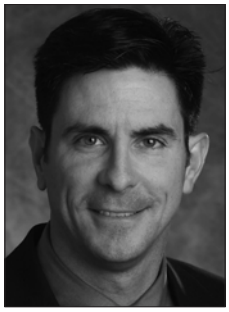
MINNESOTA PRODUCTS LIABILITY LAW 1992-2003, PART II

By George W. Soule, Kevin Curry and Amy B. Pinske
BOWMAN AND BROOKE, LLP


This is the second of a two-part article dealing with Minnesota Products Liability Law. Part I provided an introduction to the issues involved in Minnesota product liability law and failure to warn issues. Part II, which appears in this issue of *Minnesota Defense*, discusses the Seat Belt Gag Rule, Economic Loss Doctrine, Spoliation of Evidence, Res Ipsa Loquitur, Rejection of New Products Liability Theories, Foreseeability, Assumption of Risk, Subsequent Remedial Measures, and some helpful Miscellaneous Case studies.

III. SEAT BELT GAG RULE

Between 1992 and 1999, a flurry of cases addressed Minn. Stat. § 169.685, subd. 4, commonly known as the "seatbelt gag rule," which then provided that evidence concerning the use or nonuse of a seatbelt was not admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle. The gag rule was traditionally used to defeat claims that a vehicle occupant was negligent in not wearing his/her seatbelt. In the following cases, vehicle manufacturers then sought application of the statute as written – to preclude any evidence of seat belt use as part of the plaintiff's case. The courts, deciding that the statute meant what it said, applied the statute against the plaintiffs. This application prevented defective seatbelt claims because a plaintiff who cannot prove she was wearing her seatbelt also cannot prove that the seatbelt was defective and its use in a defective condition caused or contributed to her injury.

The key case, *Olson v. Ford Motor Co.,* involved an allegation that a seatbelt was negligently designed or manufactured. *Olson v. Ford Motor Co.,* 558 N.W.2d 491, 493 (Minn. 1997). Plaintiff alleged his factory-installed seatbelt failed during a collision, "materially contributing to his injuries." *Id*. The Minnesota Supreme Court held that the gag rule precluded evidence of plaintiff's alleged use of the seatbelt at the time of the accident and that the application of the rule did not violate plaintiff's rights under either the United States or state constitutions. *Id*. at 496, 497; *see also Carlson v. Hyundai*, 164 F.3d 1160, 1162 (8th Cir. 1999) (barring plaintiff's claim that she was ejected from automobile because her claims were dependent upon evidence of her use of the seatbelt); *Marsden v. Crawford*, 589 N.W.2d 804, 807 (Minn. App. 1999) (holding that gag rule applied to a breach of contract claim involving a child restraint seat and injuries occurring during an automobile accident); *Schlotz v. Hyundai Motor Co.,* 557 N.W.2d 613, 618 (Minn. App. 1997) (holding that the gag rule barred a crashworthiness claim based on manufacturer's failure to install lap belts); *Anker v. Little,* 541 N.W.2d 333, 339 (Minn. App. 1995) (holding that the statute applied to crashworthiness cases and did not violate the Minnesota and United States Constitutions); *Cressy v. Grassmann*, 536 N.W.2d 39, 42-43 (Minn. App. 1995) (holding that the gag rule does not violate the equal protection clause or unlawfully deny procedural due process).

In April 1999, however, after twice being vetoed by Governors Arne Carlson and Jesse Ventura, the state legislature successfully amended Minn. Stat. § 169.685, subd. 4, by overriding the second veto. The amended statute now contains a provision allowing the introduction of evidence, "pertaining to the use of a seatbelt or child passenger restraint system in an action" concerning an allegedly defectively designed, manufactured, installed or operating seatbelt or child passenger restraint system. Minn. Stat. § 169.685, subd. 4(b). The amendment became law on May 18, 1999, and applies to actions pending on or commenced on or after the effective date. 1999 Minn. Laws Chapter 106, Section 2.

GEORGE W. SOULE is a managing co-partner at the Minneapolis office of Bowman and Brooke, LLP. His practice is 95% devoted to litigation, in areas of Products Liability, Business and Commercial Litigation, Personal Injury -- Defense, Litigation & Appeals, Construction and Industrial Equipment, Farm Equipment, Motorcycles, ATVs and Other Wheeled Vehicles and Trucking and Bus Company Litigation. George was recognized by Minnesota Law & Politics magazine as a "Super Lawyer."

