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IN THIS ISSUE

Featured Case Summaries

- Alabama 2
- Arizona 4
- Arkansas 5
- Colorado 6
- Florida 7
- Idaho 8
- Illinois 9
- Indiana 10
- Kansas 11, 12
- Kentucky 13
- Louisiana 15
- Maryland 18
- Massachusetts 19
- Michigan 21
- Mississippi 23
- Missouri 24
- Montana 25
- Nebraska 29
- Nevada 31
- New Hampshire 32
- New Jersey 33
- New Mexico 35
- New York 37
- North Carolina 39
- Ohio 40
- Oklahoma 42
- Oregon 43
- Rhodes Island 44
- South Carolina 46
- Tennessee 48
- Texas 49
- Utah 51
- Wisconsin 52

Departments

- Upcoming ALFA International Events 54
- Corrections 54

NOTES FROM THE EDITORS

It is time again for the "Year in Review" edition of our newsletter. With the start of a new decade, we decided to take a new approach to our annual review of product liability cases. We asked our ALFA members to report on the most noteworthy product cases issued from their state or federal courts in 2010 to encompass a broader array of decisions at varying levels. The result is a compendium of case notes discussing traditional and non-traditional product liability related concepts and concerns. We hope you find the review a useful guide in navigating the legal potholes and roadblocks in the various jurisdictions where you do business or practice law. As always, we welcome your suggestions for topics or articles for our next edition and look forward to keeping you posted on breaking developments in 2011.

Editors Colleen Murnane,
Stan Shuler & Jack Ables

CASES, REGULATIONS AND STATUTES

ALABAMA

Alabama Supreme Court Holds 20-Year Rule of Repose Does Not Bar Asbestos Claims

Owens-Illinois, Inc. v. Wells, 2010 WL 1640962 (Ala. Apr. 23, 2010)

The Alabama Supreme Court recently addressed whether the 20-year common law rule of repose begins to run at the time of the defendant's actions giving rise to the claim or when all of the essential elements of the claim, including injury, are present. In *Owens-Illinois, Inc. v. Wells*, 2010 WL 1640962 (Ala. Apr. 23, 2010), the court, in a 7-2 decision, held that Alabama's rule of repose does not begin to run until all of the elements of the claim co-exist so that the plaintiff has a valid cause of action. *Id*. at *4.

The Majority Reaffirms that Rule of Repose Begins to Run When Cause of Action Accrues

In *Wells*, the plaintiffs in six asbestos cases alleged that they or their family members were injured or died because of exposure to block insulation and pipe covering known as Kaylo that was manufactured or installed by Owens-Illinois. It was undisputed that Owens-Illinois sold its Kaylo business in 1958 and that it did not manufacture or install any Kaylo product after 1958. Owens-Illinois moved for summary judgment in each of the six cases, arguing that the plaintiffs' claims were barred by Alabama's 20-year rule of repose. The trial court concluded that there was no evidence to suggest that the plaintiffs' alleged injuries occurred more than twenty years before the filing of their lawsuits and denied Owens-Illinois' motions. However, the trial court certified the orders for interlocutory review because it concluded that the motions presented a question of law "as to which there is a substantial ground for difference of opinion." Owens-Illinois petitioned the Alabama Supreme Court for permission to appeal the trial court's ruling denying summary judgment, and the court granted Owens-Illinois' petition.

On appeal, Owens-Illinois argued that Alabama's 20-year rule of repose begins to run from the point in time of the defendant's actions giving rise to the claim. The *Wells* Court, citing its recent opinion in *Collins v. Scenic Homes, Inc.*, 2009 WL 1875575 (Ala. June 30, 2009), disagreed. *Wells*, 2010 WL 1640962, at *4.

In *Collins*, the Alabama Supreme Court expressly held that the rule of repose does not begin to run until the plaintiff has suffered an actionable injury. *Collins*, 2009 WL 1875575, at *5. In that case, the residents of an apartment building sued the designer of the building alleging that injuries they received when the building was set on fire by an arsonist were proximately caused by the designer's failure to construct a building with appropriate fire suppression safeguards and escape routes. The designer moved for summary judgment, arguing that the residents' claims were barred by the 20-year rule of repose. The trial court granted summary judgment in favor of the designer, and the residents appealed.

On appeal, the Alabama Supreme Court reversed the trial court and held that the rule of repose could not bar the residents' claims because it did not begin to run until the residents suffered an injury and could have filed suit. *Id*. at *5. Citing its prior opinions discussing the policy reasons for the 20-year rule, the court explained, "it is inequitable to allow those who have slept upon their rights for a period of 20 years . . . to bring an action." *Id*. at *4 (internal quotations omitted). The court distinguished the residents' claims and concluded:

> [B]ecause the 20-year common-law rule of repose is premised upon a preexisting right to assert a claim and because the residents did not have such a right until the fire occurred and they sustained injuries as a result of an alleged breach of duty by [the designer] and because the

> residents sued within 20 years of their injuries, the rule of repose is inapplicable to this case.

Id. at *5. The court, therefore, held that the trial court erred by granting summary judgment in favor of the designer and remanded the case. *Id*. at *5-6.

The *Wells* Court applied the same reasoning to the asbestos-plaintiffs' claims and concluded, "[t]he rule of repose does not depend solely on the actions of the defendants . . . [Rather,] the rule of repose does not begin to run until all of the essential elements of that claim, including an injury, coexist so that the plaintiff could validly file an action." *Wells*, 2010 WL 1640962, at *4. The court, therefore, held that the trial court properly denied summary judgment in favor of Owens-Illinois. *Id*.

The Dissent Asserts that Majority Confuses Rule of Repose with Statute of Limitations

The two dissenters in *Wells*, Justices Glenn Murdock and Greg Shaw, adopted their dissent in the *Collins* case. *Wells*, 2010 WL 1640962, at *5. In *Collins*, Justice Murdock concluded that prior Alabama decisions addressing whether the rule of repose begins to run upon the occurrence of the wrongful act or omission or the accrual of a cause of action were "conflicted and confusing." *Collins*, 2009 WL 1875575, at *6. He noted that prior decisions stated that the passage of time is the only element of the rule of repose and that this was consistent with the policy objective of avoiding antiquated claims. *Id.* at *6-7. He explained that these policy reasons support that a period of repose should begin to run from the time of the defendant's wrongdoing. *Id*. at *7. Justice Murdock further wrote, "[c]onsistent with these policy concerns, general American jurisprudence draws a distinction between statutes of limitation and statutes of repose and recognizes that the latter run from the defendant's wrongful act or omission." *Id*. at 7-8 (citing 54 C.J.S. *LIMITATIONS OF ACTIONS* § 4 (1987); BLACK'S LAW DICTIONARY 1451 (8th ed. 2004) (defining statute of repose as "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury.")). Justice Murdock concluded, "I see no meaningful or justifiable field of operation for a 20-year rule of repose if it is to begin to run when a claim accrues, because the applicable statute of limitations, which of course also begins to run at the time of the accrual of the claim, inevitably will impose a shorter period for the filing of the claim." *Id*. at 8.

Conclusion

As the dissenters note, if the rule of repose, like a statutory limitations period, begins to run when the cause of action accrues, presumably the statute will always run first. It is, thus, difficult to imagine a scenario in practice where the rule of repose would actually be applied.

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ARIZONA

Arizona Supreme Court Declines to Recognize a Tort of Negligent or Intentional Third-Party Spoliation

Lips v. Scottsdale Healthcare Corp., 224 Ariz. 266, 229 P.3d 1008 (2010)

Background

In *Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 229 P.3d 1008 (2010), the Arizona Supreme Court declined to recognize a tort of negligent or intentional third-party spoliation. As noted by the Court, "spoliation" is the destruction or material alteration of evidence in a case. When spoliation is committed by a party to a lawsuit, it is referred to as "first-party spoliation;" when committed by a non-party, it is called "third-party spoliation." *Lips*, 224 Ariz. at 267, 229 P.3d at 1009.

In 2004, surgeons replaced Plaintiff/Appellant Monica Lips' left hip. The prosthesis failed after seventeen months and parts of it were surgically removed at one of Defendant/Appellee Scottsdale Healthcare Corporation's hospitals ("the Hospital"). Ms. Lips believed that the hip prosthesis was defective, and asked her surgeon to preserve the explanted parts. The surgeon, in turn, told the Hospital that it was obliged to retain them. *Id.*

Ms. Lips sued the manufacturer of the prosthesis. During discovery, she learned that the prosthesis parts could not be found. Ms. Lips filed an amended complaint claiming that the Hospital was liable for spoliation of the parts. The superior court granted the Hospital's motion to dismiss, concluding that Arizona does not recognize third-party spoliation of evidence as a separate tort. The court of appeals affirmed. The Arizona Supreme Court granted the petition for review, stating that it was "an issue of statewide importance" whether Arizona should recognize this separate tort. *Id.* The Court had previously declined to create a distinct cause of action for first-party spoliation. *See La Raia v. Superior Court,* 150 Ariz. 118, 722 P.2d 286 (1986).

Negligent Third-Party Spoliation – Lack of Duty

The Court analyzed whether the Hospital owed Ms. Lips a duty of care. The Court noted that, since Ms. Lips alleged that the loss or destruction of the prosthesis parts compromised her ability to prove her product liability claims against the manufacturer, she thus alleged a "purely pecuniary injury rather than injury to her person or property." *Lips*, 224 Ariz. at 268, 229 P.3d at 1010. The Court stated that it was reluctant "to broadly recognize a duty to avoid purely economic loss" and that this reluctance "comports to the refusal of other courts to recognize a tort for negligent spoliation." *Id.* 224 Ariz. at 269, 229 P.3d at 1011. Ms. Lips claimed, rather, that she sought only a *limited* duty arising from the surgeon's request to the Hospital to retain the evidence. The Court stated that "[i]n general, however, a duty of care is not created by a mere request for help, or by unilaterally being told by another that a duty exists." *Id.*

Intentional Third-Party Spoliation – Not Sufficiently Pled

The Court decided that it did not need to decide, at this time, whether to recognize a tort of third-party intentional spoliation because this tort requires an allegation that the defendant intended to harm Ms. Lips' interests. The Court noted that "[e]very jurisdiction that recognizes a third-party intentional spoliation tort requires specific intent by the defendant to disrupt or injure the plaintiff's lawsuit." *Id.* Ms. Lips conceded, however, that she did not allege that the Hospital lost or destroyed the evidence with the intent to disrupt her case. *Id.* Further, her complaint did not assert any facts from which such an intent might reasonably be inferred. *Id.* Therefore, the Court left open that possibility that it could, in the future, recognize a separate tort of

third-party intentional spoliation under different circumstances.

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ARKANSAS - DISTRICT COURT

Federal District Court Applies Component-Parts Doctrine to Arkansas Case

Davis v. Goodyear Tire & Rubber Co., 2010 WL 1710001 (E.D. Ark. April 26, 2010)

In *Davis v. Goodyear Tire & Rubber Co.*, 2010 WL 1710001, the Untied States District Court for the Eastern District of Arkansas found that Arkansas courts "applied" the component parts doctrine and used it to grant a Motion for Summary Judgment for Goodyear.

Plaintiff, Joshua Davis, was injured while working at the Almatis manufacturing plant on March 11, 2008. He claimed that he was working alongside a hose-fitting assembly when a burst in the assembly sent a stream of fluid in his direction. The assembly consisted of multiple components, including metal fittings, band clamps, and a rubber hose. The Defendant, Goodyear Tire & Rubber Company, manufactured the hose and supplied it in bulk to hose distributors. Almatis purchases reels of the rubber hose in bulk from one or more distributors.

The Almatis maintenance department maintained an inventory of rubber hose, metal fittings, and metal band clamps that it used to fabricate the hose-fitting assemblies. Once the hose-fitting assemblies were fabricated, Almatis personnel installed them on the equipment where they were needed. Goodyear did not design, control, test, or otherwise participate in the fabrication of the hose-fitting assembly in this case.

Mr. Davis contended that the hose had a limited range of uses and Goodyear reasonably should have been aware that a hose purchased for carrying liquid under pressure would require a clamp or fitting. Mr. Davis also argued that Goodyear should have provided instructions or warnings as to the proper size or type of metal fittings or band clamps to be used with the industrial hose that caused his injury. Therefore, he filed suit against Goodyear for strict products liability; negligence in design, manufacture, and distribution of the hose, failure to warn, and breach of implied warranty.

Mr. Davis' sole liability expert found no manufacturing defect in the hose, so he abandoned all claims except his negligence claim for failure to warn. Goodyear filed a motion for summary judgment on the issue based on the component-parts doctrine. Mr. Davis responded by arguing that Arkansas courts have not adopted the doctrine.

The District Court found that although Arkansas courts have not specifically adopted the component-parts doctrine, they have utilized it to find no genuine issues of material fact in a prior products-liability case. *Wagner v. General Motor Corp.*, 258 S.W.3d 749 (Ark. 2007). There, the court stated that the component-parts doctrine "provides that suppliers of inherently safe component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component-part supplier did not design or build." The court continued stating that, "the doctrine applies to claims of both negligence and strict liability." *Id.*

Based upon that "application," of the component-parts doctrine, the District Court granted Goodyear's Motion for Summary Judgment. The Court found that the Goodyear hose was not defective, had multiple safe uses, and was not inherently dangerous. Ultimately, the Court held that because Goodyear did not design,

control, test, or otherwise participate in the fabrication of the hose-fitting assembly, it was entitled to summary judgment on Mr. Davis' failure to warn claim pursuant to the component-parts doctrine.

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COLORADO

Colorado Supreme Court Holds That A Release Form A Consumer Signs Before Using A Product Does Not Prohibit The Consumer From Bringing A Strict Products Liability Claim Against The Product's Manufacturer

Boles v. Sun Ergoline, Inc., 223 P.3d 724 (Colo. Feb. 8, 2010).

Before Boles used an upright tanning booth at a tanning salon, she signed a release form that contained the following exculpatory agreement: "I have read the instructions for proper use of the tanning facilities and do so at my own risk and hereby release the owners, operators, franchiser, or manufacturers, from any damage or harm that I might incur due to use of the facilities." After entering the booth, several of Boles's fingers came in contact with an exhaust fan located at the top of the booth, partially amputating them. Boles brought a strict products liability claim against Sun Ergoline, Inc. ("Sun"), the booth manufacturer.

Sun moved for summary judgment arguing the release barred Boles's claims. The trial court applied a four-part test from *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) to determine whether the release was valid or void as against public policy. Concluding the release was valid under the factors, the trial court granted the summary judgment. The Colorado Court of Appeals affirmed and Boles appealed to the Colorado Supreme Court.

The Colorado Supreme Court reversed. It held: "We designed the Jones factors to ensure that agreements to release a party from liability for its simple negligence, although not void as against public policy in every instance, are closely scrutinized for particular circumstances or context that might nevertheless render them invalid." Strict products liability, unlike negligence, is "premised on the concept of enterprise liability for casting a defective product into the stream of commerce." Therefore, strict products liability is governed by public policy concerns unique to the consumer/manufacturer relationship. The Court stated that because the Jones factors were designed to determine when releases from liability for negligence are valid, given the differences between negligence and strict products liability, the Jones factors are not applicable to strict liability claims.

The Court held manufacturers have an economic incentive to make their products safe because they are in a position to spread the risk to all consumers. Allowing a release with language prohibiting these claims would eliminate this incentive. Thus, the Court ultimately held a release of strict products liability claims against manufacturers is invalid as against public policy.

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FLORIDA

Florida Fourth District Finds Marsh Standard Trumps Frye in State Court

Hood v. Matrixx Initiatives, Inc., 35 Fla. Law Weekly D2827 (Fla. 4th DCA Dec. 15, 2010)

Florida's Fourth District Court of Appeal in *Hood v. Matrixx Initiatives, Inc.*, 35 Fla. Law Weekly D2827 (Fla. 4th DCA December 15, 2010), recently addressed the applicability of the standards set forth in the U.S. Supreme Court's decision in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), (followed in Florida instead of Daubert's standards), to expert testimony in a product liability action.

The plaintiff in *Hood* alleged he lost his sense of smell as a result of using Zicam's gel nasal spray. Plaintiff sued the corporate entities involved in the development, manufacturing, marketing, or retail sale of the Zicam gel, and alleged strict liability, negligence and breach of warranty theories of recovery.

In support of the causation element, plaintiff offered the opinion testimony of Dr. Bruce Jafek, a professor of otolaryngology at the University of Colorado's School of Medicine. Dr. Jafek examined the plaintiff and prepared a report which addressed the plaintiff's medical history, the results of the medical examination, and the doctor's review of the medical and scientific literature. Dr. Jafek concluded his report with the opinion that plaintiff's use of Zicam was the cause of his loss of smell. The doctor also opined that the plaintiff's allergies, medications, past history, social history, family history and other medical history were not contributing factors.

Dr. Jafek's foundational opinions included that: the Zicam nasal gel can reach the olfactory epithelium; the active ingredient in Zicam, zinc gluconate, is toxic to the olfactory epithelium; and, zinc gluconate is toxic to the olfactory epithelium in the amounts delivered by the Zicam pump.

The defendants moved to exclude the opinion testimony of Dr. Jafek, plaintiff's sole causation expert, and for summary judgment. They argued that Dr. Jafek's causation opinion that Zicam nasal gel reached the plaintiff's olfactory epithelium failed to meet the *Frye* test for two reasons. First, his opinion was not scientifically accepted by the relevant scientific community. Additionally, the opinion concerning the toxicity of zinc gluconate was new and novel, and not based on scientific principles.

The plaintiff opposed the defendants' motion by arguing that his expert's opinion was "pure opinion" not subject to *Frye* and admissible under the Florida Supreme Court's decision in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). He also contended that Dr. Jafek's opinion was admissible because it was based on a "differential diagnosis."

The trial court granted the defendants' motion to exclude Dr. Jafek's general causation opinion, ruling it did not meet the *Frye* standard for the admissibility of expert scientific testimony. The court also granted the defendants' motion for summary judgment.

The Fourth District reversed on appeal, finding that Dr. Jafek's opinion, although excluded by federal courts, is admissible in Florida under *Marsh*. "Our understanding of *Marsh* is that where the scientific literature recognizes an association or possible etiology between a medical condition and a predicate event, a medical expert may render a medical causation opinion based on a differential diagnosis." "Dr. Jafek may testify to any 'pure opinion' he formed based upon his review of Mr. Hood's medical history, his clinical physical examinations, his personal experience, published research, and differential diagnosis." The district court also held that Dr. Jafek could not, however, rely on his cadaver

experiments - which were "new and novel" experiments - to form a causation opinion.

