Washington acknowledges that ordinarily a decision of a court of last resort overruling a former decision is retrospective as well as prospective, unless declared to be prospective only in the decision. Washington had previously recognized an exception to the general rule which allowed "selective prospectivity," which allowed a court to apply a new rule of law to the litigants

in the case announcing the new rule and to all litigants whose claims arise after that decision. Claims arising prior to the announcement of the new rule continued to be governed by the old, now overruled, rule of law. In *Robinson v. City of Seattle*, 199 Wn.2d 34, 830 P.2d 318 (1992), "selective prospectivity" was abolished in Washington.

Saberhagen first moved for partial summary judgment arguing that Lunsford was not a "user" under section 402A of the Restatement (Second) of Torts (1965), which had been adopted by Washington. The trial court granted the motion. The appellate court reversed, holding that a household member was a user, if his exposure to the product was reasonably foreseeable.

On remand, Saberhagen brought a second motion for partial summary judgment arguing that strict product liability should not apply retroactively in this case. Saberhagen argued that *Robinson* had been overruled by subsequent decisions and that strict product liability should be applied with selective prospectivity, utilizing the three part test set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct 349 (1971), for determining whether a new rule of federal law should apply non-retroactively in a civil case. The trial court agreed and dismissed the strict product liability claim. The appellate court reversed holding that *Robinson* required retroactive application of strict product liability to Lunsford's claim.

At the Supreme Court, Saberhagen again argued that *Robinson* had been implicitly overruled by the Court's use of *Chevron Oil* in subsequent decisions. However, the Court stated that

its decision in *Robinson* and the cases in which it had utilized the *Chevron Oil* test were not mutually exclusive, and the *Chevron Oil* test continued to be viable in determining, in a case announcing a new rule of law, whether that decision should have prospective application. “Mere use of the *Chevron Oil* factors and a scant mention of selective prospectivity in our explanation of the *Chevron Oil* test is insufficient to overrule our clear statement of law in *Robinson*. This court did not overrule *Robinson* . . . nor did we intend to.” *Id.* at 29.

Since *Robinson* remained good law, the Court held selective prospectivity was not an option. The Court further held that its decisions of law apply retroactively to all litigants not barred by procedural requirement unless it expressly limits its decision

to purely prospective application. Accordingly, since the Court had already determined that strict product liability applies retroactively to all cases not barred by procedural requirements, Lunsford could maintain his strict product liability claim. The Washington Supreme Court affirmed the appellate court decision and remanded the matter for further proceedings

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WEST VIRGINIA

West Virginia’s Highest Court Holds That State Common Law Claim of Glass Defect in Vehicle Window is Implicitly Preempted by Federal Law

Morgan v. Ford Motor Co., 680 S.E.2d 77 (W. Va. 2009)

On January 30, 2001, Mr. Morgan was driving his 1999 Ford Expedition along a West Virginia interstate when the vehicle rolled over. Mr. Morgan’s suffered a degloving injury to his left hand and arm when he was ejected from the broken, driver-side door window and pinched between the vehicle and the pavement. Mr. Morgan, originally named as a defendant by his wife who was also injured in the roll over, asserted cross-claims against Ford Motor Company (“Ford”) alleging, among other things, a West Virginia common law design defect claim. Mr. Morgan alleged that the tempered glass side windows selected by Ford in the manufacturing process were defective, and that as an alternative to tempered glass, Ford should have selected and used laminated glass or some other form of ejection-proof glass or glazing.