KEVIN CURRY is an associate in the Minneapolis office of Bowman and Brooke, LLP. His areas of practice include: Products Liability, Motorcycles, ATVs and Other Wheeled Vehicles, and Motor Vehicle Warranty. Kevin is a *magna cum laude* graduate of William Mitchell College of Law in St Paul, Minnesota.

AMY B. PINSKE is an associate in the Minneapolis office of Bowman and Brooke, LLP. She concentrates her practice on defending businesses in the areas of Employment Law, Products Liability and Commercial Litigation. Amy is a *cum laude* graduate of the University of Minnesota Law School.

IV. ECONOMIC LOSS DOCTRINE

In property damage cases, Minnesota courts have struggled to find a principled basis for deciding when breach of warranty is the exclusive remedy, and when the tort remedies of negligence and strict liability also apply.[5] In *Superwood Corp. v. Siempelkamp Corp.*, the leading economic loss doctrine case, the Minnesota Supreme Court held that economic losses arising out of commercial transactions are not recoverable under negligence and strict products liability theories, unless they involve personal injury or damage to other property. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981), overruled by *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). Then, in *Hapka v. Paquin Farms*, the supreme court further restricted the availability of tort recovery by eliminating the "other property" exception. *Hapka*, 458 N.W.2d at 688.[6] The court in *Hapka* distinguished commercial from consumer transactions based on the relative sophistication and bargaining power of the parties, reasoning that consumers who lacked the ability to negotiate warranties and remedies should still have the full "panoply of liability theory" available. *Id*.

The Minnesota Supreme Court limited the *Hapka* holding in *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, when it held that the U.C.C. provides the exclusive remedy for other property damage only when a sale fits *Hapka's* narrow definition of a "commercial transaction"; that is, where the parties are "merchants in goods of the kind." *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992). The court stated that, "in action for damages to other property which arise from a sale of goods between the parties who are not 'merchants in goods of the kind,' . . . the tort remedies of negligence and strict liability are always available, even if the parties can sue under the U.C.C. as well." *Id*.

Minn. Stat. section 604.10, enacted while *Den-Tal-Ez* was before the court of appeals, legislatively overruled *Hapka* in the same way that *Den-Tal-Ez* limited it. Under section 604.10, only transactions involving "merchants in goods of the kind" were limited to U.C.C. remedies. Minn. Stat. § 604.10. Thus, *Den-Tal-Ez* can be seen as the supreme court's harmonization of section 604.10 and *Hapka*.

The Minnesota legislature amended section 604.10 in 1998 to add the following clause: "This section shall not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation or limit remedies for those actions." Minn. Stat. § 604.10. The amendment was the result of lobbying on the part of Marvin Lumber and Cedar Company, which, at the time, was involved in a lawsuit involving allegedly defective wood preserver. *See Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 34 F. Supp. 2d 738, 741 (D. Minn. 1999). Ultimately, Marvin's lobbying efforts were not helpful to its case because the federal court ruled that section 604.10 did not apply because the transactions at issue occurred prior to the enactment of section 604.10 and the statute could not be applied retroactively. *Id.* at 743. The Eighth Circuit Court of Appeals affirmed the district court on this issue. *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 882 (8th Cir. 2000).

Notably, the court of appeals also held that Marvin's tort-based claims were barred by the economic loss doctrine because Marvin was a "merchant in goods of the kind," in this case, wood preserver. *Id.* at 883-84. The court noted Marvin's specialized knowledge of wood preserver and its status as an entity that buys wood preserver, incorporates the preserver into its finished windows, and then sells the windows. *Id*. at 884. The court reasoned that:

> Where a manufacturer with sophisticated knowledge of a component purchases and incorporates that component into its product, the manufacturer is not merely a dealer with respect to finished product, but with respect to the component part as well. Thus, Marvin was a dealer with respect to the [purchase of the wood preserver] and the economic loss doctrine operates to limit Marvin's claims.

Id.

The most recent case analyzing the Minnesota economic loss doctrine is *Holden Farms, Inc. v. Hog Slat, Inc.*, which involved a dispute between hog farms and a supplier of hog nurseries (used by the farms to store and raise their hogs). *Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1058 (8th Cir. 2003). The *Holden* court, applying the *Marvin* test discussed above, reasoned that a hog farm is not in the hog nursery business, does not incorporate the nursery into the final product (the hog), and is merely a consumer of hog nurseries. *Id*. at 1067. Thus, the court held that the economic loss doctrine does not preclude the farm's tort claims against the nursery manufacturer. *Id.*

[5] George W. Soule, *Products Liability Update,* Personal Injury Institute, Minnesota Institute of Legal Education (1994).