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IDAHO

Implied Condition Precedent in Wrongful Death Statute is not Applicable to the Statute of Limitations

Castorena v. General Electric, et al., 238 P.3d 209 (Idaho 2010)

The heirs and personal representatives of the decedents filed wrongful death suits against various manufacturers of asbestos-containing products or machinery alleging that due to the exposure to the asbestos-containing products, the decedents contracted asbestos-related illnesses which led to their eventual deaths. Each lawsuit was filed within two years of the date of each respective decedent's death. However, each decedent had been diagnosed with an asbestos-related illness more than two years prior to his death, so his personal injury claims against the same manufacturers were barred by the personal injury statute of limitations prior to death.

In two separate cases, the district court granted summary judgment in favor of the manufacturers on the basis that wrongful death actions by the heirs and personal representatives were barred by application of the condition precedent rule under Idaho's wrongful death statute, I.C. § 5-311 . The cases were decided by the district courts under a two-step analysis: (1) Idaho's wrongful death statute, I.C. § 5-311, contains an implicit condition precedent rule that the decedent's heirs cannot bring a cause of action against a tortfeasor unless the decedent himself could have brought a cause of action against that tortfeasor, had he lived; and (2) since the decedents would have been barred from bringing suit against the manufacturers, as the statute of limitations had run as to their own claims prior to death, the heirs' wrongful death claims were barred by the condition precedent rule. The two separate orders of summary judgment by the district court were consolidated on appeal.

The heirs and personal representatives argued that Idaho's wrongful death statute does not contain a condition precedent and that the omission of the condition precedent language from Idaho's wrongful death statute demonstrated a legislative intent to deviate from the statutory model of Lord Campbell's Act, which formed the basis of all American wrongful death statutes. They argued that unlike Idaho's wrongful death statute, Lord Campbell's Act contained express language providing that in order to maintain a wrongful death action, the act complained of must have been such that the decedent would have been entitled to maintain an action had death not ensued. In rejecting this argument, the Idaho Supreme Court pointed out that the Idaho wrongful death statute was based on the California wrongful death statute, which did not contain the condition precedent language in Lord Campbell's Act, but which was interpreted as containing an implied condition precedent rule. The court noted that Idaho courts have long interpreted the Idaho wrongful death act as containing a condition precedent rule.

Nonetheless, guided by its decision in *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 673 P.2d385 (Idaho 1983), the Idaho Supreme Court construed the condition precedent rule narrowly, holding that the rule merely required that the injury causing the decedent's death must have been an actionable wrong as to the decedent. The implied condition precedent rule did not apply to the statute of limitations

prior to death, and thus, even if the decedent's own cause of action would have been barred by the statute of limitations, the statute of limitations on the wrongful death action did not begin running on the heirs' wrongful death claims until the decedent's death because the cause of action for wrongful death does not accrue until death occurs. Accordingly, the Idaho Supreme Court reversed the district courts' grants of summary judgment in favor of the manufacturers and remanded the cases for further proceedings in the district court.

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ILLINOIS

Proximate Cause – Illinois Supreme Court Defines When A Defendant Can Point To The "Empty Chair" As Proximate Cause Of An Injury

Ready V. United/Goedecke Services, Inc., 238 Ill. 2d 582 (Ill. 2010)

The issue that faced the Illinois Supreme Court was whether a jury instruction on sole proximate cause should always be given in light of the Court's prior ruling that nonsettling defendants can introduce evidence that the settling defendants are the sole proximate cause. The Court previously dealt with a product liability issue in an asbestos litigation where many of the defendants had previously settled out of the case leaving one defendant alone at trial. *Nolan v. Weil-McLain*, 233 Ill. 2d 416 (Ill. 2009). In *Nolan*, the Court ruled in an asbestos litigation that the trial court erred in preventing the nonsettling defendant from presenting evidence to support its sole proximate cause defense. The Illinois Supreme Court held that the exclusive burden to prove the element of causation rests squarely with the plaintiff and that a defendant has the right to rebut any causation evidence by establishing that the conduct of another causative factor, even from a settling defendant, is the sole proximate cause of the injury. This was a sweeping victory for defendants in product liability cases in Illinois as typically many defendants settle before trial leaving usually one defendant trying the case to verdict. Thus, the sole proximate cause defense became a valuable option for defendants in product liability cases from this case forward to try cases without fear of not being able to raise this defense and thereby paying for the settling defendants' liability.

At the core of the case at hand was an expansion of the prior holding in *Nolan* that the defendant has the right to present evidence that a settling defendant or some other entity was the sole proximate cause of plaintiff's injury. The Court had to decide whether a defendant in all tort cases was entitled to the sole proximate cause jury instruction in light of the *Nolan* holding. The Illinois Supreme Court reviewed the testimony in this negligence case to determine whether the defendant's presentation of evidence warranted a jury instruction regarding sole proximate cause. The Court held that the defendant did not establish enough evidence to remove themselves from being a possible cause of plaintiff's injury. Basically, the Court held

that there was evidence in cross examination of defendant's main witness, which showed that defendant had significant control in this construction project. This evidence alone was enough to rebut any evidence that the nonsettling defendant put forth in trying to establish that the settling defendants were the sole proximate cause. With the testimony from the defendant that they still retained significant control, the Court ruled that the jury could find that this defendant was "a proximate cause", meaning that the "settling defendants could not have been the sole proximate cause." *Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 594 (Ill. 2010).

As such, the lack of issuance of the sole proximate cause instruction was not an abuse of discretion and was considered harmless since no reasonable jury could find from all of the evidence that the defendant was not at least a cause of plaintiff's injury. While the prior Illinois Supreme Court decision granted defendants the ability to produce evidence to largely point the finger at the settling defendants as the sole proximate cause, it narrowed their defense in this holding and raised the defendant's burden to establish enough evidence in order to warrant a jury instruction on sole proximate cause. As is typical in many of product liability cases, settling defendants may hold some culpability, but it is up to the nonsettling defendant to establish enough evidence to remove themselves as a possible cause of plaintiff's injury in order for the jury to be read the sole proximate cause instruction. Thus, while the *Nolan* case was a sweeping victory for product liability and construction defendants, the *Ready* holding narrowed that victory by making sure that the defendants produce sufficient evidence to establish their sole proximate cause defense as well as counter plaintiff's attempt at rebuttal of this defense.

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INDIANA

Indiana Supreme Court Reallocated Fault and Reduced Damages in a Wrongful Death Appeal

TRW Vehicle Safety Systems, Inc. v. Moore, 936 N.E.2d 201 (Ind. 2010)

The belted-in decedent was ejected through the sunroof of his Ford Explorer during a roll over that followed a tire failure. He was survived by his wife and one minor son. At the conclusion of a 14-day trial, the jury found the damages to be $25,000,000 and allocated fault to the decedent at 33%, Ford at 31%, Goodyear Tire and Rubber Company at 31% and TRW Vehicle Safety Systems at 5%. The Supreme Court reversed the judgment as to TRW, reversed the allocation of fault to Goodyear and reversed the determination of total damages.

The court applied Indiana Evidence Rule 702 to the testimony of a biomechanical engineer who gave medical causation testimony. The trial court had instructed the jury not to consider the testimony in terms of medical causation and the Supreme Court found no abuse of discretion. TRW challenged the trial court's denial of its Motion for Judgment on the Evidence. The plaintiff's theory of liability against TRW was that it placed into the stream of commerce a defectively designed, unreasonably dangerous product - the seatbelt assembly. The plaintiff's claims were based on a design defect and the Indiana Product Liability Act substitutes a negligence standard for strict liability in a design defect matter. The court noted that a party may not change its theory of liability on appeal as the plaintiff attempted to allege a claim other than a design defect against TRW and found that the evidence was insufficient to establish that TRW failed to exercise reasonable care

and vacated the judgment against TRW.

The jury awarded $25,000,000. The amount of damages is governed by the evidence, not the amount that plaintiff's counsel requests in closing argument. It was not the product of passion or prejudice due to plaintiff's inflammatory comments during the closing argument. Under Indiana's Wrongful Death Act, damages are limited to dependent children and the court found that awarding the son's damages for a period after his eighteenth birthday was not supported by the evidence. The court ruled that the plaintiff could accept the determination of total damages in the sum of $15,974,583 and granted a new trial subject to the remittitur.

The case was remanded for a new trial on the allocation of fault between Ford and the decedent, a trial on total damages unless the plaintiff accepted the remittitur, and stated that judgment would be in favor of Ford if the decedent's fault was greater than 50%.

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KANSAS

Kansas Supreme Court Indicates a More Critical Threshold for the Admission of Expert Testimony

Kuxhausen v. Tillman Partners, L.P., 241 P.3d 75 (Kan. 2010)

In *Kuxhausen*, plaintiff sought damages against building owner for exposure to toxic fumes in the workplace. Plaintiff's expert testified that plaintiff suffered from multiple-chemical sensitivity. The district court granted summary judgment for the defendant, finding that plaintiff's expert's opinion on causation would be inadmissible at trial under expert standards set forth in K.S.A. §60-456(b) because the expert testimony lacked a sufficient factual basis.

The Kansas Supreme Court agreed with the district court that plaintiff's expert's testimony lacked sufficient factual basis to assert the multiple-chemical sensitivity opinion. Specifically, the Supreme Court described plaintiff's expert's opinion as "based on nothing more than *post hoc ergo propter hoc* logic: the symptoms follow the exposure; therefore, they must be due to it." *Id.* at 81. In striking the expert's opinion, the court emphasized the lack of a sufficient factual basis for the opinion. This language from the court brings to mind the reliability prong of *Daubert* analysis which requires that, to be admissible, an expert's opinion be sufficiently tied to the underlying facts of the case. The *Kuxhausen* decision should bolster the argument for the inadmissibility of expert opinions where supposition and conjecture are offered without sufficient regard to the established facts of the case.

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KANSAS - DISTRICT COURT

2010 Developments in Kansas Product Liability Law

Stephenson v. Honeywell Int'l, Inc., 703 F. Supp. 2d 1250 (D. Kan. 2010)

A Kansas federal district court found that a defendant who substantially reconditions a product may be a "manufacturer" for product liability purposes, but cannot be strictly liable unless the product is re-sold to a new owner following the work. The case is *Stephenson v. Honeywell Int'l*, *Inc.*, 703 F. Supp. 2d 1250 (D. Kan. 2010).

In this wrongful death case (which was removed from state court), the heirs and estates of four airplane passengers who died in a 2005 plane crash brought claims of strict liability and breach of implied warranty against defendant, which had substantially repaired and reconditioned the left engine of the plane. At the time of the crash, the plane was loaded in excess of its maximum certified gross weight. Plaintiffs alleged that the crash was caused by the failure of the left engine following takeoff, and that defendant had negligently repaired the engine two years before the accident. Plaintiffs conceded that their claims were not based upon the existence of a defect in the left engine as originally manufactured and sold in 1979. Instead, plaintiffs argued that defendant's repair of the engine in 2003 was so extensive that it amounted to a remanufacture or complete overhaul of the engine.

The district court found that Kansas law does not recognize claims for strict product liability or breach of implied warranty that are founded solely on the alleged defective repair of a product. Kansas's Product Liability Act does, however, define a "manufacturer," subject to strict liability, to include an entity who re-manufactures a product.

Applying the express language of the Kansas Product Liability Act (K.S.A. § 60-3302), the district court found that the existence of a sale following this recondition is necessary to support claims for strict liability and implied warranty. Because Kansas law requires that a defect exist "at the time of the sale of the product," "sale" is the operative event that triggers a product liability claim. "A negligence analysis is more appropriate" when analyzing a defendant's conduct in a post-sale context.

While substantial reconditioning of a product may be sufficient to render the defendant a "manufacturer" who has "remanufactured" the product, the defendant must perform that reconditioning "before [the product's] sale to a user or consumer." Because in this case the original owner retained title to the plane engine during and after the repairs, there was no sale by the defendant, and, thus, plaintiffs' strict liability and warranty claims were barred as a matter of law. With the Stephenson decision, Kansas joins the majority of jurisdictions that bar product liability claims against defendants who simply repair products.

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KENTUCKY

The Quantum of Proof Necessary to Justify Apportionment Against Empty-Chair Defendants

CertainTeed Corp. v. Dexter, 2008-SC-000886-DG, 2010 Ky. LEXIS 299 (Ky. Dec. 16, 2010)

The plaintiff worked as a pipefitter for more than thirty-five years. During this period, he was exposed to asbestos. The plaintiff was later diagnosed with lung cancer, which was caused by his exposure to asbestos.

The plaintiff sued nineteen corporate defendants, including Appellant, CertainTeed Corporation (hereinafter "CertainTeed"). All defendants either manufactured products to which the plaintiff was exposed that contained asbestos or owned premises where the plaintiff worked and was exposed to asbestos.

Before trial, seventeen of the nineteen defendants were either granted summary judgment or settled with the plaintiff, leaving only CertainTeed and one other product manufacturer as defendants.

At trial, evidence was introduced showing that the plaintiff was exposed to the products of both the participating and empty chair defendants, that any exposure to asbestos would have caused his injury, and that the asbestos industry had known prior to the plaintiff's exposure that asbestos could cause lung disease and cancer. At trial, proof also demonstrated that the plaintiff was only exposed to CertainTeed's products for roughly one week of his thirty-five year career.

The jury found in favor of the plaintiff, and returned a verdict awarding $66,376 for past medical expenses, $5,000,000 for pain and suffering, and $6,750 for funeral expenses. The jury apportioned 35% fault to the plaintiff, 35% fault to the other participating defendant, and 30% to CertainTeed. The jury apportioned no fault to the seventeen empty chair defendants. The trial court granted a new trial due to the jury's failure to allocate any fault to any of the empty-chair defendants.

The specific issues addressed by the Kentucky Supreme Court were whether the trial court erred by ordering a new trial and what quantum of proof is required before it can be proper to apportion fault to empty chair defendants.

On the issue of the quantum of proof required before a jury may be allowed to apportion fault to empty chair defendants, CertainTeed argued that a participating defendant only has to demonstrate that it was not the cause of at least a portion of the Plaintiff's injury. If it does, CertainTeed argued, then it has satisfied its burden and the jury should be instructed that fault should be apportioned. The Court disagreed. Rather, it found that the same burden of proof is on the defendant who is attempting to shift liability as is on a plaintiff who is attempting to impose liability on the defendant. The Court reasoned that:

> Empty chair defendants who have settled are treated no differently than participating defendants in regards to what must be proved to apportion fault against them. Though the empty-chair defendant will not actually be held liable in the trial since it is literally not on trial, a participating defendant must still prove liability on the part of the tortfeasor onto whom it seeks to shift some of the blame.

Id. at 18.

Despite the ruling regarding the necessary quantum of proof, the Court upheld the trial court's ruling ordering a new trial. After analyzing the underlying trial, the Court found that the trial court was not "clearly erroneous" in finding that CertainTeed had put forth a sufficient amount of proof to demonstrate that other defendants, were, in

fact, liable for a portion of Plaintiff's injuries.

The Discovery Rule Is Limited To Cases Involving Latent Injuries, Latent Diseases, or Professional Malpractice; And The Failure of a Manufacturer To Disclose Product Defects To A Governmental Agency Is Not Action Sufficient To Equitably Estop That Defendant From Asserting The Statute of Limitations As An Affirmative Defense

Fluke Corporation v. LeMaster, 306 S.W.3d 55 (Ky. 2010).

On April 25, 2000, the plaintiffs were electrocuted while working on a large piece of machinery at a coal processing tipple. Before beginning work, one plaintiff applied a hand-held voltage meter manufactured by the defendant Fluke Corporation (hereinafter "Fluke"). The voltage meter indicated that no electricity was flowing through the machine's circuit breaker. The plaintiffs thereafter began working on the machine until an electrical arc surged through the cabin of the machine, causing an explosion.

The Kentucky statute of limitations for personal injury actions is one year. KRS 413.140(1)(a). In April 2001, the plaintiffs sued the owner of the tipple. Importantly, the plaintiffs did not sue Fluke at this time. In September 2001, Plaintiffs amended their complaint to include Fluke.

Shortly after the lawsuit was amended, Fluke moved for summary judgment, arguing that the statute of limitations for personal injury had lapsed. The plaintiffs argued that their claims were timely filed due to the discovery rule - a rule that tolls the statute of limitations in certain actions - and principles of equitable estoppel. The trial court ruled in favor of Fluke.

The Kentucky Court of Appeals vacated the trial court's ruling, finding that Fluke was equitably estopped because it had failed to comply with a duty to report consumer product hazards under the Consumer Product Safety Act.

a. **The Court Refused To Extend Kentucky's Discovery Rule Beyond Latent Injuries, Latent Illnesses, Or Professional Malpractice.**

Under the Kentucky discovery rule, "a cause of action will not accrue until the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) not only that he has been injured, but also that this injury may have been caused by the defendant's conduct." *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 819 (Ky. 1991). The discovery rule, however, is available only where "the fact of the injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence such as in cases of medical malpractice or latent injuries or illness." *Le Master*, 306 S.W.3d at 60.

The first issue addressed by the Court was whether the plaintiffs could extend the discovery rule beyond latent injuries, illnesses, or professional malpractice to include situations involving immediately apparent injuries caused by products not known to be defective. The Court refused to extend the discovery rule to such situations, holding that when a plaintiff's injuries are immediately apparent, he should reasonably suspect that the product associated with the injury was not working properly and investigate the malfunctioning as a possible avenue of recovery.

b. **Failure To Report Product Defects To A Governmental Agency Will Not Equitably Estop A Defendant From Asserting The Statute Of Limitations As An Affirmative Defense.**

The next issue decided by the Court was whether failing to re-

port potential problems in a product pursuant to the Consumer Protection Act equitably estopped Fluke from relying on the statute of limitations. The Court held that it did not. In doing so, the Court stated that under Kentucky law equitable estoppel requires both a material misrepresentation by one party and reliance by the other party, which did not occur in this situation. The Court, therefore, refused to hold that failure to report potential problems to a governmental organization, such as the Consumer Product Safety Commission, excused a plaintiff's duty to exercise due diligence to investigate where the product's potential role in causing the plaintiff's injury is immediately evident.

