The Product Liability Practice Group has a tradition of putting together a “Year-In Review” edition of its newsletter for its members and readers, and so we continue that tradition with a look back at 2012. We have asked our members to scour opinions from last year from each of their respective State’s supreme courts and to report on significant decisions affecting or relating to the product liability arena. In response, our members have supplied interesting case notes analyzing eighteen cases from seventeen different States. We hope you will peruse this publication to gain insight on developments in the States in which you practice law or oversee and monitor litigation and that the summaries convey useful updates on the legal nuances, new standards or changes in the jurisdictions which are of interest to you.

With Spring and “March Madness” afoot, we will begin to shift our focus in the next publication to more targeted articles of interest to all of those who enjoy product liability work, or those whose positions orient them such that they have an appreciation for product liability issues. We welcome your articles as well as your suggestions for topics to be covered. Please feel free to contact any of the editors with your papers, topics, or ideas.

Editors Colleen Murnane, Stan Shuler & Jack Ables
The Alaska Supreme Court reversed the judgment in favor of Bowie on appeal. The main crux of the decision dealt with errors made by the trial court in the admission and exclusion of evidence, including collateral source issues and evidence of Jones’ drug use. However, in an admitted advisory opinion, the Court also addressed the post-sale warning claims because the issue would “likely recur at a second trial.”

The Court then held that manufacturers owe a post-sale duty to warn of dangers that become apparent after sale of the product when “the danger is potentially life-threatening”, joining several other states in this approach. Jones, 282 P.3d at 335. The Court made clear that it was not adopting a post-sale duty to recall or to warn of technological advances. Importantly, however, the Court stated that the need for guarding around a hazard was not a technological advancement or innovation – instead, the Court adopted testimony that the need for hazard guarding has been recognized in machine design since the early 20th century. In embracing this duty rooted in Section 10 of the Restatement (Third) of Torts: Product Liability (1998), the Court also adopted the Restatement’s four factors to be considered when determining whether a reasonable person in the seller’s position would issue a post-sale warning. These four factors are: (1) whether the seller knows or reasonably should know that the product poses a substantial risk of harm (while also noting that the key issue is the severity, not the frequency, of the harm); (2) whether the seller can identify those to receive the warning and that those can reasonably be assumed to be unaware of the risk to be addressed; (3) whether the warning can be effectively communicated to and acted on by those receiving it; and (4) whether the risk of harm justifies the warning (again, focusing on severity over frequency). The Court noted that Jones had presented sufficient evidence not only to pursue this newly-recognized cause of action, but also to present a punitive damage claim to
the jury on retrial concerning Bowie’s lack of post-sale warnings.

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ARAKANS

The Arkansas Supreme Court Holds that Business of a Domestic Subsidiary is Insufficient to Establish Personal Jurisdiction over a Foreign Manufacturer

Yanmar Co. v. Slater, 2012 Ark. 36 (Feb. 2, 2012)

In Slater, the Arkansas Supreme Court held that personal jurisdiction could not be found against a foreign manufacturer based on the business of a subsidiary in the state or the manufacturer’s past, terminated business in the state. It also held that a subsidiary of the manufacturer that had no involvement in the design, manufacture, or distribution of the product owed the plaintiff no duty.

Slater was a wrongful-death action involving a decedent who was killed when a tractor manufactured by Yanmar Co. (“Yanmar Japan”) rolled over. Yanmar Japan is incorporated and has its principal place of business in Japan. It is not licensed to do business in Arkansas and does not have any offices, employees, assets, bank accounts, or property in Arkansas. The particular tractor was manufactured in 1977. It was not authorized for distribution in the United States, and Yanmar Japan had ceased selling any tractors in the United States in 1991. Yanmar America Corp. (“Yanmar America”) is a subsidiary of Yanmar Japan that sells parts for authorized Yanmar tractors that remain in service in this country. It was undisputed that Yanmar America frequently sold parts in Arkansas.

Arkansas’s long-arm statute is unrestricted, leaving constitutional due-process principles as the only limit to Arkansas courts’ personal jurisdiction. The trial court found that it had general personal jurisdiction based on a “stream of commerce” theory because Yanmar Japan was admitted aware that its parts were being sold in Arkansas by its subsidiary, Yanmar America. The trial court also based personal jurisdiction on the “symbiotic relationship” between Yanmar Japan and Yanmar America, and Yanmar Japan’s business in the state prior to 1991.

The Arkansas Supreme Court reversed and dismissed the suit. As to the “stream of commerce” theory, the Court, relying upon Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846 (2011), held that this theory is only appropriate for proving specific personal jurisdiction, which was not at issue in this case. On the “symbiotic relationship” between the two Yanmar companies, the Court held that a subsidiary’s activities could only be the basis for jurisdiction against the parent company if the parent company exercised “parental control and domination” such that the subsidiary was an “alter ego” of the parent. Finally, the Arkansas Supreme Court rejected Yanmar Japan’s former business in the state as “simply not enough” to support personal jurisdiction.

The Arkansas Supreme Court also reversed and dismissed as to Yanmar America. Yanmar America did not exist in 1977 and therefore had nothing to do with the design or manufacture of the tractor. Further, because this was a “gray market” tractor that had not been authorized for distribution in the United States, Yanmar America had had no involvement in its sale or distribution. Finally, the Court rejected the
plaintiff’s attempts to impute Yanmar Japan’s duty to Yanmar America, respecting the fact that the two companies were and are separate legal entities.

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DELAWARE

Delaware Supreme Court Affirms Grant of Summary Judgment Because Plaintiffs Failed to Present Sufficient Evidence to Support an Essential Element of Claim


Frank Edmisten alleged he worked with products containing asbestos from 1965 to 1977 at O'Neal's Bus Service ("O'Neal's") in Wilmington and Smyrna, Delaware. In 2010, Frank and his wife sued Greyhound, among others, claiming that Greyhound's products exposed Mr. Edmisten to asbestos, causing his mesothelioma. When deposed, Frank testified that O'Neal's owned two Greyhound buses—purchased "from a Greyhound location in North Carolina"—while he worked there, and that he (Frank) was responsible for ordering parts for those buses. Frank also testified that he ordered replacement clutches and brakes for those buses and installed Greyhound brakes and clutches on each bus. Frank acknowledged that he did not know whether those parts contained asbestos, but testified that he "would think so." Frank gave inconsistent testimony concerning the years the buses were purchased and from where they were purchased. He also stated that the clutches came from a "regular Greyhound company" in North Carolina, but later admitted that Greyhound's operation there "was a bus terminal." His co-worker testified that the replacement brakes generally used during Mr. Edmisten's employ contained asbestos: "Absolutely. Sure. I mean . . . in that time there, I wasn't a mechanic. But I know [the replacement brakes contained asbestos]." He also testified that, "as far as my knowledge [goes]," replacement clutches "probably" contained asbestos, but again added the caveat that, "I didn't work on them. . . . I drove them."