[6] *See also* Kenneth P. Gleason, *Strict Liability for Unsophisticated Plaintiffs: Minnesota's Legislative Response to Hapka v. Paquin Farms,* Minnesota Defense, Winter 1992.

In 2000, the legislature enacted Minn. Stat. section 604.101, which is a new codification of the economic loss doctrine and attempts to clarify some of the confusion surrounding the doctrine. The statute became effective on August 1, 2000, and governs claims if the subject transaction(s) occurred on or after August 1, 2000. Minn. Stat. § 604.101, subd. 6.[7] Importantly, unlike Minn. Stat. section 604.10 and the economic loss doctrine case law, section 604.101 does not appear to distinguish between consumer and commercial transactions. The statute applies to any claim by a buyer against a seller for harm caused by a defect in the goods sold or leased, or for a misrepresentation relating to the goods sold or leased. Id. at subd. 2.[8] The statute does not apply to personal injury claims. Id.

The statute provides that "[a] buyer may not bring a 'product defect tort claim' against a seller . . . unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods [themselves] or to the buyer's real property." *Id.* at subd. 3. A "product defect tort claim" is a "common law tort claim for damages caused by a defect in the goods but does not include statutory claims. A defect in the goods includes a failure to adequately instruct or warn." *Id.* at subd. 1. Furthermore, "[a] buyer may not bring a common law misrepresentation claim against a seller relating to the goods sold or leased unless the misrepresentation was made intentionally or recklessly." *Id.* at subd. 4. The statute addresses "three distinct situations" involving tort-based claims:

1. Product defect tort claims alleging loss to the goods are barred under the statute, along with any losses suffered by the buyer caused solely by loss or injury to the goods;
2. Product defect tort claims may be brought where the defect in the goods sold or leased causes harm to other tangible property or to real property, but the buyer's remedy is limited;
3. Where the buyer alleges intentional or reckless misrepresentation, the economic loss doctrine does not bar the claim or limit the remedy.

Daniel S. Kleinberger, et al., *Building a New Foundation: Torts, Contracts, and the Economic Loss Doctrine,* Bench & Bar of Minnesota, Sept. 2000, at 25, 26.[9]

V. SPOLIATION OF EVIDENCE

Spoliation is the destruction of evidence or the failure to preserve evidence for another's use in litigation. *Federated*

Spoliation is the destruction of evidence or the failure to preserve evidence for another's use in litigation.

Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436 (Minn. 1990). Sean J. Mickelson, *Spoliation of Evidence,* Minnesota Defense, Spring 2001, at 3, is a thorough analysis of Minnesota spoliation law. Since that article, several spoliation cases have arisen in a products liability context.

In *Falde v. Bush Bros. & Co.,* No. C2-01-435, 2001 WL 1117801 (Minn. App. Sept. 25, 2001), plaintiff was allegedly injured by eating a defective can of baked beans. Plaintiff disposed of the beans and defendant moved for summary judgment on the basis of spoliation of evidence. *Id.* The district court granted defendant's motion, but the court of appeals reversed, finding that sanctions were not justified because neither party had access to the product for testing and thus neither side was prejudiced. *Id.* The court further held that plaintiff could make out her prima facie case solely based on the testimony of plaintiff and her doctor. *Id.* The can of beans was not necessary evidence. *Id.*

Conversely, in *Dodd v. Leviton Manufacturing Co.,* No. CX-02-1570, 2003 WL 21147151, at *5 (Minn. App. May 20, 2003), the Minnesota Court of Appeals affirmed the district court's exclusion of plaintiffs' evidence of fire causation as a sanction for spoliation, resulting in summary judgment for the manufacturer. Plaintiff's home was damaged by a fire. *Id.* at *1. While plaintiffs suspected an electrical outlet manufactured by Leviton as the cause, they failed to notify Leviton of the potential claim until eight months later and after the

[7] Transactions occurring before August 2000 are governed by Minn. Stat. section 604.10 and/or the economic loss doctrine case law, depending upon the time frame in which they occurred.