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LOUISIANA

Possible Erosion of the "Alternative Design" Defense Afforded Manufacturers Under the Louisiana Products Liability Act

Terri Davis, et. al, No.94-11684, Civil Dist. Court, Parish of Orleans, State of Louisiana

Perhaps one of the most significant, recent cases to affect the interpretation of Louisiana's Product Liability Act ("LPLA") is a matter that has not yet fully garnered the attention of plaintiff attorneys or the appellate courts, yet the possibility that a significant interpretation of the LPLA will occur is likely. If the current ruling of the trial court is upheld, the application of the LPLA as it pertains to the "alternate design" defense currently afforded to manufacturers under the LPLA will be drastically eroded.

The *Davis* Cases

The case *sub judice* is a series of cases consolidated under the title case *Terri Davis, et. al vs. American Home Products Corporation*, case number 1994-11684 c/w 1994-12699 c/w 1995-3139 pending in Civil District Court for the Parish of Orleans, State of Louisiana. The matters were certified as a class and the case is still in a pre-trial stage, but there has been a significant summary judgment ruling that may alter the product liability landscape in Louisiana if maintained. Trial is scheduled to begin March 14, 2011.

The *Davis* cases are claims involving the Norplant contraceptive device. The Norplant device was developed in Finland in 1983. It was first approved for use in the United States in 1990 and was subsequently marketed the following year by American Home Products Corporation, d/b/a Wyeth-Ayerst Laboratories ("Wyeth"), the primary defendant in the *Davis* cases.

The Norplant Device

The original Norplant device was a series of six capsules implanted subcutaneously in a "fan" shape in the inner, upper arm of the recipient female. The Norplant device, however, had some side effects which contributed to its decline in usage and eventual unavailability in the United States following what appeared to be a voluntary discontinuation by Wyeth in July of 2002. Those side effects commonly included heavy menstruation, nausea, hair loss, dizziness, and headaches which the plaintiffs contend were avoidable with an alternative design.

The Louisiana Products Liability Act ("LPLA")

The Louisiana Product Liability Act, La. R. S. 9:2800.51-60, sets forth the exclusive remedies against manufacturers for dam-

ages caused by its products. A product is "unreasonably dangerous if and only if": 1) the product is unreasonably dangerous in **construction or composition**; 2) the product is unreasonably dangerous in **design**; 3) the product does not contain **adequate warnings**; or 4) the product does not conform to an **express warranty** made by the manufacturer. La. R. S. 9:2800.54.

The *Davis* claimants have made a claim against Wyeth under the second theory of liability, that being defective *design*. Claimants must initially prove two things to prevail: 1) there ***existed*** an alternative design to the product that would have prevented the claimant's damages, and, 2) the utility of that alternative design, and its likelihood to prevent damages to the claimant, outweighed the burden on the manufacturer to adopt the design. However, even if the claimant can prove both of these required elements, a manufacturer can nevertheless avoid liability if it can show, in light of the "then-existing reasonably available scientific and technical knowledge", that it did not know or could not have known that the complained of design characteristic was dangerous, or that the alternative design identified by the claimant existed, or that the alternative design was feasible. La. R. S. 9:2800.59. At issue in the *Davis* case is the meaning of the Product Act word "existed" in the phrase "There existed an alternative design", the first element of proof required of claimants. Historically, the jurisprudence has been fairly consistent in requiring a claimant to prove an alternate design ***actually existed.***

Wyeth's Motion for Summary Judgment- No Alternative Design Existed

Wyeth filed for summary judgment on the grounds that the plaintiffs could not prove that when the Norplant devices left Wyeth's control, "…There existed an alternative design for the product that was capable of preventing the claimant's damage…". In attempting to defeat the motion, plaintiffs' expert, Dr. James Benson, suggested that the Norplant device ***could have been*** significantly improved in various respects with simple modification. However, Wyeth pointed out that the expert's proffered alternative design was not ***in existence*** at the time that Norplant was distributed, and in fact was only conceived in 2006 only after Dr. Benson was retained as an expert in the case.

The plaintiffs did not try to suggest that the alternative design actually existed as had always been required under the LPLA. Rather, they argued that the alternative design could have been, and should have been, in existence. They focused their argument on the affirmative defenses established under the LPLA (regarding knowledge) and skipped over the initial burden of proof required. In successfully defeating the motion, the plaintiffs argued that the "then-existing reasonably available scientific and technological knowledge" could have produced the alternative design, and that Dr. Benson did not extrapolate any ideas that could not have been conceived back in 1990 when the product first was introduced in the United States. Plaintiffs argued that Dr. Benson's ideas in improving the Norplant were rather simplistic and came from an article written by two scientists in 1960, Dziuk and Cook, which was also the inspiration for the original Norplant design. Plaintiff's Opposition to Wyeth's Motion for Summary Judgment, page 5.

The trial court judge denied Wyeth's motion for summary judgment, but encouraged the parties to seek appellate review, no doubt in light of the prior jurisprudence, her perceived vagueness of the "existed" wording of the statute, and the significance of continuing the massive litigation should Wyeth's motion be well founded. Wyeth sought writs with the Louisiana Fourth Circuit Court of Appeal. This intermediate court declined to exercise supervisory authority. In its brief statement the three judge panel wrote:

> A fact is material if it potentially insures or precludes recovery, affects a

> litigant's ultimate success, or determines the outcome of the legal dispute. *Hines v. Garrett*, 2004-0806, p. 1 (La. 6/25/04), 876 So. 2d 764, 765. Because genuine issues as to material fact exist in this matter, we find no error in the district court's denial of relator's motion for summary judgment. La. Code Civ. Proc. Art 966(c). *Terri Davis, et.al v. American Home Products Corporation*, Case No. 10-1404, Louisiana Appellate Fourth Circuit, order dated October 10, 2010.

The Fourth Circuit did not indicate what facts it thought were still at issue, and the trial court was no doubt perplexed by the Court's inaction. To clarify the nature of her ruling, and in the hopes of obtaining some direction and clarification from the appellate court, the trial judge issued a Per Curiam to the Fourth Circuit two days later, which stated in pertinent part:

> …the Court found that the law was not clear regarding the burden of proof placed on plaintiff under the LPLA. More specifically, the Court found that the meaning of the word "existed" within the statute is ambiguous, and in so finding, the Court determined that the meaning of the word "existed" could be read to include a claim on behalf of the plaintiffs if the scientific knowledge and/or technology was available at the time a product left a manufacturer's control. Thus….this court denied the Defendant's Motion for Summary Judgment, in hopes that the Fourth Circuit and perhaps the Louisiana Supreme Court would provide guidance over this issue.

Upon application for rehearing, the Fourth Circuit again declined to address the issue, indicating that a case cannot be considered for rehearing if it has previously been denied for review. Wyeth then sought review with the Louisiana Supreme Court, arguing that the issue presented was not one of fact, but of law and interpretation of the LPLA. The case and the pending writ request, which in Louisiana is purely discretionary with the Court, gathered the attention of several manufacturer associations. *Amicus curiae* briefs urging the Louisiana Supreme Court to grant writs and to uphold the prior interpretations of the statute were filed on behalf of the Louisiana Association of Business and Industry, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Product Liability Advisory Council, Inc., who all urged for a continuation of "… the certainty and predictability that are hallmarks of the LPLA" and not to take a judicial "step backward". Amicus Curiae Brief on Behalf of Products Liability Advisory Council, Inc., page 5; *Terri Davis, et.al v. American Home Products Corporation*, Docket No. 10-CC-2379, Louisiana Supreme Court.

However, despite the request of the trial court (and others) for guidance, and what appears to be clearly a question of law, the Louisiana Supreme Court denied writs without reasons on November 19, 2010. In a six judge panel, only Justice Jeffery P. Victory voted to grant the writ.

Conclusion

The ultimate result this case may have in interpreting the LPLA is troubling to manufacturers and the defense bar in Louisiana. Unfortunately for the trial attorneys in the *Davis* cases, the matter will have to be litigated at great expense through trial, and possibly appeal, before a final outcome is achieved. Although the appellate courts have thus far declined any significant involvement in the case, this is, and may yet be to a greater degree in the future, a case of heightened concern to many in Louisiana and to those who place their products into Louisiana's stream of commerce.

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MARYLAND

Asbestos Plaintiffs Must Properly Identify Defendants' Specific Products Within the Plaintiffs' Specific Work Site

Reiter v. Pneumo Abex, L.L.C., 417 Md. 57; 8 A.3d 725; 2010 Md. LEXIS 696 (Nov. 19,2010)

In the asbestos case of *Reiter v. Pneumo Abex, LLC*, Maryland's highest court held that the Plaintiffs did not generate a jury issue on the question of whether any of the Defendants' products were used at the specific site where the Plaintiffs actually worked.

Reiter arose out of the consolidated appeal of three (3) Plaintiffs who worked as steel workers at Bethlehem Steel in the Sparrows Point facility. The Plaintiffs were William Johnson, William Reiter, and Harold Williams, and they alleged that the Defendants' asbestos-containing products caused them personal injuries. Plaintiff Johnson worked in Bethlehem Steel's slab yard for approximately twelve (12) years; Plaintiff Reiter worked in Bethlehem Steel's tin mill for approximately 53 years; and Plaintiff Williams worked around the entire facility for approximately 29 years.

The Plaintiffs alleged that Defendants Cutler-Hammer, Square D, and Pneumo Abex manufactured asbestos-containing brakes, which were used on cranes around the Plaintiffs' respective work sites. The Plaintiffs alleged that they were exposed to fibers and dusts from those brakes, which caused them personal injuries.

In determining whether the Plaintiffs sufficiently identified the Defendants, the Court of Appeals first considered the "specific site" where each plaintiff worked because the Plaintiffs must produce evidence of exposure to a specific product on a regular basis, over some extended period of time, in proximity to where the Plaintiffs actually worked. The Court held that Plaintiffs' specific site was limited to the area in the facility where the Plaintiffs worked on a day-to-day basis. The Court found that it is insufficient to merely prove that the Defendants manufactured asbestos containing products that were located on the premises of the facility. Instead, the Court held that the Plaintiffs had to identify the Defendants' products in the limited area in which the Plaintiffs actually worked.

The Court found that Plaintiff Reiter only proved that Square D brakes were used somewhere on the 480-acre facility. The Court found that Plaintiff Reiter failed to establish that Square D brakes were used on the cranes in the small 50 square foot space where Plaintiff Reiter actually worked on a day-to-day basis.

The Court found that Plaintiff Williams failed to identify which Defendants' asbestos products were used on the crane at the specific site where Plaintiff Williams worked. Again, the Court limited the specific site to a small area in which Plaintiff Williams performed his day-to-day tasks.

The Court found that Plaintiff Johnson failed to produce evidence to show that Square D brakes were used on the crane in Plaintiff Johnson's specific work site in the slab yard. There were six (6) cranes in the slab yard, so Plaintiff Johnson had to identify the asbestos product on the specific crane on which he worked.

Therefore, since each Plaintiff failed to specifically identify the Defendants' products in the limited area in which they worked, the Court held that the Defendants were entitled to summary judgment.

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MASSACHUSETTS

Massachusetts Reiterates Its Adoption Of The Apparent Manufacturer Doctrine

Lou v. Otis Elevator Co., 936 N.E.2d 435; 2010 Mass. LEXIS 896 (Mass. 2010)

The Background

In October of 1998, four year old Kevin Lou, a Massachusetts resident, was visiting relatives in the People's Republic of China. While descending an escalator within a department store, his hand became trapped between the escalator's skirt panel and treads, dragging him down the escalator. As a result, Lou's hand was almost severed and he suffered permanent injuries.

The escalator itself was manufactured and sold by China Tianjin Otis Elevator Company ("CTOEC"), under a license from the defendant Otis Elevator Company ("Otis"), a New Jersey Company. CTOEC, a joint venture formed in 1984 among three entities including Otis, manufactures escalators in the People's Republic of China pursuant to Otis's design standards. After forming the joint venture, Otis entered into both a trademark license agreement and a technical cooperation agreement with CTOEC. Under the trademark agreement, the joint venture obtained the right to use Otis's trademark within China. As such, the escalator at issue had an Otis trademark embossed at both the top and the bottom. Additionally, under the technical cooperation agreement, Otis agreed, among other things, to furnish (1) engineering and product design information; (2) production, installation and inspection methods; (3) quality standards; and (4) technical and managerial support. Rather than file suit in the People's Republic of China, Lou, through his parents, filed suit in Massachusetts.

The Restatement (Third) of Torts

For almost a century, Massachusetts case law has established that entities which give the deliberate appearance that a product they actively put into the stream of commerce is theirs is responsible for that product as if they were the manufacturer. Indeed, prior to Lou, Massachusetts recognized the apparent manufacturer doctrine as set out in § 400 of the Restatement, Second, of Torts (1965) ("Second Restatement"). This section states, that "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." In reviewing the application of § 400, the Appeals Court determined that the case law among the majority of jurisdictions fell into three categories: (1) a nonseller trademark licensor could be liable as an apparent manufacturer if it exercises substantial control over the production of products; (2) a nonseller trademark licensor may be held liable even if it had little or no participation in the production of products as buyers or users would rely on the trademark as an assurance of product's quality; and (3) a nonseller trademark licensor is not liable under the apparent manufacturer doctrine if they had little or no involvement in the production of the product.

The Court used the background of § 400 in analyzing the application of the Restatement (Third) of Torts: Product Liability § 14 (1998) (Third Restatement), which was derived from § 400. Section 14 of the Third Restatement provides:

> One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.

In explanation of § 14, Comment d states:

> Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee's

products. In these circumstances they are treated as sellers of the products bearing their trademarks.

Massachusetts Adopts Liability Pursuant to Apparent Manufacturer To a Non Seller.

Although Massachusetts previously applied the apparent manufacturer doctrine, it had not applied the doctrine to a nonselling entity outside of the distribution chain. Yet, relying on Massachusetts' rejection of contractual privity as a necessary element to recover in a product liability case, as well as case law from other jurisdictions, it determined that there was no need for the apparent manufacturer doctrine to apply only to those who "participated directly as sellers in the chain of distribution."

The Appeals Court disagreed with Otis's argument that the application of the Third Restatement improperly expanded the scope of the apparent manufacturer doctrine. In its decision, the Appeals Court found that comment d of the Third Restatement clarified the ambiguity created by the second and third category of cases decided under The Second Restatement mentioned above. Thus, the Third Restatement effectively relieves mere trademark licensors from product liability who have little or no involvement in product design or manufacture, "while leaving intact its application to cases in which the licensor had substantial participation in the design or manufacture." Thus, in cases where a nonseller truly only licenses its trademark and has little involvement in the design or manufacture of the product they will not face liability under the apparent manufacturer doctrine.

The Appeals Court also rejected the defendant's contention that imposing product liability on nonsellers ignores the separate corporate identities of the various entities. Rather to the contrary, the Court stated, "a trademark licensor who is held liable by virtue of its substantial participation in the design, manufacture, or distribution of a product is held liable as a result of its own role in placing a dangerous product into the stream of commerce." Therefore, those trademark licensors who substantially participate in creation of the product may be held liable under the new standard set out by Lou. The Lou case indicated that in determining substantial participation, the court must examine the entities' participation and role "in the design, manufacture, or distribution of the products bearing the corporation's mark as opposed to participation in merely minor, incidental or trivial respects." In Lou, the Appeals Court found there was ample evidence for a jury to find Otis had substantially participated as it provided product design, production methods, technical information and managerial support. The waters will need to be tested for clarification of where that line will be drawn with regard to what is considered sufficient participation. Thus, this inquiry will be a question of fact for a jury and will rarely be resolved by summary judgment.

Conclusion

Lou broadens the potential defendants that may be subject to liability in a product liability case. As such, in negotiating terms of licensing agreements, entities must be made aware of the potential liability for defective products when such agreements include the licensor's participation in the manufacturing, distribution or marketing of the product, regardless of whether they actually manufacture or sell the product. Such liability may even open them to a suit in a less favorable jurisdiction, as was the situation in Lou.

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MICHIGAN

Manufacturer's Duty to Warn of Dangers Associated With Another Manufacturer's Product or a Material Risk Associated With the Use of the Product

White v Victor Auto Products Inc., 2010 WL 1979249 (Mich. Ct. App. May 18, 2010), *rev'd sub nom. White v Victor Auto Prod, Inc*, 788 N.W.2d 460 (2010).

Plaintiff's decedent, Craig White, purchased a muffler repair kit manufactured and marketed by Defendants. The packaging described the product as a "Muffler and Tail Pipe Repair Kit" and stated, "Just wrap it on for instant repair." The instructions included with the kit, however, directed the user to "start the engine and run idle for at least 10 minutes" after applying the "bandage." The warning label on the package listed directly below the instructions did not advise of the dangers of carbon monoxide.

White attempted to perform the muffler repair on April 29, 2005. According to the testimony of White's wife and son, when they left the house at 11:00 a.m., White was in the driveway, working on the muffler. When they returned at about 2:15 p.m., they found White dead in the garage and with the car up on a floor jack, the motor running, and the garage door closed. An autopsy confirmed that White died of asphyxiation from carbon monoxide.

Plaintiff's Complaint alleged two violations of the duty to warn. First, Plaintiff alleged that "Defendants breached their duty of care…in failing to include an instruction with the product that vehicle should not be run in an enclosed space or must be moved outside before starting the engine as directed [in the instructions]." Second, that "Defendants breached their duty of care…in failing to warn of the dangers of carbon monoxide poisoning."

Defendants moved for summary disposition, relying on MCL 600.2948(2) which provides:

> "A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action."

Defendants' motion asserted that the "dangers of carbon monoxide poisoning are obvious and should have been a matter of common knowledge"; that the risk of injury or death from running an automobile engine in a closed garage is or should be obvious to a reasonably prudent product user; and that even if not obvious to a reasonably prudent person, the risk would or should be obvious to White because he was experienced in working on engines.

After a hearing, the trial court granted summary disposition to Defendants concluding, "Using an objective standard it's clear that the material risk of death due to carbon monoxide poisoning as a result of running a car in an enclosed garage would be obvious to a reasonably prudent user of a muffler repair kit."

Plaintiff appealed the trial court's ruling to the Michigan Court of Appeals.

