

RECENT DEVELOPMENTS IN PRODUCTS,  
GENERAL, AND CONSUMER LIABILITY LAW

*Patricia A. Sexton, Kimela R. West, Lynn Trevino-Legler,  
H. Thomas Wells III, and Franklin H. Turner III*

I. Products Liability .....	654
A. Accrual of Action .....	654
B. Theories of Liability.....	655
1. Design Defect .....	655
2. Duty of Care .....	655
3. Definition of Product.....	657
4. Defenses .....	657
a. Learned Intermediary .....	657
b. Sophisticated User .....	659
c. Statute of Repose .....	660
d. Innocent Seller .....	660
C. Particular Products .....	661
1. Asbestos .....	661
2. Tobacco .....	662
3. Pharmaceuticals .....	663
4. Lead-Based Paint .....	665
5. Other Products.....	665
II. Preemption .....	667
III. General Liability .....	669

---

---

*Patricia A. Sexton is a shareholder in the Kansas City, Missouri, office of Polsinelli Shalton Flanigan Suelthaus PC and chair of the TIPS Products, General Liability and Consumer Law Committee. Kimela R. West and Lynn Trevino-Legler are associates with Polsinelli Shalton Flanigan Suelthaus PC. H. Thomas (Trey) Wells III is an associate at Starnes & Atchison LLP in Birmingham, Alabama. He is a vice chair of the TIPS Products, General Liability and Consumer Law Committee. Franklin H. (Trey) Turner III is special counsel at Haynswoorth Sinkler Boyd, P.A. in Columbia, South Carolina, and the immediate past chair of the TIPS Products, General Liability and Consumer Law Committee.*

---

---

IV. Products Liability Class Action Developments.....	671
V. Premises Liability.....	671
VI. Evidentiary Cases.....	676
A. Other Alleged Incidents.....	676
B. Spoliation.....	677
C. Experts.....	678

## I. PRODUCTS LIABILITY

### A. *Accrual of Action*

The Alabama Supreme Court in *Griffin v. Unical Corp.*<sup>1</sup> significantly changed Alabama law regarding accrual of actions based on exposure to toxic substances by adopting a “discovery rule.” Prior to *Griffin*, in all toxic exposure cases other than asbestos, which is governed by a statutory discovery rule,<sup>2</sup> the injury was deemed to have occurred and the cause of action to have accrued “on the date of last exposure to those [toxic] chemicals.”<sup>3</sup>

In *Griffin*, a former employee of a tire manufacturing plant, who was exposed to benzene, rubber solvents, and other allegedly toxic chemicals, was diagnosed with acute myelogenous leukemia ten years after he left his employment with the plant.<sup>4</sup> After he died, his wife brought a wrongful death action against the chemical companies that had supplied the chemicals to the plant. The trial court dismissed the complaint on the ground that the deceased’s last exposure to the chemicals occurred and his cause of action accrued more than two years prior to the filing of the complaint, thereby making it time-barred.

On appeal, the Alabama Supreme Court reversed and, adopting the dissent in *Cline v. Ashland*,<sup>5</sup> overruled almost three decades of prior precedent in enunciating a new accrual rule for toxic exposure cases.<sup>6</sup> The court essentially adopted a discovery rule, stating that the “cause of action accrues only when there has occurred a *manifest*, present injury.”<sup>7</sup> The court held that this new accrual rule would only apply prospectively, except in the instant case, where it would apply retroactively because “Griffin, as the prevailing party in bringing about a change in the law, should be rewarded for her efforts.”<sup>8</sup>

1. 990 So. 2d 291 (Ala. 2008).

2. ALA. CODE § 6-2-30(b) (1975).

3. *Griffin*, 990 So. 2d at 292 (citing *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979)).

4. *Id.*

5. 970 So. 2d 755 (Ala. 2007).

6. *Griffin*, 990 So. 2d at 293.

7. *Id.* (emphasis in original).

8. *Id.*

---

## B. Theories of Liability

### 1. Design Defect

Plaintiff in *Murphy v. Mancari's Chrysler Plymouth Inc.*<sup>9</sup> purchased a Chrysler Sebring from Mancari's Chrysler Plymouth.<sup>10</sup> While driving, plaintiff sustained permanent spinal cord injuries when the car rolled over.<sup>11</sup> Murphy then sued, asserting strict products liability claims against Mancari's and the manufacturer of the vehicle, DaimlerChrysler Corporation.<sup>12</sup> Mancari's sought to dismiss the strict liability claims against it pursuant to § 2-621 of the Illinois Code of Civil Procedure, which provides immunity to such actions with one exception.<sup>13</sup> The trial court granted Mancari's motion to dismiss and also granted plaintiff's request for leave to file an interlocutory appeal.<sup>14</sup>

The appellate court remanded after stating that a plaintiff suing a non-manufacturer pursuant to § 2-621(c)(2) must "allege that the nonmanufacturer defendant had actual knowledge of the physical characteristics of the product that the plaintiff claims were unreasonably dangerous and that said characteristics made the product unreasonably dangerous."<sup>15</sup>

### 2. Duty of Care

Is a name brand drug manufacturer strictly liable for injuries and subsequent death allegedly due to the deceased's ingestion of a generic bioequivalent and/or liable for negligent misrepresentation where the brand name manufacturer did not communicate with the deceased? The court in *Stanley v. Wyeth, Inc.*<sup>16</sup> held no.<sup>17</sup>

Stephanie Stanley was prescribed medication for a "non-life-threatening heart condition."<sup>18</sup> Stanley's cardiologist prescribed Cordarone, the brand name for the drug amiodarone, developed by Wyeth. Although Cordarone, Wyeth's brand-name drug, was prescribed, the pharmacist filled the prescription with a generic version of the drug made by Sandoz, Inc. Stanley used the medication as prescribed but allegedly developed severe

---

9. 887 N.E.2d 569 (Ill. App. Ct. 2008).

10. *Id.* at 572.

11. *Id.*

12. *Id.*

13. *Id.* The statute mandates dismissal against a nonmanufacturer unless it "had actual knowledge of the defect in the product which caused injury, death or damage." 735 ILL. COMP. STAT. 5/2-621(c)(2) (West 2006).

14. *Murphy*, 887 N.E.2d at 572.

15. *Id.* at 572-73.

16. 991 So. 2d 31 (La. Ct. App. 2008).

17. *Id.* at 34-35.

18. *Id.* at 32.

side effects from the medication, including liver complications. Stanley underwent two liver transplants and ultimately died.<sup>19</sup>

Stanley's family sued Wyeth<sup>20</sup> even though a generic version of the drug caused the alleged injury.<sup>21</sup> According to the appellate court, Wyeth owed no legal duty<sup>22</sup> because "a manufacturer cannot reasonably expect that consumers will rely on the information it provides when actually ingesting another company's drug."<sup>23</sup> Moreover, plaintiff could not establish reliance on representations of Wyeth since the deceased did not purchase a Wyeth product.<sup>24</sup>

In *New Texas Auto Auction Service v. Gomez de Hernandez*,<sup>25</sup> the Texas Supreme Court found error when an appellate court held that an "auto auctioneer could be liable in both strict liability and negligence for auctioning a defective car."<sup>26</sup> Rather, although the law of products liability "requires those who place products in the stream of commerce to stand behind them . . . it does not require everyone who facilitates the stream to do the same."<sup>27</sup>

There, Big H Auto Auction auctioned a 1993 Ford Explorer to Houston Auto Auction. Houston Auto Auction then auctioned the car to Progresso Motors, which in turn sold the car to Jose Angel Hernandez Gonzalez.<sup>28</sup> Approximately one year after the sale, Gonzalez was killed in an accident in which the vehicle rolled over.<sup>29</sup> According to the court, "auctioneers are not subject to" *Restatement (Second) of Torts* § 402A because Big H "was not in the business of selling automobiles for its own account."<sup>30</sup>

Next, plaintiff alleged that Big H was negligent because it did not replace tires on the vehicle pursuant to a recall that was issued prior to the auction of the vehicle.<sup>31</sup> The court held that Big H did not have a duty to replace the tires because imposing a duty on auctioneers to "discover and repair defects" would "require them to go into a side business other than their own."<sup>32</sup>

---

19. *Id.*

20. *Id.*

21. *Id.* at 33.