[8] The statute defines a "buyer" as "a person who buys or leases or contracts to buy or lease the goods that are alleged to be defective or the subject of a misrepresentation." "Seller" means "a person who sells or leases or contracts to sell or lease the goods that are alleged to be defective or the subject of a misrepresentation." *Id.* at subd. 1. "Goods" are "tangible personal property, regardless of whether that property is incorporated into or becomes a component of some different property." *Id.*

[9] Professor Kleinberger and his co-authors were involved in drafting Minn. Stat. section 604.101, and their article is a very useful guide to the statute. See also Scott P. Drawe, *The Evolution and Practical Application of the Economic Loss Doctrine in Minnesota, Tort Law Update,* Minnesota Institute of Legal Education (2002).

home was repaired and the fire scene destroyed. *Id.* The court of appeals affirmed the district court's sanction, holding that Leviton was wholly deprived of the opportunity to investigate the fire scene properly. *Id.* at *5.

Similarly, in *Auto-Owners Ins. Co. v. Heggie's Full House Pizza, Inc.*, No. A03-316, 2003 WL 22293643 (Minn. App. Oct. 7, 2003), plaintiff alleged injury from a fire caused by a pizza oven. The fire scene, however, was bulldozed for health and safety reasons and without notification to defendants. *Id.* The pizza ovens were salvaged. *Id.* The district court dismissed the case as a sanction for the spoliation of evidence. The court of appeals upheld the dismissal, finding that destruction of the fire scene prejudiced defendants and that the court is authorized to sanction a party for spoliation of evidence regardless of whether the wrongdoing was intentional. *Id.*

As the court of appeals in both *Dodd* and *Heggie's Full House Pizza* made clear, destruction of evidence of fire causation or a fire scene is subject to close scrutiny and likely will lead to a sanction. In their holdings, both courts relied on *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998), which stated "a fire scene itself is the best evidence of the origin and the cause of a fire. . . ." and is "of unquestionable relevancy."

VI. RES IPSA LOQUITUR

Minnesota courts apply the doctrine of res ipsa loquitur where (1) the alleged injury would not ordinarily occur in the absence of negligence; (2) the cause of the injury was in the exclusive control of the defendants; and (3) the injury was not due to plaintiff's conduct. *Warrick v. Giron*, 290 N.W.2d 166, 169 (Minn. 1980).

In a 1993 case, the court of appeals upheld a res ipsa loquitur instruction to the jury where plaintiff severed his fingers while using a cutting machine. *Sanders v. Strickler's Research and Eng'g, No.* C3-92-1181, 1993 WL 71645, at *4 (Minn. App. March 16, 1993), review denied (Minn. 1993). In *Sanders*, Strickler's Research repaired and sold a cutting machine to Miller Manufacturing, plaintiff's employer. *Id.* at *1. Plaintiff subsequently severed his finger when the machine's principal switch broke and he brought suit against Strickler's. *Id.* In upholding the applicability of res ipsa loquitur to the facts of the case, the court found that there was sufficient evidence to demonstrate that the switch causing plaintiff's injury was in Strickler's exclusive control when repaired and resold to Miller, that the machine had not been altered by Miller after its purchase, and that plaintiff had used the machine as instructed. *Id.* at *4. The court further held that, even if giving the instruction was erroneous, it did not create sufficient prejudice to warrant a new trial. *Id.*

Later, the court of appeals declined to apply res ipsa loquitur to case involving a fire allegedly caused by a defective television set. *Raines v. Sony Corp.*, 523 N.W.2d 495, 497-98 (Minn. App. 1995). Where the expert testimony was conflicting and the manufacturer credibly demonstrated that the fire could have been caused by careless cigarette smoking or defective wiring, the court held that the cause of injury was not reasonably certain and thus, the doctrine of res ipsa loquitur was not appropriate. *Id. See also, Harvest States Coop., v. Phillips & Temro Indus., Inc.*, No. C1-99-1784, 2000 WL 760423, at * 2 (Minn. App. June 13, 2000) (holding that evidence of fire causation must be reasonably supported by credible evidence).

Similarly, in *Bach v. Unisys Corp.*, No. C1-95-1582, 1996 WL 146433 (Minn. App. 1996), the court did not apply res ipsa loquitur against a hay baler manufacturer where the jury could have concluded that the hay baler accident resulted from either defective design **or** plaintiff's unsafe operation. The court further noted that the lapse of time between the date of manufacture and the accident, twenty years, made it equally probable that a defect could have developed after leaving the manufacturer's control, and was thus attributable to normal wear and tear for which the manufacturer was not liable. *Id.* (citing, *Western Sur. & Cas. v. General Elec. Co.*, 433 N.W.2d 444, 449 (Minn. App. 1988), *review denied* (Minn. 1989)). The Minnesota federal district court, in *Erpelding v. United Services Automobile Ass'n*, No. Civ. 99-16, 2003 WL 721679 (D. Minn. Feb. 25, 2003), also recently held res ipsa loquitur inapplicable where several possible causes of a boat fire existed and where there was a lapse of time since the allegedly defective appliances on board were manufactured.