The Court of Appeals, pursuant to the statute, first looked to whether a reasonable juror could find that the material risk of remaining in a closed garage with a running automobile while the muffler bandage cures is or should be "obvious to a reasonably prudent product user." The Court of Appeals concluded Defendants provided no evidence that a reasonable person would know that an exposure to automobile exhaust in a garage for the time needed to cure the muffler repair presented a risk of material harm. Under these circumstances, the Defendants were not entitled to summary disposition on the question of whether the risk of material

harm from carbon monoxide inhalation from running an automobile long enough to cure this muffler product is or should be obvious to a reasonably prudent product user.

Next, under the statute, the issue was whether the material risk "is or should be a matter of common knowledge to persons in the same or similar position" as the decedent. Defendants argued that White had work experience involving engine repair and that the material danger of exposure to exhaust for the time necessary to cure the muffler repair is common knowledge to other people in the same profession.

In ruling in favor of Plaintiff, the Court of Appeals held that Defendants' argument may very well persuade a fact finder, but it was not supported by evidence that could justify the conclusion that no reasonable juror could see the matter differently. Accordingly, the Court reversed the grant of summary disposition and remanded the matter.

The Honorable Kirsten Frank Kelly filed a dissenting opinion noting:

> "I disagree with my colleagues' conclusion that the trial court's grant of summary disposition in this matter was premature. In my review, Defendants had no duty to warn of dangers associated with another manufacturer's product. Further, assuming for the sake of argument that such a duty existed, running the engine of a car in a small, enclosed space, such as a garage, is an obvious material risk to a reasonably prudent product user and would be especially obvious to a person like decedent whose employment involved servicing and repairing engines."

Judge Kelly further stated:

> "I would note at the outset that the harm decedent suffered was a direct result of running the car's engine in an enclosed space, and not the result of following the directions for, and using, the muffler wrap. It is undisputed that the muffler wrap did not create the carbon monoxide; rather, the vehicle produced the carbon monoxide and decedent's misuse of the vehicle in an enclosed space resulted in the ultimate harm. Consistent with these facts, Plaintiff never alleged that the muffler wrap itself was dangerous or defective; rather, Plaintiff alleged that decedent's harm was caused by the carbon monoxide. Defendants, however, have no duty to warn of dangerous presence in other manufacturer's products. 'The law does not impose upon manufacturers a duty to warn of hazards of using products manufactured by someone else.' *Brown v Drake-Willock International*, 209 Mich App 136, 145; 530 NW2d 510 (1995) citing *Spaulding v Lesco International Corp.*, 182 Mich App 285, 290; 451 NW2d 603 (1990). Thus, summary disposition for Defendants on this basis would have been proper."

Ultimately, Defendants filed application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals for the reasons stated in the Court of Appeals' dissenting opinion, and reinstated the trial court's order of summary disposition.

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Michigan Adopts the Apex Deposition Rule for Corporate Officers and Executives

Alberto v. Toyota Motor Corp., 2010 WL 3057755 (Aug. 5, 2010)

In a case of first impression, the Michigan Court of Appeals adopted the apex deposition rule

("ADR") for high-ranking corporate officials, holding that the trial court abused its discretion by denying defendant's motion for a protective order to quash the video depositions of Yoshimi Inaba, Toyota's Chairman and Chief Executive Officer, and Jim Lentz, its President and Chief Operating Officer.

Ms. Alberto's product liability wrongful death action claimed that her decedent drove a 2005 Toyota Camry at a speed of less than 25 miles per hour when the vehicle suddenly accelerated to a speed in excess of 80 miles per hour. Ms. Alberto also asserted that her decedent attempted unsuccessfully to apply the vehicle's brakes, but the vehicle struck a tree, went airborne, struck another tree, and plaintiff's decedent sustained fatal injuries.

Ms. Alberto noticed the video depositions of Messrs. Inaba and Lentz pursuant to MCR 2 .306 and MCR 2.315, and Toyota moved for a protective order pursuant to MCR 2.302(C) to prevent the depositions because (i) neither Mr. Inaba nor Mr. Lentz participated in the design, testing, manufacture, warnings, sale, or distribution of the 2005 Camry, or the day-to-day details of vehicle production; (ii) neither officer had unique information pertinent to issues in the case; and, (iii) the information sought by Ms. Alberto could be obtained from those persons who had so participated or had such information. Toyota's motion was denied, and its application for an immediate appeal was granted.

The Court of Appeals reviewed the ADR as applied in the corporate context by other states and numerous federal courts, and reasoned that because the Michigan court rules contemplate such a rule and Michigan courts have in essence applied the principles of the rule to government officials, albeit without using the same terminology, and because there is no principled reason for not affording similar safeguards to corporate defendants, the ADR should be adopted in Michigan for public and private high-ranking corporate officer deponents. The Court recognized that the highest positions within a juridical entity rarely have the specialized and specific first-hand knowledge of matters at every level of a complex organization, and therefore that the ADR in the corporate context (1) promotes efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, and (2) prevents the use of depositions to annoy, harass, or unduly burden the parties. Accordingly, the ADR serves as a useful rule for trial courts to use in balancing the discovery rights of the parties.

In making its ruling, the Court of Appeals specifically noted that virtually no discovery had preceded the disputed efforts to depose Messrs. Inaba and Lentz, and that while they had a generalized knowledge of a potential unintended acceleration problem, they had no unique or superior knowledge of or role in designing the subject vehicle or in implementing manufacturing or testing processes.

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MISSISSIPPI - DISTRICT COURT

Mississippi District Court Suggests that the "Consumer Expectation" Test is Correct Standard

McSwain v. Sunrise Med., Inc., 689 F. Supp. 2d 835 (S.D. Miss. 2010)

In *McSwain v. Sunrise Med., Inc.*, 689 F. Supp. 2d 835 (S.D. Miss. 2010), the District Court granted summary judgment on plaintiff's defective design claim based on the "consumer expectation" test. Prior Mississippi holdings are equivocal as to whether the consumer-friendly "risk-utility" test or the manufacturer-friendly

"consumer expectation" test should apply. *McSwain* suggests a trend toward the latter.

McSwain ordered a new wheelchair but noticed that it lacked anti-tip tubes. McSwain attempted to move the anti-tip tubes off his old wheelchair to the new one, but they did not fit. McSwain ignored the user manual and immediately began using the wheelchair. Eventually, he tipped backwards and was injured.

McSwain sued for, *inter alia*, design defects. While the District Court found that the defendants knew of the danger (since they warned of the risk of rear tip-over and recommended anti-tip tubes) and that making the anti-tip tubes standard equipment, as opposed to optional, constituted an available feasible alternative design, it held the claim failed as a matter of law because McSwain did not present evidence that the wheelchair failed to function as expected under the "consumer expectation" test, stating "a plaintiff cannot recover for injury caused by a product when, applying the knowledge of an ordinary consumer [he] saw a danger and could have appreciated that danger." (internal citations omitted). The District Court found that this ordinary user of a wheelchair understood the safety function of anti-tip tubes, knew he needed them, was aware of their availability, yet decided to use his wheelchair without the tubes, and that because McSwain knew that use of the tubes could have prevented rear tip-over, he had assumed the risk. (The court made no mention of the "risk-utility" test.)

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MISSOURI - DISTRICT COURT

Western District of Missouri's Unreported Opinion Overrules Reported Decision on Repairers' Liability

In a year in which the Missouri Supreme Court issued no holdings of significance related to products liability and the sole Missouri Court of Appeals' decision related to product liability failure to warn claims of importance is on appeal (*Moore v. Ford Motor Co*., (SC 90681) 2011 WL 265308 (Mo.banc. Jan. 25, 2011)), it was up to the Western District of Missouri to provide an interesting series of three orders in 2010.

Background
Plaintiff filed a Complaint in the Circuit Court of Boone County, Missouri against two defendants: Bear Lake, an out-of-state gun manufacturer, and Powder Horn, a local gun shop. According to the Complaint, Plaintiff took his rifle, manufactured by Bear Lake, to Powder Horn for service. Powder Horn recommended to Plaintiff that the rifle be shipped to Bear Lake for repair. Powder Horn then shipped the rifle to Bear Lake, which cleaned and repaired the rifle and shipped it back to Powder Horn, which returned it to Plaintiff. Powder Horn did not charge for its service and had not originally sold the rifle to Plaintiff.

Later, Plaintiff fired the rifle, and it exploded, causing serious injury to his head and face. Plaintiff sought damages against Bear Lake and Powder Horn on theories of strict liability, negligence, negligent supply of a dangerous instrumentality, and *res ipsa loquitur*. Bear Lake removed the case to the Western District of Missouri based on diversity jurisdiction alleging that Powder Horn was fraudulently joined.

The Three Holdings
In the sole opinion available on Westlaw, the Western District of Missouri denied Plaintiff's motion for remand, and held that, "[b]ecause there is no reasonable basis in fact and law supporting a claim against Powder Horn, Powder Horn has been fraudulently joined." *Santoyo v. Bear Lake Holdings, Inc.,* No. 10-CV-04050-NKL, 2010 WL 2522745, *3

(W.D.Mo. June 15, 2010) (*Santoyo I*).

In *Santoyo I*, the court evaluated Plaintiff's claims against the local defendant, Powder Horn, in order to rule on Plaintiff's motion to remand and Defendants' joint contention that Powder Horn had been fraudulently joined in order to defeat removal. *Santoyo I*, at *1. The court noted that Missouri had adopted the rule of strict liability as stated in Restatement (Second) of Torts Section 402A. *Id.* at *2. Under Section 402A, strict liability may arise where the defendant is "[o]ne who sells any product in a defective condition reasonably dangerous to the user or consumer or to his property." *Id.*

Thus, under Section 402A, Plaintiff's strict liability claim against Powder Horn depended on Powder Horn being a "seller" of the rifle which allegedly caused Plaintiff's injury. *Id.* The Western District noted that while one Missouri Court had recognized that the seller of a product can be liable for its subsequent service and repairs, no Missouri court had extended this rule to "impose strict liability on repairers not connected to the original sale of the product." *Id.* (citing *Winters v. Sears, Roebuck & Co.,* 554 S.W.2d 565, 572 (Mo.App.1977)).

Because plaintiffs did not allege that Powder Horn sold the rifle or acted in any other manner to bring the store within the chain of distribution, the Plaintiffs failed "to show a reasonable basis in fact and law supporting a claim against Powder Horn based on strict liability." *Id.* Thus, Plaintiff had fraudulently joined Powder, and Plaintiff's motion to remand was denied. *Id.* at 3.

In light of the Court's holding, Powder Horn filed a supplemental motion to dismiss pursuant to F.R.C.P. 12(b)(6). The Court granted the motion four days later in a 4-line, text-only order. *Santoyo v. Bear Lake Holdings, Inc.*, No. 10-CV-4050-NKL (W.D.Mo. June 28, 2010) (*Santoyo II*).

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MONTANA

Statute of limitations tolled by class action filed in Tennessee; learned intermediatry doctrine does not preclude drug manufacturer from having a duty to warn providers other than treating physician

Stevens v. Novartis Pharmaceuticals Corp., 2010 MT 282, 2010 WL 5476690

A Missoula County jury awarded Peggy Stevens (Stevens) $3,200,000.00 in compensatory damages in Stevens' action for negligence against Novartis Pharmaceuticals Corporation (Novartis). Stevens alleged that Novartis failed to properly warn that its drug, Zometa, causes osteonecrosis of the jaw (ONJ) in patients who undergo dental surgery while taking the drug.

Stevens was diagnosed with follicular lymphona, and her oncologist prescribed Zometa in April 2002, shortly after FDA approval, when no reports of serious side effects had arisen. Such reports had circulated by August 2004, when Stevens learned that she needed to have a tooth extracted. She called her oncologist, but spoke instead to staff and locum tenens physicians, none of whom

raised any concerns. Within days after the extraction, Stevens began having pain that was later diagnosed as ONJ. Since then, she has suffered from chronic pain and constant infection, and can no longer work.

The District Court denied Novartis' motions for summary judgment based on the statute of limitations, ruled against Novartis on several evidentiary issues, and denied post-trial motions for judgment as a matter of law and for a new trial. Novartis appealed. Stevens cross-appealed.

The Supreme Court addressed nine issues, four of which are addressed here.

1. Whether the District Court erred in denying Novartis' motion for summary judgment.

Novartis argued Stevens's claim was barred by the three year statute of limitations. The Court held the limitation statute was tolled during the pendency of a class action suit that had been filed against Novartis in Tennessee. The court recognized that its holding raised the possibility of a rush of out-of-state plaintiffs filing in Montana's courts, but found that concern less compelling than the burden on the court system that would be imposed by *not* adopting the rule, as plaintiffs would be required to file protective individual suits in Montana courts to avoid limitations defenses, while otherwise relying on a pending class action suit filed elsewhere. The court saw no reason application of this policy should depend on whether the class action was filed in Montana or elsewhere, so long as the defendants are on fair notice of the claims against them. Recognizing that in some instances a class action suit may *not* fairly put the defendants on notice, the Court limited the rule to situations in which defendants are fairly put on notice of the substantive claims against them, and the tolling period is not extended for so long that the principles of notice and fairness to defendants are disregarded.

2. Whether the District Court erroneously instructed the jury as to Novartis' duty to warn.

Relying on the "learned intermediary" doctrine, Novartis contended the District Court incorrectly instructed the jury that Novartis had a duty to warn health care professionals other than Stevens' prescribing physician. The Court rejected that argument, holding Novartis did not demonstrate prejudicial error because the jury verdict form allowed the jury to find Novartis negligent in either of two ways, one of which did not rely on the allegedly deficient jury instruction.

Before making that holding, though, the Court expounded on the learned intermediary doctrine and "suggest[ed] that the scope of Novartis' duty to warn, in this case, would presumably include at least the treating locum tenens physicians at Guardian Oncology who counseled Stevens on dental surgery, if not the nurses who routinely administered Zometa to Stevens."

3. Whether the District Court erred in refusing Novartis permission to amend its answer to include an apportionment defense.

Two months after Novartis was notified that the treating physician had settled with Plaintiff, Novartis moved to amend its answer to assert a defense seeking to apportion liability with the treating physician. The trial court denied the motion and the Supreme Court affirmed, "see[ing] no reason aside from an attempt to gain an advantage why Novartis should not have made clear its intention to blame Dr. Schmidt from its initial appearance in the case."

4. Whether the District Court erred in offsetting social security disability benefits against the general damages awarded by jury.

At the request of Novartis, the trial court reduced the judgment by the amount of social security benefits the Plaintiff had received. Plaintiff cross-appealed that ruling, and the Supreme Court reversed because "the jury verdict does not set out what portion of

its damage award is attributable to items subject to collateral source offsets-in this instance, losses due to diminished wage-earning capacity, for which Stevens will be compensated by social security disability benefits." The Court explained that without this "line-item" breakdown of the damages awarded by the jury, the District Court could not have complied with the mandate of § 27-1-308, MCA, that jury awards may only be reduced by amounts attributable to losses which are compensated by collateral sources.

Evidence that child safety seat complied with federal motor vehicle safety standards was irrelevant to issue of liability for compensatory damages on defective design claim, but was relevant to the issue of punitive damages

Malcolm v. Evenflo Co., Inc., 2009 MT 285, 217 P.3d 514

Parents of a four-month old child killed in a rollover car accident brought a strict products liability action against Evenflo, the manufacturer. The parents alleged Evenflo's open-ended belt hook and the lack of expanded polystyrene (EPS) padding constituted design defects that allowed the car seat and child to be ejected during the rollover. They contended Evenflo could have manufactured the seat using a feasible superior alternative design that required the vehicle's seatbelt to be routed through an enclosed seat belt tunnel even when the seat was used without the base. They claimed that alternative design would have saved the child's life.

Evenflo contended that the seat was not defective in any way and that the child's death was caused by the severity of the forces involved in the accident, which forced open the rear passenger door, allowing the car seat to come into direct contact with the ground as the Suburban rolled, causing the seat to detach from the seat belt system and ultimately fly out the open door. Evenflo emphasized that the production model of the car seat passed each of the FMVSS tests conducted on it and that the seat differed completely from other models that had failed some FMVSS tests.

The district court granted the parents' motion in limine to exclude arguments that the car seat complied with FMVSS 213, finding such evidence irrelevant and more prejudicial than probative. The parents' expert testified, over Evenflo's relevance objections, that the car seat had "failed" tests under FMVSS 213 standards in 157 out of 582 tests where "there was some kind of problem, either a fracture or a crack, or a break," but the trial court refused to allow Evenflo to rebut that testimony with evidence that those problems were not "failures" and the car seat had actually passed all of the FMVSS tests. The jury returned a verdict in favor of the parents for $6,697,491 in compensatory damages, and for $3,700,000 in punitive damages. Evenflo appealed.

The Supreme Court affirmed the compensatory damage award, holding Evenflo's argument based on *Restatement (Third) of Torts: Product Liability, § 4*, was an improper attempt to "inject into strict products liability analysis the manufacturer's reasonableness and level of care – concepts that are fundamental to negligence law, but irrelevant on the issue of design defect liability." Noting that FMVSS 213 addresses frontal impacts, the Court found evidence showing the car seat had passed that standard was not relevant in this case because it involved a rollover accident.

The Court also affirmed the trial court's admission of evidence that Evenflo had recalled a different model car seat in 1995 for its failure to conform to FMVSS 213, holding the models were substantially similar with respect to the design defects alleged, and that Evenflo's attempt to distinguish the two models of car seats rested on an "incomplete representation to NHTSA" about the true hazard of the other model, which Evenflo had not corrected in either model. The Court held that evidence was

relevant to Evenflo's state of mind and admissible on the issue of punitive damages.

Although the Supreme Court affirmed the exclusion of evidence that Evenflo's seat complied with FMVSS regarding the parents' design defect claim, the Court reversed and remanded the punitive damage award against Evenflo because the district court had excluded that same evidence regarding the punitive damages claim. The Supreme Court held evidence of Evenflo's good faith effort to comply with all government regulations "would be evidence of conduct inconsistent with the mental state requisite for punitive damages." The Supreme Court recognized the difficulty of instructing juries to disregard such evidence regarding the design defect claim while considering it concerning punitive damages, but felt juries had to be trusted to deal with the challenge. In this case, though, the Court remanded the case only for further proceedings regarding punitive damages.

Judgment against product manufacturer reduced pro tanto by amount of settlement with negligent contractor, rather than in proportion to negligence attributed to each defendant

Hulstine v. Lennox Industries, Inc., 2010 MT 180, 357 Mont. 228, 237 P.3d 1277.