22. *Id.* at 34–35.

23. *Id.* at 34.

24. *Id.*

25. 249 S.W.3d 400 (Tex. 2008).

26. *Id.* at 402.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 405–06. Section 402A imposes strict liability on the seller if the seller "is engaged in the business of selling such a product." *Id.* (citing *Restatement (Second) of Torts* § 402A (1965)).

31. *Id.* at 406.

32. *Id.*

### 3. Definition of Product

Besides being insured by plaintiff, Linda and Michael Murphy were homeowners and customers of defendant in *Travelers Indemnity Co. of America v. Connecticut Light & Power Co.*<sup>33</sup> The Murphys experienced voltage fluctuations in their home. Defendant allegedly identified the source of the problem as a “defective neutral connection” within the handhole/vault, which was located on the Murphys’ property and “contained the defendants’ underground electrical distribution system.”<sup>34</sup> After the problem had supposedly been repaired, a fire caused by the same voltage fluctuation damaged the Murphys’ home.<sup>35</sup>

Travelers paid its insured and then sued alleging (1) negligence and (2) a violation of the Connecticut Products Liability Act (CPLA).<sup>36</sup> Defendant sought to strike the CPLA claim, contending that electricity does not meet the definition of a product under the CPLA and that count two did not comply with the exclusive remedy provision of § 52-572n(a) of the CPLA.<sup>37</sup> The court rejected defendant’s motion, concluding that for the “purpose of imposing strict liability,” electricity becomes a product after it has passed through a consumer’s meter.<sup>38</sup>

### 4. Defenses

*a. Learned Intermediary*—Plaintiff in *Wegryn v. Smith & Nephew, Inc.*<sup>39</sup> alleged that defendant’s knee replacement system was defective.<sup>40</sup> The decision in that case resolved plaintiff’s motion to strike five special defenses interposed by defendant,<sup>41</sup> including the learned intermediary doctrine.<sup>42</sup>

According to the court, “the learned intermediary doctrine<sup>43</sup> . . . [arises out of a policy allowing] . . . manufacturers of prescription medical products, in terms of product liability, to satisfy their duty to warn by providing the prescribing doctor with adequate warnings based on the doctor-patient relationship.”<sup>44</sup> The court refused to distinguish between “a prescription implantable medical device and prescription drugs” when the learned intermediary doctrine is raised as a defense to a “product liability claim for

33. No. CV075012441S, 2008 WL 2447351 (Conn. Super. Ct. June 3, 2008).

34. *Id.* at \*1.

35. *Id.*

36. *Id.* (citing CONN. GEN. STAT. § 52-572n(a)).

37. *Id.*

38. *Id.* at \*4–5.

39. No. CV075013243S, 2008 WL 803405 (Conn. Super. Ct. Mar. 5, 2008).

40. *Id.* at \*1.

41. *Id.*

42. *Id.* at \*2.

43. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k (1965).

44. *Wegryn*, 2008 WL 803405, at \*2.

failure to warn.” Thus, the court denied plaintiff’s request to strike these special defenses.<sup>45</sup>

The court also refused to strike defendant’s state-of-the-art defense<sup>46</sup> because said defense was at least applicable to any or all of the allegations, did not have to provide a “complete bar to recovery against all allegations to be valid,” and could be raised in response to failure-to-warn allegations.<sup>47</sup>

Finally, plaintiffs argued that the state-of-the-art defense shifted the focus from the product to the “manufacturer’s conduct.” However, the court rejected this motion because Connecticut followed the “majority view which allowed introduction of such evidence to assist the jury in determining whether a product was defective or unreasonably dangerous.”<sup>48</sup>

After plaintiff in *Breen v. Synthes-Stratec, Inc.*<sup>49</sup> broke his left femur, Dr. Lena implanted a screw plate manufactured by defendant into plaintiff’s leg.<sup>50</sup> Six months later, the first screw plate broke, and Dr. Lena implanted a second screw plate, also manufactured by defendant. The second screw plate broke six months later, and plaintiff underwent a third surgery to repair his leg. Plaintiff sued pursuant to the Connecticut Product Liability Act for personal injury, alleging that injuries were due to the defective screw plates.<sup>51</sup> A jury ruled in favor of defendant.<sup>52</sup>

Plaintiff challenged a learned intermediary doctrine jury instruction, but the appellate court rejected the challenge, stating that application of the *Restatement (Second) of Torts* § 402A comment (k) was not limited to prescription drugs and thus could be applied to implanted medical devices such as the screw plates in question.<sup>53</sup> The court also rejected the challenge holding that the learned intermediary doctrine is applicable to cases involving “prescription implantable medical devices.”<sup>54</sup> The court then affirmed the judgment in favor of the manufacturer.<sup>55</sup>

In *Springhill Hospitals, Inc. v. Larrimore*,<sup>56</sup> the Alabama Supreme Court applied the learned intermediary doctrine to foreclose a duty of care owed by a pharmacist employed by Springhill Memorial Hospital (SMH).<sup>57</sup> There, Luther Larrimore complained of knee pain. His doctor diagnosed him with

---

45. *Id.* at \*3.

46. *Id.* at \*5.

47. *Id.*

48. *Id.*

49. 947 A.2d 383 (Conn. App. Ct. 2008).

50. *Id.* at 385.

51. *Id.*

52. *Id.*

53. *Id.* at 386.

54. *Id.* at 386–88.

55. *Id.* at 389.

56. No. 1051748, 2008 WL 542090 (Ala. Feb. 28, 2008).

57. *Id.* at \*6.

gout and prescribed colchicine.<sup>58</sup> A pharmacist informed the physician that he had prescribed the wrong dosage. The physician then corrected the dosage amount. Shortly after taking the medication, Larrimore was admitted to the emergency room, where he was diagnosed with a viral syndrome and a reaction to colchicine.<sup>59</sup> Luther died two days later.

Since the physician, and not the pharmacist, had the knowledge of the patient's individual medical history necessary for properly prescribing medication, the physician, and not the pharmacist, should bear the liability for mistakes in prescribing or dosing medication, according to the court.<sup>60</sup> Therefore, the learned intermediary doctrine precluded SMH's liability for harm resulting from any mistakes on the doctor's part in prescribing colchicine.<sup>61</sup>

*b. Sophisticated User*—The decision in *Johnson v. American Standard, Inc.*<sup>62</sup> addressed adoption of the “sophisticated user” doctrine, which operates as a defense “to negate a manufacturer’s duty to warn of a product’s potential danger when the plaintiff has advance knowledge of the product’s inherent hazards.”<sup>63</sup> It applies where a plaintiff “knew or should have known of the product’s hazards.”<sup>64</sup>

Plaintiff alleged defendant and other manufacturers failed to warn about the potential hazards of exposure to R-22, an air-conditioning refrigerant.<sup>65</sup> The complaint included claims of negligence, strict liability failure to warn, strict liability design defect, and breach of implied warranties<sup>66</sup> arising out of plaintiff's exposure to phosgene gas when he brazed refrigerant lines on an evaporator, causing him to develop pulmonary fibrosis.<sup>67</sup>

Defendant presented undisputed evidence that technicians could reasonably be expected to know of the hazard of brazing refrigerant lines.<sup>68</sup> “Thus, the danger created by exposing refrigerant to high heat and flame was well known within the community [] to which plaintiff belonged.”<sup>69</sup> Finally, the court found clear evidence that technicians knew or should have known of the dangers of R-22 heat exposure.<sup>70</sup> Recognizing the defense,

---

58. *Id.* at \*1.