Mr. Edmisten died while the case was pending. Greyhound moved for summary judgment, which the Superior Court granted, opining: “While it is true that the Court must make allowances for lapses in witnesses' memories, the conflicting testimony presented by the Plaintiff, as well as the inconsistent and confusing nature of [Edmisten's] own testimony, leads the Court to conclude that [Edmisten's] claims that he was exposed to Greyhound products are merely speculative and not evidence of a genuine factual dispute.”

Plaintiffs appealed to the Delaware Supreme Court. While recognizing the evidence must be viewed in the light most favorable to the non-moving party, the Supreme Court said that requires the court to accept the non-movant's version of any disputed facts. The court distinguished the evidence presented in Cain v. Green Tweed & Co., Inc., 832 A.2d 737 (Del. 2003), upon which Edmisten relied because, in Cain, the plaintiff remembered using a particular product which he knew contained asbestos. Id. at 741-42. Because Mrs. Edmisten provided no evidence indicating that Greyhound, specifically, sold or supplied asbestos-containing brakes and clutches to O'Neal's, she failed to present sufficient evidence to support an essential element of her claim. Therefore, the grant of
summary judgment to Greyhound was correct, and was affirmed by the Supreme Court.

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Georgia’s General Apportionment Statute Now Allows Fault Allocations To Criminally Culpable Third Parties

_Couch v. Red Roof Inns, Inc._, 291 Ga. 359, 729 S.E.2d 378 (2012), is a premises liability case that provides a significant interpretation of Georgia’s apportionment statute, O.C.G.A. § 51-12-33, which holding can arguably be applied in product liability cases. The issue came to the Georgia Supreme Court by way of a certified question from the United States District Court for the Northern District of Georgia. The district court asked the Supreme Court to answer whether in a premises liability case in which the jury determines a defendant property owner negligently failed to prevent a foreseeable criminal attack, is the jury allowed to consider the “fault” of the criminal assailant and apportion its award of damages among the property owner and criminal assailant. 291 Ga. at 379. In analyzing § 51-12-33, the Court noted that “there is direct evidence from the statute [] that fault is not meant to be synonymous with negligence, but instead includes other types of wrongdoing which include intentional acts.” 291 Ga. at 382. The Court recognized that the statute uses “fault” synonymously with “responsibility” and “liability.” 291 Ga. at 381. Notably, the Court surveyed other state statutes to determine that not every state includes intentional torts when determining the applicability of the given state’s apportionment statute. 291 Ga. 363. Moreover, and according to the dissent, the Court seems to “eviscerate more than a century of Georgia’s common law” that did not include intentional acts when considering fault. 291 Ga. 385 (J. Melton dissenting). Although such a holding arguably seemed to contradict Georgia common law, the majority went on to discuss that the Legislature was free to create a statute that trumps common law, so long as the law was not unconstitutional. 291 Ga. at 382.

Georgia’s apportionment statute has generally found widespread application to product liability cases in the state. Whereas the issue of criminal conduct by a non-party can readily be an issue in a product liability case, for example when a drunk driver crashes into another car and the victim claims his own car was defectively designed and did not provide adequate protection from the drunk driver’s vehicle, having precedent such as _Couch_ provides solid footing to seek to get the drunk driver, or any other intentional tortfeasor, placed on the jury verdict form for purposes of allocating fault to him or her.

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The Idaho Supreme Court recently confirmed the requirements for proving product defect in product liability cases, while simultaneously making it more difficult for appellants to get their cases heard before the highest court in the state. On May 29, 2012 the Supreme Court affirmed the ruling of the Idaho Court of Appeals in Hurtado, a case involving a dispute between a dairy calf rancher and a milk replacer manufacturer.

Hurtado arose out of a 2005 incident in which J & J Calf Ranch purchased a Land O’Lakes milk replacer product called Purina 20-20 Milk Replacer and began feeding it to its dairy calves. Shortly after switching to this product, J & J experienced a sharp increase in the death rate of its calves from scours. The normal scours mortality rate for calves at the J & J ranch was between 3-5%; switching to the Land O’Lakes product increased the mortality rate to 19-20%. J & J lost at least 130 calves which were valued at $1,000 each.

J & J began feeding its bull calves a different product and the bull calves’ death rate from scours returned to normal. The heifer calves mortality rate remained high. J & J sent a sample of the milk replacer, as well as two fecal samples from sick calves, for testing to a nearby laboratory. The milk replacer samples tested positive for non-pathogenic staphylococcus, cryptosporidia and streptococcus. Cryptosporidia is the only organism that could cause scours. J & J’s nutrition expert, Brad Brudevold, testified that despite the presence of crypto, the scours was caused by a nutritional problem created by the milk replacer.

J & J first sued Land O’Lakes in December of 2005 on various theories of product liability. J & J received a jury verdict in the amount of $150,000, and Land O’Lakes appealed. In the first appeal, the Idaho Supreme Court held that the district court had abused its discretion in admitting certain business records and vacated the judgment. After a second trial, the jury entered another verdict in favor of J & J, this time in the amount of $50,000, to be reduced by 40% due to J & J’s negligence. Land O’Lakes appealed the second verdict on several evidentiary and sufficiency of proof grounds.

In the second appeal, Land O’Lakes first argued that the admission of J & J’s expert testimony was an abuse of discretion because J & J failed to demonstrate that the witness was an expert, that any scientific basis existed for the opinion testimony, and that there was a substantial similarity between the scours problem at the expert’s ranch and J & J’s ranch. The Supreme Court did not consider this evidentiary argument, deeming it waived. In doing so, it created an entirely new rule for appeals from evidentiary rulings, holding that appellants before the Supreme Court in Idaho must demonstrate that any claimed error in admission of or refusal to admit evidence affects a “substantial right”. Thus, appellants in Idaho must properly support their appeals from evidentiary rulings with both authority and argument that a substantial right has been implicated. Failure to do so will be deemed a waiver of the appealed evidentiary issue.
Land O’Lakes went on to argue that the verdict on J & J’s product liability claim was not supported by substantial and competent evidence, because J & J failed to prove the exclusion of other reasonable causes of the scours in its calves, and because it failed to prove damages to a reasonable degree of certainty. The Idaho Supreme Court upheld and reinforced the longtime rule that when a product liability claim is based on circumstantial evidence, the plaintiff has the burden of proving “that the product malfunctioned, and that there are no other reasonably likely causes of the malfunction.” *Id.* at 420; citing *Murray v. Farmers Ins. Co.*, 118 Idaho 224, 227, 796 P.2d 101, 104 (1990). The Court reaffirmed that the plaintiff is not required to exclude every possible cause, but only reasonably likely causes. The Court also confirmed that proof of the occurrence of an accident, by itself, is not sufficient to support a product liability claim.

