IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

In a product liability action, the plaintiff must establish that the defendant's product was the cause or contributing cause to plaintiff's injuries regardless of the theory alleged. This can be fairly straightforward when the product is available for inspection and testing. But how does a plaintiff demonstrate a product defect when the subject product is unavailable? The following article examines case law from select jurisdictions to see how various courts address this unique issue.

Does Spoliation Spoil a Product Liability Claim?

Analyzing and Defending Product Liability Claims of the Product-less Claimant

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In a product liability action, a plaintiff's burden – simply stated – is to establish that the defendant's product was the cause or contributing cause to plaintiff's injuries. Whether arguing a design defect,[1] manufacturing defect,[2] failure to warn,[3] breach of warranty,[4] or other product liability theory, the plaintiff must ultimately point to the product and demonstrate its injury-causing feature. This demonstration can be fairly straightforward when the product is available for inspection and testing. But, how does a plaintiff demonstrate a product defect when the subject product is *unavailable*? In other words, how can a product-less plaintiff meet the burden of proof in a product liability action? The following article examines caselaw from select jurisdictions to see how various courts address this unique issue.

Plaintiff's Inability to Present Product as Determinative of Ruling in Defendant's Favor

Some courts have concluded that, where the subject product is absent, a plaintiff simply has no evidence upon which to rely to substantiate his or her product liability claim. These courts thus find that judgment as a matter of law in favor of defendants is proper. This occurred in *Liz v. William Zinsser & Co.*, where plaintiffs claimed that a spray paint can ignited, causing burns, but failed to preserve the spray paint can. 253 A.D.2d 413 (N.Y. 2d Dep't 1998). The court found that the plaintiffs' failure to preserve the product allegedly resulting in injury required dismissal of plaintiffs' manufacturing defect claim. *Id.*

Similarly, in *Humphreys v. General Motors Corp.*, the plaintiff sued a car manufacturer, alleging the driver seat back was not designed with sufficient strength to remain locked during a collision. 839 F. Supp. 822 (N.D. Fla. 1993), *aff'd* 47 F.3d 430 (11th Cir. 1995). The car and its components were destroyed after the plaintiff released the evidence to the insurer and before either party or their experts were afforded an

[1] *See, e.g.*, *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 255-56 (Tex. 1999) (quoting Section 82.005(a) of the Tex. Civ. Practice & Remedies Code: "(a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that: (1) there was a safer alternative design; and (2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.").

[2] *See, e.g.*, *Harris v. Stryker Spine*, 39 F. Supp.3d 846, 849-50 (S.D. Miss. 2014) ("As the statute makes plain, to succeed on a claim based on a manufacturing defect, the plaintiff has the burden to plead and prove that the product deviated in a material way from the manufacturer's specifications for the product or from a properly constructed product. […] A plaintiff cannot sustain this burden merely by proof of an accident or injury. […]Rather, to sustain his burden to prove that a product was defective and that such defect caused the plaintiff's injury, expert testimony is generally required.").

[3] *See, e.g.*, *Hutto v. McNeil-PPC, Inc.*, 79 So.3d 1199, 1210-11 (La. Ct. App. 2011) (citing La. Rev. Stat. Ann. § 9:2800.57: "In a failure to warn case, the claimant bears the burden of establishing that 'at the time the product left the manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.'").

[4] *See, e.g.*, *Simms v. Southwest Tex. Methodist Hosp.*, 535 S.W.2d 192, 197 (Tex. Civ. App. 1976) ("Whether plaintiff sought recovery because of negligence, breach of warranty, or a theory of strict liability in tort, the burden was on her to prove that her injury resulted from a defect in the product.").

opportunity for inspection. *Id*. at 823-24. Because this was "not a case where the defect is patent," the plaintiff's claim required expert testimony related to the allegedly defective product; the claim necessarily failed. *Id.* at 826-27 (noting in FN 2 that, not only was the subject product absent, but the plaintiff further produced no photographs, diagrams or reports of the product at the time of the accident to "substantiate the defect."). The court further held that the plaintiff could not proceed under a "malfunction theory," where a product is deemed defective at both the time of injury and the time it leaves the defendant's control if the product malfunctions during its normal operation, as this would also require expert testimony that the product did not perform properly under the circumstances. *Id.* at 828-29. Based on this analysis, the court granted judgment as matter of law in favor of defendants. *Id.* at 829.