At the trial court level, Ford moved for summary judgment as to Mr. Morgan’s claims by asserting that federal law implicitly preempted his common law design defect claims. Specifically, Ford claimed that Mr. Morgan’s common law design defect claim was preempted by the National Traffic and Motor Vehicle Safety Act found at 49 U.S.C. § 30101 *et seq.* (“Safety Act”), and the Safety Act’s implementation of the Federal Mo-

tor Vehicle Safety Standard 205 (“FMVSS 205”), which specifically governs vehicle glass and provides manufacturers a choice among several options. Relying on the United States Supreme Court decision in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the trial court dismissed Mr. Morgan’s claims by finding that “because tempered glass is a permitted option for manufacturers to use in vehicle side windows under FMVSS 205, the imposition of state tort liability based on the exercise of such option would frustrate the full purposes and objectives of Congress.” *Morgan*, 680 S.E.2d at 82. Mr. Morgan appealed.

The sole issue on appeal before the Supreme Court of Appeals of West Virginia was “whether the circuit court erred in its conclusion that appellant Mr. Morgan’s side-window glass and glazing defect claims are preempted by FMVSS 205.” *Id.* at 82. After setting forth the basic framework for preemption, the Court analyzed existing tension between state and federal courts’ interpretation of FMVSS 205, but ultimately affirmed the decision of the trial court and found that Mr. Morgan’s claims were preempted. The Court interpreted FMVSS 205 as permitting manufacturers to select among different types of safety glass to install in their vehicles. Having found that federal law allows manufacturers different options, the Court reasoned that Plaintiff’s West Virginia common law design defect claim is preempted because it would foreclose an option specifically allowed by federal law.

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WEST VIRGINIA

West Virginia Common Law Claims for Negligent Manufacture of Manufactured Homes is Not Preempted by the Manufactured Home Construction and Safety Standards Act

Harrison v. Skyline Corporation,
2009 W. Va. Lexis 108 (Nov. 13, 2009)

In November 2009, the Supreme Court of Appeals of West Virginia addressed two certified questions from the state trial court related to the federal Manufactured Home Construction and Safety Standards Act (“MHA”), 42 U.S.C. §§ 5401-5426:

- (1) Did Congress intend to preempt common law negligence claims based on formaldehyde exposure in manufactured homes which seek to establish a standard or performance not covered by the MHA or

regulations promulgated there under and which pose no challenge to the federally established formaldehyde emission standards; and

(2) Is ambient air testing for the presence of formaldehyde in wood products used in the construction of a manufactured home built in accordance with the provisions of the MHA, admissible as evidence in a common law negligence action seeking to establish a standard of performance not covered by the act or associated regulations when the regulatory agency responsible for carrying out the federal act rejected the use of ambient air standards as a measure of acceptable formaldehyde emission levels for certain wood products installed in such homes?

The Court answered the first question in the negative and the second in the affirmative.

The case involved plaintiffs' purchase of a manufactured home which included formaldehyde treated floor decking. Plaintiffs claimed to have been experiencing health problems after living in the home for approximately six years, and a home inspection revealed that debris from the formaldehyde-treated floor decking had existed in the duct work of the home's heating and air system. Plaintiffs admitted the formaldehyde treated floor decking complied with the federal regulatory standards for formaldehyde emission levels in plywood and particle board materials used in manufactured homes. Nonetheless, plaintiffs sued the home manufacturer alleging negligent manufacturing. Although three questions were certified to the Supreme Court of Appeals of West Virginia, the Court ultimately addressed just two of them.

Addressing the issue of preemption, the Court first looked to the language of the MHA to determine if it expressly answered the question. The Court found conflicting clauses in the statute: one stating that no state or political subdivision shall pass a law that preempts the MHA, and another, the "savings clause," stating "compliance with any Federal Manufactured Home Construction or Safety Standard issued under this chapter does not exempt any person from any liability under common law." 42 U.S.C. § 5409(c). The Court determined the presence of the "savings clause" did not eliminate the potential that certain common law actions will still be preempted under the Act.

