IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

Though state courts in Missouri have sparsely weighed in on whether comparative fault is admissible in enhanced-injury, crashworthiness cases, a relatively recent opinion from the United States District Court for the Western District of Missouri would place the state in the minority of jurisdictions that do not allow evidence of comparative fault.

This article explains the underdeveloped state of the law surrounding this issue in Missouri, and the potential negative ramifications for product manufacturers if the state's high court does not weigh in soon and align the state with the majority of jurisdictions nationwide.

Do Enhanced-Injury Crashworthiness Cases Filed in Missouri Mean Enhanced Liability for Product Manufacturers?

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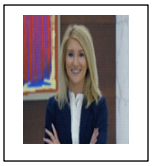

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Crashworthiness cases, or so-called second-collision or enhanced-injury cases, involve claims that a vehicle's occupant sustained "enhanced" injuries in an accident—injuries that allegedly would not have occurred, or would have been dampened, but for the existence of a vehicle defect. Another way to frame the allegation is that certain injuries would not have occurred, or would have been dampened, if a vehicle's safety feature worked (or was designed) properly. Alternatively or in addition, the "defect" could be framed as involving the vehicle's warnings or instructions—or lack thereof.

The "crashworthiness doctrine" arose from enhanced-injury claims being framed in one or more of the ways described above. This doctrine imposes a duty on manufacturers to prevent "enhanced injuries" by designing a "crashworthy" vehicle. Under the doctrine, a strong distinction is drawn between the occupants' conduct and the circumstances causing an accident (on the one hand) and an alleged design defect causing an injury to a plaintiff (on the other hand).[1]

A Split of Opinion

The enhanced injuries a plaintiff sustains are often referred to as the "second collision," enabling plaintiff's attorneys to treat such injuries as being entirely "separate and distinct" from the circumstances (including any comparative negligence) that caused the initial accident.

In cases alleging enhanced injury, a sharp split has developed among courts on whether the fault of the plaintiff in causing the initial accident may be considered. Though courts were more evenly divided on the issue in the late 1990s through the early 2000s,[2] states have increasingly adopted the position that a plaintiff's comparative fault in causing an accident *should* be considered in enhanced-injury crashworthiness cases.

And Missouri?

Despite the above and growing trend, Missouri still has not taken the majority approach. As such, plaintiff's attorneys have grounds to argue that Missouri (like a minority of other states) will not allow evidence of a plaintiff's comparative fault in enhanced-injury crashworthiness cases. "Will not allow" means a plaintiff's role in causing an accident is deemed irrelevant, because the "enhanced injuries" are allegedly attributable to the product defect and are supposedly independent of the plaintiff's own negligence.

Because the Supreme Court of Missouri has not weighed in on the issue, the federal court sitting in Kansas City has recently had to make an "*Erie* guess"[3] regarding what the state's high court would have to say. As discussed below, the "guess" went against the majority trend; as such, attorneys defending manufacturers must (for now) find a way to distinguish this new precedent and explain why opinions from other

[1] *Thornton v. Gray Automotive Parts Co.*, 62 S.W.3d 575 (Mo. Ct. App. 2001).
[2] *See* "Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim," 69 A.L.R. 5th 625.
[3] Referring to *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), requiring federal courts to (A) apply state law (as declared by a state's highest court) when subject matter jurisdiction is based on diversity of citizenship; or, when the state's highest court has not spoken on the issue, (B) make a reasoned determination of what that court would say if asked to decide the same issue. The reasoned determination is not a "guess"; rather, that term is used for shorthand.

jurisdictions are sufficiently (or more) persuasive. And to the extent this precedent applies in federal cases heard in the Western District of Missouri (or may serve as persuasive authority in Missouri state courts and in the Eastern District of Missouri), enhanced-injury cases filed in Missouri—at least for the time being—may mean enhanced liability for product manufacturers.