Some courts have held that, where the plaintiff fails to preserve and produce the allegedly-defective product for inspection by the defendant, it is simply sound public policy to dismiss plaintiff's claim. For example, in *DeWeese v. Anchor Hocking Consumer & Indus. Products Group*, the Pennsylvania Superior Court held:

> To permit claims of defective products where a purchaser of the product has simply thrown it away after an accident, would both encourage false claims and make legitimate defense of valid claims more difficult. It would put a plaintiff (or plaintiff's attorney) in the position of deciding whether the availability of the item would help or hurt his or her case. Where producing the product for defense inspection would weaken rather than strengthen a case, we unfortunately are obliged to conclude that some plaintiffs and attorneys would be unable to resist the temptation to have the product disappear.

628 A.2d 421, 423 (Pa. Super. Ct. 1993). The court concluded, "[A]llowing a cause of action to continue without the allegedly defective product is contrary to public policy"; thus, the plaintiff's "failure to produce the product for inspection by the defense will render summary judgment appropriate." *Id.* at 423-24 (also noting, here, that no evidence tended to establish that the subject product was manufactured or sold by defendants, as plaintiff could not recall the model of the product used at the time of the accident). In a subsequent ruling in *Smitley v. Holiday Rambler Corp.*, the court clarified that the general "spoliation doctrine" applied in *DeWeese* may have limited applicability where the spoliation is not due to plaintiff's acts. 707 A.2d 520, 527-28 (Pa. Super. Ct. 1998).

Establishing Plaintiff's Claim by Circumstantial Evidence, Despite Product Absence

Other courts have held that, even where a plaintiff cannot produce the subject product, the plaintiff may nonetheless present circumstantial evidence of defect and causation. In *Worsham v. A.H. Robins. Co.*, the plaintiff alleged injury due to a specific defect in her inter-uterine device, but she could not present the subject product. 734 F.2d 676, 683 (11th Cir. 1984). Plaintiff was nonetheless allowed to proceed with circumstantial evidence and evidence that

ruled out alternative causes of the suffered injuries. *Id.* at 683-84. In reaching this holding, the court relied upon Florida precedent with regard to product liability actions allowing a plaintiff to establish defect and causation based upon circumstantial evidence. *Id.* at 683.

In *Speed v. Avis Rent-a-Car*, a plaintiff brought a product liability action resulting from an alleged defect of a vehicle, but the subject vehicle had been destroyed by the rental company before either party had an opportunity to inspect it. 172 A.D.2d 267 (N.Y. 1st Dep't 1991). Defendant filed a pre-trial motion to preclude plaintiff from presenting evidence related to her claim of a defective power brake booster in the subject vehicle. *Id.* at 267-68. The court denied defendant's motion, holding that the plaintiff should be allowed to establish the claim through circumstantial evidence, including evidence of a recall of the type of car involved in the accident due to improper assembly of the power brake booster. *Id.* at 268 (explaining that a determination as to the admissibility of recall evidence would be more properly made at trial).

Likewise, in *Barber v. General Elec. Co.* the defendant innocently destroyed an allegedly defective transformer that caused plaintiff's injury – then moved for summary judgment, arguing that the plaintiff had no evidence to establish that the defect existed when it left defendant's control. 648 F.2d 1272, 1276 (10th Cir. 1981). Plaintiff argued that, even though defendant's destruction of evidence was unintentional, summary judgment in favor of defendants would be unfair based solely upon the plaintiff's inability to produce pieces of the subject product that defendants destroyed. *Id.* The court denied summary judgment, relying on Oklahoma case law recognizing that a plaintiff may prove a product liability claim through circumstantial evidence, since actual or direct evidence of a sophisticated product may solely be within the defendant's knowledge or possession. *Id*. 1277-78 (explaining in FN 1 that, in determining whether summary judgment is appropriate, "the ultimate issue is the sufficiency or lack thereof of evidentiary proof").

In *Brissette v. Milner Chevrolet Co.*, a plaintiff was injured when his automobile's tire failed and led to an accident. 479 S.W.2d 176 (Mo. Ct. App. 1972). The plaintiff maintained the tire for some time, inspected it and also had it inspected by a garage, then provided it to his insurance company. *Id.* at 178. Three years after the accident, plaintiff filed suit. *Id.* Before trial, the defendant moved to compel Plaintiff to produce the tire; Plaintiff's counsel wrote a letter to the insurance company to locate the tire and no answer was received – thus, the Plaintiff was "unable to comply" with the defendant's motion. *Id.* at 178-79. At trial, defendant moved for directed verdict based upon Plaintiff's inability to produce the tire. *Id.* at 179. The trial court granted defendant's motion, despite plaintiff's intention to present alternative evidence of the product defect through the testimony of the individuals who had inspected it. *Id*. The Missouri Court of Appeals found, however, that even though the subject product was not available, several individuals were available to testify – and be subjected to cross-examination – to allow the plaintiff to establish the requisite defect and causation elements through circumstantial evidence. *Id.* at 182-83 ("The lack of the object—the tire—is a matter going to the weight of the

evidence rather than to a complete failure of proof when there is sufficient testimony to indicate what defects existed."). The appellate court reversed and remanded the case for further proceedings. *Id.* at 183.