Finally, the court of appeals applied res ipsa loquitur in the products liability context to a plaintiff who allegedly became ill after eating a can of baked beans. *Falde v. Bush Bros. & Co.*, No. C2-01-435, 2001 WL 1117801 (Minn. App. Sept. 25, 2001). The court, citing an exploding bottle case, held that a plaintiff need not eliminate all possible causes of an accident for the doctrine to apply. *Id.* (citing, *Holkestad v. Coca-Cola Bottling Co.*, 180 N.W.2d 860, 865 (Minn. 1970)). It is enough "if the circumstantial evidence reasonably eliminates improper handling by others or misuse by the injured party, thus permitting the jury to reasonably infer that is

more probable than not that the [product] was defective." *Id.* The court expressly stated that the principles contained in *Holkestad* were not limited to exploding bottle cases. *Id.*

VII. NEW PRODUCTS LIABILITY THEORIES REJECTED

Since 1992, Minnesota courts have declined to recognize several proffered torts based in products liability law.

First, as an issue of first impression, the Minnesota Court of Appeals decided that it would not recognize the tort of "fraud-on-the-FDA," which imposes liability on a product manufacturer that fails to disclose harmful effects of a drug during the Food and Drug Administration approval process. *Flynn v. Am. Home Products Corp.*, 627 N.W.2d 342, 349 (Minn. App. 2001).

In *Tester v. American Standard, Inc.*, 590 N.W.2d 679, 680-81 (Minn. App. 1999), the court declined to read Minn. Stat. section 604.02, subd. 3, broadly to permit recovery by an at-fault plaintiff from a less-at-fault defendant in a products liability case. Minn. Stat. section 604.02, subdivision 3 provides:

> In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectable from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but no amount the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

Minn. Stat. § 604.02, subd. 3.

In interpreting subdivision 3, the court found that the statute and the term "chain of manufacture and distribution" only applied in the context of multiple parties that were vertically situated in the chain of distribution working together to bring a product to market. *Tester*, 590 N.W.2d at 681. It did not apply where, as in this case, defendants were horizontally situated as two competing manufacturers. *Id.* at 680-81. Because the court was not asked to determine whether the various asbestos defendants were vertically or horizontally situated, the court did not apply the statute further. *Id.* (The court likewise declined to aggregrate the fault of multiple defendants when applying the comparative fault statue, section 604.01, subd. 1, against an at fault plaintiff; such aggregation was only appropriate where defendants were engaged in a joint enterprise).

Finally, in *Nimeth v. Prest Equip. Co.*, No. C1-93-685, 1993 WL 328767, at *2 (Minn. App. 1993), the Court of Appeals stated that no Minnesota case recognizes a cause of action for negligent merchandising and that sellers do not have a duty to inspect a product for sale unless they have reason to know it is dangerous.

VIII. FORESEEABILITY

In a products liability action, plaintiff must demonstrate that the manufacturer owed him or her a duty of care given the circumstances. *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 621-22 (Minn. 1984). It is well established that a manufacturer's duty to a plaintiff only extends to foreseeable dangers. Whether a danger is foreseeable turns on whether the danger was objectively reasonable to expect. *Oswald by Thies v. Law*, 445 N.W.2d 840 (Minn. App. 1989).

Applying this rule, the Minnesota Supreme Court in *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918-19 (Minn. 1998), upheld summary judgment for a snowmobile manufacturer after plaintiff's minor son sustained injuries when his toboggan collided with the snowmobile while it was stationary. The court, reversing the court of appeals, held that it was not foreseeable for the manufacturer to expect that a minor would collide with the stationary snowmobile while sledding. *Id.* at 919. In so holding, the court relied upon analogous cases involving stationary automobiles and found persuasive the fact that the snowmobile was not in use at the time of the accident. *Id.*