The Court held that the jury’s verdict was supported by substantial and competent evidence of the exclusion of other reasonably likely causes of the scours problem. The Court also held that the trial court did not abuse its discretion in permitting the owner of the calves to testify as to their fair market value. *Id.* at 422.

**INEquality**

**Indiana Supreme Court Affirms Forum Non Conveniens Dismissal In Product Liability Suit Stemming From Canadian Helicopter Crash**

*Anyango v. Rolls-Royce Corp.*, 971 N.E.2d 654 (Ind. 2012)

The Indiana Supreme Court issued an important product liability forum non conveniens opinion on July 30, 2012 in *Anyango v. Rolls-Royce Corp.*, 971 N.E.2d 654 (Ind. 2012).

The facts of the case involve what the Court described as “an almost unbelievable accident.” The plaintiffs were citizens of Kenya. Their son, a college student in British Columbia, Canada, was killed when a helicopter flying overhead lost power and crash-landed on him in Cranbrook, British Columbia. Also killed were the helicopter’s pilot and two passengers. The plaintiffs filed a product liability wrongful death suit in Indiana, where the helicopter engine was manufactured by a predecessor of Rolls-Royce and where the engine components were designed by Honeywell. A separate suit was filed in British Columbia by the survivors of the other victims of the crash.


The argument advanced by the plaintiffs was that British Columbia did not provide an “adequate” forum because their action would not be economically viable there, contending that under applicable British Columbia law, the only monetary compensation permitted would be burial or funeral expenses. As the Indiana
Supreme Court remarked, the “sole reason” the plaintiffs opposed dismissal was “because their wrongful-death action would have ‘a significant seven figure value’ if litigated in Indiana, whereas it would have only nominal value if litigated in Canada.” 971 N.E.2d at 658.

In affirming the Court of Appeals decision, the Indiana Supreme Court adopted the reasoning of the United States Supreme Court in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The Court agreed with the holding in Reyno that a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry. The Court found no reason to believe that the plaintiffs “would be treated unfairly or be deprived of their remedy” in Canada, where they could pursue their cause of action and recover “some substantive damages,” even if their damages “may be nominal in value.” Id. at 663.

Significantly, Trial Court 4.4(C) vests the forum non conveniens decision to the exercise of the trial court’s discretion. The Indiana Supreme Court found no abuse of discretion under these facts.

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MINNESOTA

Minnesota Supreme Court Rejects Broad Expansion of Duty to Warn

Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572 (Minn. 2012).

In this case, the Minnesota Supreme Court rejected a broad expansion of a product manufacturer’s duty to warn to include a duty to train end users as to the product’s proper use. Specifically, the Supreme Court addressed whether an airplane manufacturer owed a duty to a noncommercial pilot who, after purchasing an airplane from the manufacturer but failing to receive all of the flight training promised to him as part of that purchase, died when his airplane crashed. The case was brought by the wrongful death estates of the pilot and of his passenger who was also killed in the crash. The jury found the manufacturer was negligent, awarded $19,400,000 in damages, and the district court denied the manufacturer’s post-trial motion for judgment as a matter of law. The Minnesota Court of Appeals reversed, concluding that the manufacturer did not have a duty to provide training and that the claims were barred by the educational malpractice doctrine. The Supreme Court affirmed the court of appeals, with two justices dissenting, holding: (1) that an airplane manufacturer’s duty to warn does not include a duty to provide training to pilots who purchase an airplane from the manufacturer; and (2) a pilot may not recover in tort against an airplane manufacturer when the duty owed to the pilot by the manufacturer was imposed only by contract. Given this resolution, the Supreme Court did not reach the issues of educational malpractice or causation.

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MISSISSIPPI

The Dividing Line: Differentiating the Sophisticated-User Doctrine at Common Law Versus the Mississippi Products Liability Act

Mississippi Valley Silica Co., Inc. v. Eastman, 92 So. 3d 666 (July 19, 2012)

In Eastman, the Mississippi Supreme Court addressed differences between common-law and Mississippi’s statutory version of the sophisticated-user defense. Both the common-law and statutory versions are available to manufacturers defending claims of inadequate warning in product liability suits. The Court also provided direction for drafting jury instructions incorporating a sophisticated-user defense and commented on ambiguity in the Mississippi Products Liability Act (“MPLA”), which renders the sophisticated-user defense potentially applicable to any person or entity that “used” the product at issue.

Generally, at common law, “[t]he sophisticated user defense relieves a seller of liability for failing to warn a subsequent user of dangers or defects of which the user is already aware.” Eastman at 671 (quoting Kenneth M. Willner, Failures to Warn and the Sophisticated User Defense, 74 Va. L. Rev. 579, 587 (April 1988)). In Mississippi, this common law defense is subject to an exception-- the “defense does not relieve the manufacturer of its duty to warn . . . unless the manufacturer’s reliance on the [sophisticated user] is reasonable.” Eastman at 672 (quoting Swan v. I.P., Inc., 613 So. 2d 846, 856 (Miss. 1993)). This exception has been dubbed the “reasonable reliance requirement.” Id.

On the other hand, the sophisticated-user doctrine as codified in the MPLA does not contain a reasonable reliance requirement:

(e) In any action alleging that a product is defective pursuant to paragraph (a) (i)2 of this section [failure to contain adequate warnings or instructions], the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

Miss. Code Ann. § 11-1-63(e) (Rev. 2002).

In Eastman, defendant Mississippi Valley Silica Company, Inc. (“MVS”) provided silica sand to Marathon LeTourneau (“LeTourneau”), a shipbuilding business that employed Robert Eastman as a sandblaster for 28 years. Eastman sued after he was diagnosed with lung disease and silicosis and the jury returned a verdict against MVS in excess of $2 million. Eastman died prior to entry of final judgment by the trial court.

In its defense, MVS submitted the following sophisticated-user jury instruction:

If the purchaser of silica [LeTourneau] knew or should have known the dangers that may be associated with silica, then the purchaser is a sophisticated user, and a supplier [MVS] has no duty to warn of those dangers.

Eastman at 672.
The Court specifically stated that “Mississippi recognizes both a statutory and the common-law sophisticated-user defense.” *Id.* at 671. The Mississippi Supreme Court found that the instruction was flawed under the common law sophisticated-user doctrine because it failed to include language about the reasonable reliance requirement. The Court pointed out, however, that the instruction was a correct statement of the sophisticated-user defense as codified in the MPLA, which has no reasonable reliance requirement. Further, the Court stated that the subject jury instruction could have been reformed by substituting “user” for “purchaser”, thereby addressing Eastman as the “sophisticated user” rather than LeTourneau as the purchaser of the product. However, the Court specifically declined to address “the meaning of ‘user’ as it is used in the statute” because that issue had not been briefed by the parties.