59. *Id.* at \*2.

60. *Id.* at \*3–4.

61. *Id.* at \*6.

62. 179 P.3d 905 (Cal. 2008).

63. *Id.* at 907.

64. *Id.*

65. *Id.* at 908–09.

66. *Id.* at 909.

67. *Id.* at 908–09.

68. *Id.* at 909–10.

69. *Id.*

70. *Id.*

the court dismissed all allegations based on defendant's alleged failure to warn.<sup>71</sup>

*c. Statute of Repose*—A Florida appellate court in *Stimpson v. Ford Motor Co.*<sup>72</sup> reversed entry of summary judgment in favor of Ford, finding that the “twelve-year statute of repose in products liability cases was tolled for any period in which Ford actively concealed the defect.”<sup>73</sup>

Mrs. Stimpson sustained injuries when her 1991 Ford Aerostar unexpectedly accelerated and hit a pole.<sup>74</sup> Plaintiffs sued Ford, alleging that a defect in the van caused the acceleration. Ford asserted that the suit was untimely under Florida law because the twelve-year repose period “is tolled for any period during which the manufacturer . . . had actual knowledge that the product was defective . . . and took affirmative steps to conceal the defect.”<sup>75</sup>

The *Stimpson* court relied on the plain meaning of the statute to hold that the running of the statute of limitations “stops during any period of active concealment by a manufacturer.”<sup>76</sup> Because plaintiff adduced evidence of same at the hearing,<sup>77</sup> concealment constituted a disputed material fact precluding summary judgment.<sup>78</sup>

In *Estate of Robert Ryan v. Heritage Trails Assocs.*,<sup>79</sup> the Supreme Court of Iowa held that the contribution exception found in the Iowa statute of repose for products liability cases “does not prevent a claim for contribution from accruing during the period of repose,”<sup>80</sup> provided that there is common liability.<sup>81</sup> Thus, common liability “has to exist between the tortfeasors at the time of the injury out of which the right to contribution arose.”<sup>82</sup>

*d. Innocent Seller*—The decision in *Owens & Minor, Inc. v. Ansell Healthcare Products, Inc.*<sup>83</sup> was issued in response to a certified question regarding the scope of a “manufacturer’s indemnity obligation.”<sup>84</sup> Under Texas law, an “innocent seller” can seek indemnification for litigation costs from the manufacturer of an alleged defective product.<sup>85</sup> According to the *Owens &*

---

71. *Id.* at 916–17.

72. 988 So. 2d 1119 (Fla. Dist. Ct. App. 2008).

73. *Id.* at 1120–21.

74. *Id.* at 1120.

75. *Id.* (citing FLA. STAT. ANN. § 95.031(2)(d) (West 2003)) (emphasis in original).

76. *Id.* at 1121.

77. *Id.*

78. *Id.*

79. 745 N.W.2d 724 (Iowa 2008).

80. *Id.* at 731.

81. *Id.*

82. *Id.*

83. 251 S.W.3d 481 (Tex. 2008).

84. *Id.* at 482.

85. *Id.* at 483–84 (referring to TEX. CIV. PRAC. & REM. CODE ANN. § 82.002 (Vernon 2005)).

---

*Minor* court, manufacturers are not required to indemnify “a distributor against claims involving products other manufacturers released into the stream of commerce.”<sup>86</sup> Thus, a manufacturer fulfills its obligation under Texas law by offering to “defend or indemnify a distributor for claims relating only to the sale or alleged sale of that specific manufacturer’s product.”<sup>87</sup>

### C. Particular Products

#### 1. Asbestos

Plaintiffs in *Garza v. Asbestos Corp., Ltd.*<sup>88</sup> sued, “alleging that Joseph [Garza]’s exposure to asbestos and asbestos-containing products [(ACP)] caused him severe and permanent lung damage, [loss of consortium,] as well as increased risk and fear of developing mesothelioma and lung cancer.”<sup>89</sup> A jury found that Asbestos Corporation, Ltd. (ACL) sold ACP where “the risks of its use were known or knowable to ACL at the time it sold the asbestos.”<sup>90</sup> The jury also found that ACL “failed to adequately warn about the risks of asbestos fibers[,] . . . that ordinary consumers would not have recognized those potential risks,” and that ACL’s “negligence was a substantial factor in causing harm to Joseph.”<sup>91</sup> After the jury awarded substantial compensatory and punitive damages, the court denied ACL’s motion for judgment notwithstanding the verdict and its motion for a new trial.<sup>92</sup>

According to the appellate court, strict liability applies to suppliers of raw asbestos because “incorporating raw asbestos into an insulation product does not substantially alter” the asbestos and because strict liability is not “restricted to processed products.”<sup>93</sup> After distinguishing *Walker v. Stauffer Chemical Corp.*,<sup>94</sup> the court affirmed ACL’s liability “because incorporating raw asbestos into an insulation product does not substantially alter ACL’s product”<sup>95</sup> and because there was no evidence that ACL provided warnings to its purchasers of asbestos within the relevant time frame, either on the

---

86. *Id.* at 482.

87. *Id.*

88. 161 Cal. App. 4th 651 (Cal. Ct. App. 2008).

89. *Id.* at 653.

90. *Id.* at 654.

91. *Id.*

92. *Id.*

93. *Id.* at 659.

94. 19 Cal. App. 3d 669, 671 (Cal. Ct. App. 1971).

95. *Garza v. Asbestos Corp. Ltd.*, 161 Cal. App. 4th 651, 658 (Cal. Ct. App. 2008) (citing *Arena v. Owens-Corning*, 63 Cal. App. 4th 1178, 1188 (1998) (emphasis in original)).

one-hundred-pound bags in which it shipped or on any safety data materials shipped with the product.<sup>96</sup>

In *Kedy v. A.W. Chesterton Co.*,<sup>97</sup> the Rhode Island Supreme Court formally recognized the doctrine of *forum non conveniens*.<sup>98</sup> The issue arose after thirty-nine cases were filed in Superior Court where Canadian plaintiffs alleged “personal injury and wrongful death” due to workplace exposure to asbestos,<sup>99</sup> even though the “exposure, injuries, and treatment occurred in Canada.”<sup>100</sup> Defendants, however, were not incorporated in Rhode Island nor was it their principal place of business; but they did conduct business in the state.<sup>101</sup>

After the trial court judge held that jurisdictional and venue requirements had been satisfied in all thirty-nine of the underlying cases,<sup>102</sup> the Rhode Island Supreme Court concluded that the doctrine of *forum non conveniens* exists as part of a court’s “inherent judicial power” and that the thirty-nine cases “present compelling reasons for the application of the doctrine.”<sup>103</sup> Accordingly, the court vacated the orders that denied defendants’ motions to dismiss.<sup>104</sup> However, to ensure the “availability of an adequate alternative forum,” the court required defendants “to waive any statute of limitations defense in the alternative forum.”<sup>105</sup>

## 2. Tobacco

Plaintiff in *Bullock v. Phillip Morris USA, Inc.*<sup>106</sup> smoked cigarettes manufactured by defendant for forty-five years until she was diagnosed with lung cancer.<sup>107</sup> Plaintiff sued defendant, seeking damages based on, inter alia, products liability and fraud.<sup>108</sup> The jury found

a defect in the design of cigarettes and that they were negligently designed; that Phillip Morris failed to adequately warn plaintiff of the dangers of smoking; that it intentionally and negligently misrepresented facts and made a false promise; that it intentionally concealed material facts; and that each of those acts of misconduct was a cause of plaintiff’s injury.<sup>109</sup>

---

96. *Id.* at 661–62.