The Court then analyzed whether the Plaintiffs' claim was impliedly preempted under either field or conflict preemption. The Court determined that field preemption did not exist relative to the negligent manufacture claim because there was "no clear manifestation of congressional intent to occupy the field or regulation of formaldehyde usage in manufactured housing so as to preempt all state common law causes of action involving formaldehyde." As to conflict preemption, the Court noted that

the only two circumstances in which it may exist: (i) when federal and state regulations conflict, or (ii) state involvement prevents accomplishing the intent of the congressional legislation. No state regulation related to the formaldehyde treated product existed to create a conflict. Referring to a United States Senate report discussing the intent of the MHA, the Court found nothing to "lead to the conclusion that Congress intended to remove all matters related to formaldehyde emission in manufactured homes from the purview of the states." The Court, thus, held that the common law claims at issue were not preempted by the MHA.

For the second certified question, the Court held that ambient air testing results reflecting the presence or absence of formaldehyde wood products in manufactured homes built in accordance with the MHA's requirements were admissible as evidence in a common law negligence action even though the regulatory agency responsible for carrying out the MHA rejected the use of the ambient air standards as a measure for acceptable levels of formaldehyde emission levels. The Court reasoned:

[T]he [Plaintiffs'] common law negligence claim in this case is an attempt to set a performance standard in an area for which HUD has no standard; the proper disposal for formaldehyde treated materials during the manufactured home construction process. We fail to see how such a standard would thwart attainment of the overall objectives of the MHA since it would promote the purpose of 'protect[ing] the quality, durability, safety and affordability of manufactured homes.'

The Court concluded that the ambient air testing results were admissible.

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WISCONSIN

**Pre-Market Approval Preemption
Despite Claim That the Pre-Market
Approval Was “Superseded” by a
Subsequent Supplemental
Pre-Market Approval**

Blunt v. Medtronic, Inc., 760 N.W.2d 396 (Wis. 2009)

Plaintiffs, Joseph Blunt, Sr. and Margaret Blunt, sued Medtronic, Inc. (“Medtronic”) for negligence, strict liability and loss of consortium related to an implantable defibrillator device.

On December 17, 2002, the FDA provided device-specific pre-market approval for Medtronic’s Marquis 7230 defibrillator. Medtronic became aware of a potential shorting problem with the product’s battery, and subsequently submitted a supplemental pre-market approval application containing design changes to address the shorting issue. On October 23, 2003, the FDA approved those changes.

In May of 2004 the original version of the Marquis was implanted in Joseph Blunt. In February of 2005, this defibrillator was removed from Mr. Blunt shortly after his physician was advised of the shorting problem.

The Plaintiffs argued that their claims were not preempted because when Medtronic obtained the supplemental pre-market approval (with related design changes) the effect of the original defibrillator pre-market approval implanted into the plaintiff was “superseded.” In essence, the Plaintiffs argued that in light of the supplemental pre-market approval, when Medtronic sold the original defibrillator used in the Plaintiff, it was no longer subject to a federal “requirement” for preemption purposes.

The specific issue addressed by the Wisconsin Supreme Court was whether the supplemental pre-market approval of the defibrillator affects the preemption holdings and reasoning of the U.S. Supreme Court’s decision in *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008), ruling that state tort law claims like those brought by the Blunts regarding PMA approved devices are expressly preempted by federal law. Specifically, the Supreme Court in that case confirmed that device-specific pre-market approval of a Class III medical device constitutes a federal “requirement” within the

meaning of 21 U.S.C. §360k(a) and that the preemption provision precluded state tort law claims relating to safety or effectiveness because those state tort law claims constitute “state requirements.”