Ultimately, the Court reversed and remanded because the trial judge refused the proffered instruction instead of revising it, denying the jury an opportunity to consider the argument that MVS had no duty to warn of risks associated with silica sand because LeTourneau knew or should have known of the dangers.

When faced with a judge inclined to refuse any jury instruction on the basis that the instruction is an incorrect statement of law, this case stands as a reminder that the proper course of action is to revise the instruction because failure to revise the instruction is reversible error.

Substantively, *Eastman* establishes that the reasonable reliance exception does not apply to the sophisticated-user defense in a lawsuit brought solely under the MPLA. But, a products liability lawsuit that includes non-MPLA theories of liability must address the reasonable reliance requirement to wield the sophisticated-user defense against those claims outside the Act. Further, *Eastman* can be used to make the argument that because the MPLA does not define the term “user”, any person or entity who has “used” the product at issue may qualify as a sophisticated user under the Act.

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**MONTANA**

**MONTANA’S SUPREME COURT CREATES HEADACHES IN FAILURE TO WARN CASES INVOLVING BYSTANDERS**


A baseball bat manufacturer was liable in a failure to warn case to a plaintiff who was neither the actual consumer nor the actual user of the baseball bat. Additionally, the manufacturer was not entitled to an assumption of risk defense without a subjective showing that plaintiff had actual knowledge of possible injury or death and chose to engage in the activity with that knowledge.

While pitching in a baseball game, Decedent was struck in the head by a baseball hit off an aluminum bat manufactured by Defendant.

Decedent's parents alleged claims of manufacturing and design defect and failure to warn. Defendant argued assumption of risk. The jury did not hold Defendant liable for manufacturing and design defect; however, the jury did determine the bat was defective due to
failure to warn of enhanced risks associated with its use. Defendant appealed the verdict.

Defendant argued that it could only be liable to the actual consumer (purchaser) and actual user (in this case, the person batting) in a failure to warn action. In failure to warn cases, the plaintiff must prove: 1) the product was sold in defective condition due to lack of or inadequate warnings, 2) the defect caused the injury, and 3) the defect is traceable to the defendant. The Court disagreed and held that a manufacturer could be liable to anyone exposed to a potential risk of harm. In a baseball game, this would include all players and bystanders. The Court also held that the feasibility of warning was not at issue in this case because there are methods of warning other than just a warning on the product itself, such as advertisements, oral warnings, posters, releases, etc.

The Court upheld the trial court’s decision to exclude Defendant from using an assumption of risk defense. The assumption of risk defense is inapplicable, as a matter of law, without evidence that the decedent actually knew that he was exposing himself to injury or death and voluntarily exposed himself to the danger. The determination is subjective. In this case, for Defendant to use the assumption of risk defense, Defendant would have needed to show that decedent had actual knowledge that he would be seriously injured or killed while pitching to someone using Defendant’s bat and then voluntarily proceeded to pitch under those circumstances.

MONTANA SUPREME COURT CLARIFIES ADMISSIBILITY OF SEAT BELT EVIDENCE IN DESIGN DEFECT CASE


A law prohibiting the introduction of evidence concerning seatbelt use or non-use in a civil action does not apply if the seatbelt system itself is alleged to be defective.

Decedent was killed in a roll-over car accident involving a rental car. Plaintiff, the decedent’s estate, filed a lawsuit alleging strict liability for defective design against the car manufacturer and a negligence action against the car rental company for failure to maintain the vehicle in a safe condition. Plaintiff argued the initial impact caused only minor injuries but the seatbelt slackened and spooled during the rollover and caused the decedent to partially eject, resulting in his death.

Under a Montana statute, evidence of seatbelt use or non-use is inadmissible in civil actions for personal injury or property damage involving motor vehicles. The trial court ruled that the statute permitted the introduction of evidence of seatbelt use or non-use in strict product liability claims, but prohibited its admission in negligence claims. Based on this ruling, the trial court told Plaintiff that if it intended to introduce evidence of seatbelt use it would have to drop its negligence claims against the defendants. Plaintiff appealed the trial court’s ruling.

The Montana Supreme Court held that evidence of seatbelt use or non-use was admissible under the facts of the case. The Court looked to the purpose of the law requiring seatbelt use, which is the basis for the statute excluding evidence of use or non-use. The purpose of that law was to create a legal sanction for failing to wear a
seatbelt, but not to penalize a person civilly for non-use.

Plaintiff’s claims were directed toward the condition of the seatbelt system and not to the conduct of the driver. Evidence of seatbelt use or non-use that concerns the conduct of a driver is inadmissible because it focuses on the comparative negligence or contributory fault of the driver, contrary to the intent of the law requiring seat belt use.

In this case, though, evidence of seat belt use was not offered as it relates to the conduct of the driver, but rather to whether the seatbelt system itself is defective. The Court recognized that in this factual situation it would be impossible to address the claims in Plaintiff’s action without the jury becoming aware of seatbelt use. The Court held that when the seatbelt system is placed directly at issue, evidence of use or non-use must be allowed.

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NEVADA

Nevada Adopts the Lohrmann Exposure Test for Asbestos Cases


In a matter of first impression in Nevada, the Nevada Supreme Court “examine[d] the causation tests that [other] courts have implemented when a plaintiff’s or decedent’s mesothelioma is alleged to have been caused by exposure to a defendant's asbestos-containing products.” The Nevada Supreme Court agreed with the “majority view” and adopted the test set forth in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir.1986). The Lohrmann test requires a plaintiff to establish exposure to a defendant’s product(s) on a regular basis over some extended period of time and in proximity to where the plaintiff actually worked, such that it is probable, or reasonable to infer, that the exposure caused the mesothelioma. De minimis exposures are, thus, insufficient to prove that they were a substantial factor in causing the plaintiff’s mesothelioma.

Plaintiffs claimed that Randy Holcomb’s death was caused by exposure to the defendant manufacturers’ asbestos-containing products. Mr. Holcomb used asbestos-containing products over several years while working as a construction laborer and as an automotive mechanic. At his deposition, Mr. Holcomb recalled using the defendants’ brands on a regular basis, but “he did not recall using any particular product on any particular job at any particular time.” As such, Mr. Holcomb could not identify whether the products he used actually contained asbestos. Applying the Lohrmann test, the Nevada Supreme Court ruled that there was sufficient evidence to create a jury question about whether the manufacturers’ products were substantial factors in Mr. Holcomb’s development of mesothelioma. However, with respect to the asbestos supplier, the Court ruled the summary judgment was warranted in its favor. Although the defendant manufacturers had numerous asbestos suppliers, only one was a defendant in the suit. The Court reasoned that, without knowing the specific products that Mr. Holcomb used at a particular time, the plaintiffs could not show that the defendant supplier’s asbestos was in the products used by Mr. Holcomb.
The Nevada Supreme Court opined that the *Lohrmann* test is a “balanced approach to find a causation test that is not overly rigorous or too relaxed in order to ensure protection for both manufacturers and consumers.”