In another case, *Jones v. Dreis & Krump Manufacturing Co.*, No.C5-92-1246, 1992 WL 379070 (Minn. App. 1992), the court of appeals upheld summary judgment where there was no evidence that a mechanical press was sold for the use causing plaintiff's alleged injury, and thus, the use was not foreseeable. In refusing to impose a duty on the manufacturer, the court also found significant that eleven years had transpired between the sale of the mechanical press at issue and plaintiff's injury. *Id.*

Finally, in *Drager by Gutzman v. Aluminum Industries Corp.*, 495 N.W.2d 879, 884 (Minn. App. 1993), a case involving a child who fell from a second floor window, the court of appeals held that the window screen manufacturer had no duty to design a screen that would prevent the child's accidentally dislodging the screen and falling from the window. Accordingly, the event was not foreseeable and the window manufacturer could not be liable for it. *Id.* The court recognized that window screens are to allow ventilation, not to

prevent people from falling out windows, and reasoned that the failure of a screen to prevent a child's fall from a window does not render the screen unreasonably dangerous. *Id.* at 883-84.

IX. ASSUMPTION OF RISK

Minnesota recognizes two types of assumption of risk: primary and secondary. Primary assumption of risk exists where the plaintiff and defendant have entered a relationship in which plaintiff assumes well-known, incidental risks. *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 226 (Minn. 1986) (trial court properly submitted primary assumption of risk to jury in case where plaintiff fell while roller-skating at a skating rink).

Primary assumption of risk exists where the plaintiff and defendant have entered a relationship in which plaintiff assumes well-known, incidental risks.

In contrast, secondary assumption of risk examines whether plaintiff was negligent in regard to his own safety. *See, Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104-05 (Minn. App. 1991). Plaintiff must have known and appreciated the danger created by defendant without relieving it from its duty of care. *Id.* ("plaintiff's lighting of a cigarette in a gas-filled room was a voluntary acceptance of a known danger"). Another difference lies in the outcome: primary assumption of risk bars a plaintiff's recovery; secondary assumption of risk does not, but is subsumed in contributory fault. *Id.*

There have been two recent federal court cases addressing assumption of risk in the products liability context. In *Kraft v. Ingersoll-Rand Co.*, 136 F.3d 584 (8th Cir. 1998), the Eighth Circuit Court of Appeals reversed summary judgment, finding that the district court erred in holding that plaintiff assumed the risk of injury from a beet piler. The court found persuasive the fact that plaintiff had limited experience operating the beet piling machine, had seen the machine operated in the same manner without incident, and believed that the power was off and prevented harm. *Id.* Under such circumstances, summary judgment based on primary assumption of risk was not appropriate. *Id.*

Conversely, a plaintiff who worked in a clay plant for ten years and in his position for ten months, observed others using the pug mill machine, knew his method of cleaning it was dangerous, and who had been injured while cleaning the machine on two prior occasions assumed the risk of injury sustained while cleaning the pug mill while the auger was running. *Walk v. Starkey Machinery, Inc.*, 180 F.3d 937, 938 (8th Cir. 1999). The key factors for the court in distinguishing this case from *Kraft* and other cases barring application of assumption of risk was plaintiff's experience and knowledge that the auger was running and could injure him. *Id.* at 939-40.

X. SUBSEQUENT REMEDIAL MEASURES

Rule 407 provides that evidence of subsequent remedial measures cannot be used to prove negligence or culpable conduct in connection with the "event" giving rise to the claim. Minn. R. Evid. 407. The rule does, however, permit evidence of subsequent remedial measures when offered for another purpose, "such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." *Id.* In 1987, the Minnesota Supreme Court ruled that Minnesota Rule of Evidence 407 bars evidence of subsequent remedial measures in a strict liability case, as well as in a negligence case. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987).

Citing to the exception to Rule 407, the court in *Sanders v. Strickler's Research and Engineering*, No. C3-92-1181, 1993 WL 71645, at *2 (Minn. App. March 16, 1993), held that the district court properly admitted evidence of subsequent remedial measures where feasibility of repair of cutter machine was at issue.

In *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. App. 1992); Minn. R. Evid. 407, the court of appeals decided the meaning of the "event" giving rise to the claim, holding that "[t]he accident is the event contemplated by the rule." Pursuant to this definition, the court upheld the district court's admission of evidence of the manufacturer's conduct after the sale of the product but before the accident, finding that it did not by definition qualify as a subsequent remedial measure under Minn. R. Evid. 407. *Beniek*, 479 N.W.2d at 723. Citing to *Beniek*, the court in *Myers v. Hearth Technologies, Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001), similarly held that evidence of changes made to an allegedly defective fireplace prior to explosion did not constitute subsequent remedial measures because they occurred prior to the accident or event giving rise to the lawsuit – the explosion.