97. 946 A.2d 1171 (R.I. 2008).

98. *Id.* at 1175.

99. *Id.* 1175–76.

100. *Id.* at 1176.

101. *Id.*

102. *Id.* at 1178.

103. *Id.* at 1186.

104. *Id.*

105. *Id.* at 1187, 1189.

106. 159 Cal. App. 4th 655 (Cal. Ct. App. 2008).

107. *Id.* at 667.

108. *Id.* at 672.

109. *Id.*

The same jury also held defendant liable for “oppression, fraud, or malice with respect to each count.”<sup>110</sup>

The trial court refused to instruct the jury that it should not impose punishment for harms suffered by people other than plaintiff.<sup>111</sup> The appellate court affirmed the finding of liability and the award of compensatory damages.<sup>112</sup> However, the court also held that refusal to give the aforementioned instruction was prejudicial error, thereby requiring a new trial limited to the amount of punitive damages.<sup>113</sup>

### 3. Pharmaceuticals

Although finding the trial court’s refusal to submit to the jury the learned intermediary instruction and to allow evidence of the cross-claim to be admitted to be erroneous, the Supreme Court of Kentucky in *Hyman & Armstrong, P.S.C. v. Gunderson*<sup>114</sup> nevertheless judged both to be harmless error and affirmed.<sup>115</sup> In that case, after giving birth by cesarean section to her second child, Mrs. Hyman was prescribed Parlodel to stop lactation.<sup>116</sup> About five days later, she complained of headaches and pain between her shoulder blades. She was found dead in her bed on the next day. Her estate and children filed suit against Sandoz Pharmaceutical Corporation (Sandoz) alleging products liability and medical malpractice. A jury awarded approximately \$19 million in compensatory and punitive damages.<sup>117</sup>

The appellate court remanded the punitive damages award because it was predicated on conduct occurring outside of Kentucky but affirmed the remaining aspects of the case.<sup>118</sup> Defendant appealed to the Kentucky Supreme Court. In addressing the failure to give a learned intermediary instruction, the court noted the existence of evidence of defendant’s efforts to deliberately conceal or downplay the risks of the drug, which undermined the adequacy of warning.<sup>119</sup> The court, accordingly, concluded that plaintiff had met his burden of demonstrating that no prejudice resulted from the error.<sup>120</sup> Finding that there was sufficient reliable and relevant evidence that Mrs. Hyman died as a result of a Parlodel-induced seizure

---

110. *Id.*

111. *Id.* at 693.

112. *Id.* at 667, 701.

113. *Id.* at 693–95, 701.

114. Nos. 2006-SC-000175-DG, 2006-SC-000179-DG, 2008 WL 1849798 (Ky. Apr. 24, 2008).

115. *Id.* at \*1.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at \*15.

120. *Id.*

to submit the issue before the jury, the court affirmed denial of defendant's motion for a directed verdict.<sup>121</sup>

In *Merck & Co., Inc. v. Ernst*,<sup>122</sup> an estate alleged that a man's death was caused by his ingestion of Vioxx. A jury agreed, after which Merck appealed, challenging the sufficiency of plaintiff's evidence on causation. The appellate court recognized the existence of evidence establishing that "Vioxx use at a certain dose and duration is associated with an increased risk of thrombotic cardiovascular events."<sup>123</sup> However, though heart attacks can be triggered by blood clots, the autopsy did not reveal any blood clots.<sup>124</sup> Recognizing the problem, plaintiff called three experts, who testified that a blood clot was the most likely cause of death. Each hypothesized that the clot must have either dissolved or been dislodged during cardiopulmonary resuscitation, leading the court to conclude that there was insufficient scientific evidence to support the jury verdict.<sup>125</sup> According to the court, "[t]he experts' speculation that a clot 'could have' existed, but 'could have' dissolved, been dislodged, or fragmented gives rise to nothing more than conjecture."<sup>126</sup> The court reversed the jury verdict and directed that the trial court render a judgment that plaintiff should receive nothing.

The court in *Merck & Co., Inc. v. Garza*<sup>127</sup> also reversed a jury verdict based on insufficient evidence of causation. There, a man with a significant preexisting heart disease died after taking Vioxx for several weeks. His wife and children sued Merck. Unlike for the plaintiff in *Ernst*, the autopsy revealed two blood clots as the cause of a heart attack.<sup>128</sup> The appellate court nevertheless reversed a jury verdict in plaintiffs' favor "because Mr. Garza's preexisting cardiovascular disease was another plausible cause of his death, [and that, accordingly] the plaintiffs were required to offer evidence excluding that cause with reasonable certainty."<sup>129</sup> The court found that plaintiffs' expert's testimony that the simultaneous formation of two blood clots was "rare," absent exposure to Vioxx, was insufficient to establish with reasonable certainty that Vioxx, as opposed to a preexisting heart disease, caused his death.<sup>130</sup>

---

121. *Id.* at \*16-17.

122. No. 14-06-008350CV, 2008 WL 2201769 (Tex. App. May 29, 2008).

123. *Id.* at \*7.

124. *Id.* at \*3.

125. *Id.* at \*5-6.

126. *Id.* at \*7.

127. No. 04-07-00234-CV, 2008 WL 2037350 (Tex. App. May 14, 2008).

128. *Id.* at \*2.

129. *Id.*

130. *Id.*

#### 4. Lead-Based Paint

In *Smith v. 2328 University Avenue Corp.*,<sup>131</sup> plaintiffs sought damages for “injuries sustained by the infant plaintiffs as the result of their exposure to lead-based paint in the apartment where they resided between 1995 and 2001.”<sup>132</sup> Plaintiffs also sued NL Industries, which manufactured the lead-based pigments used to make the paint to which the infants were exposed.<sup>133</sup>

According to the evidence, any lead-based paint used in the interior of plaintiffs’ homes would have been applied prior to 1960,<sup>134</sup> leading the court to conclude that the paint pigments were not defective when they were created, particularly because distribution of lead-based paint pigments was not prohibited until 1960.<sup>135</sup> Also, the court noted that the problems associated with lead-based paint only arise after many years of “inadequate maintenance” on the part of the owner. Thus, the court held that, under the circumstances, a product manufacturer cannot be held liable for “harm inflicted some 50 or more years after the creation of its product,” especially due to the owners’ duty to remedy “existing lead conditions in apartments inhabited by young children.”<sup>136</sup> Thus, plaintiffs did not establish a prima facie case in strict products liability for design defect,<sup>137</sup> and the appellate court reversed the lower court’s order denying NL Industries’ motion to dismiss the complaint.<sup>138</sup>

#### 5. Other Products

Plaintiffs in *Green v. Alparma, Inc.*<sup>139</sup> sued Alparma, Inc. and others, alleging that arsenic-laced chicken litter polluted the air and caused their son’s leukemia.<sup>140</sup> In their complaint, they alleged (1) negligence; (2) negligence per se; (3) intentional failure to warn, concealment, and/or misconduct; and (4) strict liability/product liability.<sup>141</sup> The circuit court summarily dismissed the poultry producers. It also excluded the testimony of one doctor and limited the testimony of another at trial.<sup>142</sup>

131. 859 N.Y.S.2d 71 (N.Y. App. Div. 2008).

132. *Id.* at 72.

133. *Id.* at 72–73.

134. *Id.* at 73.

135. *Id.*

136. *Id.*

137. *Id.* at 73–74.

138. *Id.* at 72.

139. No. 07-382, 2008 WL 1970890 (Ark. May 8, 2008).

140. *Id.* at \*1–2.

141. *Id.* at \*2.