The Plaintiffs argued that their claims were not preempted because when Medtronic obtained supplemental PMA with the design changes the effect of that was to “supersede” the original PMA. Thus, according to Plaintiffs, when Medtronic sold the device implanted into Mr. Blunt, that older version was no longer subject to a federal “requirement” to preempt their state tort law claims. The Court first noted that there was nothing in the medical device amendments suggesting that a device-specific approval once given was diminished by a supplemental approval without some further affirmative act by the FDA. The Court next observed that the FDA clearly had the power to withdraw PMA or to recall a device once PMA had been given and had not done so in this case. Finally, the Court observed that despite the supplemental PMA given for the defibrillator with the design changes, Medtronic was still under an obligation to comply with post-approval reporting requirements for the original defibrillator. In ruling, the Court held:

We have found nothing in the comprehensive federal regulatory scheme that suggests a change in device-specific pre-market approval of a Class III medical device occurs simply because a subsequent device has received supplemental pre-market approval, and the Blunts have identified no such provision in the federal law. Accordingly, we conclude that the supplemental pre-market approval that Medtronic received did not affect the federal requirement of pre-market approval granted to the original Marquis 7230 defibrillator. *Id.* at 407.

The Court concluded that once a manufacturer obtained supplemental approval, absent further FDA action, the prior approval of the device remains valid and the federal requirement established by pre-market approval is ongoing. Accordingly, the Court affirmed the decisions of the lower courts which held that plaintiffs’ claims were preempted.

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WISCONSIN

**No Defective Design Claim in Wisconsin When the
Design Complained About is Inherent in the
Nature of the Product and Removing
That Characteristic Would Transform
it into a Different Product**

Godoy v. E.I. du Pont de Nemours and Company,
768 N.W.2d 674 (Wis. 2009)

In this case the petitioner, Ruben Godoy, sought review of the appellate court’s decision affirming the trial court’s dismissal of his defective design claims against manufacturers of white lead carbonate pigment. Godoy, a minor, had lived in an apartment painted with paint containing white lead carbonate

pigment. Godoy alleged he sustained lead poisoning and the source of that poisoning was the white lead carbonate pigment.

The trial court concluded that Godoy's complaint failed to state a claim for defective design where "(1) the product is white lead carbonate pigment; (2) the alleged design defect is the presence of lead; and (3) the defendant manufacturers were manufacturers of white lead carbonate pigment." *Id.* at 678. Without lead, there can be no white lead carbonate pigment.

The court of appeals affirmed based upon its conclusion that the product was not defectively designed where the design is inherent in the nature of the product itself, such that an alternative design would change the very nature of the product. *Id.* at 680. The intermediate appellate court noted that, although Wisconsin had neither accepted nor rejected the Restatement (Third) of Torts: Product Liability, it could be helpful in its inquiry. *Id.* at 680. The Restatement (Third) requires proof of a reasonable alternative design, and applying the facts at bar, the court concluded there was no viable design defect claim.

The Supreme Court of Wisconsin outlined the State's product liability law and reiterated that the Restatement (Third)'s definition of defective design is at odds with Wisconsin product liability law, and that Wisconsin embraced Section 402A of the Restatement (Second) of Torts which focuses on the strict liability standard rather than the required elements of proof. The

distinction was that a defect can exist, but that does not mean the product was defectively designed.

The comments to §402A supported the Court's conclusion. Comment h lists four potential deficiencies that can result in a defective condition: (1) foreign objects; (2) deterioration before sale; (3) the way in which the product was packaged or prepared; and (4) harmful ingredients, not characteristic of the product itself. The Court noted the Restatement (Second) "does not state that a defective condition can arise from harmful ingredients that are characteristic of the product". *Id.* at 684.

The Court reaffirmed that Wisconsin law does not require proof of the feasibility of an alternative design, and concluded that the complaint failed to state a claim for defective design, noting that "[a] claim for defective design cannot be maintained where the presence of lead is the alleged defect in design, and its very presence is a characteristic of the product itself. Without lead, there can be no white lead carbonate pigment. We therefore conclude that the complaint fails to allege a design feature that makes the design of the white lead carbonate pigment defective." *Id.* at 115.

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WISCONSIN

Wisconsin Supreme Court Holds That Consumer Contemplation Test, Not a Bystander Contemplation Test, Governs Product Liability Claims

Horst v. Deere & Co., 769 N.W.2d 536 (Wis. 2009)

A minor and the minor's mother, as guardian *ad litem*, filed negligence and strict liability claims against Deere & Company ("Deere"), related to injuries suffered by the minor as a bystander to a lawnmower manufactured by Deere.