XI. MISCELLANEOUS CASES

The following cases, although not necessarily heralding any new developments in product liability law, are noteworthy or may be helpful to practitioners of product liability law:

• *In re Temporomandibular Joint Implants Prods. Liab. Litig.*, 113 F.3d 1484 (8th Cir. 1997): Recipients of TMJ implants sued the parent corporation of the implant manufacturer. The court held that the parent corporation did not undertake a duty, through silicone testing or trademark agreements, to ensure safety of manufacturer's TMJ implants and therefore summary judgment in favor of parent corporation was appropriate.

• *In re Temporomandibular Joint Implants Prods. Liab. Litig.*, 97 F.3d 1050 (8th Cir. 1996): Recipients of TMJ implants sued both the manufacturer of the implants and the manufacturer and distributor of component parts (Teflon resin and film) used within the implants. Although unsuitable for use in TMJ implants, the court held that the resin and film were not defectively designed. Reasoning that suppliers of inherently safe component parts are not responsible for accidents that result when the parts are integrated into a larger system that the component part supplier did not design or build, the court affirmed summary judgment in favor of the manufacturer and distributor of the component parts.

• *Mozes v. Medtronic, Inc.*, 14 F.Supp.2d 1124 (D. Minn. 1998): In a products liability case involving an allegedly defective pacemaker lead, plaintiff was required to prove his claim with expert testimony because workings of pacemaker leads, the reasons why they fail, and the standard of care applicable to medical manufacturer were not within the general knowledge and experience of lay people. Because plaintiff failed to provide such expert testimony, summary judgment in favor of the manufacturer was appropriate.

• *In re Shigellosis Litig.*, 647 N.W.2d 1 (Minn. App. 2002): Minnesota Statute section 544.41, the "seller's exception" statute, allows dismissal of strict liability claims against a seller of a defective product, provided the seller played no active role in creating the product defect and certifies the correct identity of the manufacturer. In this case, the court of appeals clarified that the seller may not be dismissed until the manufacturer has been served with a complaint and the manufacturer has or is required to answer.

• *Morris v. Goodwill Indus., Inc.*, No. C2-95-196, 1995 WL 465348 (Minn. App. August 8, 1995): Munsingwear sold Goodwill Industries approximately 250 clothing racks in a liquidation sale. Because this was a one-time sale of racks, Munsingwear was not a "merchant with respect to goods of that kind" as defined in the U.C.C. Therefore an implied warranty of merchantability did not attach to the racks. Similarly, because Munsingwear did not design or manufacture the clothing racks, and was not regularly engaged in the business of selling such a product, it was not liable under a theory of strict liability.

• *Rebehn v. Gen. Motors Corp.*, No. CX-94-1568, 1995 WL 146662 (Minn. App. April 4, 1995): Appellants challenged the trial court's failure to give the jury a specific instruction on the "crashworthiness" doctrine. The court of appeals held that no substantial prejudice arose from the failure to instruct on crashworthiness. The more general "design defect" instruction given the jury was appropriate and both parties, during the course of trial, had adequately explained the crashworthiness doctrine to the jury.

• *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146 (Minn. App. 1992), review denied (Minn. 1993): The court considered Minnesota law stating that a products liability can be applied to a product's package if the package is an integral part of the product.[10] The court of appeals refused to apply product liability theories against a manufacturer of a bracing system that failed and allegedly caused falling crates of glass and injury. The court held that the bracing system was not an integral part of the glass product and accordingly, was not part of the package for products liability purposes. In finding that the bracing system was not "integral" to the product, the court found persuasive the fact that the glass and bracing system were not sold together as a unit. *Id*. at 149.