Dormitory residents brought a strict products liability and negligence suit against a heating unit manufacturer and the contractor who installed it to recover damages for carbon monoxide poisoning. The residents settled with the contractor for $2 million. At trial against the manufacturer, the special verdict form required the jury to apportion liability between the manufacturer and the contractor, but did not require the jury to specify how much of the verdict was attributable to strict liability and how much to negligence. The jury returned a verdict against the manufacturer under both theories of liability in the total amount of $7,490,000, and found the manufacturer 70% negligent and the contractor 30% negligent. The district court reduced the verdict by 30% and entered judgment. The residents appealed.

The Supreme Court reversed, holding the verdict should not have been reduced by 30% because the jury was not instructed to award damages separately for negligence and strict liability, but awarded "damages, in whole or in part, under a strict products liability theory" and comparative negligence does not apply to strict liability claims.

While the Court rejected the 30% reduction, it did order the verdict reduced *pro tanto* by the amount of the settlement with the contractor, rejecting the residents' argument that such a reduction is not appropriate because of the different theories of liability, and focusing instead on whether there was a single injury for which the defendants would be jointly and severally liable. As a result of the Court's rulings, the judgment was reduced to $5,490,000, rather than the $5,243,000 that it would have been with a 30% reduction.

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NEBRASKA - 8TH CIRCUIT

Expert testimony on causation is required under Nebraska law to support a toxic tort claim against a chemical manufacturer

*Barrett v. Rhodia, Inc.***,** 606 F.3d 975 (8th Cir. 2010).

Dave Barrett, technician at hazardous waste disposal facility, and Clean Harbors Environmental Services, Inc., the facility's operator, brought this action against manufacturer Rhodia, Inc., alleging that Barrett had suffered permanent injury while working with a chemical manufactured by Rhodia. The United States District Court for the District of Nebraska, granted a motion to exclude causation evidence of plaintiffs' expert witnesses, and granted Rhodia's motion for summary judgment. Barrett and Clean Harbors appealed, protesting the exclusion of some of their expert testimony and the adverse summary judgment. The Court of Appeals for the Eighth Circuit affirmed. In affirming the trial court, the Eighth Circuit held that the proposed expert testimony on causation did not have sufficient scientific support to be admissible; under Nebraska law, expert testimony was required to show that hydrogen sulfide gas allegedly released from manufacturer's drum caused brain injury suffered by technician; and expert testimony on technician's level of exposure to hydrogen sulfide gas when drum was opened was a required element of toxic tort strict liability claim under Nebraska law.

Owner's allegations that destruction of a vehicle was a sudden, violent event were insufficient to state a claim for strict liability

2011 LEXIS 11; *Dobrovolny v. Ford Motor Co*., 793 N.W.2d 445 (Neb. 2011); .

David Dobrovolny brought a strict liability action against manufacturer Ford Motor Company (Ford) for damage to his vehicle after it caught fire on April 16, 2006 while parked in Dobrovolny's driveway with the engine shut off. No one was injured, and no property other than the vehicle was damaged, but the vehicle was completely destroyed. Dobrovolny did not file suit until May 20, 2009. Dobrovolny alleged negligence, breach of the warranty of merchantability, and strict liability on the part of Ford. Dobrovolny sought to recover the cost of the truck. Ford filed a motion to dismiss for failure to state a claim, which the district court granted because Dobrovolny did not allege any damage other than that to the truck and the district court concluded that actions for strict liability and negligence cannot be maintained when damages are confined to the defective property. Under *National Crane Corp. v. Ohio Steel Tube Co.,* 213 Neb. 782, 332 N.W.2d 39 (1983), the economic loss doctrine provides that a plaintiff cannot recover under strict liability if the only damages claimed are for ""“inadequate value, costs of repair and replacement . . . or consequent loss of profits—without any claim of personal injury or damage to other property . . . .”"" *Id*. at 786, 332 N.W.2d at 42.

Dobrovolny appealed to the Nebraska Court of Appeals and assigned as error that the trial court erred in dismissing his cause of action against Ford under the theory of strict liability. He argued that his case was distinguishable from *National Crane Corp.* because he asserted that the sole cause of the fire which destroyed the vehicle was the result of a "sudden, violent event," which takes his claim outside the general rule announced in *National Crane Corp.* The Nebraska Court of Appeals held that Dobrovolny's allegations that destruction of the vehicle was a sudden, violent event were sufficient to state a claim for strict liability; it reversed the trial court's order

dismissing Dobrovolny's action and remanded for further proceedings. *Dobrovolny v. Ford Motor Co*., 18 Neb. App. 483, 785 N.W.2d 858 (2010).

The Nebraska Supreme Court granted Ford's petition for further review and reversed the decision of the Court of Appeals. In addressing the line between contract and tort law as it concerns products liability, the Nebraska Supreme Court cited the United States Supreme Court's reasoning in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 871, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), in which the Court stated "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." The Nebraska Supreme Court concluded that the usage of the term "sudden, violent event" is unnecessarily confusing and adopted the rule that disallows recovery in tort when the damages are to the product alone, following both the Restatement (Third) of Torts and the U.S. Supreme Court's decision in *East River S.S. Corp*. The Nebraska Supreme Court quoted the Supreme Court in *East River S.S. Corp.*:

> Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law. . . .
>
> . . . .
>
> . . . The maintenance of product value and quality is pre-cisely the purpose of express and implied warranties. . . .
>
> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements.

East River S.S. Corp., 476 U.S. at 870-73. Because in this case the only damage done was to Dobrovolny's vehicle, Nebraska Supreme Court held that the economic loss doctrine barred recovery under products liability law. The statute of limitations on the contract claim had run before Dobrovolny filed his complaint.

Summary judgment granted to manufacturer upon finding that as a matter of law there was an intervening cause that prevented recovery of damages against manufacturer on product liability claim

Wedgewood v. U.S. Filter/ Whittier, Inc., A-09-1280, 2010 WL 5384269 (Neb. Ct. App. Dec. 21, 2010).

Jay H. Wedgewood brought a product liability action against manufacturer U.S. Filter/Whittier, Inc. (U.S. Filter). Wedgewood was injured when hot lactic acid escaped from a "fines filter" manufactured by U.S. Filter. The trial court granted summary judgment in favor of U.S. Filter.

Wedgewood appealed. The Nebraska Court of Appeals stated that in a products liability action on a claim of strict liability based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect. The appellate court found no error in the trial court's determination that the actions of

another worker, who was responsible for ensuring that duties related to the fines filter were performed and who failed to properly complete those duties, were not foreseeable and were an efficient intervening cause, breaking the causal connection between the alleged design, warning, and instruction defects by U.S. Filter and the injuries for which damages are claimed by Wedgewood. The Court of Appeals affirmed the trial court's grant of summary judgment in U.S. Filter's favor.

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NEVADA

Compliance with Regulatory Standards Does Not Automatically Insulate a Defendant from Punitive Damages

Wyeth v. Rowatt, 2010 Nev. LEXIS 48, 126 Nev. Adv. Rep. 44 (Nov. 24, 2010)

In 1994, Defendant Wyeth Pharmaceuticals sought approval from the Food and Drug Administration ("FDA") to market its hormone replacement therapy drug, Prempro, which was a combination of the hormones estrogen and progestin. According to evidence produced at trial, the FDA approved Prempro as safe and effective, but conditioned its approval on Wyeth "conducting a large-scale clinical trial on bone mineral density and breast cancer risk." The FDA also required Wyeth to provide a precise warning label. The FDA modified Wyeth's proposed warning label to state that "some studies have reported a moderately increased risk of breast cancer," but that the "added progestins on the risk of breast cancer is unknown." The warning label also stated that the rate of breast cancer in Wyeth's human study did "not exceed that expected in the general population." It was later determined, however, that Wyeth conducted no human study, and had been aware of a possible link between hormone replacement therapy and the increased risk of breast cancer since the late 1980s.

In 1996, a European study identified an increased risk for breast cancer in thin or lean women taking the estrogen-progestin combination. Wyeth changed its warnings on all Prempro sold in Europe, but did not change its warnings in the United States. Evidence also indicated that Wyeth spent millions of dollars each year to promote its hormone replacement therapy and counter reports regarding a possible link between breast cancer and hormone replacement therapy. Wyeth reportedly went so far as to sponsor ghostwritten medical articles, discussing the benefits of hormone replacement therapy. These articles were actually written by Wyeth personnel.

In 2004, the three Plaintiffs each filed a personal injury and products liability action against Wyeth. The matters were subsequently consolidated. Each Plaintiff alleged that she took Wyeth's hormone replacement therapy for a number of years and subsequently developed breast cancer. During trial, Plaintiffs presented expert testimony from an oncologist who testified that Plaintiffs' tumors showed the presence of estrogen and progestin receptors and but for taking the hormone therapy drugs, the Plaintiffs would not have developed cancer. Plaintiffs sought punitive damages in addition to compensatory damages for medical expenses and pain and suffering. The jury returned a verdict for the Plaintiffs totaling $35.1 million in compensatory damages and $99 million in punitive damages. The District Court reduced the compensatory damages award to $23 million and the punitive damages award to $57,778,909.00.

Wyeth appealed the verdict to the Nevada Supreme Court, asserting

that it could not be liable for punitive damages because it complied with FDA requirements for labeling and testing. Wyeth claimed that compliance with these FDA regulations negated the requisite finding of malice. In support of its argument, Wyeth cited cases from other jurisdictions in which the defendants were able to avoid punitive damages by complying with federal standards. The Nevada Supreme Court held, however, that those cases were inapplicable to the facts presented in the Wyeth case, as "Wyeth's conduct was fraught with reprehension and deception." The Court further noted that if it adopted Wyeth's argument, "potentially every company that complied with federal regulations would be absolved of punitive damages." The Nevada Supreme Court also cited a recent United States Supreme Court decision, which held that a drug manufacturer was responsible for the content of its drug label and ensuring the adequacy of its warning labels. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1197-98 (2009).

The Nevada Supreme Court specifically noted that the drug warnings provided by Wyeth were inadequate because they were misleading. The Court cited to evidence presented during trial that suggested that Wyeth "financed and manipulated scientific studies" and downplayed the "risk of cancer while promoting certain unproven benefits." The Court found that it would be improper to allow Wyeth to benefit from its own deceptive and malicious actions, and that Wyeth's conduct demonstrated a reckless disregard for the health and safety of the users of it product. The punitive damage award was therefore appropriate to punish Wyeth's conduct and deter other drug manufacturers from acting in the same manner.

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NEW HAMPSHIRE

Bartlett v. Mutual Pharmaceutical Co., Inc., 2011 DNH 4, 2011 U.S. Dist LEXIS 1376

The New Hampshire Supreme Court issued no products liability decisions in 2010. However, New Hampshire's Federal Court presided over *Bartlett v. Mutual Pharmaceutical Co., Inc.*, Civ. No. 1:08-cv-00358. The defendant's appeal from a plaintiff's jury verdict is currently headed to the First Circuit Court of Appeals. The Barlett case involved a plaintiff who suffered Stevens-Johnson Syndrome/Toxic Epidermal Necrolysis, or SJS/TEN, allegedly as a result of taking the generic drug Sulindac. The defendant prevailed on summary judgment on all claims except the plaintiff's strict liability claim under New Hampshire law. The elements of that claim form the main basis for the appeal, as well as the possibility that the First Circuit will certify a question to the New Hampshire Supreme Court.

In Bartlett, the defense argued that a design-defect plaintiff must plead and prove (among other elements): 1) that the product is defective; and 2) that the product is unreasonably dangerous. See *Buckingham v. R.J. Reynolds Tobacco, Co.*, 142 N.H. 822, 826 (1998). The Court, on the other hand, determined that "a product is defective as designed if the magnitude of the danger outweighs the utility of the product." *Bartlett v. Mut. Pharm. Co.*, Civ. No. 08-cv-00358-JL, p. 1 (D.N.H. 8/12/10). In other words, the District Court collapsed the elements of defective design and unreasonable danger into one element, i.e., the Court stated that a product is defective if it is unreasonably dangerous.

The Court's position is derived from the case *Vautour v. Body Masters Sports Indus. Inc.*, 147 N.H. 150, 154 (2001). In that

case, the New Hampshire Supreme Court stated that "a product is defective as designed if the magnitude of the danger outweighs the utility of the product." The Supreme Court made a similar statement in *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 831 (2005).

On the other hand, statements from prior New Hampshire cases conflict with the language from Vautour and Kelleher on which the Bartlett Court seized. Language from these prior cases seem to indicate that "defect" and "unreasonably dangerous" are, in fact, distinct elements. See *Buckingham v. R. J. Reynolds Tobacco Co.*, 142 N.H. 822, 826 (1998)("If the plaintiff were correct that a product is per se defective if it is unreasonably dangerous, then it would be redundant for section 402A to include both the terms 'defective' and 'unreasonably dangerous.'"); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 858 (D.N.H. 1988)("prior to reaching a question concerning unreasonable dangerousness of a product, an allegation of some defect associated with the product must be maintained."); see also *Buckingham*,142 N.H. at 826 ("When the plaintiff cannot allege that something is "wrong" with the product, strict liability should not be used as a tool of social engineering to mandate that manufacturers bear the entire risk and costs of injuries caused by their products.").

Whether the Barlett Court committed an error of law will be sorted out on appeal. If the Barlett Court did not commit an error of law, it would seem that the First Circuit would have to overrule (explicitly or sub silentio) Buckingham and prior cases, as there is no indication in either in Vautour or Kelleher that the Supreme Court was making new law.

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NEW JERSEY

New Jersey Exercises Jurisdiction Over Foreign Manufacturers Under "Stream-of Commerce" Doctrine

Nicastro v. McIntyre Machinery America, Ltd., 201 N.J. 48, *cert. granted* 131 S. Ct. 62 (2010).

Robert Nicastro was injured during a work-place accident involving a recycling machine manufactured by J. McIntyre Machinery, Ltd. ("J. McIntyre"), a United Kingdom corporation. McIntyre Machinery America, Ltd. ("McIntyre America"), an independently owned and operated exclusive United States distributor of J. McIntyre products based in Ohio, sold the machine to Nicastro's employer during a trade show in Las Vegas and shipped the machine to New Jersey. Jurisdictional discovery revealed that J. McIntyre targeted the United States market as a whole by engaging the American distributor and attending American trade shows. Nicastro and his wife brought a product liability action against J. McIntyre and McIntyre America in New Jersey. The issue before the Court was whether New Jersey courts could exercise personal jurisdiction over J. McIntyre under the stream-of-commerce doctrine.

The Evolution of the Stream-of-Commerce Doctrine

A state court's exercise of personal jurisdiction over a defendant is limited by "traditional notions of fair play and substantial justice" in accordance with the Due Process Clause of the Fourteenth Amendment; in other words, is it fair to require a foreign party to defend a claim in the forum state? What constitutes a "fair" exercise of jurisdiction, however, has evolved with the world economy, from requiring physical presence in the forum state (*Pennoyer v. Neff*, 95 U.S. 714 (1878)), to minimum contacts with the forum state (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)), to a "stream-of-

commerce" theory that provides for jurisdiction if the defendant causes its product to enter the forum state through the stream of commerce (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

New Jersey adopted *World-Wide Volkswagen's* stream-of commerce theory in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460 (1986). A year later, however, a plurality of the Supreme Court of the United States in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), affirmed *World-Wide Volkswagen*, but disagreed regarding the application of the stream-of-commerce rule. Justice O'Connor, writing for four Justices, opined that merely placing a product into the stream of commerce is an insufficient basis for personal jurisdiction and required a showing that the defendant purposefully availed itself of the laws of the forum state. This test has become known as "stream-of-commerce plus." On the other hand, Justice Brennan, writing for four Justices, found that the exercise of personal jurisdiction satisfies due process if the defendant is aware that its product is being marketed in the forum state. Because the leading New Jersey case on stream-of-commerce personal jurisdiction, *Charles Gendler*, was decided before *Asahi*, there has been some question as to which test would be applicable in this state.

New Jersey's Stream-of-Commerce Doctrine

The Court in *Nicastro* held that, under the stream-of-commerce doctrine, a foreign manufacturer will be subject to jurisdiction in New Jersey if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. The Court rejected Justice O'Connor's "stream-of-commerce plus" theory, instead holding that its decision in *Charles Gendler* and Justice Brennan's opinion in *Asahi* "reflect modern truths" of the global economy and "embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State." *Id.* at 75-76. Thus, foreign manufacturers who place defective products in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the jurisdiction of a New Jersey court in a product-liability action. To avoid jurisdiction when it targets a national market, a foreign manufacturer must "take some reasonable step to prevent the distribution of its product in this State." *Id.* at 77. Pointing to J. McIntyre's engagement of an American distributor and its participation in trade shows in the United States, the Court found that it targeted the American market as a whole and therefore knew or should have known that its products could end up in New Jersey. The fact that McIntyre America, and not J. McIntyre, actually directed the product through the stream of commerce into New Jersey was of no consequence: "[t]he focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold." *Id.*

Given its distribution activities, to avoid personal jurisdiction, J. McIntyre was required to "present a compelling case that defending a product-liability action in New Jersey would offend 'traditional notes of fair play and substantial justice.'" *Id.* at 79. The Court rejected J. McIntyre's argument that it would be burdensome to force it to litigate in New Jersey, noting that J. McIntyre travelled to the United States to promote its products at trade shows, and that the ease of contemporary international communication and travel no longer make it unfair to force a party to defend an action abroad. *Id.* The Court concluded that any purported burden was outweighed by New Jersey's strong interest in exercising jurisdiction over claims of injury to its residents that occur within its jurisdiction. *Id.* at 80.

Therefore, given that J. McIntyre introduced the product into the global stream of commerce, foreseeably resulting in the product's entry into New Jersey, the Court held that the state's exercise of personal jurisdiction over the foreign manufacturer did not offend traditional notions of fair play and substantial justice.

Justices Hoens and Rivera-Soto filed blistering dissents, accusing the majority of abandoning due process in favor of a stream-of-commerce rule that imposes jurisdiction over any foreign manufacturer that distributes its product nationwide, without regard for whether that system of distribution was purposefully directed at New Jersey in particular. The dissenting Justices argued that this is a significant departure from the Court's decision in *Charles Gendler* and Justice Brennan's opinion in *Asahi*. Justice Rivera-Soto also argued that the rule promulgated by the majority is unconstitutional and should be reversed by the United States Supreme Court.