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**NEW YORK**

**In New York Federal Pre-emption Does Not Bar Manufacturer Liability When a Tour Bus Rolls Over but the State Is Immune From Suit When a Tour Boat Sinks**


In recent cases concerning catastrophic tour bus and tour boat accidents, the New York Court of Appeals has shown that when it comes to claims of unsafe design, as Mel Brooks said, “it’s good to be the king.” In *Doomes v Best Transit Corp.* 17 N.Y.3d 594; 958 N.E.2d 118 (2011), *Metz v State of New York*, 2012 N.Y. LEXIS 3555; 2012 NY Slip Op 8172

Prior to trial, the manufacturer of the bus, Warrick Industries, Inc. (“Warrick”), moved to preclude the plaintiffs’ claim that the lack of seatbelts contributed to the passengers’ injuries because national standards do not require the installation of passenger seatbelts on buses under Federal Motor Vehicle Safety Standard 208 and, thus, such claims are preempted by national law. *Id.* The trial court dismissed Warrick’s motion to preclude and the jury found both Warrick and Best Transit Corp., the owner of the bus,
negligent for failure to install seatbelts and failure to operate the vehicle without seatbelts. *Id.* Liability was apportioned 80% and 20%, respectively. *Doomes v. Best Transit Corp.*, supra.

On appeal to New York’s intermediate level appellate court, the Appellate Division, the judgment as to Warwick was dismissed, as the court held that “these claims conflicted with the federal goal of establishing a uniform regulatory scheme for transit safety.” *Id.* at 601. The issue was then heard by the Court of Appeals, New York’s highest level court, which reversed the Appellate Division’s determination. *Id.* at 601. The Court specified two ways in which implied preemption may occur. First is when federal law is so inclusive that the only conclusion is the legislators intended to control the subject matter. *Id.* The second is when state law is in direct conflict with federal law. *Id.*

The Court observed that although the preemption clause “constrains states from enacting guidelines that deviate from federal standards,” this goal “cannot be singularly pursued at the expense of the Safety Act’s primary purpose to ‘reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.’” *Id.* at 603, quoting 15 USC 1383. Indeed, the Supreme Court itself has found that “the savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards.” *Doomes v. Best Transit Corp.*, supra at 603, quoting *Geier* 529 US at 871.

The court further reasoned that implied preemption did not apply in this case because it was possible for the defendant to comply with both state and federal law. *Id.* at 603. Although the defendant was provided the ability to choose its safety standards with respect to the driver’s seat belt, the reading of FMVSS is silent on passenger seat belt devices. *Id.* at 604. Therefore, as the drafters of FMVSS 208 simply did not consider including seat belts in buses over ten thousand pounds, the Court reasoned that there was no preemptive intent to preclude common law claims. *Id.* at 607.

The facts in the *Metz* case could be found in a product defect claim; however, the New York Court of Appeals defined the boundaries of sovereign immunity in determining that the State had no actionable duty to passengers who were injured and killed as a result of the failure of state inspectors’ to accurately determine the number of people a vessel could safely transport. In *Metz*, a tour boat called the Ethan Allen tragically capsized in Lake George, killing twenty passengers and injuring several others. *Metz v. State of New York*, supra. At the time of the sinking, the boat was carrying forty-seven passengers and one crew member—within the forty-eight person capacity limits prescribed by the Certificate of Inspection. *Id.* at 2. The requirement that such certificates be issued derives from Navigation Law Section 50, which mandates that a state inspector must determine the maximum number of passengers that a vessel can safely transport as well as the amount of crew members necessary to operate the vessel. *Id.* at 2.

The Ethan Allen was constructed in 1964 and was consistently approved for a total capacity of fifty persons (forty-eight passengers and two crew members). *Id.* at 3. This number remained the maximum capacity, despite the fact that the vessel was significantly modified in 1989 when a canvas canopy was replaced with one constructed of wood. *Metz v. State of New York*, supra at 3. Further, the State increased the average assumed weight per passenger by thirty-four pounds. *Id.* As a result, the Ethan Allen could no longer safely hold forty-eight passengers. *Id.* Inspectors testified that rather than conduct a new stability assessment to determine a safe passenger capacity, they simply relied on previous capacity numbers in issuing certificates. *Id.* at 3.
The case made its way to the Court of Appeals which found that the affirmative defense of sovereign immunity applied. *Id.* It was noted by the court that, prior to finding that the State is entitled to governmental immunity, plaintiffs must first demonstrate “the existence of a special duty owed to them by the State,” as the State may not be held liable for conducting an action which is within its governmental function unless it has a special duty to the injured party. *Metz v. State of New York*, supra at 5. Although the statute required inspection of the vessel and certification of the number of passengers it could safely transport, the Court determined that there was no specialized duty of care owed to the individual passengers in this matter. *Id.* at 7.

Further, the Court observed that the intent of legislators in drafting the Navigation Law was not to impose governmental tort liability, but liability upon the owners and operators of the vessels. *Id.* at 8. In support of this position, the Court noted that when the Legislature recently amended this law as a result of the Ethan Allen incident, it deliberately overlooked the addition of a private right of action and enhanced penalties against individuals rather than the State. *Metz v. State of New York*, supra at 8.

So after 2012, it appears that New York law provides that a manufacturer can be liable under state law when a relevant federal safety standard fails to impose a specific duty for equipment on a bus; but the State can escape responsibility when it fails to comply with a clearly established inspection standard and actually certifies a vessel is safe for the passenger load carried when, tragically, it is not.

**NORTH CAROLINA**

**Product Alteration or Modification Defense Applies When Anyone Other than the Manufacturer or Seller, Including a Non-party, Modifies the Product**


The North Carolina Supreme Court reversed a unanimous decision of the North Carolina Court of Appeals and held that the statutory alteration or modification defense applies to anyone other than the manufacturer or seller and is not limited to the actual parties to the lawsuit.

On April 23, 2003, Tonya Stark was driving her family’s 1998 Ford Taurus, with her husband, Gordon Stark, in the front passenger seat, and her three children, Cheyenne, Cory and Cody Stark, in the back passenger seats. The family’s vehicle suddenly accelerated in a parking lot and collided into the concrete base of a light pole. Cody and Cheyenne suffered the most serious injuries. As a result of the accident Cody required emergency lifesaving surgery and Cheyenne became paralyzed.

