MINNESOTA PRODUCTS LIABILITY LAW *1986 - 1992*

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In the mid-1980s, the Minnesota Supreme Court established the principal standards and approaches for the trial of product liability actions in Minnesota. The supreme court, for example, adopted a reasonable care standard for design defect cases in *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984), and ruled that courts rather than juries should decide whether a manufacturer has a duty to warn of a product danger, *Germann v. F.L. Smithe Machine Co.*, 395 N.W.2d 922 (Minn. 1986). These developments and others are discussed in three Minnesota Defense articles: George W. Soule and Cynthia J. Atsatt, *Recent Developments in Minnesota Products Liability Law*, Winter 1986 ["*Recent Developments*"]; George W. Soule, *Returning Negligence Principles to the Trial of Failure to Warn Claims in Minnesota*, Spring 1988 ["*Returning Negligence Principles*"]; and Frederick L. Grunke, *Failure to Warn Update*, Spring 1989.

In recent years, the Minnesota appellate courts have applied these standards and approaches and further developed the Minnesota law of products liability. This article is intended as an update, analyzing the decisions of the Minnesota appellate courts on product liability issues since publication of the articles listed above. The issue of limitations on the recovery of economic losses under tort theories, known as the "*Superwood* doctrine," was analyzed thoroughly in Kenneth P. Gleason, *Strict Liability for Unsophisticated Plaintiffs: Minnesota's Legislative Response to* Hapka v. Paquin Farms, Minnesota Defense, Winter 1992, at 2, and will not be covered here.

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I. EVIDENCE OF A FEASIBLE ALTERNATIVE DESIGN IN A DESIGN DEFECT CASE

In *Kallio v. Ford Motor Co.*, 407 N.W.2d 92 (Minn. 1987), plaintiff claimed, in part, that his Ford pickup truck was defective in the design of its automatic transmission shifting mechanism. Plaintiff prevailed at trial, and Ford appealed, contending that the plaintiff "failed to demonstrate the existence of a feasible, practicable, and safer alternative automatic transmission shift design." *Id.* at 94.

The issue for the Minnesota Supreme Court, one of "first impression" in Minnesota, was whether a plaintiff alleging design defect "must establish as an element of his case that at the time of manufacture a safer, practicable, and technologically feasible alternative design existed." *Id.* The court affirmed the verdict for the plaintiff, finding that, although proof of a feasible alternative design is a *practical* burden for the plaintiff, it is not a *legal* burden. The court held that the "existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case." *Id.* at 97.

According to the court, the existence of a safer, alternative design is a factor bearing on whether the product was unreasonably dangerous, one of the elements of the design defect claim. Thus, as a practical matter, a plaintiff would ordinarily have to produce evidence of a feasible alternative design to prevail in a design defect case. *See, e.g., Krein v. Raudabough*, 406 N.W.2d 315, 318-19 (Minn. Ct. App. 1987) (manufacturer prevailed where plaintiff failed to show that suggested alternative had greater capability than the actual design); *Kallio*, 407 N.W.2d at 96 n.6 ("[S]uccessful plaintiffs, almost-without fail, introduce evidence of an alternative safer design.").

Regarding whether the jury instructions adequately addressed the question of alternative feasible design, the *Kallio* court approved Minnesota JIG III 117 (Strict

Liability — Design Defect). The jury instruction advises "that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field." 4 Minnesota Practice Civil JIG at 81 (3d ed. 1986). Further, the jury is instructed to consider "the feasibility and burden of any precautions which would be effective to avoid the harm." *Id.*

The comment to JIG 117 provides more specific instruction if "the critical issue in the case will be the feasibility of a product design." *Id.* at 84. In this situation, the comment suggests that the court advise the jury to consider the following factors: (1) whether the suggested alternative design was technologically feasible; (2) the suggested alternative's safety; (3) the suggested alternative's cost; and (4) whether the suggested alternative will affect the performance of the product. *Id.* at 84-85 (based upon *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978), *reh'g denied*, 579 P.2d 1287 (Or. 1978)).

The court [found] . . . that, although proof of a feasible alternative design is a *practical* burden for the plaintiff, it is not a *legal* burden.