142. *Id.*

To survive a motion for summary judgment under the *Chavers* test,<sup>143</sup> plaintiffs had to prove that: (1) [their son] was exposed to the arsenic-laced chicken litter spread by the poultry producers, (2) with sufficient frequency and regularity, (3) in proximity to where he . . . lived and went to school [], (4) such that it is probable that the exposure to the arsenic-laced chicken litter caused [their son]'s injuries.<sup>144</sup>

The court reasoned that plaintiffs submitted sufficient evidence to satisfy the requirements of the *Chavers* test<sup>145</sup> and thus reversed the summary judgment granted by the circuit court due to the existence of disputed material facts.<sup>146</sup>

Plaintiffs also argued that the circuit court abused its discretion by limiting the doctor's testimony.<sup>147</sup> The court disagreed because plaintiffs failed to show that Dr. O'Connor's methodology was reliable.<sup>148</sup> In fact, the test used by Dr. O'Connor had neither been generally accepted by the scientific community nor subjected to peer review.<sup>149</sup> The court finally affirmed, limiting the testimony of Dr. Sawyer because he was only prohibited from relying on tables developed by Dr. O'Connor and was otherwise free to and, in fact, did testify that the dosage could cause leukemia.<sup>150</sup>

In *K-2, Inc. v. Fresh Coat, Inc.*,<sup>151</sup> the relevant parties were a builder (Life Forms Homes, Inc.); K-2, Inc.; and Fresh Coat, Inc., with whom Life Forms had contracted to install Finestone's exterior insulation and finish system (EIFS).<sup>152</sup> The case arose after a homeowner complained about leaks in the EIFS, causing mold, rot, and termite infestation.<sup>153</sup> Determination of the responsible party or parties required the court to ascertain whether Finestone had to indemnify K-2 against loss arising out of a products liability action. It had to do so "unless the manufacturer shows the loss was due to seller,"<sup>154</sup> pursuant to Texas law.

Fresh Coat prevailed at trial, where a jury awarded it moneys paid to the homeowners as well as the attorney fees paid to Life Forms; Finestone

143. *Chavers v. Gen. Motors Corp.*, 349 Ark. 550, 79 S.W.3d 361 (2002).

144. *Green*, 2008 WL 1970890, at \*5 (citing *Chavers*, 79 S.W.3d at 369).

145. *Id.* at \*9.

146. *Id.*

147. *Id.* at \*10.

148. *Id.* at \*10-12, \*17.

149. *Id.* at \*12-14.

150. *Id.* at \*17.

151. 253 S.W.3d 386 (Tex. App. 2008).

152. *Id.* at 389.

153. *Id.*

154. *Id.* at 389 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 82-001-08 (Vernon 2005 & Supp. 2007)).

appealed.<sup>155</sup> The appellate court held that EIFS “is a product within the meaning of . . . the Texas Products Liability Act.”<sup>156</sup> The court also concluded that Fresh Coat was in the business of selling EIFS material.<sup>157</sup> Fresh Coat charged Life Forms Homes for both the EIFS material and installation of the “component materials” on the homes.<sup>158</sup> The court stated that “Fresh Coat’s application of EIFS on Life Forms’ houses, ultimately sold by Life Forms to the homebuyers, is legally and factually sufficient evidence of Fresh Coat’s placement of the Finestone product in the stream of commerce for use.”<sup>159</sup> Thus, Fresh Coat was a seller entitled to indemnification by Finestone,<sup>160</sup> with one exception: Finestone was not required to indemnify Fresh Coat for its decision to indemnify Life Forms because this obligation arose out of a contract between them as opposed to a products liability action.<sup>161</sup>

## II. PREEMPTION

While driving her 1998 Chevrolet Cavalier, plaintiff Roland in *Roland v. General Motors Corp.*<sup>162</sup> was struck by another car.<sup>163</sup> Roland’s son, who was sitting in the center seat of the rear passenger compartment at the time, was wearing only the lap belt provided for the center seat (there was no shoulder belt) and sustained disabling injuries.<sup>164</sup>

On appeal, Roland alleged that the trial court erred when it summarily dismissed her common law tort claim as preempted by federal law.<sup>165</sup> Roland contended that the restraint system was “defectively and negligently designed” because it utilized a “lap-only seat belt” instead of a lap/shoulder seat belt and because the restraint system utilized a “manual adjusting device” instead of a “retractor.”<sup>166</sup> Finally, Roland asserted that the trial court erred when it held that her state law misrepresentation and failure-to-warn claims were also preempted by federal law.<sup>167</sup>

---

155. *Id.*

156. *Id.* at 390.

157. *Id.* at 392–93.

158. *Id.* at 393.

159. *Id.*

160. *Id.* at 393–94.

161. *Id.* at 394–96.

162. 881 N.E.2d 722 (Ind. Ct. App. 2008).

163. *Id.* at 724.

164. *Id.*

165. *Id.* at 725. More specifically, the trial court held that the claim was preempted by the Federal Motor Vehicle Standards 208, 49 C.F.R. § 571.208 (2008), which was promulgated pursuant to the National Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1391–1431, recodified as amended at 49 U.S.C. §§ 30101–30170.

166. *Roland*, 881 N.E.2d at 724.

167. *Id.*

According to the appellate court, manufacturers could install either a lap or lap shoulder belt.<sup>168</sup> Also, the court held that manufacturers could utilize either “manual adjusting devices” or “retractors” in restraint systems.<sup>169</sup> Thus, Roland’s common law tort actions alleging defective and negligent design were preempted by federal law because the common law tort actions conflicted with the deliberate and comprehensive scheme set forth under federal law.<sup>170</sup>

Finally, the court rejected Roland’s misrepresentation and failure-to-warn claims, which were based on her belief that General Motors should have notified parents that the lap belt had to be used in conjunction with a child car seat.<sup>171</sup> The court found that Roland’s claim was dependent on the lap belt being defective and thus constituted a “back-door attempt to challenge the options provided” by federal law.<sup>172</sup>

In *BIC Pen Corp. v. Carter*,<sup>173</sup> the Texas Supreme Court also held that plaintiff’s design defect claims were preempted by federal law.<sup>174</sup> There, plaintiff filed suit after six-year-old Brittany Carter suffered severe burns when her five-year-old brother “accidentally set fire to her dress with a J-26 model BIC lighter.”<sup>175</sup> Plaintiff sued BIC, alleging that Brittany’s injuries were the result of design and manufacturing defects. The jury returned a verdict in favor of plaintiff.

The court of appeals affirmed the design defect award but failed to address the claim for manufacturing defects. Since “[t]he J-26 lighter is subject to the federal standards for child-proof lighters and must be certified as compliant by the Consumer Product Safety Commission,”<sup>176</sup> the issue on appeal was whether plaintiff’s common law claims alleging a “higher standard of child resistance” were compatible with the federal regulations imposed by the Consumer Product Safety Act.<sup>177</sup>

The Texas Supreme Court held that plaintiff’s design defect claim was “impliedly preempted”<sup>178</sup> because the J-26 model lighter was “properly certified” in accordance with “federal protocol” and the imposition of a higher standard of child resistance under common law would “conflict with the federal regulatory scheme in this area.”<sup>179</sup> However, the existence of

---

168. *Id.* at 725–28.

169. *Id.*

170. *Id.*; *see also* Federal Motor Vehicle Standards, 49 C.F.R. § 571.208.

171. *Roland v. Gen. Motors Corp.*, 881 N.E.2d 722, 729 (Ind. Ct. App. 2008).

172. *Id.* at 729–30; *see also* Federal Motor Vehicle Standards, 49 C.F.R. § 571.208.

173. 251 S.W.3d 500 (Tex. 2008).

174. *Id.* at 502–03.

175. *Id.* at 503.

176. *Id.*

177. *Id.* at 506; *see also* 15 U.S.C. §§ 2074–2075 (1972) (preemption clause).

178. *BIC Pen*, 251 S.W.3d at 509.