On September 28, 2010, the Supreme Court of the United States granted J. McIntyre's petition for writ of *certiorari*.

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NEW MEXICO

Admissibility Of Expert Testimony In New Mexico Revisited

In 2010, the New Mexico Supreme Court (the State's highest court) issued no opinions directly involving a product liability issue. However, the following opinions, one from the Supreme Court and two from the Court of Appeals, included holdings related to the admissibility of expert testimony. Since the admissibility of expert testimony is often an important element of a product liability case, a brief summary of these opinions follows:

State v. Wilson, 2011-NMSC-001 – In this criminal case, the Defendant was convicted of first-degree child abuse resulting in death. Among other items of error, the Defendant alleged that the trial court erred in permitting Dr. Nolte, a forensic pathologist who supervised the child's autopsy, to testify regarding whether the cause of death was consistent with smothering. The Defendant's argument was that Dr. Nolte's testimony was unreliable because it was based on the Defendant's confession and the police report, rather than on medical science. The Supreme Court, however, disagreed and held the testimony of Dr. Nolte was properly admitted because it was "relevant, reliable, and helpful to the jury." The Supreme Court found that Dr. Nolte's opinion was based on several sources of information, including the medical records and autopsy report. Moreover, Dr. Nolte's conclusion that the child's death was caused by "smothering" did not equal a conclusion that death was caused by homicide, since "smothering" was used in a scientific manner and not suggestive of any particular cause. The jury was free to determine, as the ultimate arbiter of credibility, whether evidence supported a conclusion as to the cause of death.

Bustos v. Hyundai Motor Co., 2010-NMCA-090, 149 N.M. 1, 243 N.M. 440 (Certiorari has been granted by the Supreme Court) – In this product liability case, the personal representative of the deceased plaintiff filed suit following a rollover accident. He alleged that the roof structure on the car was defectively designed, which resulted in an enhanced injury (death) to the plaintiff. The jury found in favor of the plaintiff and the defendants appealed, alleging the trial court erred in a number of respects regarding the admissibility of expert testimony in favor of the plaintiff. First, the defendants alleged that the testimony of the plaintiff's causation expert should have been excluded because it was generalized and not based on the facts of the case. However, the

Court of Appeals disagreed and concluded that the evidence showed the expert's testimony "specifically related to his investigation of the performance of the [car's] roof in this accident." Second, the defendants argued, in light of the medical expert's testimony that the plaintiff would have survived with a roof crush of three inches, that the causation expert failed to testify that the roof crush would have been three inches but for a defect. The Court of Appeals rejected this argument and held that it was sufficient for the causation expert to testify that the roof should have been designed to maintain a survival space for passengers, even if he did not specify the exact amount of roof crush space needed for such survival space. The Court of Appeals also held, based on the testimony of the causation expert, that the medical expert adequately established the design defect caused the enhanced injury because none of the plaintiff's other injuries were life-threatening and it was a lack of adequate survival space that led to death by asphyxiation. Finally, contrary to the position of the defendants, the Court of Appeals held that it was not error for the jury to hear alternative theories of design defect because the "nature of any actionable defect … [is] left for the jury" and that the plaintiffs were not required to demonstrate the existence of a reasonable alternative design since that is but one consideration in whether the product created an unreasonable risk of injury.

Parkhill v. Alderman-Cave Milling and Grain Co., 2010-NMCA-110 (Certiorari has been granted by the Supreme Court) – In this product liability case, the plaintiffs sued for personal injury as the result of an alleged exposure to monensin, a chemical commonly used in cattle feed but which the plaintiffs' allege was mistakenly included in horse feed they used to feed their horses. In support of their allegation that the personal injury was caused by exposure to monensin during feeding, the plaintiffs relied on the testimony of their primary care doctor and an expert in environmental medicine and toxicology. Following an evidentiary hearing on a motion to exclude the testimony of both doctors, the trial court granted the motion. The Court of Appeals affirmed the ruling of the trial court. First, with respect to the primary care doctor, the Court of Appeals held that while such a doctor may not normally be required to satisfy the qualification standard of *Daubert* (and New Mexico's adoption of *Daubert* via the *Alberico* case) with respect to internal causation (e.g., obesity is a cause of hypertension), such a doctor is required to satisfy the qualification standard with respect to external causation, especially in a toxic tort case, since a treating physician is not automatically qualified to testify as to the external agent that caused a patient's disease. Following that standard, the Court of Appeals held that the plaintiffs' primary care physician was not qualified merely because he performed a differential diagnosis since, in part, he had never heard of monensin prior to treating the plaintiffs and most of what he knew about the substance came from the plaintiffs. The Court of Appeals also affirmed the ruling of the trial court with respect to the toxicology expert. The Court of Appeals held that the failure of the toxicology expert to quantify the dosage of monensin to which the plaintiffs could have been exposed resulted in a failure to "lay a scientific groundwork for the general toxicity of monensin" and, therefore, it was proper to exclude his testimony.

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NEW YORK

New York Law Does Not Recognize A Post-Sale Duty To Retrofit Or Recall A Product

Adams v. Genie Industries, Inc., 14 N.Y.3d, 929 N.E.2d 380 (2010)

Adams v. Genie Industries, Inc. ("Genie") was a product liability lawsuit involving allegations of a defectively designed "personnel lift." The plaintiff, Walter Adams, was a maintenance worker whose employer had purchased a Genie single-person lift in 1986. In 1997, Mr. Adams was utilizing the lift to install a block and tackle at an elevated location when the lift toppled over, spilling Adams to the floor from a height of twelve feet and injuring him in the process.

Plaintiff's theory of liability was premised on the contention that the lift design was not reasonably safe because it did not incorporate interlocking "outriggers" to provide stability during operation. The trial court put a number of questions to the jury, including: (a) whether the product was defective; (b) whether Genie was negligent in selling the product in 1986; and (c) whether Genie was negligent during the ten year period between the sale and the accident. The jury answered each of these questions in the affirmative, returning a verdict for the Plaintiff that included damages of $100,000 for past pain and suffering and $400,000 for future pain and suffering. The trial judge granted the plaintiff's motion for *additur* and ordered a new trial on damages unless Genie agreed to an increase in those awards to $500,000 and $750,000, respectively. Genie stipulated to the *additur*, and then took appeal to the New York State Appellate Division, First Department, which affirmed but nonetheless granted Genie leave to appeal to the Court of Appeals.

The first issue of significance decided by the Court was whether Genie, by stipulating to the trial court's *additur* in lieu of a new trial, had forfeited its right to appeal. The plaintiff argued that by agreeing to an *additur*, Genie was not an "aggrieved party" within the meaning of New York Civil Practice Law and Rules ("CPLR") 5511, and thus had no right to take an appeal on the other aspects of the trial court's judgment. While acknowledging that there was New York authority to support the plaintiff's position, the Court rejected his argument, overruling its prior precedent, and finding that a defendant's stipulation to the amount of damages in lieu of a new trial does not bar that party from challenging other unrelated issues on appeal.

The second issue of note in the *Genie* decision was the Court's reiteration of the New York legal standard for a claim of strict products liability for design defect. Prior to analyzing the sufficiency of the evidence presented at trial, the Court succinctly set forth the relevant legal standard for a *prima facie* claim as previously laid down in *Voss v. Black & Decker Mfg., Co*., 59 Y.Y.2d 102, 450 N.E.2d 204 (1983). Importantly, the Court expressly reaffirmed that the legal standard for a strict products liability claim is identical to, and co-extensive with, the legal standard for a claim for negligent product design.

Finally, the Court considered the challenge to the jury's finding that Genie had been negligent post-sale. The trial court had posed the question to the jury of whether there was separate negligence by Genie between the sale of the product in 1986 and the injury in 1997. Since the adequacy of Genie's warnings was not in dispute, the Court considered the question of Genie's post-sale negligence in terms of its alleged failure to recall or retrofit its product. In what was a question of first impression for the Court of Appeals, the Court held that while a manufacturer does have a post-sale duty *to warn* a consumer of a product defect where it learns of new risks following the sale of the product, New York law does not recognize any post-sale duty by a manufacturer to retrofit or recall a product, and hence found that the trial court had erred by submitting that question to the jury.

Nonetheless, the Court held that the error was harmless in that the jury's awarded damages were co-extensive with the negligent design cause of action product, and hence found that the trial court had erred by submitting that question to the jury. Nonetheless, the Court held that the error was harmless in that the jury's awarded damages were co-extensive with the negligent design cause of action.

The Tolling Provision Found In NYCPLR 214-C (4) Applies Only To Injuries "Caused By The Latent Effects Of Exposure To A Substance" And Does Not Create An Independent Exception To The Relevant Statute Of Limitations For Other Species Of Tort Claims

Giordano v. Market Amer., Inc., 2010 WL 4642451, 15 N.Y.3d 590 (Nov. 18, 2010)

In *Giordano v. Market Amer., Inc.,* the plaintiff suffered a series of strokes in 1999, which he alleged were caused by the dietary supplement *Ephedra*. Plaintiff brought suit in July of 2003, some four and half years after the strokes. The case was removed to federal district court and the defendants moved to dismiss the action on statute of limitations grounds. The district court originally granted the motion to dismiss. Thereafter, on appeal, the Second Circuit certified several questions of New York law to the New York Court of Appeals.

In responding to these queries, the Court of Appeals issued a majority decision containing two significant holdings. First, the Court considered the scope of the tolling provision found at CPLR 214-c (4). That provision, in relevant part, extends the statute of limitations to the earlier of five years from discovery of the injury, or the date when, with reasonable diligence, the injury should have been discovered. Further, subsection (4) provides that if the cause accrues after the standard three year period, the plaintiff is required to prove that the technical, scientific or medical knowledge sufficient to ascertain the cause of the injury had not been discovered prior to the expiration of the original period. In *Giordano*, the Court considered the question of whether this provision was limited only to those tort injuries caused by the latent effects of exposure to a substance, or could be applied to a broader array of tort claims.

The Court observed that while the language of subsection (4) did not expressly limit the above extension to claims involving "latent exposure to a substance," the subsection was necessarily limited in such a manner because the limitation is contained in the previous two subsections of CPLR 214-c, which are interrelated with subsection (4). Hence, the Court found that the repeated references to subsections (2) and (3) within subsection (4) was a clear indication that subsection (4) should be read to contain the same limitation as those sections. Further, the Court observed that such a limitation was entirely consistent with the legislative intent of the entire provision, which was meant to apply only in toxic tort scenarios. Accordingly, the Court held that the provision could not be read to create a general independent exception to the statute of limitations for all tort injuries.

The second issue of importance decided by the Court of Appeals related to the definition of "latent" as applied to this statute. The question posed was whether a harm that appears within "24 to 48 hours" of the exposure to the substance can be considered "latent" for purposes of the statue. The Court of Appeals answered in the affirmative, holding that even a delay as short as several hours between the exposure and the manifestation of the symptoms is sufficient to satisfy the definition of "latent" as the term is used in CPLR 214-c.

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NORTH CAROLINA

Product Alteration and Modification Defense Inapplicable to Alterations or Modifications Made by Children Under the Age of Seven and Non-parties

Stark v. Ford Motor Company, 693 S.E.2d 253 (N.C. Ct. App. May 18, 2010)

As a matter of first impression, the North Carolina Court of Appeals considered whether the alteration and modification statutory defense applied to alterations or modifications made by persons who were non-parties at the time of trial.

On April 23, 2003, Tonya Stark was driving her family's 1998 Ford Taurus, with her husband, Gordon Spark, in the front passenger seat, and her three children, Cheyenne, Cory and Cody Stark, in the back passenger seats of the vehicle. Cheyenne and Cody Stark were injured when the vehicle suddenly accelerated and collided with a light pole. As a result of the accident, Cheyenne was paralyzed below her rib cage. At the time of the accident, Cheyenne was five years old, Cody was nine years old and Cory, who was sitting in the middle, was three years old.

The family filed a products liability action against Ford for defective design of the engine and seatbelt. Tonya, Gordon and Cory's claims were dismissed on a summary judgment motion. At the time of trial, plaintiffs were Cheyenne Stark and Cody Stark, represented by their Guardian ad Litem, Nicole Jacobsen. Plaintiffs presented evidence that Cheyenne's injuries were caused by a design defect. Ford asserted the "alteration and modification defense" and presented evidence that Cheyenne's injuries were caused by slack in the seatbelt that was the result of an improper alteration or modification of the seatbelt by Cheyenne or Mr. Spark. Ford presented evidence that the shoulder portion of the seatbelt was behind Cheyenne's back, which made it impossible for the alleged defect to have caused the injury.

N.C. General Statute section 99-B1 et seq. provides that a defendant manufacturer or seller must prove that the alteration or modification by a party other than the defendant manufacturer or seller of the product proximately caused the personal injury. Plaintiffs filed a motion for a directed verdict as to the affirmative defense on the grounds that the alteration and modification defense was unavailable to Ford, because Tonya and Gordon Stark were not parties to the action and Cheyenne, who was under the age of seven years, was legally incapable of negligence. The trial court denied plaintiff's motion. The jury found that Cheyenne's injuries were caused by an alteration or modification of the design of the seatbelt. The trial court subsequently denied plaintiffs' motion for judgment notwithstanding the verdict, or in the alternate, for a new trial.

The Court of Appeals, reviewing the decision de novo, held that (1) the five-year old victim was legally incapable of negligence; and (2) as a matter of first impression, pursuant to the alteration and modification statute, the person that made the alterations or modifications to the product must be a party to the action.

In arriving at its first holding, the Court looked to the proximate cause analysis in Hastings for Pratt v. Seegars Fence Co., 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997). In Hastings, the Court held that a determination of proximate cause requires an analysis of foreseeability. The Court explained that the test for foreseeability is usually "whether a person of ordinary prudence could have reasonably foreseen that the unintended use of the product would cause injury." Stark, 693 S.E.2d at 258 (quoting Hastings, 128 N.C. App. at 170, 493 S.E.2d at 785). In the case of a minor child, the test is "whether a child of similar age, capacity,

discretion, knowledge and experience could have foreseen that his or her use of the product would cause injury." *Id.* Applying these same principles of negligence to the alteration and modification statutory defense, the Court held that because Cheyenne was under seven years old and legally incapable of negligence, she was unable to foresee that any modification or alteration could cause her injury.

The Court then addressed as a matter of first impression whether the alteration and modification defense is applicable to alterations or modifications made by non-parties. In arriving at its decision, the Court looked to the plain language of the statute. The statute provides that a defense is available where "a party other than a manufacturer or seller" alters or modifies the product. § 99B-3. Party is defined as "one who takes part in a transaction." Stark, 693 S.E.2d at 260 (quoting Black's Law Dictionary, 1231-32 (9th ed. 2009)). The Court determined that because Tonya and Gordon Stark were not parties, the alteration and modification defense was inapplicable to any alteration or modification made by them.

The holding in this case narrows the application of the alteration and modification defense and requires defendants to be attentive in order to preserve the defense against non-parties. In those cases, defendants must file a third-party complaint or seek contribution from the non-party modifier. If the trial court severs the third-party action from the principal action, as the trial court did in this case, defendants must argue the severance issue on appeal to apply the alteration and modification defense.

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OHIO

Supreme Court of Ohio Constructs Four Walls around Premises Liability Due to Asbestos Exposure

Boley v. Goodyear Tire & Rubber Company, 125 Ohio St. 3d 510, 929 N.E.2d 448 (Ohio 2010)

Background
On June 10, 2010, the Supreme Court of Ohio upheld the Eighth District Court of Appeals' decision to affirm summary judgment in favor of Goodyear Tire & Rubber Company in an asbestos case. The Court held that "[a] premises owner is not liable for tort claims arising from asbestos exposure originating from asbestos on the owner's property unless the exposure occurred at the owner's property." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, at syll. (Ohio 2010).

The plaintiffs, the executor of Mary Adams' estate and decedent's husband, Clayton Adams, brought claims against Goodyear for negligence, strict liability, breach of express and implied warranties, loss of consortium, statutory products liability, fraudulent concealment and representation, wrongful death, and punitive damages. The claims arose from Mary's purported exposure to asbestos when she shook and laundered her husband's work clothes at their home. Clayton worked with asbestos-containing materials at Goodyear's facility in St. Mary's, Ohio, from 1973 to 1983. Mary was diagnosed with malignant mesothelioma in 2007 and died that year. *Id.* at 511.

Summary of the Decision
The Ohio Supreme Court addressed the following proposition of law: "Revised Code Section 2307.941(A) does not apply to 'take home exposure' asbestos cases against a family member's employer who exposed the employee to asbestos and that family member brought asbestos home on their clothing causing other family members to become exposed to asbestos, and develop an asbestos related disease." *Id.*

The parties' arguments centered on the statutory interpretation of Revised Code Section 2307.941, which provides: "(A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property: (1) A premises owner is not liable for an injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property." The plaintiffs argued that this language applied only to tort actions against a premises owner for "exposure to asbestos on the premises owner's property," and, therefore, subsection (A)(1) did not bar their claims. They further asserted that any contrary interpretation would violate their due process rights. *Id.* at 511-512. Goodyear, on the other hand, maintained that the phrase "on the premises owner's property" modified "asbestos" rather than "exposure," so subsection (A)(1) applied to all claims without regard to where the exposure occurred. *Id.* at 512.

The Court's "paramount concern" was the legislative intent of the General Assembly in enacting the statute. *Id.* at 513. The General Assembly revised the statute "in response to a legislative finding that the current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike." *Id.* Further, the Court highlighted the importance of evaluating the statute as a whole. *Id.* at 512.

With these principles in mind, the Court determined that it could not accept the statutory interpretation offered by the plaintiffs because their piecemeal reading of the statute resulted in superfluous sections. Reading the phrase "exposure to asbestos" in R.C. 2307.941(A) as modifying "on the premises owner's property" would give no meaning to subdivision (A)(1). Consequently, the only reading of the statute that gave effect to its entire meaning was that the phrase "on the premises owner's property" modified the word "asbestos." *Id.* at 513-514.

Finally, the Court noted that the General Assembly intended to limit the liability of premises owners for claims of asbestos exposure that occur away from the owner's premises. *Id.* at 514

The concurring opinion by Judge O'Connor rejected plaintiffs' argument that the Court's statutory interpretation violated due process for two reasons. First, the plaintiffs were not prevented from seeking a remedy against other defendants, such as manufacturers and suppliers of products containing asbestos. Second, the plaintiffs failed to assert a facial challenge to the statute in the lower courts.