Although the Civil JIG Committee advises the trial court to use the more specific instruction when appropriate, the court's refusal to give the instruction may not be error. In *Omnetics v. Radiant Technology Corp.*, 440 N.W.2d 177 (Minn. Ct. App. 1989), the issue was whether the trial court abused its discretion in instructing the jury according to JIG 117 without giving the supplementary instruction set forth in the comment. The appellant argued that the court should have given the supplementary instruction because the issue of the feasibility of an alternative design was a critical question in the case. The court disagreed, holding that "because CIV JIG 117 accurately states the law and because appellant's counsel was free to argue the importance of a feasible alternative design, . . . the trial court did not abuse its discretion in refusing to give the requested supplementary instruction." *Id.* at 181.

II. Limitation of a Manufacturer's Duty to Provide Safety Devices for Multi-Use Equipment

Bilotta v. Kelley Co., 346 N.W.2d 616 (Minn. 1984), is often cited for the general rule that "a manufacturer may not delegate its duty to design a reasonably safe product." *Id.* at 624. The actual holding in *Bilotta*, however, was much narrower than this general statement. The court held that a manufacturer may not *as a matter of law* discharge its obligation to use reasonable care in the design of a product by offering an optional safety device that would not impair function of the product under some circumstances. In rejecting the "option offer defense" — that a manufacturer's offer of an optional safety device discharges its duty as a matter of law — the court specifically noted that the dock board at issue was "not multi-use" and its "functioning [was] never impaired by the installation of the [safety] device." *Id.* Under these circumstances, whether the manufacturer used reasonable care would be a jury issue under the design defect test adopted in *Bilotta*.

In *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352 (Minn. Ct. App. 1991), *rev. denied* (Minn. Sept. 13, 1991), the court of appeals was faced with a case in which the product had multiple uses, some of which would be impaired by installation of a specific safety device. The plaintiff in *Westbrock* claimed that the manufacturer of a mechanical punch press had a duty to equip the press with a point-of-operation guard. The manufacturer contended, however, that "the press was multi-functional and that different point-of-operation guards were required for each set of dies. . . . [T]he guards had to be specially designed for each job. . . . [A] single guard would be inappropriate for all punch press functions." *Id.* at 358. The plaintiff did not offer any evidence that the press "was uni-functional or that a single safety device could have been used without irreparably sacrificing the machine's multi-functional nature." *Id.* In the face of this uncontested evidence, the court of appeals held that the manufacturer had no duty to provide point-of-operation guards for the press, and sustained the trial court's summary judgment dismissing plaintiff's design defect claim. The court distinguished *Bilotta* because it involved a product which was "not multi-functional" and for which "a standard safety device would not have impaired the machine's operation." *Id.* at 357.

Ultimately, the broad "non-delegable duty" language of *Bilotta* (incorporated in an "optional paragraph" in JIG III 117, 4 Minnesota Practice Civil JIG at 7 (Supp. 1988)), is not helpful in deciding particular cases, and whether a product's design is defective and unreasonably dangerous in most cases will be a jury issue to be decided under reasonable care standards. "The circumstances under which the manufacturer made a decision to design and market a product will be relevant in determining whether the manufacturer exercised reasonable care." *Westbrock*, 473 N.W.2d at 357. Thus, whether a manufacturer has failed to use reasonable care in the design of a product which lacks a particular safety device may depend on several circumstances, including the product's uses, the available safety device's impairment of those uses, and the manufacturer's offer of optional safety devices. *See Recent Developments* at 5.

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Westbrock became a summary judgment case because plaintiff apparently did not contend that the manufacturer failed to use reasonable care in not marketing the product with optional safety devices. Indeed, there was no evidence in *Westbrock* that the manufacturer had offered various point-of-operation guards as optional equipment for different applications of the press. The court simply rejected, as a matter of law, plaintiff's contention that reasonable care required that the manufacturer equip the press with a particular safety device when any one such device would have impaired at least some uses of the machine. "[A] product may be sufficiently safe if a device could not feasibly be installed in a multi-purpose machine without impairing the machine's multi-purpose nature." *Westbrock*, 473 N.W.2d at 357. It is noteworthy, however, that the court did remand the case for trial on the issue of whether the manufacturer had breached a duty to warn press users "against using the press without proper safety guards." *Id.* at 358.

III. The Application and Effect of the Useful Life Defense

Minn. Stat. § 604.03, subd. 1, provides that a designer, manufacturer, distributor, or seller of a product in a product liability action has "a defense . . . [if] the injury was sustained following the expiration of the ordinary useful life of the product." The statute further states that "[t]he useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user." Minn. Stat. Ann. § 604.03, subd. 2 (1988). Two Minnesota cases have interpreted this statute.