Plaintiffs alleged that the two-year-old child was playing in the family's yard while the minor's father ("Father") was mowing the yard using a Deere riding lawn mower. As the Father was mowing in reverse along the rear of the house, the minor moved into the path of the mower and out of the Father's line of sight. As the father proceeded backward, the mower hit the minor, severing both of his feet.

The mower contained a safety feature that prevented it from being used in reverse. This feature, however, also had an override, allowing the operator to mow in reverse. It is undisputed that the Father knowingly engaged the override feature prior to the accident to allow him to mow in reverse along the rear of the house. In their strict liability claim, the Plaintiffs alleged that

designing a mower to operate in reverse is unreasonably dangerous and that the mower should have had an alternate design.

The issue posed was whether Wisconsin had adopted or should adopt the "bystander contemplation test" for strict liability claims advanced by the Plaintiffs. At trial, the Plaintiffs proposed a jury instruction that would add the phrase "or bystander" following most occurrences of "user" and "consumer" to Wisconsin Jury Instruction – Civil 3260. The trial court rejected this proposed instruction, instead using the following:

The law in Wisconsin imposes a duty on a manufacturer to a bystander, if the bystander is injured by a defective product, which is unreasonably dangerous to the ordinary user or consumer.

The Plaintiffs also requested a special verdict question asking the jury the following:

Do you find from the evidence that the subject lawn tractor, when it left the hands of Defendant, Deere & Company, was in a defective condition so as to be unreasonably dangerous to a prospective user/consumer or bystander?

The trial court denied this request, submitting the above-question to the jury without the "or bystander" language.

The jury ultimately found the parents of the minor, not Deere, were negligent in the injury. The jury also found that the mower was not in an unreasonably dangerous, defective condition to the prospective user or consumer. Thus, Deere was not strictly liable for the minor's injuries.

The Plaintiffs appealed on the grounds that the jury was improperly instructed. The Court of Appeals agreed with the trial court, holding that the contemplation of the consumer, not the bystander, is the proper standard for unreasonably dangerous products. Accordingly, the jury instructions contained an accurate statement of the law.

The Plaintiffs sought review of the Court of Appeals decision. Similarly, the Supreme Court of Wisconsin rejected the Plaintiffs' proposed bystander contemplation test, holding that the contemplation of the consumer, not the bystander, governs strict liability actions. The Supreme Court stated that the bystander contemplation test advanced by the Plaintiffs comes "dangerously close to absolute liability" where a jury could "find a manufacturer liable under any conceivable fact situa-

tion." In arriving at its holding, the Court stated that while the bystander can recover when injured by a unreasonably dangerous product, the determination as to whether that product is unreasonably dangerous is based on the expectations of the ordinary consumer, not the bystander.

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WYOMING

Wyoming Supreme Court Finds No Defect for Lack of Optional Safety Equipment When Hazards Posed by External Factors are Open and Obvious

Loredo .v Joy Technologies, Inc., 212 P.3d 614 (Wyo. 2009)

On August 14, 2002, Jose Loredo was working as an equipment operator in a trona mine in Wyoming (trona is used primarily in the manufacturing of glass and in water treatment). Loredo was operating a roof bolting machine he had used for many years. The bolter was designed and manufactured by Joy Technologies and is used in mining operations to secure the roof to prevent injuries by falling rock. The roof bolter operated by Loredo had no canopy to protect the operator. Towards the end of a long workday, Loredo had problems steering the equipment and, in an effort to free it after getting stuck, he inadvertently drove into an area where the roof was not yet bolted. A large section of the roof collapsed, rendering Loredo quadriplegic.

