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The Pennsylvania Supreme Court Set to Revisit Malfunction Theory in September 2008: *Barnish v. KWI Building Co.*

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Since *Webb v. Zern* in 1966, the Pennsylvania Supreme Court has recognized a cause of action in strict liability against the manufacturer of a product pursuant to Section 402A of the *Restatement (Second) of Torts*. *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). In order to recover on a theory of strict product liability, a plaintiff must prove that: (1) the product was defective; (2) the defect was the proximate cause of the plaintiff's injuries; and (3) the defect existed at the time it left the manufacturer's control. *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 898 (Pa. 1975).

In most cases, the plaintiff presents direct evidence of the product's defective condition. However, in some cases the plaintiff is unable to offer any evidence of a specific defect and may rely on the malfunction theory of product liability to get to the jury. The malfunction theory relieves the plaintiff of the obligation to present direct evidence of the defect and permits the use of circumstantial evidence for the purpose of establishing a defect in the product. A jury may then infer from this circumstantial evidence that the product was defective at the time of sale. *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989); *MacDougall v. Ford Motor Company*, 257 A.2d 676, 680 (Pa. Super. 1969). A plaintiff proceeding under the malfunction theory must establish proof sufficient to satisfy three prongs of the malfunction theory analysis:

1. that the product malfunctioned;
2. the absence of abnormal use; and
3. the absence of any reasonable, secondary causes.

See Pennsylvania Standard Jury Instructions 8.05, Strict Liability Upon Proof of Malfunction.

Although the Pennsylvania Superior Court has considered the malfunction theory of strict liability in a multitude of cases, the Pennsylvania Supreme Court did not fully

adopt this evidentiary approach until the case of *Rogers v. Johnson & Johnson Products, Inc.* in 1989 and has not directly considered the theory since. *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989). The Supreme Court will take another look at malfunction theory in September, when it hears argument in the case of *Barnish v. KWI Bldg. Co.*, 916 A.2d 642 (Pa. Super. 2007) *appeal granted* 946 A.2d 639 (Pa. 2008).

In *Barnish*, employees working at a particleboard manufacturing plant were injured after an explosion at the factory. *Id.* at 644. In 1991, GreCon, a manufacturer of heat sensing equipment sold spark detection sensors and a central control panel, used to monitor the sensors, to the plant. *Id.* The sensors and control panel were intended to work in concert to detect sparks in the particleboard during manufacture and, if detected, activate an automated alarm and water deluge response system. *Id.* The GreCon sensors, installed in 1991, operated for ten years without incident. *Id.*

On February 13, 2001, several plant employees observed "a large glowing ember" in particleboard on one of the plant's conveyor belts. *Id.* Despite the presence of the ember, the GreCon sensors did not activate the alarm and water deluge response system, resulting in a large explosion and fire. *Id.* As a result of the explosion, the Plaintiffs sustained severe injuries. *Id.* Plaintiffs instituted an action based upon strict liability against GreCon. *Id.* GreCon filed a Motion for Summary Judgment which was granted by the trial court and, thereafter, appealed by the Plaintiffs based upon the contention that the trial court erred in granting summary judgment on the ground that the Plaintiffs could not prove that the sensors were defective when they left GreCon's hands. *Id.* at 645.

The Superior Court concluded that the trial court did not commit an error of law or abuse of its discretion in granting summary judgment to GreCon, since a jury could



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not reasonably draw the inference that a defect in the sensors existed when they left GreCon's hands, ten years prior to the malfunction, given that Plaintiffs conceded that the sensors functioned properly during that ten year period and failed to present sufficient proof of an original defect. *Id.* at 647-648 (citation omitted). As a result, the Plaintiffs were found by the Superior Court not to have presented a case-in-chief free of reasonable, secondary causes. *Id.* at 648. Therefore, "[a] jury could not reasonably infer that a defect existed at the time the sensors left GreCon's hands, as any such inference would constitute mere speculation." *Id.*

Pennsylvania courts prior to *Barnish* have held that in cases of prolonged use of a product before the alleged malfunction, a plaintiff cannot meet its burden of presenting a case-in-chief free of reasonable, secondary causes. See *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 923 (Pa. 1974); *Woodin v. J.C. Penney Co., Inc.*, 629 A.2d 974, 976 (Pa. Super. 1993). In such cases, the jury should not be permitted to infer that a product was defective when it left the manufacturer's control. See *Kuisis*, 319 A.2d at 922.

Establishing evidence of a malfunction satisfies only the first prong of the malfunction theory analysis. A plaintiff must also eliminate evidence of reasonable secondary causes of the malfunction that appear in plaintiff's case-in-chief. *Barnish*, 916 A.2d at 646. While a plaintiff proceeding under the malfunction theory need not "negate every theoretically conceivable secondary cause for the malfunction[,] the plaintiff cannot meet its burden of establishing a *prima facie* case if the plaintiff fails to negate evidence of other reasonable, secondary causes that could account for the accident or evidence of abnormal use that the plaintiff introduces in its own case-in-chief. *Id.* (citations omitted).

In granting the Plaintiffs' Petition for Allowance of Appeal in *Barnish*, the Supreme Court has directed the parties "to address the effect of the continued successful use of a product on a plaintiff's ability to withstand summary judgment under the malfunction theory of strict product liability." *Barnish*, 946 A.2d 639 (Pa. 2008). This will be the first time since the adoption of the evidentiary approach in *Rogers* that the Court considers this issue. An affirmation by the Supreme Court of the Superior Court's ruling will have a significant effect on the defense of product defect claims and a manufacturer's ability to obtain summary judgment in cases which would otherwise have been destined to go to the jury. Stay tuned for an Alert following the Court's hearing of the matter this September.

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