In *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989), the supreme court considered whether the plaintiff was entitled to recover even though the jury had determined that the "useful life" of the subject tire rim had expired by the time of plaintiff's accident. Goodyear argued that the useful life defense should have been a complete defense to plaintiff's claim, barring recovery for any injury occurring after the useful life of the product had expired. Hodder contended that the defense is only one factor for the jury to consider in determining fault.

After considering the language, history, and purpose of the statute, the supreme court decided that "[e]xpiration of useful life is a defense but . . . the legislature has stopped short of saying it is an absolute defense." *Id.* at 832. Specifically, the court held:

> [T]he expiration of a product's useful life under section 604.03 is a factor to be weighed by the jury in determining fault of the manufacturer and the fault of the user. In other words, the statute emphasizes to the trier of fact the importance, in determining comparative liability, of considering whether the product has outlived its useful life.

Id.

The court in *Hodder* concluded that the jury's finding that the K-rim's useful life had expired was not inconsistent with its distribution of fault to Goodyear, rather

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than to the plaintiff. According to the court, the "jury would have weighed the useful life expiration along with all the other liability aspects of the case" in making its findings of fault. *Id.*

In practice, a court should include § 604.03 in its jury instructions, "perhaps with a prefatory statement that the statutory defense, if found to be applicable, is to be considered, along with other factors, in evaluating the conduct of the manufacturer and the user." *Hodder*, 426 N.W.2d at 832. The special verdict form should not contain a separate "useful life" question because the jury's evaluation of the defense "will be reflected in its answers to the special verdict questions on fault." *Id.*

In *Eide v. Mayrath Industries*, No. C2-88-1006, 1989 WL 5610 (Minn. Ct. App. Jan. 31, 1989), *rev. denied* (Minn. Apr. 19, 1989), the court of appeals considered a manufacturer's argument that a product's useful life had expired when subsequent models of the product had eliminated the defect allegedly present in the product involved in the accident. The plaintiff in *Eide* was injured when his hand was caught in the unguarded drive shaft of a grain auger that was designed and manufactured by the defendant. The jury found that the auger design was defective. The manufacturer appealed the trial court's directed verdict dismissing its useful life defense. The manufacturer argued that the auger's useful life had terminated before the accident because the alleged defect had been effectively "designed out" when the defendant designed later versions of the auger with drive shaft guards. *Id.* at *4. The court rejected this argument, focusing on the actual product involved in the accident, finding that the defendant may not rely on the defense where the product is "unquestionably utile." *Id.* Thus, the addition of safety equipment to later products will not automatically terminate the "useful life" of an unadorned product. If the product is still useful to the user, the court will probably reject the "useful life" defense, despite the subsequent design changes to the product.

IV. Subsequent Remedial Measures Not Admissible in a Strict Liability Case

In *Kallio v. Ford Motor Co.*, 407 N.W.2d 92 (Minn. 1987), the 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. The court held that the trial court erred in admitting evidence of Ford's 1980 design modification to its 1977 pickup truck, along with evidence of a 1981 letter to Ford owners reminding them of proper procedures in parking Ford vehicles. *Kallio*, 407 N.W.2d at 97-98.

Rule 407 bars admission of subsequent remedial measures to "prove negligence or culpable conduct in connection with the event" giving rise to the plaintiff's claim. In *Dahlbeck v. DICO Co.*, 355 N.W.2d 157 (Minn. Ct. App. 1984), the court of appeals held that "Rule 407 does not apply to strict liability because negligence is not at issue. Therefore, subsequent changes in design are admissible to prove that a product was defective." *Id.* at 165. In *Kallio*, however, the supreme court rejected the *Dahlbeck* analysis, reasoning that negligence and strict liability are basically the same theory in a product defect

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case in Minnesota. *See Kallio*, 407 N.W.2d at 98 ("In Minnesota we have clearly concluded that the analysis necessary for a trier of fact to resolve whether a given product is unreasonably dangerous is substantially similar to the analysis employed in determining whether negligence exists.").

The court in *Kallio* also found that the same public policy considerations excluding evidence of subsequent remedial actions in negligence cases apply equally to design defect cases. As stated by the court, "[b]etter protection is afforded the public by encouraging manufacturers to pursue actions to correct perceived design flaws without fear that the corrections will be used by plaintiffs to raise the inference that the manufacturer has admitted the product's defect by altering the product." *Id.*

The court noted that evidence of subsequent remedial measures is inadmissible only if the manufacturer concedes that the subsequent design was feasible at the time of manufacture. *Id.*; *see also* Minn. R. Evid. 407 ("This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving . . . feasibility of precautionary measures, if controverted . . . ."). If the manufacturer does not make this concession, the court will admit the evidence of subsequent remedial measures only for the limited purpose of showing feasibility at the time of manufacture.