Loredo filed suit against several entities after his incident. The Defendants included (i) Loredo's employer's parent company, on the basis that it exercised substantial control over its subsidiary's safety programs and mine operations; (ii) his co-worker/direct supervisor, for acting intentionally and with reckless disregard for Loredo's safety by making him continue to use the roof bolter in this area despite the problem with its steering; and (iii) Technologies, the roof bolter manufacturer, alleging liability for providing no canopy protection and not recommending canopy protection to the initial purchaser. The trial court granted summary judgment to all defendants, finding no duty owed to Loredo under the circumstances.

The crux of Loredo's product liability claim was that Joy Technologies should have either included a canopy for operator protection as standard equipment or recommended that the canopy option be accepted. Joy Technologies had listed a canopy as an available option when it replied to bid requests for the equipment more than twenty years before the accident. The evidence also showed that both company policy and Mine Safety & Health Administration regulations prohibited use of the roof bolter under an unsupported roof and that Loredo was aware of this. Additionally, the bolter had a boom, where the actual bolting was accomplished. Therefore, in addition to Loredo's conduct being prohibited, there was no need for the operator to be under an unsupported roof structure in normal operation. In addressing whether a product manufacturer has a duty to provide or recommend safety accessories, the Court noted that a chief consideration is whether the product itself is dangerous *without* the accessory. The Court looked to several factors, including the obviousness of the danger presented, the existence and content of any relevant safety standards, the presence of a warning, and the effectiveness of the accessory in preventing the risks of injury. The Court also addressed the "relative positions of the manufacturer and buyer", considering such factors as industry custom and/or standard, the buyer's awareness of the accessories and the hazards/risks of using the product without them, the feasibility of installing the options, the buyer's reliance on the manufacturer's expertise and whether the options were, in fact, offered and refused.

In affirming summary judgment for Joy Technologies, the Court found that the facts established no duty on its part to either equip the roof bolter with a canopy or to recommend the canopy be used. The open and obvious nature of the hazard (rock falling from the roof of a mine shaft), the presence of industry and company standards prohibiting the use of the machine under an unsupported roof, and the fact that the canopy was disclosed as an available alternative, yet rejected by a so-

p sophisticated purchaser (Tenneco), all led the Court to hold that no such duty existed. Another factor the Court deemed important was that it was not common practice in the industry for these machines to be equipped with a canopy for the operator. As a result, the Court found no defect in the roof bolter at the time it was sold. The Court also affirmed summary judgment for the remaining defendants, finding there was no evidence to suggest the parent corporation exercised sufficient control over the

safety practices of its subsidiary to warrant the imposition of liability, and finding the actions of Loredó's supervisor, while questionably negligent, did not rise to the level of willful or wanton conduct.

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San Antonio, TX

Upcoming ALFA International Events

March 11-13, 2010

2010 ALFA International Client Seminar

JW Marriott Desert Springs
 74855 Country Club Drive
 Palm Desert, CA

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 HUNTER MACLEAN EXLEY & DUNN, P.C.
 Savannah, GA
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April 28-30, 2010

Transportation Practice Group Seminar

Marriott Marco Island Resort
 400 South Collier Blvd.
 Marco Island, FL

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Chair: Clark Aspy
 NAMAN HOWELL SMITH & LEE, P.L.L.C.
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June 2-14, 2010

Retail Real Estate & Business Litigation Seminar

The Ritz-Carlton Palm Beach
 100 South Ocean Blvd.
 Palm Beach, FL

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June 16-18, 2010

Employment Practices Liability Insurance (EPLI) Seminar

The Ritz-Carlton Battery Park
 Two West Street
 New York, NY

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July 21-23, 2010

Construction Law Seminar

Four Seasons San Francisco
 San Francisco, CA

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REMINDER

The 2010 ALFA International Client Seminar
 Co-hosted by the Product Liability Practice Group

March 11-13, 2010
 JW Marriott Desert Springs
 74855 Country Club Drive

980 N. Michigan Avenue
Suite 1180
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