Through their Guardian ad Litem, Cheyenne and Cody filed a products liability action against Ford claiming that the Taurus’s seat belt system enhanced their injuries. Specifically, they alleged that design deficiencies caused Cody’s abdominal injuries and Cheyenne’s paralysis. Ford asserted the ‘alteration or modification defense’ and presented evidence that Cheyenne’s seat belt system had been modified by placing the shoulder belt behind her back.
N.C. General Statute section 99B-3 shields a product manufacturer or seller from liability proximately resulting from an “alteration or modification of the product by a party other than the manufacturer or seller.” Plaintiffs filed a motion for directed verdict to prevent the alteration or modification defense from reaching the jury. They argued that the alteration or modification of the seat belt system was done by Tonya or Gordon Stark, neither of whom were a “party” to the action. The trial court rejected plaintiffs’ argument. The jury found Ford not liable for the enhanced injuries to Cody and Cheyenne. The jury did determine that Cheyenne’s seat belt was an unreasonable design, but that her injuries were also proximately caused by a modification of the Taurus, relieving Ford of liability.

The Court of Appeals reversed the trial court’s judgment, holding that in order to apply the alteration of modification statute, the person that made the alterations or modifications to the product must be a “party” to the action. The North Carolina Supreme Court allowed Ford’s petition for discretionary review. The Court, reviewing the statutory interpretation de novo, began its analysis with the text of the statute. At issue is whether the term “party,” an undefined term in the statute, was to be given its broad and general meaning or narrow and technical meaning. Looking to dictionary sources, the statute’s limiting language, temporal usage, Pattern Jury Instructions, and scholarly commentary, the Court found ample support for the trial court’s interpretation of section 99B-3. Reversing the Court of Appeals, the North Carolina Supreme Court held “that the defense found in section 99B-3 applies not only when the one who modifies or alters the product is a party to the action concerning the product, but also whenever anyone other than the manufacturer or seller modifies or alters the product.”

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OKLAHOMA

Oklahoma Supreme Court: Must Object to Experts on Daubert Grounds in limine or Contemporaneously with Testimony

Covel v. Rodriguez, 272 P.3d 705 (Okla. 2012)

The Oklahoma Supreme Court has reiterated that Daubert challenges not timely made are waived. In Covel v. Rodriguez, the defendants first contested the admissibility, on Daubert grounds, of the plaintiffs' expert testimony in a motion for judgment notwithstanding the verdict. Upholding long standing Oklahoma procedural law, the Oklahoma Supreme Court reminded that when a party fails to make a timely Daubert objection to an expert witness’s testimony, either in limine or contemporaneously, the error is waived, and cannot be raised on appeal except in circumstances resulting in fundamental error, notwithstanding the Defendant’s controversy at trial of the testimony belatedly attacked post-judgment.

At trial, Plaintiffs' expert witness was qualified as an expert in accident reconstruction, biomechanical engineering, and human factors without any objections. Then, Plaintiffs' expert, relying upon scene photographs, bus maintenance records, survey data prepared with the Total Station surveying tool, eyewitness
accounts, witness statements, deposition testimony, bus maintenance manual, and other vehicle data, concluded that skid marks left at the scene indicated faulty brakes and that effective brakes would have materially changed the point of impact. He concluded that possible, resulting difference in the point of impacts would have made a "tremendous difference."

Defendants did not cross-examine Plaintiffs' witness about his supposed scientific foundation or methods. Plaintiff recovered a multi-million dollar verdict.

The Defendants moved for a JNOV, remittitur, or new trial, all of which were denied. On initial appeal, the Oklahoma Court of Civil Appeals ruled the Plaintiffs' expert witness testimony on causation was impermissible on Daubert grounds.

But, on further appeal to the Oklahoma Supreme Court, Defendants/Appellees specifically argued, belatedly, that Plaintiffs' expert witness had not performed any of the "typical" accident reconstruction calculations to determine the effect of any brake malfunction on the bus’s braking efficiency.

The Oklahoma Supreme Court found Defendants' arguments unpersuasive, citing three courts of appeals and existing Oklahoma jurisprudence. The Court noted that Oklahoma jurisprudence had long held that when a party fails to object to the introduction of [arguably dubious, “not helpful”] evidence, once admitted – even if the testimony is incompetent – the jury is entitled and required to consider such evidence in rendering a verdict. The Oklahoma Supreme Court observed, "Allowing the defendants to raise Daubert objections to the expert's testimony in the guise of an insufficiency-of-the-evidence argument after the testimony has been admitted without objection deprives the expert of the opportunity to offer other supporting proof. . . By failing to object, the error is waived on appeal, in the absence of fundamental error." (Emphasis added.)

(The Supreme Court, however, did not take opportunity to address whether this admitted evidence, if incompetent, presented "fundamental error.")

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The Supreme Court of Pennsylvania has ruled that any product liability defense based upon the "highly reckless conduct" of the plaintiff must be pled as an affirmative defense, and cannot be argued simply to defeat the element of causation which the plaintiff has the burden of establishing. If not pled, it is waived, and, if not established by independent evidence offered by the defendant, it in essence is meaningless.

In Reott, the plaintiff was injured while jumping on a tree stand to “set” it into a tree. The tree stand collapsed, and he was injured. The defendants argued to the jury that the plaintiff’s conduct in jumping on the stand was highly...
reckless and was the cause of the plaintiff’s injuries, and the jury agreed by finding that the defect in the treestand was not the cause of his injuries.

The Supreme Court of Pennsylvania reversed, finding that the plaintiff’s highly reckless conduct cannot be used to support a finding of no causation and, instead, is an affirmative defense which must be pled, and established by independent evidence. Highly reckless conduct was held to be applicable only if it was (1) the sole cause of the injuries, or (2) a superseding cause of the injuries. Highly reckless conduct can only exist if the plaintiff knew or had reason to know of facts which created a high degree of risk of physical harm to himself and nonetheless deliberately acted, or failed to act, in conscious disregard of that risk.

Because the defendants did not present evidence that the plaintiff’s highly reckless conduct was the sole cause of the plaintiff’s injuries or that the plaintiff’s conduct was a superseding cause (extraordinary and unforeseeable) of the plaintiff’s injuries, the Supreme Court of Pennsylvania reversed the trial court’s denial of the plaintiff’s motion for judgment notwithstanding the verdict on the issue of causation and remanded the case to the trial court for a trial solely on damages.

This decision creates a trap for the unwary product liability practitioner in Pennsylvania, both at the pleading stage and at trial. Pennsylvania product liability law is evolving in many ways, from court decisions like Reott to the Third Circuit Court of Appeals’ recent prediction that the Restatement (Third) of Torts will be adopted by the Supreme Court of Pennsylvania (it has not been as of this writing). Any manufacturer faced with a product liability claim in Pennsylvania would be wise to engage an experienced Pennsylvania product liability lawyer in their case.

In March 2004, Plaintiff purchased two pairs of FreshLook Colors contact lenses from Kim's Dollar Store. These lenses were non-corrective, or “plano” lenses. Along with changing the eye color, the contact lenses Plaintiff purchased had UV protection and were marked with a “prescription only” symbol. Kim’s was not authorized to sell or distribute the contact lenses and had no affiliation with CIBA. Additionally, Plaintiff did not have a prescription for the contact lenses. Plaintiff was given no instructions concerning the care, cleaning, or

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usage of the lenses with her purchase, nor was she informed of the necessity of a medical prescription and oversight for usage of the contact lenses.