Judge Pfeifer, however, dissented because "[t]he majority opinion waxes poetic about its duty to read the statute and nothing but the statute, neither adding words to, nor subtracting words from, the statute, but then adds words to the statute." *Id.* at 517. He noted that the statute does not refer to where the asbestos "originates" and its plain words apply only to plaintiffs who claim they were exposed to asbestos on a premises owner's property, concluding "[i]t seems mean-spirited to deny her claim while so obviously misconstruing it." *Id.* at 518.

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OKLAHOMA

Oklahoma Appellate Court Finds that the Learned Intermediary Doctrine Requires Only an Adequate Warning of Risk

Tortorelli v. Mercy Health Center, Inc., 242 P.3d 549 (Okla. Civ. App. 2010)

Background
On June 4, 2010, the Oklahoma Civil Court of Appeals upheld the trial court's granting of summary judgment in favor of two defendants by applying the learned intermediary doctrine. *See generally Tortorelli v. Mercy Health Ctr., Inc.*, 242 P.3d 549 (Okla. Civ. App. 2010).

In *Tortorelli*, a patient and her husband filed an action against her surgeon, the hospital, and the manufacturer of a bone putty for complications arising from her allergic reaction to the bone putty.

Plaintiffs alleged that both the manufacturer, IsoTis Orthobiologicals, Inc. (IsoTis), and the supplier of the bone putty, Mercy Health Systems, Inc. (Mercy), were strictly liable for manufacturing and supplying a defective product. *Id.* at 557. The trial court granted summary judgment to both defendants.

Court's Opinion Addressing the Learned Intermediary Doctrine
On appeal, plaintiffs argued that summary judgment was improper because the defendants' failure to provide adequate warnings with the defective bone putty rendered the learned intermediary doctrine inapplicable. *Id.* at 557. IsoTis countered that it had adequately warned the patient's surgeon of the potential for an allergic reaction. *Id.* at 559.

Oklahoma recognizes the learned intermediary doctrine as an exception to a manufacturer's duty to warn of the potential dangers that may result from consumers' use of its product when it is known or should be known that a hazard exists. *See id.* at 558 (citations omitted). The doctrine shields a manufacturer and/or supplier from liability in the medical context when that manufacturer and/or supplier adequately warned the prescribing physician of the danger(s) proximately causing the consumer's injury. *Id.* (citing *Edwards v. Basel Pharms*., 933 P.2d 298 (1997)).

In support of its motion for summary judgment, the manufacturer submitted an affidavit from the plaintiff's surgeon confirming he read and understood the directions accompanying the putty and was aware it could create an antigenic reaction in the plaintiff. *Id.* at 559.

Despite this evidence, plaintiffs argued that the warning issued by IsoTis was inaccurate and misleading. *Id.* Plaintiffs presented the deposition testimony of a biomedical research scientist to prove that IsoTis's warning that "the reaction of the body to any allograft is not completely understood," was false because reactions to allografts were understood at the cellular level. The Oklahoma appellate court explained that whether all potential reactions were "'completely understood'" was a "red herring." *Id.* The product insert did, in fact, warn of the possibility of an antigenic reaction. *See id.* Therefore, the deposition testimony failed to contradict, refute, or falsify the warning that use of the bone putty may result in an antigenic reaction. *Id.* at 559-60.

In affirming summary judgment, the Oklahoma Civil Court of Appeals stated, "to invoke a defense to liability under the learned intermediary doctrine, a manufacturer seeking its protection must provide sufficient information to the learned intermediary (physician) of the risk subsequently shown to be the proximate cause of a plaintiff's injury." The Oklahoma Civil Court of Appeals determined that the manufacturer warned of the risk from using its product, the surgeon knew of the possible risks, knew of the manufacturer's

warnings, considered the risks posed by using the bone putty, and decided it was appropriate to use the product under the circumstances. Accordingly, the manufacturer and hospital were shielded from liability pursuant to the learned intermediary doctrine.

It is clear from this decision that, under Oklahoma law, a medical manufacturer or supplier is not obligated to either inform potential learned intermediaries about every product detail or instruct them on the practice of medicine; rather, they must only adequately warn about the risks of their products.

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OREGON

Supreme Court of Oregon Finds Jury Instruction on Punitive Damages that Lacks Parameters Within Which Particular Evidence Must Be Considered Insufficient

Schwarz v. Philip Morris Inc., 235 P.3d 668 (Ore. 2010) and *Schwarz v. Philip Morris Inc.*, 2010 Ore. LEXIS 951 (Dec. 30, 2010)

Background
On June 24, 2010, the Supreme Court of Oregon affirmed the Court of Appeals' finding that the trial court's jury instruction on punitive damages was incomplete. *Schwarz v. Philip Morris Inc.*, 235 P.3d 668, 678 (Ore. 2010). The case was remanded for a new trial on punitive damages. *Id.* Upon reconsideration, the Supreme Court of Oregon clarified that the new trial was limited to determine the correct amount of punitive damages, not whether the defendant was liable for punitive damages. *Schwarz v. Philip Morris Inc.*, 2010 Ore. LEXIS 951 at *2 (Dec. 30, 2010).

Facts
Plaintiff/Decedent Michelle Schwarz began smoking in 1964. *Schwarz*, 235 P.3d at 670. She died in 1999 from a brain tumor originating from lung cancer. Her husband sued Philip Morris for negligence, strict product liability and fraud in the manufacturing, marketing and research of defendants' low-tar cigarettes. *Id.* Plaintiff claimed that defendants' marketing of its "less tar," but "full flavor" cigarette caused decedent to alter her smoking habits such that she ingested the same amount of tar as she had from full flavor brands.

At trial, the trial court included an instruction on punitive damages modeled after the Uniform Civil Jury Instruction 75.05A (Oct. 1977):

> To recover punitive damages, [plaintiff] must show by clear and convincing evidence that defendant Philip Morris … has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others[.]

Id. at 671 (emphasis added). Defendant objected, offering an instruction directing the jury "not to impose punishment for harms suffered by persons other than the plaintiff before [them]" or, in the alternative, conduct on individuals in other states. *Id.* at 672. The trial court refused to use Philip Morris' instruction. *Id.*

The jury returned a large verdict against Philip Morris, but apportioned 49 percent of the responsibility to Plaintiff. *Id.* Philip Morris appealed.

The Court of Appeals vacated the punitive damages award, stating that the jury is not to punish a defendant for the impact of its conduct on individuals in other states. *Id.* at 673. The Supreme Court of Oregon affirmed.

The Supreme Court of Oregon's Opinion and Analysis

In the Oregon Supreme Court, Philip Morris argued (1) the trial court erred by not including its proffered instruction on punitive damages; and (2) the trial court erred by giving the instruction it gave. Philip Morris claimed that its proffered instruction was legally correct and supported by *Williams v. Philip Morris Inc.*, 549 U.S. 346 (2007) (Williams II), a decision that was rendered after the trial of the Schwarz case. In Williams II, the United States Supreme Court concluded that a jury may not use a punitive damages verdict to punish a defendant for harms to nonparties. *Schwarz*, 235 P.3d at 674 *citing Williams*, 549 U.S. at 355. However, the Williams II Court held that evidence of harm to others was appropriate and relevant to determine the reprehensibility of a defendant's conduct. *Id.*

Plaintiff argued that the instruction offered by Philip Morris was inaccurate and incomplete in that it directed the jury not to use evidence of harm to nonparties for any purpose, including determining the reprehensibility of Philip Morris' conduct. *Id.*

The Oregon Supreme Court found the trial court did not err in refusing to use Philip Morris' instruction. *Id.* It opined that the Supreme Court in Williams II created a fine line between permissible and impermissible uses of evidence of harm to others that may easily be lost. *Id.* at 675. "When the law draws a line between the proper and improper use of evidence, a jury instruction must be equally explicit in describing what falls on each side of that line." *Id.* The Supreme Court of Oregon found that where parameters are set to consider evidence, an instruction that does not include all of the parameters is erroneous. *Id.*

Using this same rationale, the Oregon Supreme Court concluded that the trial court erred in using the instruction it did. *Id.* at 676. The Court found that the jury could have understood the instruction to allow them to use the evidence of harm to others to arrive at the punitive damages verdict. *Id.* Because the instruction permitted the jury to consider evidence of harm to nonparties in assessing punitive damages, a remand on the punitive damage amount was required. *Id.*

The decision establishes that evidence of harm to others is permissible with regard to punitive damages, but only for the limited purpose of proving the reprehensibility of a defendant's conduct. Properly instructing the jury on the limits of the use of this evidence is the challenge.

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RHODE ISLAND - FIRST CIRCUIT

Plaintiff's Intoxication Irrelevant in Assessing Defense of Assumption of Risk

Sheehan v. The North American Marketing Corp., et al., 610 F.3d 144 (1st Cir. 2010)

Jennifer Sheehan became a quadriplegic after fracturing her C5 vertebrae while attempting to dive into a four foot above ground pool filled with three and a half feet of water. She brought suit for negligence, strict liability, breach of express warranty and breach of

implied warranty against the manufacturer and seller of the pool. The defendants moved for summary judgment on the grounds that Sheehan assumed the risk of her injuries when she attempted the dive and that proof of proximate cause was unduly speculative. The District Court granted defendants' motion for summary judgment. The U.S. Court of Appeals for the First Circuit affirmed, holding, that under Rhode Island law, plaintiff's level of intoxication should not be taken into account when determining whether she assumed the risk of injuries.

Immediately prior to her injuries, plaintiff was swimming in the pool, which had four warnings stating, in essence, "Danger – No Diving – Shallow Water". At least once, plaintiff stood on the pool's coping and successfully accomplished a shallow dive. When plaintiff later climbed on the coping intending to make another dive, she lost her balance falling straight down into the pool and fracturing her vertebrae. Her blood alcohol content was between .169% and .178% at the time of the incident.

The Court of Appeals rested its decision on the doctrine of assumption of risk. Under Rhode Island law, assumption of risk is a complete defense to strict product liability claims, including breach of warranty. In order to establish an assumption of risk defense, defendants must prove that the plaintiff knew of the existence of the danger, appreciated its unreasonable character, and voluntarily exposed herself to it. This standard is a subjective one and is based on what the particular individual saw, knew, understood and appreciated. While ordinarily an issue for the finder of fact, if the only reasonable inference is that plaintiff assumed the risk, the issue becomes one of law for the judge.

Sheehan attempted to avoid the legal conclusion that she knew and accepted the risk of diving by parsing the risk involved. By her account, the worst possible outcome was the risk that she could scrape the bottom of the pool on a poorly executed dive. The Court noted that the issue was not whether she subjectively believed the risk could be minimized or avoided. Under Rhode Island law, when the circumstances are such that a person is presumed to know the risks of her dangerous conduct, she is charged with knowing all of the ordinary risks associated with that conduct. The Court rejected Sheehan's argument, finding the risk of a poorly executed or botched dive is subsumed within the risk of diving generally. Sheehan further argued that assumption of risk did not apply because she was not in the act of diving at the time that her injuries occurred. She argued that she never assumed the risk of falling from the allegedly defective coping. The Court agreed that the case would be different if Sheehan stood on the coping to dive and fell backwards or fell while engaging in some activity other than diving. However, Sheehan stood on the coping in order to dive and suffered the same injury as contemplated by the pool's multiple warnings.

Finally, Sheehan argued that the District Court failed to properly take her intoxication into account when assessing her subjective knowledge of the risk of diving. As the Court noted, excuses based on drunkenness are too easy to make and too costly to permit. A person who voluntarily becomes intoxicated is held to the same standard as if he were sober. Accordingly, the Court of Appeals agreed with the District Court in finding that Sheehan assumed the risk of her injuries and affirmed the District Court's entry of summary judgment in favor of the defendants.

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SOUTH CAROLINA

South Carolina Supreme Court Reverses $31 Million Dollar Verdict and Issues an Opinion with Vast Products Liability Law Implications

Branham v. Ford Motor Co., 701 S.E.2d 5 (S.C. 2010)

Background
On June 17, 2001, Cheryl Hale was driving several children in a 1987 Ford Bronco II 4x2, including Jesse Branham. Hale turned around to the backseat to ask the children to quiet down, leading to a rollover accident in which Branham was thrown from the vehicle and injured. Branham filed a products liability suit against Ford Motor Company ("Ford").

The jury found Ford responsible and awarded the Plaintiff $16,000,000 in actual damages and $15,000,000 in punitive damages.

The Risk-Utility Test is the Exclusive Test in a Products Liability Design Case with its Requirement to Show a Feasible Alternative Design
On appeal, Ford argued that South Carolina law requires a risk-utility test in design defect cases to the exclusion of the consumer expectations test. The State's Supreme Court agreed. The Court in *Branham* held that "the exclusive test in a products liability design case is the risk-utility test with its requirement of showing a feasible alternative design."

Post-distribution Evidence is Inadmissible when Evaluating Whether a Product is Defectively Designed
The Court then reversed and remanded the finding of liability and award of actual damages for three reasons. First, the Court found that in assessing a manufacturer's liability in a design defect claim, only evidence that was *known* or *reasonably attainable* at the time of manufacture should be considered. "The use of post-distribution evidence to evaluate a product's design through the lens of hindsight is improper."

Even if the Other Incidents Evidence is Substantially Similar, the Evidence is Inadmissible if it is Post-Distribution Evidence Offered to Establish Liability
Second, the Court in *Branham* held that, in considering the admissibility of other incidents, even if a plaintiff satisfies the "substantially similar" test, "such evidence must not run afoul of the rule in products liability cases that prohibits post-distribution evidence to establish liability." The Court found that the admission of post-manufacture evidence of purported similar incidents was error, even if the "substantially similar" threshold was met. "Post-manufacture evidence of similar incidents is not admissible to prove liability."

A Closing Argument Cannot Be Intended to Inflame the Jury's Passion and Prejudice
Finally, the Court held that Plaintiff's counsel's closing argument was "designed to inflame and prejudice the jury." The Court provided that "[i]t is improper for counsel to make a 'closing argument to the jury . . . calculated to arouse passion or prejudice." The Court noted that Plaintiff's closing request relied heavily on inadmissible evidence. "The closing argument invited the jury to base its verdict on passion rather than reason. The closing argument denied Ford a fair trial."

A Jury May Not Rely on "Harm to Others" in Awarding Punitive Damages
The Court also held that the $15,000,000 punitive damages award was unconstitutional. Plaintiff's counsel asked the jury to punish Ford for the harm caused to all Bronco II rollover victims. The trial court charged the jury not to punish for other "conduct." The Court found that the charge violated the "harm to others" prohibition, as previously set forth by the South Carolina and United States Supreme Courts. "By focusing on conduct, as opposed to harm to Branham,

the charge invited the jury to punish Ford for all Bronco rollover deaths and injuries – the very harm . . . forbid[den]" by the highest courts in South Carolina and the United States.

South Carolina Supreme Court Addresses the Admissibility of Expert Testimony and Other Incidents Evidence in an Opinion Reversing a $15 Million Verdict Against Ford

Watson v. Ford Motor Co, et. al., 699 S.E.2d 169 (S.C. 2010)

Background

On December 11, 1999, Sonya Watson was driving a 1995 Ford Explorer with three other passengers on board, including Patricia Carter, when shortly after merging onto the interstate, Watson lost control of the vehicle and left the roadway. The vehicle rolled four times. Watson's injuries rendered her a quadriplegic and Carter died in the accident. Plaintiffs alleged the cruise control system was defective in that it suddenly accelerated.

The jury found Ford liable on the cruise control claim. The jury awarded compensatory damages of $15 million to Watson and $3 million to Carter.

Court's Opinion Addressing the Admissibility of Expert Testimony

The Plaintiffs claimed the Explorer's cruise control was defective because it allowed electromagnetic interference (EMI) to affect the system. Plaintiffs presented testimony from Bill Williams, an expert on "cruise control diagnosis." The Plaintiffs also offered testimony from Dr. Antony Anderson, who opined that on the day of the accident, EMI interfered with the Explorer's cruise control system, causing the vehicle to suddenly accelerate and result in the accident. Dr. Anderson further testified that Ford could have employed an alternate design to prevent EMI.

As to Williams, the Court found that he should not have been qualified as an expert on cruise control systems because he "had no knowledge, skill, experience, training or education **specifically related to** cruise control systems." His knowledge and experience related to other automobile components, including brake systems, was insufficient to qualify him as an expert on cruise control systems.

As to Dr. Anderson, the Court held he failed to meet South Carolina Rule of Civil Procedure 702's "fundamental requirement that the witness be qualified in the particular area of expertise." Dr. Anderson's background involved an entirely different product, with different electrical wiring systems and different voltage levels. He had no experience in the automotive industry. He had never studied nor designed a cruise control system. Furthermore, the testimony as to an alternative design "lacked any scientific basis and contained no indicia of reliability." Dr. Anderson neither explained how his alternative design could be implemented in the cruise control system, nor offered a model comparison. And finally, Dr. Anderson offered no evidence to support his contention that his alternative design was economically feasible.

Next, the Court rejected the admissibility of Dr. Anderson's EMI theory on the affect it has on cruise control systems. The Court, "assuming Dr. Anderson was qualified in this area," found that his EMI theory and supporting testimony had "no indicia of reliability." The theory had not been peer reviewed, had never been published by Anderson, had never been tested (nor could be tested) and could not be replicated. In the Court's view, the trial court admitted Dr. Anderson's testimony by concentrating on whether he was qualified as an expert in the field of electrical engineering generally, and failed to analyze the reliability of the proposed testimony. *Watson* makes clear that in South Carolina, trial courts

must evaluate the substance of the proffered testimony to determine if it is scientifically reliable.

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TENNESSEE

Deciding an Issue of First Impression The Tennessee Court of Appeals Holds that the National Traffic and Motor Vehicle Safety Act Preempts Claims Involving the Use of Tempered Glass and the Lack of Passenger Seatbelts on Large Buses

Lake v. The Memphis Landsmen, LLC, 2010 Tenn. App. LEXIS 200 (Tenn. Ct. App. Mar. 15, 2010)

Background

In March of 1998, Mr. Lake flew into Memphis, Tennessee on business. *Lake v. The Memphis Landsmen, LLC*, No. W2009-00526-COA-R3-CV, 2010 Tenn. App. LEXIS 200, at *2 (Tenn. Ct. App. Mar. 15, 2010) (no perm app. filed). After he landed, he caught an airport shuttle bus, expecting to be taken to Budget Rent A Car to pick up a rental vehicle. *Id.* On the way, a cement truck struck the shuttle bus, which spun into a light pole and ejected Mr. Lake, who sustained serious brain injuries when he hit his head on a concrete curb. *Id.* at *3.