As to expert testimony related to a missing product, courts have stated that *Daubert* cannot be "determined on a global basis, but rather require[s] a case-specific inquiry to address the sufficiency of each plaintiff's expert proof." *Bradley v. Cooper Tire & Rubber Co.*, 2005 WL 5989799 at *4 (S.D. Miss. Oct. 25, 2005). Thus, as the *Bradley* court explained, the absence of the subject product does not "necessarily preclude a reliable expert opinion" as to defect and causation, nor will it "compel dismissal" of plaintiff's product claims. *Id.*

Similarly, courts have also ruled that, while the occurrence of an accident alone cannot establish a product defect, common experience may suggest that some accidents ordinarily do not occur without a product defect. Thus, this type of circumstantial evidence can establish a plaintiff's *prima facie* case, even if the subject product is absent. For example, in *Potter v. Van Waters & Rogers, Inc.*, the plaintiff was injured when an allegedly defective rope split while the plaintiff was using the rope to secure objects in a truck bed, causing the plaintiff to fall from the truck to the pavement. 578 P.2d 859 (Wash. App. 1978). Although the plaintiff could not present the subject rope, he presented circumstantial evidence related to, *inter alia*, the newness of the rope, the amount of force subjected upon the rope, the normal use of the rope, and evidence of capacities of ropes of similar strength. *Id.* at 862-63. The trial court initially granted summary judgment in favor of the defendant, based on plaintiff's failure to present evidence that the rope was defective. *Id.* at 748. However, the appellate court reversed and remanded, concluding that the plaintiff's circumstantial evidence raised genuine issues of material fact regarding the existence of a defect in the rope. *Id.* at 759. As the *Potter* court explained: "[T]he mere fact of an accident, standing alone, does not generally make out a case that a product was defective. On the other hand, there are some accidents as to which there is common experience dictating that they do not ordinarily occur without a defect, and as to which the inference that a product is defective should be permitted." *Id.* at 755. This is closely related to the "malfunction theory" of product liability, under which courts have held that a plaintiff may use circumstantial evidence to support a product liability claim even without producing the allegedly defective product for inspection or testing. *See, e.g., Gordner v. Dynetics Corp.*, 862 F. Supp. 1303 (M.D. Pa. 1994) (applying "malfunction theory," which does not require the plaintiff to establish a precise defect or to produce the subject product, but allows the factfinder to infer a defect existed where there is mere evidence of malfunction, along with evidence ruling out abnormal use of the product or alternative causes of the malfunction; listing potential sources of circumstantial evidence as: (1) malfunction itself, (2) expert testimony of related causes, (3) timing of malfunction versus timing of plaintiff's obtaining the product, (4) similar accidents involving the same product, (5) elimination of alternative causes of accident, and (6) proof that accident would not have occurred absent manufacturing defect).

Additional Factors Considered

1. Type of Product Liability Claim Asserted

The type of claim asserted may affect a court's analysis as to whether a product-less plaintiff has met his burden of proof. For example, a design defect claim (where every product suffers from the alleged defect due to its very design), as opposed to a manufacturing defect (where the subject product is the only product suffering from the alleged defect), may allow the plaintiff to produce proof of a defect in an exemplar product if the subject product is destroyed or otherwise unavailable. *See, i.e.*, *Greco v. Ford Motor Co.*, 937 F. Supp. 810 (S.D. Ind. 1996) (Auto manufacturer defendant argued that presence of the subject product is critical to product liability action. Thus, because automobile was destroyed in the underlying accident, defendant moved for summary judgment or alternatively, that plaintiff should not be allowed to present expert testimony about design defects in the subject vehicle. Court found the defendant failed to distinguish between manufacturing defect and design defect claims, explaining that a design defect "is a constant that is unaffected by the accident equation.").