179. *Id.*

a manufacturing defect is a separate question from “whether the design itself was faulty”<sup>180</sup> and, thus, was not preempted.<sup>181</sup> The court accordingly remanded the manufacturing defect claim to the appellate court for further review.<sup>182</sup>

### III. GENERAL LIABILITY

The Rhode Island Supreme Court in *Willis v. Omar*<sup>183</sup> affirmed the summary dismissal of a suit by a passenger against her dinner hosts, stating that plaintiff failed to show any special duty triggering facts.<sup>184</sup> There, plaintiff and her boyfriend consumed a copious amount of alcohol at the defendants’ home and at a restaurant.<sup>185</sup> Both were so intoxicated that plaintiff’s aunt would not let her other niece leave with them.<sup>186</sup> After driving a short distance from her aunt’s house, plaintiff’s boyfriend crashed the vehicle into a utility pole, resulting in the amputation of plaintiff’s left leg.<sup>187</sup> After the trial court refused to recognize social host liability in this case, plaintiff appealed.<sup>188</sup>

The Supreme Court of Rhode Island “refused to adopt the principle that a social host owes a duty to a third party for injuries suffered by an intoxicated guest who was [drinking] at his or her home.”<sup>189</sup> However, the court did note that it has imposed such a duty when a special relationship exists, such as when alcohol is illegally provided to minors and injury is foreseeable.<sup>190</sup>

In *20801, Inc. v. Parker*,<sup>191</sup> plaintiff attended the grand opening of a bar operated by defendant.<sup>192</sup> There, he was allegedly served between ten and fifteen free alcoholic beverages, after which plaintiff became involved in an argument with another patron (Griffin) and was asked to leave. Once outside, Griffin punched plaintiff, causing him to fall and strike his head on the pavement. Plaintiff alleged that he suffered serious injuries, including a fractured skull and brain injury, as a result of this incident.<sup>193</sup>

---

180. *Id.*

181. *Id.*

182. *Id.*

183. 954 A.2d 126 (R.I. 2008).

184. *Id.* at 127–29.

185. *Id.* at 127–28.

186. *Id.* at 128.

187. *Id.*

188. *Id.* at 129.

189. *Id.*

190. *Id.* at 129–30.

191. 249 S.W.3d 392 (Tex. 2008).

192. *Id.* at 395.

193. *Id.*

Parker sued the bar under both a premises liability theory and the Texas Dram Shop Act.<sup>194</sup> He alleged defendant and its agents were negligent for providing alcoholic beverages and liquor to plaintiff and Griffin because they knew or should have known that plaintiff and Griffin were so intoxicated as to be dangerous to themselves and others and because “such intoxication was a proximate cause of the damages suffered by plaintiff.”<sup>195</sup>

The trial court summarily dismissed the suit, and the appellate court affirmed the dismissal of the premises liability claim.<sup>196</sup> At issue was a provision in the Texas Dram Shop Act that provides an affirmative defense when the employer requires employees to attend special training, the employee does attend, and the employer does not encourage the employee to violate the law.<sup>197</sup> The Texas Supreme Court reversed and remanded to give plaintiff the opportunity to present evidence of whether defendant’s employees were encouraged to continue to serve plaintiff and Griffin.<sup>198</sup>

In *Speight v. Walters Development Co., Ltd.*,<sup>199</sup> the Iowa Supreme Court adopted and applied “the doctrine of implied warranty of workmanlike construction to subsequent, as well as initial, purchasers.”<sup>200</sup> There, plaintiffs purchased their home in 2000 and filed suit against defendants in 2005.<sup>201</sup> After purchasing the home, plaintiffs, who were the third owners of the home that was custom-built by defendants in 1995, “noticed water damage and mold” allegedly caused by a “defectively constructed” roof and rain gutters.<sup>202</sup>

The Iowa Supreme Court adopted the “emerging” view that “subsequent purchasers may recover for breach of implied warranty of workmanlike construction, against a builder-vendor as recognized in *Kirk*<sup>203</sup> for first-party purchasers.”<sup>204</sup> Although the court stated that regardless of who owns the home, the builder/vendor is no longer liable for an implied warranty claim once the statute of repose has run,<sup>205</sup> it also held that plaintiffs’ claim was not time-barred because “plaintiffs could not have gained actual or imputed knowledge of the defect in their home more than five years prior to commencing this action.”<sup>206</sup>

---

194. *Id.*

195. *Id.*

196. *Id.*

197. TEX. ALCO. BEV. CODE § 106.14(a) (Vernon 2003).

198. 20801, Inc. v. Parker, 249 S.W.3d 392, 400 (Tex. 2008).

199. 744 N.W.2d 108 (Iowa 2008).

200. *Id.* at 116.

201. *Id.* at 110.

202. *Id.*

203. *Kirk v. Ridgway*, 373 N.W.2d 491 (Iowa 1985).

204. *Speight*, 744 N.W.2d at 115.

205. *Id.*

206. *Id.* at 116.

---

---

#### IV. PRODUCTS LIABILITY CLASS ACTION DEVELOPMENTS

Defendant in *Masquat v. DaimlerChrysler Corp.*<sup>207</sup> challenged the trial court's certification of a class of plaintiffs asserting breach of warranty claims based on an alleged defect in the steering mechanism of certain vehicles manufactured by DaimlerChrysler. According to plaintiffs, DaimlerChrysler failed to provide a bolt fix for the steering mechanism, thereby breaching express and implied warranty obligations to the class. Plaintiffs also sought an order requiring DaimlerChrysler to compensate the class for the cost of the bolt fix and steering-related repairs.<sup>208</sup>

Defendant opposed, arguing that the suit was untimely.<sup>209</sup> After plaintiffs amended to assert tolling, after the trial court certified a class, and after defendant filed an interlocutory appeal, the appellate court affirmed, reasoning that "evidence of the alleged acts of concealment and . . . of whether knowledge of the alleged defect was readily available so as to put an ordinary prudent class member on inquiry" predominated over whether some class members could have ascertained the problem through due diligence.<sup>210</sup> Finally, the court determined that the class action requirements of commonality and typicality were also satisfied.<sup>211</sup>

Both parties in *Salmonsens v. Charleston Gypsum Dealers & Supply Co.*<sup>212</sup> appealed orders certifying and refusing to decertify a class action suit seeking damages arising out of application of allegedly defective synthetic stucco to the home of plaintiffs and others similarly situated.<sup>213</sup> Plaintiffs alleged breach of implied warranty, breach of express warranty, negligence, and strict liability.<sup>214</sup> The case is most notable because the trial court certified an opt-in class.<sup>215</sup> The South Carolina Supreme Court held that the opt-in order was appealable, that it was wrong, and that the class certification order was not otherwise appealable at the time.<sup>216</sup>

#### V. PREMISES LIABILITY

In *Padilla v. Rodas*,<sup>217</sup> an appellate court affirmed summary dismissal of negligent supervision and premises liability claims by a parent against a

---

207. 195 P.3d 48 (Okla. 2008).

208. *Id.* at 50.

209. *Id.* at 54–55.

210. *Id.* at 57.

211. *Id.* at 57–58.

212. 661 S.E.2d 81 (S.C. 2008).

213. *Id.* at 82.

214. *Id.*

215. *Id.* at 84.

216. *Id.* at 85.