V. Continued Application of the *Germann* Rule: A Manufacturer's Duty to Warn Is Decided by the Court

In recent years, the Minnesota appellate courts have continued to apply the rule announced in *Germann v. F.L. Smithe Machine Co.*, 395 N.W.2d 922 (Minn. 1986), that the trial court, and not the jury, is to decide whether a manufacturer or seller had a duty to warn of a product danger under the circumstances. The *Germann* rule has been applied despite criticisms in *Returning Negligence Principles* and *Failure to Warn Update* of the supreme court's treatment of the duty issue and its failure to use a reasonable care standard in deciding warning cases.

Consider, for example, *Hart v. FMC Corp.*, 446 N.W.2d 194 (Minn. Ct. App. 1989), *rev. denied* (Minn. Dec. 1, 1989), in which plaintiff's decedent was killed when he was riding on a tripper car manufactured by defendant and struck his head on an overhead platform. The jury concluded that FMC had failed to warn of the hazard of an overhead obstruction when riding the tripper car. Citing *Germann* and *Huber v. Niagara Machine and Tool Works*, 430 N.W.2d 465 (Minn. 1988), the court of appeals stated that "[b]ecause the question of whether a manufacturer has a duty to warn is a question of law, it is appropriate for this court to decide it." *Hart*, 446 N.W.2d at 197. Consequently, the court of appeals reversed the jury verdict, holding as a matter of law that the manufacturer had no duty to warn. *Id.* at 199.

Reviewing the evidence, the court found that there was "no serious factual dispute regarding the events leading up to the accident in question, and it was error for the trial court to submit the question to the jury." *Id.* at 197. The court based its decision on two grounds: the overhead obstruction involved in the accident was not a condition reasonably foreseeable to FMC, but was added to the system design after FMC had supplied the tripper car, and the danger of the obstruction was "obvious to everyone." *Id.* at 198; *see also Laubach v. Isaacson*, No. C0-91-1984, 1992 WL 31367 (Minn. Ct. App. Feb. 25, 1992), *rev. denied* (Minn. Apr. 29, 1992) (sustaining summary judgment in favor of manufacturer on the ground that there was no duty to warn that gasoline antifreeze was explosive when dangerous misuse of the product was not reasonably foreseeable).

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In another case, the court of appeals held that the evidence justified imposing a duty to warn on a product manufacturer. In *Todalen v. U.S. Chemical Co.*, 424 N.W.2d 73 (Minn. Ct. App. 1988), *rev. denied* (Minn. June 29, 1988), a caustic chemical erupted and caused injuries to plaintiff after he had attempted to clear a drain with the chemical. The evidence showed that the manufacturer knew of the chemical reaction causing such an eruption, but did not warn against misuse of the product which would result in this reaction. The chemical company contended that the chemists at plaintiff's place of employment were aware of the potential reaction of the caustic chemical, and that the court should apply a "learned intermediary" or "knowledgeable user" principle to defeat plaintiff's failure to warn claim. *Id.* at 79. The court found, however, that the

plaintiff was the final user entitled to a warning and he was not a sophisticated user. The court thus sustained the trial court's finding that the chemical company had a duty to warn. *Id.* at 80.

Component Parts

In cases in which plaintiffs alleged a duty to warn by component part suppliers, the courts have held that the component manufacturers did not have a duty to warn. *Huber, supra,* involved a foot switch manufactured by Allen-Bradley, incorporated into a punch press manufactured by Niagara Machine. The supreme court found that the removal of a safety device on the foot switch was not foreseeable, and thus the switch did not require a warning against removal of the safety device. Plaintiff also contended that Allen-Bradley should have warned that a press with which the foot switch was operated should be equipped with point-of-operation guards. The supreme court held that it was not reasonably foreseeable to Allen-Bradley that plaintiff's employer would violate OSHA requirements and fail to provide proper point-of-operation guards. Allen-Bradley therefore "had no duty to warn about possible dangers of failing to provide proper point of operation safety mechanisms." *Huber,* 430 N.W.2d at 468. Thus, the supreme court reversed the decision of the court of appeals, at 417 N.W.2d 740, discussed in *Returning Negligence Principles* at 5.

