

Update

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Pa. Supreme Court Upholds Summary Judgment In Malfunction Theory Case Where Product Performed Successfully For Ten Years Prior To Alleged Malfunction

The malfunction theory of products liability was first recognized by the Pennsylvania Supreme Court in *Rogers v. Johnson & Johnson Products, Inc.*, 565 A.2d 751, 754 (Pa. 1989). This theory relieves a plaintiff from demonstrating the precise defect in a product and permits the jury to infer the existence of a defect from evidence establishing the product's malfunction and eliminating abnormal use and other reasonable secondary causes for the malfunction.

In *Barnish v. KWI Building Co.*, 980 A.2d 535 (Pa. 2009), the Supreme Court considered the effect of a product's prior successful use on a plaintiff's ability to withstand summary judgment in a products liability action based upon the malfunction theory.

Following an explosion at a particleboard manufacturing plant, the plaintiffs in *Barnish* filed personal injury and wrongful death claims against the manufacturer of heat sensors installed in the plant. The plaintiffs alleged that the sensors failed to detect and extinguish a glowing ember in particleboard materials which caused the explosion. The plaintiffs, however, could not present direct evidence of a defect in the sensors because the sensors were lost after the explosion. Accordingly, the plaintiffs proceeded under the malfunction theory.

In moving for summary judgment, the defendant argued that the plaintiffs could not establish that the allegedly defective condition existed when the sensors left the defendant's control in light of the plaintiffs' admission that the sensors functioned properly for ten years prior to the explosion.

The trial court granted the defendant's motion and the Supreme Court affirmed, holding that a plaintiff proceeding under the malfunction theory must still present evidence of each element of a strict liability cause of action in order to survive summary judgment. Although the malfunction theory permits a plaintiff to present circumstantial evidence of a defect, the plaintiff must still present evidence that

the defect caused the injury and that the defect existed at the time that the product left the manufacturer's control. The Court found that the plaintiffs failed to present any evidence, either direct or circumstantial, that the sensors were defective at the time they left the defendant's control.

However, the Court "refuse[d] to conclude that the prior successful use of a product, in and of itself, dooms a plaintiff's ability to present a prima facie case for strict product liability under the malfunction theory." 980 A.2d at 546. Rather, for the purposes of the malfunction theory, "a plaintiff's acknowledgement of prior successful use undermines the inference that the product was defective when it left the manufacturer's control." *Id.* at 547. Accordingly, the Court held that in order to survive summary judgment, "a plaintiff who admits that the product functioned properly in the past must present some evidence explaining how the product could be defective when it left the manufacturer's control and yet still function properly for a period of time." *Id.* at 547.

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Pa. Supreme Court Holds Prior Litigation Of Nonmalignant Asbestos-Related Diseases Does Not Preclude Subsequent Suit Against New Defendants For Asbestos-Related Cancer Claims

In *Abrams v. Pneumo Abex Corporation*, 981 A.2d 198 (Pa. 2009) the Pennsylvania Supreme Court ruled that a plaintiff's pre-1992 lawsuit for increased risk of cancer does not bar a subsequent suit against new defendants arising out of an asbestos-related cancer diagnosis.

The plaintiffs, Kenneth Abrams and John Shaw, were diagnosed with nonmalignant asbestos-related diseases in 1984 and 1985, and filed separate lawsuits against various defendants to recover damages for increased fear of cancer. Those actions were resolved in out-of-court settlements between the parties. However, in December 2002, both plaintiffs were diagnosed with asbestos-related lung cancer and subsequently filed separate lawsuits against various manufacturers of asbestos-containing products.

Defendant John Crane, Inc. ("Crane") filed a motion for summary judgment, arguing that, because plaintiffs' initial claims were filed prior to Pennsylvania's adoption of the separate-disease rule in 1992, the claims against Crane should have been asserted in the earlier litigation and the statute of limitations barred the present actions. The trial court granted Crane's motions and the Superior Court affirmed, concluding that the plaintiffs' claims for damages of lung cancer were identical to their previously-litigated risk of cancer claims and, therefore, were required to be raised at the same time.

The Supreme Court reversed, holding that the plaintiffs' claims for lung cancer accrued in December 2002, when they were diagnosed with lung cancer, and therefore, the plaintiffs' actions against Crane were timely. In so holding, the Court emphasized that the plaintiffs' "cause of action against Crane is an individual one, separate and distinct from the causes of action asserted by [the plaintiffs] against other defendants in the 1980s; thus, the fact [the plaintiffs] previously asserted risk of cancer claims against other defendants does not preclude a subsequent timely action against Crane for actual cancer." 981 A.2d at 210. Accordingly, the Court ruled that that cancer and non-cancer diseases give rise to separate claims and the plaintiffs' claims for damages for lung cancer were "clearly separate and distinct from any claims for risk or fear of cancer that may have existed in the 1980s." *Id.* at 211.