217. 160 Cal. App. 4th 742 (Cal. Ct. App. 2008).

homeowner arising out of an allegedly defective gate because the homeowners did not owe a duty, they did not breach a duty of supervision, and the parent could not establish that the absence of a self-latching mechanism on a gate was the cause of the accident.<sup>218</sup> There, a two-year-old drowned in the backyard pool of the homeowners when his mother went into the house for a glass of water and left her child unattended by the pool for about five minutes.<sup>219</sup> Upon her return she found her child facedown in the pool.<sup>220</sup>

Although California courts had not previously considered the issue, the appellate court noted that “courts in other states have determined that a homeowner has no duty to supervise a child in the vicinity of a residential swimming pool when the child’s parent is also present and have affirmed summary judgments in favor of homeowners on facts similar to those here.”<sup>221</sup> The court then affirmed based on the analysis of cases in other states, concluding that the homeowners did not have a duty to supervise and had not undertaken such responsibility.<sup>222</sup> Finally, the court concluded that even if the gate was defective due to the absence of the self-latching mechanism, the parents could not establish that the defect caused their child to drown.<sup>223</sup>

In *Garcia v. Paramount Citrus Ass’n, Inc.*,<sup>224</sup> Salud Andrade, a crew supervisor for a farm laborer, was driving near Paramount Citrus Association’s property. Andrade rammed into a van carrying Ignacio Garcia and other farmworkers to a work site.<sup>225</sup> Plaintiff, who suffered brain damage and was rendered essentially a paraplegic by the accident, sued defendant alleging that defendant owed a duty to him and others to place a warning on its private road alerting drivers of the approaching intersection with a public road.<sup>226</sup> Defendant appealed a verdict holding it thirty-five percent responsible for the injuries.<sup>227</sup>

The appellate court concluded that the landowner did not owe a duty of care to a farmworker arising from the nonpermissive, negligent use of its property by the third party. Accordingly, it reversed, stating that the foreseeability of that type of negligent act by a third party is insufficient to justify the implementation of the high burden that the proposed duty would place upon rural landowners to prevent such conduct.<sup>228</sup>

---

218. *Id.* at 745.

219. *Id.* at 746.

220. *Id.*

221. *Id.* at 748.

222. *Id.* at 751–52.

223. *Id.* at 752–53.

224. 161 Cal. App. 4th 321 (Cal. Ct. App. 2008).

225. *Id.* at 325.

226. *Id.* at 326.

227. *Id.*

228. *Id.* at 333.

In *Edenshaw v. Safeway, Inc.*, Gerald Edenshaw sued Safeway, Inc. and others after a slip-and-fall accident.<sup>229</sup> The Alaska Supreme Court accepted certification to determine whether “actual or constructive notice of a hazardous condition is an element of a prima facie case in a[] [negligence] [action] against a grocery store owner” in such a case.<sup>230</sup> In resolving the issue, the *Edenshaw* court cited the decision in *Webb v. City & Borough of Sitka*,<sup>231</sup> which abolished the common law distinctions between trespassers, licensees, and invitees while simultaneously holding that a landowner “must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.”<sup>232</sup> The *Edenshaw* court then held that “while actual or constructive notice of a hazardous condition is a factor that a factfinder may consider in determining reasonableness, it [was] not an element of a prima facie case” therein.<sup>233</sup>

In *Metcalf v. County of San Joaquin*, Thomas Metcalf sued the county of San Joaquin after suffering a serious injury in an automobile accident.<sup>234</sup> Concluding that any negligent or wrongful conduct of defendant did not create the dangerous condition and that the county did not have notice of any allegedly dangerous condition, a jury ruled in favor of the county.<sup>235</sup> On appeal, the California Supreme Court held that in order to establish liability, plaintiff had to show that the county negligently created or had notice of that condition.<sup>236</sup> Because plaintiff had not, the California Supreme Court affirmed.

In *Kopczynski v. Barger*,<sup>237</sup> plaintiff's child (a coplaintiff), along with other children, accepted an invitation from a neighbor's son to jump with him on the trampoline.<sup>238</sup> Plaintiff's child injured her knee and her mother sued, seeking damages based on premises liability and attractive nuisance.<sup>239</sup> The trial court summarily dismissed the complaint.<sup>240</sup> According to the appellate court, the attractive nuisance doctrine was inapplicable because

---

229. 186 P.3d 568 (Alaska 2008).

230. *Id.* at 569.

231. 561 P.2d 731 (Alaska 1977).

232. *Edenshaw*, 186 P.3d at 570.

233. *Id.*

234. 176 P.3d 654 (Cal. 2008).

235. *Id.* at 656.

236. *Id.*

237. 887 N.E.2d 928 (Ind. 2008).

238. *Id.* at 930.

239. *Id.*

240. *Id.*

plaintiffs failed to show that the trampoline was particularly dangerous or attractive to children. The court found that plaintiff was a trespasser and affirmed.<sup>241</sup>

The Indiana Supreme Court reversed, holding that, under some circumstances, a minor's invitation to enter the premises may bind the landowner for purposes of premises liability and that a trampoline could be an attractive nuisance.<sup>242</sup> More specifically, "[t]he reasonableness of twelve-year-old [plaintiff's] belief that she had permission to jump on the [defendant's] trampoline by virtue of [a six-year-old's] invitation . . . presents a genuine issue of material fact that precludes a determination of her status as a matter of law."<sup>243</sup> Turning to the attractive nuisance claim, the Indiana Supreme Court also found the existence of disputed material facts with regard to the open and obvious nature of the dangers of trampolines. That is, it was not unreasonable to assume that children would be attracted to a large trampoline sitting in the middle of an open yard.<sup>244</sup>

The court in *Nash v. Port Authority*<sup>245</sup> addressed claims arising out of the 1993 World Trade Center bombing. In 1984, the Port Authority was warned that the World Trade Center's underground parking garage was a "prime" and "high risk" target for terrorists because, in part, there was transient public parking beneath the towers.<sup>246</sup> The Port Authority, nevertheless, rejected recommended remedial measures such as screening vehicles for explosives and surveillance.<sup>247</sup> In February 1993, terrorists drove a rental van, loaded with explosives, into the garage and ignited it, killing six people and injuring hundreds.<sup>248</sup>

According to the appellate court, defendant landlord had ample notice that a car bombing such as the one that occurred was not merely possible but could very well occur if obvious, specifically identified vulnerabilities were not addressed.<sup>249</sup> A fortiori, there was a showing that the Port Authority's negligence "was extraordinarily conducive of the terrorists' conduct."<sup>250</sup> Accordingly, the jury was justified in assigning sixty-eight percent of the fault to the Port Authority.<sup>251</sup>

---

241. *Id.*

242. *Id.*

243. *Id.* at 932.

244. *Id.* at 934.

245. 51 A.D.3d 337 (N.Y. App. Div. 2008).

246. *Id.* at 340.

247. *Id.* at 340-42.

248. *Id.* at 339.

249. *Id.* at 347.

250. *Id.* at 358.

251. *Id.* at 358-59.

In *Torchik v. Boyce*,<sup>252</sup> plaintiff, a Ross County sheriff's deputy, investigated a burglar alarm on defendant's property.<sup>253</sup> There, plaintiff suffered injuries when the steps of a deck collapsed. Plaintiff sued the contractor who constructed the steps and deck, not the homeowner. The trial court summarily dismissed the complaint based on the "fireman's rule."<sup>254</sup>

Under the fireman's rule, a landowner owes only a limited duty to a firefighter or police officer that is injured while on the owner's premises in a professional capacity.<sup>255</sup> Specifically, if a police officer or fireman enters upon private premises in the performance of his official duties and is injured, there is no liability unless the owner of the premises is guilty of willful or wanton misconduct or negligence.<sup>256</sup> The court concluded that a contractor could use the fireman's rule as a shield, noting that the homeowner had control over the premises and that the independent contractor was not working on the premises at the time of the accident.<sup>257</sup>

In *General Electric v. Moritz*,<sup>258</sup> the Texas Supreme Court addressed whether a landowner has a duty to warn an independent contractor's employees of known and obvious hazards.<sup>259</sup> There, Moritz was employed by an independent contractor of General Electric (GE) delivering parts to GE customers.<sup>260</sup> While loading parts into his truck, Moritz fell off the ramp's side, fracturing his hip, pelvis, and thumb. Moritz sued GE and others, alleging that as owners they were liable for negligence.<sup>261</sup>

The appellate court reversed entry of summary judgment based on the existence of disputed material facts. The Texas Supreme Court then analyzed the case using the negligent activity theory. According to that theory, an owner does not owe a duty to ensure that independent contractors perform their work in a safe manner unless the owner retains the right to control the independent contractor's work.<sup>262</sup> The Texas Supreme Court reversed because GE did not have contractual or actual control over Moritz's decision to carry loads in the back of his pickup; thus, GE was not negligent.<sup>263</sup> The court, of course, recognized that under the premises condition theory, GE had a duty to warn Moritz of concealed defects.<sup>264</sup> However, because

---

252. No. 06CA2921, 2008 WL 308460 (Ohio Ct. App. Feb. 1, 2008).

253. *Id.* at \*1.