In *Audetat v. Blaschke,* No. C4-89-434, 1989 WL 131560 (Minn. Ct. App. Nov. 7, 1989), the court of appeals sustained a summary judgment dismissing plaintiff's failure to warn claims against the manufacturer of a hydraulic ram which was a component of a log splitter. The court stated that:

> Warning purchasers of every potential danger from every possible application of the ram is an obvious impossibility, as is ensuring that the warning remains visible when the component is integrated into another machine. Furthermore, "a purchaser of multi-use equipment knows best the dangers associated with its particular use, and so it should determine the degree of safety provided." . . . Since [the ram manufacturer] did not deal in log-splitters, it was not qualified to warn of the dangers associated with them, and had no duty to warn appellant.

Id. at *2 (citations omitted). The court also sustained the dismissal on the ground that the danger of the operation of the log splitter was "obvious to all." *Id.* at *1.

In *Westbrock v. Marshalltown Mfg. Co.,* 473 N.W.2d 352 (Minn. Ct. App. 1991), the court of appeals, however, reversed the trial court's summary judgment dismissing plaintiff's warning claims, holding that a punch press was not a component part entitling its manufacturer to dismissal of the failure to warn claim. The court of appeals found that the manufacturer had "failed to produce any evidence that this particular press was merely a component of a larger punch press system." *Id.* at 359.

The sole question of whether the product involved is merely a component may not be particularly helpful in determining whether the product manufacturer owes some duty to warn the product's users. That the product involved is a component part implicates other important questions, such as whether the danger emanates from the component itself or from some other aspect of the complete product, whether the manufacturer of the complete product is familiar with the operation and risks of the component, and whether there is any effective way for the component manufacturer to convey a warning to the final product user.

Sale of Used Products

The court of appeals has also applied the *Germann* approach to dismiss failure to warn claims against sellers of used equipment when plaintiffs could offer no evidence that such sellers were aware of the products' dangers. In *Gorath v. Rockwell International, Inc.,* 441 N.W.2d 128 (Minn. Ct. App. 1989), *rev. denied* (Minn. July 27, 1989), plaintiff's hand was amputated while he was feeding paper into a guillotine paper cutter. In response to a motion for summary judgment by the seller of the used paper cutter, plaintiffs offered no "evidence contradicting the seller's testimony that he had no actual knowledge of any defect in the paper cutter." *Id.* at 131. By the time of the accident, the product was thirty years old, and the accident occurred nine years after its sale as a used product. The court of appeals held that, "[u]nder these circumstances, [plaintiffs] have failed to causally link an act by the seller to [plaintiff's] injury. The seller had no duty to warn [plaintiff]." *Id.* at 133.

Similarly, in *Vergin v. Gladwin Machinery and Supply Co.,* No. C6-91-94, 1991 WL 132763 (Minn. Ct. App. July 23, 1991), the court of appeals upheld a summary judgment dismissing plaintiff's claim that the seller of a used press brake failed to warn that the product lacked available safety devices. At the time of its sale as a used product, the press did not meet applicable safety standards and the seller did not inform the purchaser of the availability of safety guards or devices. Nevertheless, the court found that plaintiff had "produced no evidence, only allegations, that [the seller] had any knowledge of

the dangerous condition of the press brake." *Id.* at *2. Thus, the seller had no duty to warn "that the press brake lacked available safety devices." *Id.*

In both cases, plaintiffs . . . could offer no evidence that the used product sellers were aware of hazards of the machines. Because the sellers could not reasonably foresee those hazards, there was no duty to warn.

While it is tempting to regard *Gorath* and *Vergin* as simply "used equipment cases," protecting sellers of used products from failure to warn claims, the underlying legal analysis in those cases proves more important than the labels. In both cases, plaintiffs, when faced with summary judgment motions, could offer no evidence that the used product sellers were aware of hazards of the machines. Because the sellers could not reasonably foresee those hazards, there was no duty to warn.

Reasonable Foreseeability — Court or Jury Issue

In *Dise v. Rockwell Graphic Systems, Inc.*, 428 N.W.2d 130 (Minn. Ct. App. 1988), plaintiff was injured when he became entangled in an unguarded drive shaft under a printing press. Plaintiff claimed that the manufacturer was liable for failing to warn of dangers presented by the drive shaft. The trial court entered summary judgment dismissing plaintiff's claim. The court of appeals reversed the summary judgment on the failure to warn claim, stating:

> [W]e note two factors which suggest injuries from the unguarded drive shaft may have been foreseeable. . . . Under the circumstances, we believe [plaintiff] should be afforded an opportunity to present evidence at trial to support his claim regarding the allegedly dangerous condition of the exposed drive shaft and the foreseeability of injury resulting from an unguarded drive shaft.