Likewise, in *O'Donnell v. Big Yank, Inc.*, the plaintiff's pants ignited and melted when exposed to an electrical voltage as result of an alleged defect that was present in the pants when sold. 696 A.2d 846 (Pa. Super. Ct. 1997). The court held that, even though the pants were destroyed, because plaintiff asserted a defect present in all like products manufactured and sold by the defendant, the plaintiff could prove his case by introduction of like products. *Id.* at 849. The court explained that the defendant would have the opportunity to rebut the plaintiff's theory at trial by presenting evidence regarding the flammability of its products in various situations and evidence of effects of repeated washing or the presence of soil or other substances on clothing at the time of the accident. *Id.*

Courts have applied a similar rationale where the plaintiff proceeds on a failure to warn theory. *See, e.g.*, *Columbian Rope Co. v. Todd*, 631 N.E.2d 941 (Ind. Ct. App. 1994) (presence of subject product is not required where claim is based on inadequate warnings that accompany all products produced by defendant).

2. Sufficiency of Evidence to Identify the Subject Product and Proper Defendant

Regardless of the type of claim asserted, courts have held that a product-less plaintiff cannot establish a *prima facie* case without evidence sufficient to identify the appropriate defendant. Thus, where the plaintiff's evidence fails to identify the subject product (and thus the proper defendant) with some specificity, summary judgment in defendant's favor may be appropriate. However, where the plaintiff – even though he cannot produce the subject product – can present alternative evidence to identify the product and its manufacturer or other source, the plaintiff's claim may survive.

An example of a plaintiff's failure to produce sufficient evidence to identify the subject product and proper defendant is found in *Healey v. Firestone Tire & Rubber Co.,* where the plaintiff sued a tire manufacturer after

suffering a severe injury when a truck tire rim exploded after being dropped, resulting in a piece of the rim striking the plaintiff's head. 663 N.E.2d 901 (N.Y. 1996). Plaintiff alleged that the rims showed signs of substantial distortion in shape which led to the explosion. *Id.* at 902. The subject rims were lost after being inspected by two plaintiff's experts. *Id.* Defendant moved for summary judgment, arguing the evidence, or lack thereof, was insufficient as a matter of law to implicate the defendant. *Id.* The trial court denied the defendant's motion, finding circumstantial evidence was sufficient to raise issues of fact, but the appellate court reversed based upon the general rule that a plaintiff in a strict products liability action must establish that the defendant manufactured the subject product. *Id.* at 903. The appellate court found that, even if the identification is proven by circumstantial evidence, that circumstantial evidence must establish it is reasonably probable – not just possible – that the named defendant was the "source of the offending product." *Id.* Because plaintiff's evidence was "insufficient to establish any reasonable probability that [defendant] made the offending product," summary judgment in defendant's favor was appropriate. *Id.* at 904.

On the other hand, an example where the plaintiff presented alternative evidence adequate to identify the subject product – and thus the appropriate defendant – is found in *Van Buskirk v. West Bend Co.*, where the parents of an infant child brought an action against a deep fryer manufacturer after the child pulled a hanging cord of the fryer, causing it to fall and spill hot oil all over the child's body. 1997 WL 399381 (E.D. Pa. 1997), *rev'd in part on unrelated grounds* 149 F.3d 1166 (3d Cir. 1998). The child's aunt threw the fryer away following the incident, without consent of the plaintiff's parents. *Id.* at *3. The defendant manufacturer argued in support of its summary judgment motion that it could not be identified definitively as the manufacturer of the subject fryer in absence of the product. *Id.* at *2. The court agreed that the plaintiff was required to present sufficient evidence to identify the manufacturer but found that this plaintiff presented enough alternative evidence to create a genuine issue of fact as to whether the fryer was manufactured by the defendant. *Id.* For instance, the plaintiff presented a spoon that came with the subject unit, a product brochure, a service-center list, and testimony of the plaintiff's mother regarding the brand of the fryer. *Id.* Defendant also argued that the absence of the product would be highly prejudicial, as such absence prevented inspection to determine pre-existing damage, misuse or alteration. *Id.* at *3. But the court found that, under a design defect theory, the defendant was not prejudiced because it could examine its entire line of deep fryers to furnish expert testimony and produce test results with exact replicas of the subject product. *Id*. at *3-4 (noting a different result may be in order under a manufacturing defect theory).