One year later, Mr. and Mrs. Lake sued several entities, including Metrotrans Corporation, the manufacturer of the shuttle bus, alleging negligence and strict liability for the design of the bus. *Id.* at *3-4. According to the Lakes, the bus was unreasonably dangerous because it had perimeter seating, no passenger seatbelts, and because it used tempered glass instead of advanced glazing on the windows. *Id.*

At trial, Metrotrans moved for directed verdict, arguing that the National Highway Transportation Safety Administration's ("NHTSA") safety standards preempted the design claims. *Id.* at *8. Specifically, Metrotrans advanced Federal Motor Vehicle Safety Standard ("FMVSS") 205, which regulates tempered glass in side windows, and FMVSS 208, which regulates seatbelts. *Id.* at *14.

The trial court denied the motion and submitted the case to the jury. *Id.* The jury found a non-party to be completely at fault for the accident. *Id.* The parties appealed, and on March 15, 2010, the Western Section of the Tennessee Court of Appeals reversed, holding that the trial court erred in denying Metrotrans's motion for directed verdict on the preemption issue.

Preemption Analysis

Lake considered an issue of first impression that implicated the doctrine of implied conflicts preemption. *Id.* at * 13. Under the doctrine, preemption "occurs when it is impossible to comply with both state and federal law, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotations and citation omitted).

1. Tempered Glass

Metrotrans argued that FMVSS 205 preempted the Lakes's claims about the use of tempered glass on the side windows. *Id.* at 17. The Lakes asserted that the regulation established only a minimum standard and left state law claims undisturbed. *Id.*

The court looked to the objectives of FMVSS 205, which NHTSA furthered by allowing manufacturers to use tempered glass in side windows. *Id.* at *18. It then turned to case law, where the Fifth Circuit and the Supreme Court of West Virginia were

among the few courts to have analyzed the preemptive effect of FMVSS 205, and they had reached different results. *Id.* at *18-20. The *Lake* court rejected the Fifth Circuit's conclusion. *Id.* at *21.

In the end, the language of FMVSS 205 and NHTSA's rejection of advance glazing convinced the court that federal policy allowed the use of tempered glass in side windows. *Id.* at *21-24. Thus, allowing the Lakes to pursue their claim would "present an obstacle to the variety and mix of devices that the federal regulation sought . . . [and would be] an obstacle to the accomplishment and execution of a federal policy." *Id.* at *26.

2. Seatbelts

Metrotrans asserted that FMVSS 208 preempted the seatbelt claims because it does not require seatbelts for passenger buses like the shuttle bus, which weighed more than 10,000 pounds. *Id.* at *26-27. The Lakes countered that the silence on seatbelts was a decision not to regulate that did not preempt state law. *Id.*

The *Lake* court found a split of authority on the question. *Id.* at *28. The language of FMVSS 208, however, requires seatbelts in buses smaller than the shuttle bus, which suggests a federal standard for large buses. *Id.* at *31. That is, "[i]f a manufacturer wishes to build a bus without seatbelts, it must build [one] that [weighs more] than 10,000 pounds." *Id.*

To allow the Lakes's seatbelt claim to stand would require all large buses in Tennessee to have passenger seatbelts, which would be a direct obstacle to NHTSA's policies and congressional goals. Thus, FMVSS 208 preempted their claims. *Id.* at *33.

The Precedential Value of *Lake*

The *Lake* decision is unpublished, but it established a new rule of law in Tennessee, and the Lakes filed for permission to appeal on May 14, 2010. Tenn. Ct. Sys., *at* http://www.tsc.state.tn.us/index.htm. (last visited February 5, 2011). As of this writing, the court has neither granted nor denied the same.

Published or not, in any given year, Tennessee courts render relatively few product liability decisions. Counsel and judges rely on those decisions and recognize that the critical question is whether the court's reasoning is sound. The *Lake* opinion is thoughtful and well researched, having been considered by the Supreme Court of South Carolina and the Supreme Court of Texas without regard to its unpublished status. As such, it remains an important decision in Tennessee products liability law.

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TEXAS

The Texas Supreme Court Creates a Roadmap to Personal Jurisdiction Over Non-Resident Manufacturers

Spir Star AG v. Kimich, 310 S.W.3d 868 (Tex. 2010)

Non-resident product manufacturers may want to reexamine the "stream of commerce" through which their products ultimately reach Texas in light of the Texas Supreme Court's decision in *Spir Star AG v. Kimich*, 310 S.W.3d 868 (Tex. 2010). *Spir Star AG* defines the circumstances under which a non-resident manufacturer can be subjected to specific jurisdiction in Texas when it uses a Texas entity to distribute its product.

Defendant Spir Star AG ("AG"), a German manufacturer of high pressure hoses and fittings, sold its products through a Texas distributor, Spir Star Limited ("Star Ltd"). Although formed by several AG directors as a Texas entity to sell AG products to refineries near Houston, the

distributor did not exclusively sell AG products and had limited permission to use the trademarked name "Spir Star." Because title to all AG products passed from AG to Star Ltd. in Germany, AG's actual contacts with Texas were limited.

In 2003, plaintiff sued AG and Star Ltd. when he was seriously injured by one of AG's hoses. AG filed a special appearance arguing Texas lacked personal jurisdiction over AG.

AG relied on a line of Texas cases that reject jurisdiction "[w]hen a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws." *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 808 (Tex. 2002). AG argued no personal jurisdiction existed because neither AG nor Star Ltd. controlled the business operations of the other.

In finding the trial court properly exercised special jurisdiction over AG, the Texas Supreme Court emphasized that jurisdiction over the manufacturer did not hinge on the Texas distributor's actions or imputing them to the manufacturer, but whether AG marketed and distributed the products to profit from the Texas economy.

The Court focused on whether AG's actions satisfied the limits for specific jurisdiction, which exist when (1) the defendants' contacts with the forum state are purposeful, and (2) the cause of action arises from or relates to the defendant's contacts. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009). Although sporadic contacts may support specific jurisdiction, a seller's awareness that the stream of commerce may or will sweep a product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State. *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996). In that circumstance, Texas precedent, in keeping with *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102 (1987), generally requires some "additional conduct" that indicates "an intent or purpose to serve the market in the forum State." One example of this additional conduct includes "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112.

Using the "additional conduct" test and U.S. Supreme Court precedent, the Texas Supreme Court created a shortcut general rule with several exceptions for applying specific jurisdiction in product liability cases against non-resident manufacturers:

"When an out-of-state manufacturer like AG specifically targets Texas as a market for its products, that manufacturer is subject to a product liability suit in Texas based on a product sold here, even if the sales are conducted through a Texas distributor or affiliate. In such cases, it is not the actions of the Texas intermediary that count, but the actions of the foreign manufacturer who markets and distributes the product to profit from the Texas economy. . . [P]urposeful availment of local markets may be either direct (through one's own offices and employees) or indirect (through affiliates or independent distributors)." *Spir Star AG*, 310 S.W.3d at 874.

In dicta, the Court noted at least one important exception to its general rule. While use of a Texas distributor may alone satisfy the "additional conduct" requirement in some cases, there may be situations in which it does not. For example, if a Texas distributor is used merely to increase the manufacturer's bottom line more broadly through efficiency or greater economies of scale and is not intended to serve just Texas, that relationship may not constitute the "additional conduct" required for jurisdiction.

Spir Star AG now provides a jurisdictional road map for plaintiffs seeking to sue foreign

manufacturers. Those manufacturers must carefully consider the capacity in which they use a Texas distributor and how that use will be viewed. If the motive is to market its products to Texas, there is an increased likelihood personal jurisdiction will be found. The manufacturer cannot simply avoid Texas jurisdiction by thoughtfully structuring its transactions outside the state, but by following the signs posted by *Spir Star AG*, it can alter future dealings to lessen its exposure.

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UTAH

Utah and the "Components Part" Doctrine

Gudmundson v. Del Ozone, 2010 UT 33 (Utah 2010).

Plaintiff, a former Utah State Prison employee, sued the component part supplier of the prison's new ozone laundry system for design defects that purportedly caused her significant brain injuries due to ozone exposure from the system. After rejecting plaintiffs' attempt to introduce a new theory in response to defendant's motion for summary judgment, the court focused on the liability of the component part manufacturer. It held that a manufacturer of a non-defective component part may be liable for creating a defective system if it played a substantial role in designing the system and if inclusion of the non-defective component rendered the system defective and unreasonably dangerous.

Plaintiff argued that the component part manufacturer, Del Ozone, was liable for the design defects that existed in the ozone-disinfection system (manufactured by OzoneSolutions) as a whole because it had collaborated with the OzoneSolutions' engineers on the system generator design and supplied all the component parts necessary for the system. Del Ozone countered by arguing (i) it merely filled OzoneSolutions' purchase order, and (ii) OzoneSolutions was the only party responsible for selecting the size of the generator and installing the system's necessary components.

The Utah Supreme Court had not previously addressed the extent to which installation of a nondefective product into a defective system results in tort liability, but it had required that in order to recover in strict liability against a seller, the plaintiff must prove

(1) that a defect or defective condition of the product made it unreasonably dangerous,
(2) that the defect was present at the time of the product's sale, and
(3) that the defective condition was the cause of the plaintiff's injuries.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, ¶ 16, 79 P.3d 922. *Schaerrer* provided the boundaries of manufacturer liability, but provided no guidance on what constitutes a "product" or when movement of the "product" constitutes a "sale."

To answer that question, the Court analyzed the "component-parts doctrine." Under that doctrine, a manufacturer of a component part who participates in the design of the final product or system may be held liable for injuries caused by the final product even if the component itself was not defective. The Court ultimately adopted the Third Restatement of Torts, Products Liability, Section 5, which provides:

> "One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to

> liability for harm to persons or property caused by a product into which the component is integrated if. . .:
> (b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
> (2) the integration of the component causes the product to be defective, as defined in this Chapter; and
> (3) the defect in the product causes the harm."

In reaching its conclusion, the Court relied upon the policy-based rationale that although manufacturers of non-defective component parts should not bear the risk of ensuring the integrated product's safety, a component manufacturer who participates in the design of the product should bear some risk of liability. Providing guidance on the "substantially participates" aspect of the Restatement, the Court noted that a component part supplier must have had some degree of control over the decision-making process of the final product or system. It also emphasized the importance of the causation element, i.e., the non-defective component part must cause the system to be defective. *See* ¶¶ 57 – 60. The Court remanded the case for findings consistent with the opinion—without the benefit of additional discovery.

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WISCONSIN - DISTRICT COURT

Gibson v. American Cyanamid Co., 719 F. Supp. 2nd 1030 (E.D. Wis. 2010), and Slip Opinion, Case No. 07-C-864 (E.D. Wis. Nov. 15, 2010)

Background – Creating a "Mecca for Lead Paint Suits."
In *Thomas v. Malett*, 701 N.W.2d 523, the Wisconsin Supreme Court adopted a controversial "risk contribution" rule for childhood lead poisoning cases that enabled plaintiffs to circumvent traditional causation requirements. Instead of having to prove that a given defendant marketed or produced any particular lead paint used in the home in question, a plaintiff could simply show that the defendant was engaged in the industry during the relevant period, namely the time period during which the home existed. Under the rule, once a plaintiff makes such a showing, the burden shifts to the defendant to prove that it either did not participate in the industry during the potentially expansive time period, or did not market its paint in the geographic area where the house in question was built.

Notably, the *Thomas* court declined to address constitutional arguments raised by the defense, finding that they were not ripe. Upon remand at trial, the jury found that the plaintiff had not proven he was injured by ingesting lead paint. As a result, the jury never applied the risk-contribution rule formulated by the Wisconsin Supreme Court. Justice Prosser, however, lamented in his dissent that by adopting the "risk contribution" rule Wisconsin would become "the mecca for lead paint suits." 2005 WI 129, ¶ 268.

***Gibson—Thomas* "Risk Contribution" Rule Dismantled on Due Process Grounds.**
As predicted, many more lead paint suits were filed after *Thomas*. Ultimately, *Gibson* landed in federal court before Judge Rudolph Randa and entailed the same inability to identify a specific producer of the lead paint ingested as existed in *Thomas*.

Judge Randa issued two separate decisions granting summary judgment to all seven of the paint industry defendants. In both instances, the court relied on two distinct rationales in finding that the risk contribution rule, as applied to the defendants, is unconstitutional on substantive due process grounds. The first rationale emanates from the U.S. Supreme Court's admittedly

"fragmented" decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). From the competing decisions in *Eastern*, Judge Randa extracted the principle that a state rule of law (whether judicial or legislative in nature) may be unconstitutional if it imposes: "'(1) severe, (2) retroactive liability on a (3) limited class of parties that (4) could not have anticipated the liability, and the extent of that liability is (5) substantially disproportionate to the parties' experience.'" 719 F. Supp. 2d at 1047-48 (quoting *Eastern E.*, 524 U.S. at 528-529 (Kennedy, J., concurring)). Finding each of these elements to have been met, the court held that the risk contribution rule created an "arbitrary and irrational remedy." It "imposes a burden unrelated to any injury actually caused by the [defendant] and bears no legitimate relationship to the government's interest in compensating victims of lead poisoning for their injuries." *Id.* at 1050.

The second rationale was derived from recent U.S. Supreme Court cases striking down punitive damages awards as violative of due process when based upon the reprehensibility of conduct involving non-parties. *Id.* at 1051-52 (discussing *State Farm Mutl. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *Phillips Morris USA v. Williams*, 549 U.S. 346 (2007)). From these cases, the court distilled the fundamental principle that imposing damages for the wrongful conduct of others violates due process. *Id.* at 1052. The risk contribution rule violated that principle because it is premised on a plaintiff's inability to identify a particular manufacturer's product as causing him injury. Hence, there would be no "clear nexus or provable connection between a damages award and the harmful conduct of the defendant." *Id.*

Gibson's Lasting Significance in the Wake of "Tort Reform"

One might question the lasting significance of *Gibson* in light of the January 2011 enactment of Wis. Stat. § 895.046, which effectively overturns *Thomas*'s risk contribution rule. That legislation, however, is not retroactive. Moreover, since the plaintiffs' bar will no doubt challenge the constitutionality of this and other recently enacted tort reform initiatives, the new legislation's ultimate fate is by no means certain. No matter the outcome, the *Gibson* decision provides powerful ammunition for the ongoing defensive battles against one-sided, pro-plaintiff legal rules in Wisconsin and beyond.

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CORRECTIONS

Corrections to last edition of Newsletter — Giving Credit Where Credit is Due

Samantha Halliburton was a contributing author on the case note titled: *Tenth Circuit Requires Jury Instruction on the Risk-Benefit Test if the Product Defect Claim is Primarily Technical and/or Scientific and Application of State Law Presumptions* (*Kokins v. Telflex*, 2010 U.S. App. LEXIS 21168 (Oct. 14, 2010)) that was published in the last edition (Nov. 2010) of our newsletter. Ms. Halliburton is an attorney with Hall & Evans, LLC in Denver, Colorado. Thanks are owed for her contribution in that piece.

Upcoming ALFA International Events

April 7-8, 2011
Workers' Compensation Practice Group Seminar
Ritz-Carlton New Orleans
New Orleans, Louisiana
PG Chair: Jeff Linder
Program Chair: Mark Robins
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May 4-6, 2011
Transportation Practice Group Seminar
The Ritz-Carlton Laguna Niguel
Dana Point, California
PG Chair: Pete Doody
Program Chair: Joe Swift
ALFA Contact:
Amy Halliwell at ahalliwell@alfainternational.com

June 8-10, 2011
Insurance Law Roundtable
The Ritz-Carlton Battery Park
New York, New York
PG Chair: Jill Endicott
Program Chairs: Bob Hebb & Jim Johansen
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Tara Miller at tmiller@alfainternational.com

June 16-19, 2011
European Regional Meeting
The Margi Hotel - Athens, Greece
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July 24-27, 2011
ATA Forum for Motor Carrier General Counsel
(Share/Zaroski)
Hilton La Jolla Torrey Pines - La Jolla, California
ALFA Contact:
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September 21-23, 2011
Product Liability Practice Group Seminar
Loews Vanderbilt - Nashville, Tennessee
PG Chair: Kevin Owens
Program Chair: Kara Stubbs
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October 12-14, 2011
Hospitality Practice Group Seminar
Westin Kierland - Scottsdale, Arizona
PG Chair: Beth Kamp Veath
Program Chairs: Felice Cotignola & Dick Krieg
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October 20-22, 2011
Annual Business Meeting
Westin Chicago River North - Chicago, Illinois

October 30-November 4, 2011
International Bar Association Annual Conference
(Share/Zaroski)
Dubai, UAE
ALFA **C**ontact:
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November 9-11, 2011
International Law Practice Group Seminar)
Hilton - Sydney, Australia
PG Co-Chairs: Eddy Hayes & Alfred Meijboom
Program Chair: Alistair Little
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November 9-11, 2011
Workers' Compensation Disability Conference
(Share/Zaroski)
Las Vegas Hilton - Las Vegas, Nevada

March 8-11, 2012
International Client Seminar
Labor & Employment PG Chair: Carol Ervin
Program Chair: Beth Johnson
Westin Kierland Resort & Spa- Scottsdale, Arizona
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May 2-4, 2012
Transportation Practice Group Seminar
The Ritz-Carlton Amelia Island - Amelia Island, Florida
PG Chair: Clark Aspy
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June 6-8, 2012
Retail Real Estate Seminar
The Ritz-Carlton Palm Beach - Manalapan, Florida
PG Chair: Jeff Newman
ALFA **C**ontact:
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July 25-27, 2012
Construction Law Practice Group Seminar
The Broadmoor - Colorado Springs, Colorado
PG Chair: Gary Bague
Program Co-Chairs: Darrell Whiteley & Benton Barton
ALFA **C**ontact:
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October 18-20, 2012
Annual Business Meeting
Westin Copley Place - Boston, Massachusetts
ALFA **C**ontact:
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June 5-7, 2013
Insurance Law Roundtable
The Ritz-Carlton Battery Park - New York, New York
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Products Liability *Perspectives*

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