Genesis of a New Precedent

In *Norman v. Textron, Inc.,* the plaintiff was operating a forklift on a construction site when it tipped over, causing him severe injuries.[4] The plaintiff argued the crashworthiness doctrine and alleged the forklift was defective.[5] He sought damages for his enhanced injuries, which he theorized were caused by the forklift's defective and unreasonably dangerous design.[6]

Before trial, the plaintiff submitted a motion in limine to exclude all evidence or arguments indicating he was comparatively at fault.[7] He interpreted Missouri law to exclude as irrelevant all evidence of the "original" (or "first") accident's cause, including his own fault.[8]

In response, the defendant forklift manufacturer argued that the plaintiff's fault in causing the "original" accident should be considered by the jury. In support of its argument, the defendant asserted that Missouri's comparative fault statute, Section 537.765 RSMo, specifically provides for comparative fault in product liability cases.[9] As a result, the defendant asserted that evidence of the plaintiff's fault was admissible to determine whether the forklift was unreasonably dangerous under the circumstances.[10]

A Rule Is Announced

After considering both parties' arguments, the *Norman* Court held that evidence of a plaintiff's comparative fault is not admissible in enhanced-injury crashworthiness cases.[11] The court reasoned that a plaintiff's conduct is not relevant when the plaintiff's use, or misuse, of the product sets the injury-causing sequence in motion, and that use was reasonably foreseeable by the manufacturer.[12]

The court further found the plaintiff's operation of the forklift to be a reasonably anticipated and foreseeable use, and stated that even if the operation was a misuse of the forklift, such misuse would still be reasonably foreseeable.[13] In reaching its conclusion that the operation of the forklift was objectively foreseeable, the court heavily relied on the Missouri Court of Appeals' decision in *Gerow v. Mitch Crawford Holiday Motors*.[14] There, the court held that because the plaintiff was driving her vehicle on a highway and that constituted an intended use of the vehicle,

[4] *Norman v. Textron Inc.*, 2018 WL 3199487 at *1 (W.D. Mo. May 17, 2018).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Norman*, 2018 WL 3199487 at *1.
[10] *Id.*
[11] *Id.* at *2.
[12] "The U.S. Court of Appeals for the Eighth Circuit noted that Missouri courts have found *misuse* to be reasonably anticipated" (citing *Thornton v. Gray Automotive Parts Co.,* 62 S.W.3d 575, 587 (Mo. Ct. App. W.D. 2001) (quoting *Gerow v. Mitch Crawford Holiday Motors,* 987 S.W.2d 359, 362-63 (Mo. Ct. App. W.D. 1999)).
[13] *Id.*
[14] *Id.* at 363.

any driver error was reasonably foreseeable and irrelevant in proving an enhanced-injury claim.[15]

The Statute Does Not Control

The *Norman* court acknowledged the defendant manufacturer's argument that Section 537.765 RSMo specifically permits consideration of a plaintiff's comparative fault in product liability cases. But the court evaded applying the statute by noting it had been in effect since 1987, over 10 years *before* the Missouri Court of Appeals' decision in *Gerow.* Because the statute was in effect long before *Gerow* was decided, the Court of Appeals presumably was aware of the statute but chose not to apply it in "enhanced-injury" crashworthiness cases.

Thus, in the end the *Norman* Court reasoned that the Supreme Court of Missouri—if asked to decide the issue—would hold that a plaintiff's fault must not be considered in an enhanced-injury crashworthiness case when his or her use of the product was reasonably anticipated by the manufacturer.

Acknowledging the Unsettled State of Affairs

Though the *Norman* Court came down with the minority of jurisdictions prohibiting evidence of a plaintiff's comparative fault in "enhanced-injury" crashworthiness cases, the court noted the rather unsettled state of the law in Missouri. Moreover, the court admitted *Gerow* was "not [from] the Missouri Supreme Court," and that "decisions of Missouri's intermediate appellate courts are not binding on this court, but they are persuasive authority" as the best evidence of Missouri law.[16] In addition, the *Norman* Court relied on the South Carolina Supreme Court's footnoted reference to Missouri as a state that does not allow comparative negligence in crashworthiness cases.[17]

Other States (Previously) Struggling with the Issue

In addition to Missouri, a number of states within the Eighth Circuit have struggled with whether to consider a plaintiff's fault in enhanced injury cases. Nonetheless, all of the other states have come down differently than did the *Norman* Court.