After wearing a pair of the contact lenses, Plaintiff developed an eye infection, which led to the temporary loss of vision in her left eye. She then brought this action against Kim's and CIBA alleging six causes of action: (1) negligence per se for selling misbranded contact lenses; (2) negligence in the manufacture, sale and/or distribution of contact lenses, and in failing to provide adequate warnings and instructions; (3) breach of implied warranty of merchantability and fitness because the lenses were not safely labeled; (4) strict liability for placing defectively labeled products into the stream of commerce; (5) sale of a defective product due to inadequate warnings; and (6) violation of the South Carolina Unfair Trade Practices Act by committing an unfair or deceptive act or practice, including inadequate labeling and warnings, in the conduct of trade or commerce. Essentially, Petitioner claimed CIBA knew its non-corrective lenses were frequently sold without a prescription and by unauthorized sellers, yet CIBA failed to take steps to ensure customers received lenses by prescription only and with appropriate warnings and instructions.

CIBA ultimately moved for summary judgment on the basis that the majority of Plaintiff’s claims and legal theories were subject to federal preemption pursuant to the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §§ 301-399a (West 1999 & Supp. 2008) (FDCA). The circuit court ultimately found CIBA was entitled to summary judgment on the basis of federal preemption on all of those causes of action that were “dependent on warning, labeling, design, marketing, misbranding, or other similar claims.”

The Court of Appeals affirmed the partial grant of summary judgment, finding CIBA demonstrated that no genuine issue of material fact existed as to whether FreshLook Colors non-corrective lenses underwent the pre-market approval process and were subject to device-specific FDA requirements.

Plaintiff argued to both the trial court and Court of Appeals that the contact lenses she purchased should be considered a cosmetic, rather than medical, device. However, when the case came before the Supreme Court the Plaintiff conceded that the lenses she purchased were Class III medical devices, but claimed they were never subject to pre-market approval. As a result, the only issue before the Supreme Court was whether the lenses were subject to FDA approval through the pre-market approval process.

The Supreme Court began by recognizing the case was controlled by the express preemption provisions in the Medical Device Amendments of 1976. The Court then pointed to the recent case of National Meat Ass’n v. Harris, 132 S.Ct. 965 (2012) to support its intention to interpret the express preemption provisions of a federal regulatory scheme in a very broad manner “with an eye towards a federal agency’s extensive authority and responsibility of ensuring the safety and effectiveness of consumer products.”

After expressing this intent, the Court undertook application of the test set forth in Riegel v. Medtronic, Inc., 552 U.S. 312, 322 (2008). It ultimately found that all of the evidence in the record clearly established that the FreshLook UV lenses were subject to preemption because the UV-absorbing component present in the lenses had undergone the pre-market approval process by the FDA. In doing so, the Supreme Court refused to allow the Plaintiff to argue that, in hindsight, the lenses should not have been subject to pre-market approval, focusing instead on whether they actually were.
After this determination, the Court affirmed the trial court’s dismissal of those causes of action that were “dependent on [claims of] warning, labeling, design, marketing, misbranding” because they sought to impose requirements different from or in addition to those set forth by the pre-market approval process. However, the Court also held any claim that “parallels applicable federal requirements” could proceed. As a result, a claim that the lenses were negligently manufactured was allowed to proceed. Unfortunately, because of a “lack of specificity” in the trial court’s order, the Court was unable to specify exactly what claims, beyond the one for negligent manufacture, survived the ruling. As a result, the case was remanded to the trial court for further proceedings to determine which claims paralleled applicable federal requirements.

Ultimately, this case reaffirms South Carolina’s intention to interpret and apply express preemption regulatory schemes in a very broad manner. It also makes clear that Plaintiffs will not be able to litigate whether a certain device should have been subject to pre-market approval. However, manufacturers will still need to rely on the trial courts to correctly determine which state law claims seek to impose requirements different from or in addition to those set forth by the pre-market approval process.

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**VIRGINIA**

**Virginia Supreme Court Backtracks on Failure to Warn Claims**

Products liability defendants in Virginia breathed a sigh of relief recently after the Supreme Court of Virginia reversed itself in a failure to warn case, withdrew a prior published opinion, and announced a new majority opinion in *Funkhouser v. Ford Motor Co.*, ___Va. ___, (Va. Jan. 10, 2013). In June 2012, the Supreme Court of Virginia, by a narrow 4-3 margin, decided *Funkhouser v. Ford Motor Co.*, 726 S.E.2d 302 (Va. June 7, 2012) against Ford. The *Funkhouser I* opinion was discussed in the Summer 2012 issue of Product Liability Perspectives. *Funkhouser I* generated significant interest because many people considered it to be a departure from established law in Virginia and an expansion of product liability exposure by making failure to warn claims easier to prove. The Supreme Court granted rehearing and one justice switched sides, resulting in an equally narrow new majority opinion, *Funkhouser II*, in favor of Ford.

The facts of the Funkhouser case no doubt generated significant sympathy. A three-year-old girl was playing in her family minivan and was left temporarily unsupervised. The van caught fire, causing her third degree burns, and she died from her injuries. The estate’s expert identified the fire’s origin in the instrument panel with the ignition key in the off position, and the cause of the fire as electrical activity emanating from one of the wires or connectors in the vicinity. Because of seven other fires in the same model Ford minivan, the expert opined that the Funkhouser vehicle was dangerous because Ford failed to provide warnings when it knew or should have known that the instrument panel had the potential to fail and result in a fire when the ignition key was in the off position.
The estate could not state with specificity how or why the fire started, and it did not challenge the design of the minivan’s electrical system. There was, therefore, no claim that the electrical system or any part of the minivan was defectively designed or manufactured.

The two legal issues in the case arose over the admissibility of evidence of seven other fires on the same model Ford minivan. Was evidence of the other fires admissible at the trial, and could the estate’s expert rely on these other fires when forming his opinions? More fundamentally, however, the dispute between the majority and the dissent concerned the very nature of this type of warnings defect in a product liability case.

The majority in *Funkhouser II* concluded that the estate’s claim failed because it could not show what defect, if any, caused the fire in the Funkhouser minivan or what defects caused the seven other fires that were allegedly similar. Evidence of other accidents is admissible in Virginia only if they happened under substantially the same circumstances and they were caused by similar defects. The majority concluded, therefore, that evidence of the seven other fires was inadmissible because of a lack of similarity between the alleged defects.