3. Evidence of Plaintiff's Alteration, Modification or Repair of the Subject Product

In a product liability case where there is evidence that the absent product was altered, modified, or repaired, courts have held that even "the world's foremost" expert could not reliably testify as to the issue of causation, even where a substitute product

of the same make and model is available for inspection. *See Miller v. Genie Industries, Inc.*, 2012 WL 161408 at *5 (N.D. Miss. Jan. 19, 2012) ("[B]ecause unique and specific alterations were made to the jib boom in this case during the welding process, […] there is, in the court's view, simply no way for any expert to determine, without inspecting the actual boom in question, what effect that welding process had upon its structural integrity."); *see also Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995) (finding summary judgment proper in favor of defendants where subject product had been substantially modified before accident and where defendant was unable to inspect the now lost product and would be limited to review of plaintiff's expert report, which did not clearly depict the remains of the subject product – especially in light of fact that plaintiffs knew or should have known the importance of retaining relevant evidence).

4. Type of Product

The type of product also may affect the analysis. For instance, in *Haynes v. Coca-Cola Bottling Co. of Chicago*, a plaintiff was injured when she ingested soda that had been contaminated with a foreign substance. 350 N.E.2d 20 (1st Dist. 1976). The plaintiff discarded the can but maintained the solid material she had discovered at the bottom of the drink for inspection by her physician, who testified at trial that (based on lab tests) the solid material contaminated the drink and caused plaintiff's injuries. *Id.* at 22-23. Because the plaintiff could not present the subject can, the defendant argued that the plaintiff's "failure to produce the can created the legal presumption that it was damaged after it left the defendant's control." *Id.* at 26. The court, however, concluded it was impossible for the contaminating material to have been placed inside the can following the manufacturer's sealing of the can; the only explanation was the negligence of the defendant in the canning process. *Id.* at 25. Accordingly, the absence of the subject soda can was immaterial, given the nature of the product at issue.

A Word on Spoliation

While this article does not profess to fully analyze spoliation in product liability actions, it is important to note that, in any case of a product-less plaintiff, questions will likely arise related to evidence spoliation – namely, which party bears the responsibility for the absence of the subject product; whether the product is absent due to negligent or intentional conduct; and whether penalties should be imposed in the form of dismissal, preclusion of expert testimony or other evidence, or a spoliation jury instruction.[5]

Relevant factors courts tend to consider about whether sanctions – in one form or another – should be imposed for the loss of evidence in a product liability action include: (1) whether the non-spoliating party was prejudiced by the loss of the evidence, (2) whether that prejudice can be cured, (3) the

[5] *See* Richard E. Kaye, "Effect of Spoliation of Evidence in Products Liability Action," 102 A.L.R.5th 99 (2002). The issue of spoliation in cases of product-less plaintiffs is thoroughly discussed in Kaye's article, in which many of the cases cited here are also found. While Kaye specifically focuses on the spoliation analysis, this article seeks to highlight issues related to the product-less plaintiff's evidentiary burden.

importance of the lost evidence, (4) good or bad faith of the spoliator, and (5) the effectiveness of a particular sanction compared to a lesser penalty.[6] The timing of the evidence destruction also may be important. That is, the court may treat spoliation less harshly when the spoliating party destroyed the evidence before suit was contemplated or commenced[7] or after the non-spoliating party had an opportunity to inspect the subject evidence,[8] after sufficient notice of potential litigation,[9] after receipt of a request to preserve evidence,[10] or after the court's entry of a protective order.[11]

Conclusion and Recommendations

A review of product liability case law demonstrates that the absence of a product is not necessarily fatal to a product liability claim. When presented with these types of claims, a defendant should aggressively investigate, among other things, the source of the missing product, the circumstances surrounding the missing product, the available circumstantial evidence, the type of product liability claim pursued by plaintiff, and the type of product at issue. The manufacturer should also be familiar with the particular jurisdiction's precedent on these types of claims and tailor its defense accordingly.

[6] *Id.*
[7] *See Schidzick v. Lear Siegler Inc.*, 222 A.D.2d 841 (N.Y. 3d Dep't 1995).
[8] *See Shultz v. Barko Hydraulics, Inc., a Div. of Pettibone Corp.*, 832 F. Supp. 142 (W.D. Pa. 1993).
[9] *See Fire Ins. Exchange v. Zenith Radio Corp.*, 747 P.2d 911 (Nev. 1987).
[10] *See Rockwell Intern. Corp. v. Menzies*, 561 So.2d 677 (Fla. Dist. Ct. App. 1990).
[11] *See Farley Metal, Inc. v. Barber Colman Co.*, 645 N.E.2d 964 (Ill App. 1994).

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