Nearly 10 years ago, Iowa aligned itself (via the *Jahn* case, discussed below) with the growing majority of states allowing evidence of a plaintiff's comparative fault in crashworthiness cases. In doing so, Iowa's high court overruled *Reed v. Chrysler Corp*, a closely divided opinion decided nearly 20 years earlier.

In *Reed,* a five-judge majority of the Iowa Supreme Court held irrelevant any evidence that a plaintiff driver was intoxicated at the time her Jeep crashed into a concrete bridge abutment. The majority reasoned that any role the driver's intoxication may have played in causing the accident was "beside the point," because the manufacturer had a duty to develop a crashworthy vehicle aimed at reducing the likelihood of injury (and damages) in "accidents precipitated for myriad reasons."[18] The four dissenting judges in *Reed* reasoned that the usual rules

[15] *Id.*
[16] *Id.*
[17] *See Donze v. Gen. Motors, LLC,* 800 S.E.2d 479, 488 n.3 (S.C. 2017).
[18] *Id.*

for fault comparison should apply to the "enhanced-injury" portion of a claim.[19]

The decision that overruled *Reed* was *Jahn v. Hyundai Motor Co.*, in which Iowa's high court adopted the approach of the Third Restatement and allowed evidence of comparative fault in enhanced-injury cases.[20] The court discussed in depth Iowa's comparative fault statute, which like Missouri's[21] expressly states that the fault of other parties and the plaintiff should be considered in cases of negligence and strict liability.[22] The court noted that though an exception to the application of comparative fault principles for enhanced-injury cases *might* be supportable on policy grounds, the legislature had *not* provided for such an exception.[23] As a result, the court joined the majority of jurisdictions and concluded that evidence of a plaintiff's comparative fault *is* allowable in enhanced injury cases.[24]

Other States on the Bandwagon

Other states within the Eighth Circuit have joined most of the rest of the country in allowing evidence of comparative fault in enhanced-injury crashworthiness cases, including North Dakota[25] and Arkansas.[26] Indeed, though the situation was different 20 years ago, today most courts throughout the U.S. addressing whether a plaintiff's comparative fault applies in crashworthiness cases have concluded a jury *should* consider comparative fault.

Takeaways, and the Pros and Cons of Each Approach

Under the majority approach, manufacturers are held accountable for the products they produce, while consumers are encouraged to be reasonable in their use of such products.

Advocates arguing on behalf of the minority approach tend to raise moral quandaries in support of their position. For example, they ask whether a defendant "corporate" manufacturer is in a better position to "internalize" the costs of injury, even as questions arise concerning whether to absolve a plaintiff who caused the underlying accident while engaged in illegal activity.[27]

Though some courts continue to struggle with these conflicting considerations, states opting not to allow evidence of a plaintiff's comparative fault may find themselves circumventing strong public policies aimed at preventing the very conduct the plaintiff was engaged in at the time of the accident. Moreover, attempting to divide the accident at the heart of an enhanced-injury claim into two supposedly "separate and distinct collisions," is arguably an exercise in semantics, whereas the majority approach recognizes that these cases involve several

[19] *Id.*
[20] *Jahn v. Hyundai Motor Co.,* 773 N.W.2d 550, 559 (Iowa Oct. 9, 2009).
[21] *See* Section 537.765 RSMo, previously discussed.
[22] *Jahn*, 773 N.W.2d at 559.
[23] *Id.*
[24] *Id.*
[25] *Day v. General Motors Corp*., 345 N.W.2d 349 (N.D. 1984).
[26] *Kelley v. Hyundai Motor Co*., 2011 WL 1533456 (E.D. Ark. Apr. 21, 2011).
[27] *Donze v. General Motors, LLC*, 2017 WL 2153919 (S.C. May 17, 2017) (considering whether the public policy of South Carolina bars a plaintiff, who was allegedly intoxicated by drugs or alcohol at the time of the underlying accident, from bringing a crashworthiness claim).

proximate causes that deserve unitary examination by a jury.

Until the time (likely) comes when Missouri aligns with the majority of jurisdictions nationwide and allows evidence of comparative fault in enhanced-injury crashworthiness cases, attorneys defending products manufacturers—and their clients—should remain aware of the differing approaches and their impact in product liability litigation.

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