The dissent criticized the legal reasoning and policy rationale behind the majority opinion. As the dissent saw it, the effect of the majority opinion was to make a failure to warn theory essentially duplicative of the separate and distinct design and manufacturing defect theories. The dissent noted that the majority’s rationale forced the estate to prove first that there was a design or manufacturing defect and then show that the manufacturer failed to warn of the defect. The dissent believed the estate could prove the van was defective or dangerous because Ford failed to warn of the potential for fires: “Funkhouser is asserting that the minivan was unreasonably dangerous due to the potential for key-off electrical dashboard fires, not due to a specific design or manufacturing defect.” The majority, on the other hand, was concerned that the dissent’s rationale would make failure to warn cases too easy to prove. Indeed, what would be the limit of a defendant’s legal duty and legal liability if every accident gave rise to a duty to warn even if the product was safely designed and manufactured?

The majority in *Funkhouser II*, to the relief of product liability defendants in the Commonwealth, saw the matter differently. In the context of this case, the estate had to identify a defect in the van that caused the fire before it could introduce evidence of the seven other fires. Otherwise, the manufacturer became an insurer of its product. The estate could not prevail by proving the fact of the fire plus seven other fires, which may or may not have been caused by something in the minivan that may or may not have been attributable to the same defect. There must be a similarity of the defects between the one at issue in the case and the others. The majority noted that to do otherwise would essentially invert causation and result in the assumption that the product was defective because there was a fire: “Funkhouser is asking this Court to invert the test and infer similar causes, i.e., defects, from the existence of similar effects, i.e., fires.”

Perhaps just as importantly, the majority then addressed whether the estate’s expert could rely on the seven other fires even though they were not, as a matter of law, substantially similar to the Funkhouser fire. The dissent believed that the expert could rely on the other fires even if they were not substantially similar, leaving the issue as one for cross-examination before the jury, i.e. whether the expert had an adequate foundation for his opinion.
In contrast, the majority held that the expert could not, when formulating his opinions, rely on evidence of the seven other fires because they were not substantially similar. A Virginia statute permits experts to rely on evidence that is inadmissible but, according to the majority, this does not end the inquiry. An expert’s opinion must not be speculative or based upon assumptions with insufficient factual basis. An opinion based on accidents that were not substantially similar lacked an adequate foundation.

The different outcomes in Funkhouser I and Funkhouser II were the result of the switch of one vote. The opinions reflect a fundamental dispute by the justices over the nature of the failure to warn theory. The likely outcome of Funkhouser II is a continuation of the status quo and the resolution, at least for now, of this issue in the Commonwealth.

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WASHINGTON

A New Exception To The Rule; The Washington Supreme Court Clarifies Simonetti And Braaten And Finds Exception For Inadequate Warnings Involving Other Manufacturer’s Products

In the past 12 months, only one key decision has been decided by the Washington Supreme Court concerning the Washington Products Liability Act (WPLA), RCW 7.72. et. seq.: Macias v. Saberhagen Holdings, Inc., 175 Wash. 2d 402; 282 P.3d 1069 (2012). Macias presented the Court with its first opportunity to clarify the breadth of recent decisions in which a general rule was announced regarding the duty owed by a manufacturer for harm caused by products manufactured by another. Those cases—Simonetti v. Viad, 165 Wash 2d 341, 197 P.3d 127 (2008), and Braaten v. Saberhagen Holdings, 165 Wash 2d. 373, 198 P.3d 493 (2008)—involved claims against the manufacturers of various components used by the US Navy aboard its vessels. The components were eventually wrapped in asbestos containing materials as insulation. During years of service and repair, plaintiffs were exposed to asbestos, allegedly resulting in personal injury.

The court in Simonetti and Braaten held that the manufacturers were not involved in the chain of distribution of the asbestos containing materials and, therefore, owed no duty under the WPLA regarding another manufacturer’s product. Crucial to the court’s ruling was that the Navy, a learned intermediary, ultimately chose to wrap the components with asbestos insulation and that asbestos insulation was not an element of the design of the subject components.

In Macias, plaintiff was exposed to asbestos and other harmful contaminants in his role as a worker in the tool room of a boat yard. 175 Wash. 2d at 404. Plaintiff would check in and check out tools, including respirators, to the workers operating in toxic work environments, including environments exposing the workers and respirators to asbestos. Id. at 405-407. Upon check in, plaintiff would stack the masks in a basket and, when the pile reached capacity, would clean the respirators and replace the filters. Id. at 406. He would do so without wearing protective equipment. Id. He alleged exposure to concentrated amounts of toxic substances, including asbestos, during this cleaning process. Id. at 406-407.

Plaintiff developed mesothelioma, a deadly cancer associated with exposure to asbestos. Id.
at 406. He filed suit against the respirator manufacturers alleging, amongst other claims, that the respirators posed an unsafe risk to plaintiff due to their failure to include adequate warnings regarding potential exposure during the handling and cleaning process. *Id.* at 404. Plaintiff alleged that a) the very design was to subject these masks to toxic environments and concentrate the toxins into the filter portion of the mask; b) the toxic environments were known to the manufacturer to include asbestos; and c) cleaning and replacement of the filter system is a fundamental use and design intent of the respirators.

Defendants moved for summary judgment based on the holdings in *Simonetti* and *Braaten*, arguing that the asbestos was not defendants’ product and, therefore, they could not be liable for the harm caused by that product. The trial court denied the motion. The court of appeals accepted an interlocutory appeal and reversed, applying *Simonetti* and *Braaten* and holding that the claims were barred because defendants were not in the chain of distribution of the asbestos containing materials.

The Washington Supreme Court reversed again, holding that the claims were not controlled by *Simonetti* and *Braaten*; the very design intent of the respirators was to protect the user from toxic substances such as asbestos and the cleaning and replacement of the filters was a key design element which exposed plaintiff to heightened risk. Construing the facts in a light most favorable to plaintiff, the Supreme Court held that the WPLA would provide relief and a duty was owed.

There were three key clarifications and holdings in this case:

1) The WPLA applies to any claim in which a product causing harm did so after 1981, when the WPLA took effect. While *Simonetti* and *Braaten* were decided under the Restatement of Torts that guided asbestos claims prior to the implementation of the WPLA, here; plaintiff’s exposure occurred between the years 1978 and 2004. The Court held “when substantially all of the exposure to injury-causing asbestos occurs on or after July 26, 1981, the WPLA applies.” *Id.* at 409.

2) *Simonetti* and *Braaten* did not foreclose a situation where a product manufacturer could be liable for inadequate warnings related to a risk of hazardous exposure to another manufacturer’s product when that exposure is inherent in the intended use of the subject product. The Court made clear that while *Simonetti* and *Braaten* set out a general rule that a manufacturer cannot be liable for harms caused by another manufacturer’s product, there are exceptions. *Id.* at 411-412.

3) A manufacturer in the chain of distribution is subject to liability for failure to warn of the hazards associated with the use of its own products, even when those specific hazards include risk of exposure to another manufacturer’s products. *Id.* at 416.

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## Upcoming ALFA International Events

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