Pa. Superior Court Holds There is No Constitutional Guarantee of Recovery for Claims Barred by Time Limitation under Workers' Compensation Act

In *Ranalli v. Rohm and Hass Company*, 2009 WL 2857521 (Pa. Super. Nov. 10, 2009), the plaintiff filed a wrongful death action against his wife's employer, alleging that his wife developed a brain tumor as a result of her exposure to vinyl chloride while working for the defendant.

The defendant filed preliminary objections on the grounds that the plaintiff's claims were barred by the exclusivity provisions of the Workers' Compensation Act, 77 Pa.S.A. 481(a) (the "Act"). The trial court overruled the preliminary objections and the defendant appealed, arguing that the Act provides the exclusive remedy and the 300-week statute of repose provided by the Act barred the plaintiff's claims.

The Superior Court held, as a matter of first impression, that that application of the Workers' Compensation Act's exclusivity provision to bar a plaintiff's suit did not violate the Pennsylvania Constitution. In so holding, the court explained that the Act was a compromise to provide workers recovery without any fault on the part of the employers while relieving employers of some of the damages in a traditional common law action and imposing a time limitation to protect employers from strict liability for stale claims.

Citing to the Pennsylvania Supreme Court's decision in *Kline v. Arden H. Verner Co.*, 469 A.2d 158 (Pa. 1983), the Superior Court found that the Act may bar a plaintiff's common law claims since the Act grants some benefits that would be unavailable otherwise, stating "it is not the law that simply because an employee is unable to recover under the Act, the employee may file a civil action in tort against the employer." 2009 WL 2857521 *2. Accordingly, the Court reversed the order overruling the defendant's preliminary objections and directed the trial court to enter judgment for the defendant.

W.D. Pa Court Holds Plaintiff May Present Direct Evidence in Malfunction Theory Case

In *Del Baggio v. Maytag Corp.*, 2009 WL 3111809 (W.D. Pa. Sept. 23, 2009), the plaintiffs filed a products liability claim against the manufacturer of an electric range. According to the plaintiffs, the range malfunctioned and caught fire, resulting in substantial fire damage to their residence.

The plaintiffs produced reports from several experts supporting their claim, including a fire marshal, a “cause and origin” expert, and an electrical engineer. One of the experts identified a specific component of the range that caused the fire. The defendant moved for summary judgment, arguing that the plaintiffs’ decision to proceed under the “malfunction theory” precluded them from identifying a specific component of the range that caused the fire and therefore the malfunction theory was no longer available to them.

The plaintiffs countered that the malfunction theory had been argued since the commencement of the action and that the component identified by the expert had multiple electrical components within it, and therefore, the plaintiffs merely limited the malfunction to a specific area of the range and did not transmute their theory of recovery from malfunction to specific defect.

The court, citing *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489, 496 (Pa. Super. 1997), noted that in some products liability cases, under the “specific defect theory,” a plaintiff may be able to prove that a product

suffered from a specific defect by producing expert testimony to explain to the jury precisely how the product was defective and how the defect must have arisen from the manufacturer or seller.

Under the “malfunction theory,” however, the plaintiff, even without expert testimony articulating the specific defect, may be able to convince a jury that the product was defective when it left the seller’s hands by producing circumstantial evidence such as (1) the malfunction of the product; (2) expert testimony as to a variety of possible causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect.

The court was not persuaded by the defendant’s position that because the plaintiffs’ expert identified a specific component of the range as the origin of the fire, they were now constrained to proceed under the specific defect theory. The court denied the defendant’s motion, noting that the malfunction theory merely affords a plaintiff an alternative route to establishing the existence of a defect but does not ban the plaintiff from producing direct evidence that by itself would be insufficient under the specific defect theory.

M.D. Pa Court Holds Dissolution of Marriage is Not a Total Bar to Loss of Consortium Claim

In *Cmiech v. Electrolux Home Products, Inc.*, 2009 WL 3103786 (M.D. Pa. Sept. 24, 2009), a husband and wife brought an action against the distributor of an allegedly defective stove. The plaintiffs claimed the stove suddenly exploded due to a fuel leak, causing serious injuries to the wife, including second and third degree burns on approximately fourteen percent of her body.

The wife asserted claims for, *inter alia*, strict liability against the defendant while her husband brought a claim for loss of consortium. Prior to trial, the couple separated and eventually divorced. The defendant subsequently

filed a motion for partial summary judgment arguing that because the marriage dissolved, the husband was no longer entitled to damages for his loss of consortium.

The court noted that, although there was no controlling Pennsylvania case law directly on point, several other jurisdictions have held that the dissolution of a marriage merely marks the end of the compensable period for loss of consortium, but does not bar recovery completely. The court predicted the Pennsylvania Supreme Court would likely hold similarly; therefore, the defendant’s motion for partial summary judgment was denied.

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