254. *Id.*

255. *Id.* at \*2.

256. *Id.*

257. *Id.* at \*5.

258. 257 S.W.3d 211 (Tex. 2008).

259. *Id.* at 213.

260. *Id.* at 213–14.

261. *Id.* at 214.

262. *Id.*

263. *Id.* at 215.

264. *Id.* at 216.

the absence of handrails on the ramp was not a concealed defect, neither GE nor other defendants had a duty to warn.<sup>265</sup>

## VI. EVIDENTIARY CASES

### A. Other Alleged Incidents

The court in *Employers Reinsurance Co. v. Superior Court*<sup>266</sup> reviewed a trial court's decision to exclude claims handling history in interpreting insurance policies.<sup>267</sup> Concluding that the admissibility of such evidence did not require that the claims handler be the same individual who had negotiated the contract, the court held that course of performance evidence was admissible.<sup>268</sup>

In *Sparks v Mena*,<sup>269</sup> a Tennessee appellate court found error when the trial court "exclud[ed] evidence of other similar incidents involving actual or potential surgical injuries with the same model of device" and excluded the "testimony of plaintiff's expert witness."<sup>270</sup> There, plaintiff was injured during surgery when a surgical device, manufactured by Ethicon Endo-Surgery, Inc. (Ethicon), allegedly lacerated her aorta. A jury returned a verdict for Ethicon, finding that the Ethicon device was not "defective and unreasonably dangerous."<sup>271</sup>

Appellant contended that the trial court erred when it excluded evidence of prior similar incidents involving the same device,<sup>272</sup> where, during trial, plaintiff had attempted to introduce "21 Ethicon analysis reports documenting 23 claims of similar incidents involving the 512SD trocars within the two years prior to her injury."<sup>273</sup> The appellate court agreed that the exclusion was reversible error,<sup>274</sup> concluding that eighteen of Ethicon's analysis reports were substantially similar and admissible to "show the existence of a particular dangerous condition" or "to show defendant's knowledge

---

265. *Id.*

266. 161 Cal. App. 4th 906 (Cal. Ct. App. 2008).

267. *Id.* at 911-12. The insurers sought to adduce the evidence in an action by an insured seeking to declare that its policies, which had paid asbestos claims over thirty years, were not exhausted because the insurers should not have been allocating all payments to product as opposed to nonproduct claims. *Id.*

268. *Id.*

269. No. E2006-02473-COA-R3-CV, 2008 WL 341441 (Tenn. Ct. App. Feb. 6, 2008).

270. *Id.* at \*1.

271. *Id.*

272. *Id.* at \*1-2.

273. *Id.* at \*1.

274. *Id.* at \*2. The trial court had treated same as inadmissible character evidence pursuant to Tennessee Rule of Evidence 404(b). *Id.*

of the dangerous condition.”<sup>275</sup> Appellant also challenged the trial court’s exclusion of testimony by plaintiff’s expert, Dr. Eyrick.<sup>276</sup> The court determined that Dr. Eyrick was qualified to render an opinion regarding the “mechanical design and operation of the device at issue” and that the trial court erred when it disqualified him.<sup>277</sup>

### B. Spoliation

In *Reed v. Alpha Professional Tools*,<sup>278</sup> a Florida appellate court addressed whether dismissal was an appropriate remedy for spoliation.<sup>279</sup> Plaintiff was operating a grinder attached to a polishing wheel when the polishing wheel broke into pieces.<sup>280</sup> Although plaintiff was wearing safety glasses while operating the polishing wheel, a piece of the wheel allegedly hit plaintiff in the eye and caused permanent blindness. Following the accident, plaintiff’s counsel gained possession of the polishing wheel, grinder, and protective glasses. Plaintiff sued, alleging strict liability, negligence, and negligent failure to warn against distributors of the polishing wheel.<sup>281</sup> After the complaint and answer had been filed, the distributors of the polishing wheel filed a “motion for inspection of the polishing wheel.”<sup>282</sup> During a hearing on the matter, plaintiff’s counsel informed the court that the evidence had been lost during relocation of counsel’s law firm.<sup>283</sup> However, plaintiff’s expert had taken “extensive photographs,” including detailed close-ups of the evidence.<sup>284</sup>

The appellate court reversed the trial court’s dismissal of plaintiff’s claims, finding that the parties could be placed on “an equal footing by limiting the plaintiff to the physical evidence available to both parties,” i.e., the photographs.<sup>285</sup> In addition, the court stated, even without the polishing wheel, defendant would not be rendered “completely unable to defend” but only “unable to defend completely.”<sup>286</sup> Finally, the court found that because the decision to dismiss plaintiff’s claims was based on the opinion of the defense expert, plaintiff should be allowed to conduct discovery to test the expert’s opinions.<sup>287</sup>

---

275. *Id.*

276. *Id.* at \*4–5.

277. *Id.*

278. 957 So. 2d 1202 (Fla. Dist. Ct. App. 2008).

279. *Id.* at 1203.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1204.

286. *Id.*

287. *Id.* at 1205.

### C. Experts

The Amory School District contracted with M&W Gas Company (M&W) to convert some of the district's school buses to propane fuel in *Smith v. Clement*.<sup>288</sup> The lawsuit arose as the result of a 1995 school bus fire during which two children were burned while trying to escape.<sup>289</sup> After settling with Amory, the school district filed a third-party complaint against M&W alleging negligent installation of the propane fuel system.<sup>290</sup> M&W then filed a motion for summary judgment alleging that the school district could not establish that there was a genuine issue of material fact with regard to the fuel system being in the same condition at the time of the fire as it was when it left M&W in 1981.<sup>291</sup> Plaintiff's response to the motion included an affidavit from its expert, Forbes. In response, M&W filed a motion to strike the affidavit by Forbes and provided an affidavit from its expert, Nolan.<sup>292</sup>

The Mississippi Supreme Court affirmed the trial court's decision to strike Forbes's affidavit.<sup>293</sup> It stated that Mississippi courts are not required to hold a "formal 'Daubert' hearing when an expert's opinions are challenged"; instead, the party presenting the challenged expert opinion "is given a fair opportunity to respond to the challenge."<sup>294</sup> For the five-month period from the date of Nolan's affidavit attacking the basis of Forbes's opinion until summary judgment was awarded, the school district "was on notice" of the challenge to their expert's opinion.<sup>295</sup> According to the Mississippi Supreme Court, although this was sufficient time to submit "scientific evidence and other indications" that Forbes's opinion was reliable, the school district nevertheless did not submit any evidence showing that Forbes's opinion "was based on sound scientific principles."<sup>296</sup>

The Mississippi Supreme Court finally affirmed the grant of summary judgment in favor of M&W, finding that without Forbes's opinion, the school district could not establish that M&W was negligent in the installation of the propane fuel system.<sup>297</sup>

---

288. 983 So. 2d 285 (Miss. 2008).

289. *Id.* at 286–87.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 390.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*