• *Guyer v. Valmet Inc.*, No. 01-2310, 2003 WL 22076608 (D. Minn. September 2, 2003): The Minnesota federal court ruled that plaintiff's product liability case against a paper mill machine survived summary judgment where plaintiff offered evidence of other similar incidents. In *Guyer*, plaintiff, a paper mill worker, was crushed by a machine designed to lower paper rolls. Defendants moved for summary judgment on the basis that plaintiff failed to meet the "reasonable care balancing test" applied to design defect cases, which balances the likelihood of harm and the gravity of harm if it happens against the burden of the precaution required to

[10] See *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984); Cerepak v. Revlon Inc., 200 N.W.2d 272, 275 (Minn. 1984).

avoid the harm. The court held that the previous incidents were enough and that plaintiff's death was sufficient to demonstrate that the risk of harm was serious. Plaintiff need not offer evidence on each of the reasonable care factors to survive summary judgment.[11]

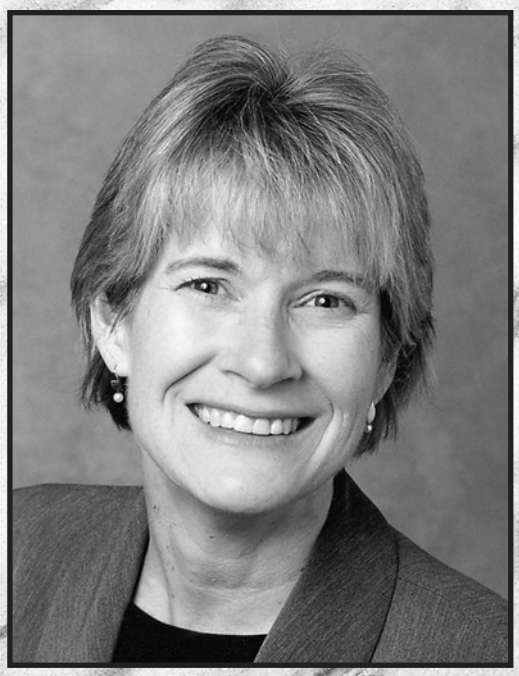
• *Loucks v. New Holland Mfg Inc.*, No. C0-92-2305, 1993 WL152288 (Minn. App. 1993): The court held that a one-year warranty on a combine was not manifestly unreasonable merely because the alleged defect in the product was discovered after the warranty expired. The court distinguished this case from others holding one year warranties unreasonable on the basis that discovery of the products' defects in those cases required an unusual occurrence, such as an ice storm or an automobile accident. In contrast, in this case, the alleged wiring defect was discovered through ordinary use of the combine. *Id*.

• *Nimeth v. Prest Equip. Co.*, No. C1-93-685, 1993 WL 328767 (Minn. App. 1993): In this case, the court of appeals examined Minn. Stat. section 544.41, which permits dismissal of a nonmanufacturing defendant in a strict liability action where the party answering correctly identifies the correct manufacturer allegedly causing the damage and where the nonmanufacturing defendant did not otherwise have involvement in the product's design, manufacture, defect or instructions. The court of appeals held that the dismissal permitted by section 544.41 applies not only to strict liability claims, but also to implied warranty claims preempted by strict liability.

• *Piotrowski v. Southworth Prods. Corp.*, 15 F.3d 748, 751-52 (8th Cir. 1994): The Eighth Circuit Court of Appeals noted that in a products liability action, Minnesota courts merge the theories of strict liability and negligence (citing *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984)). The court went on to hold that, while the implied warranty of merchantability may merge into strict liability, the implied warranty of fitness for a particular purpose was a distinct claim more akin to an express warranty claim. As such, the court held that an implied warranty of fitness for a particular purpose should be submitted to the jury as a separate claim. ▲

[11] The following factors are typically considered in making this determination: (1) the usefulness and desirability of the product, (2) the availability of another and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger, (6) the avoidability of injury by care in use of the product, and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. *Holm v. Sponco Mfg.*, 324 N.W.2d 207 (Minn. 1982). The demonstration of an alternative design is an additional factor in a defective design case.

ANNOUNCEMENT



On March 9, 2003, Governor Tim Pawlenty appointed former MDLA President **Kathryn Davis Messerich** as District Judge in Dakota County. She will replace the retiring Judge Thomas Murphy. Judge Messerich was sworn in on April 23, 2003.

ANNOUNCEMENT

The election of the Officers and Members of the Board of Directors of the Minesota Defense Lawyers Association will take place as part of the Association's Annual Meeting in Duluth on **Friday, August 20, 2004.**

The Nominating Commitee is accepting nominations for the positions of the Officers of the Association and Members of the Board of Directors. The Chair of the Nominating Committee is President Emeritus Steven J. Pfefferle, Terhaar, Archiblad, Pfefferle & Griebel.

If any member of the Association has an interest in serving as an Officer or Member of the Board of Directors, or would like to nominate any other member of the MDLA, please contact Deb Oberlander at the MDLA Office, (612) 338-2717.