Id. at 133. The court did not perform the *Germann* analysis, but held that plaintiff could present evidence of the foreseeability of the danger at trial. The case, therefore, may be analyzed as one in which there was a fact issue as to foreseeability of the dangers, which the court or jury should resolve at trial, or as a case in which plaintiff did not have sufficient time to develop evidence of the foreseeability of the danger.

The *Germann* approach must leave trial courts in a quandary as to which duty to warn issues they should decide themselves, and which issues should be submitted to juries. In many cases, the court of appeals has had little trouble in deciding whether a manufacturer or seller had a duty to warn under the circumstances. In most of these cases, however, the evidence — usually pertaining to foreseeability of the danger — was unequivocal, i.e., of a type that would sustain a motion for a directed verdict on the issue. Minnesota appellate courts have not squarely addressed the issue of whether the court or the jury should decide whether a danger was reasonably foreseeable to a manufacturer when the evidence on that issue is disputed. In dicta, the court in *Huber v. Niagara Machine and Tools Works, supra,* stated that "[o]nly if there is a specific factual dispute concerning a manufacturer's awareness of a risk should the issue be submitted to the jury for its resolution." *Huber,* 430 N.W.2d at 467; *see also* Michael K. Steenson, *Products Liability in Minnesota: Design Defect and Failure to Warn Claims,* 14 Wm. Mitchell L. Rev. 443, 486 (1988) ("If there is a serious dispute over the foreseeability of a particular injury or risk, the fact question could be submitted to the jury in the form of a special verdict.").

Negligence Standard

Unfortunately, the entire framework for deciding failure to warn claims in Minnesota is based upon a misapprehension about the "duty issue," and fails to apply important aspects of negligence law. These shortcomings are addressed at length in *Returning Negligence Principles* and *Failure to Warn Update,* and have not been acknowledged or rectified by the Minnesota appellate courts. The courts have reserved to themselves questions that juries should decide. The courts have also failed to acknowledge that a manufacturer may in the exercise of reasonable care decide not to issue a warning against certain dangers that are foreseeable.

The only acknowledgement of the argument that a failure to warn claim must be proven under negligence principles came in an unpublished decision of the court of appeals. *See Speldrich v. Kawasaki Motor Corp., U.S.A.,* No. C8-91-1490, 1992 WL 77538 (Minn. Ct. App. Apr. 21, 1992).

There, the manufacturer argued that the trial court's instruction to the jury on failure to warn, JIG III 119, "was inadequate as not sufficiently setting forth the standard of reasonable care and as seeming to impose an absolute duty to warn." *Id.* at *2. In finding that the trial court did not err in using the instruction, the court stated:

> Thus, in a design defect case where knowledge of a defective design is imputed to the manufacturer, once a jury has determined that reasonable care has not been used in designing the product and, therefore, that the product is unreasonably dangerous, it is inevitably necessary to warn of that design defect. Consequently, it is unnecessary to modify the instruction, as suggested by [defendant], to state that the jury is to determine "whether reasonable care requires the manufacturer to provide a warning" in this situation.

Id. at *3. This cursory statement, however, misses the issue in a number of respects. Most importantly, a failure to warn instruction is given to the jury *before* the jury has considered the design defect issue. The premise relied upon by the court in *Speldrich* — that there is a design defect in the product — is not established, if it is at all, until the jury deliberates after instructions. Moreover, in some cases, the jury may conclude that the product is not defective in its design, but still decide that a manufacturer's failure to warn was negligent. In other cases, plaintiffs may assert a failure to warn claim without contending that there is a design defect in the product. The court of appeals' flawed reasoning does not address the point that a reasonable care standard should be employed in deciding failure to warn claims.

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VI. Post-Sale Duty to Warn

In most failure to warn cases, the plaintiff alleges that the manufacturer failed to warn of dangers which were known, or should have been known, by the manufacturer at the time of production or sale of the product. In some cases, however, the claim is that the manufacturer should have warned of a danger involved in the use of the product which the manufacturer discovers, or should have discovered, *after* sale of the product. In these cases, plaintiffs allege a post-sale duty to warn.

The Minnesota appellate courts have not addressed a post-sale duty to warn until recently. The first pronouncement on the issue came from the court of appeals in *Balder v. Haley*, 390 N.W.2d 855 (Minn. Ct. App. 1986), *rev'd*, 399 N.W.2d 77 (Minn. 1987):

> We agree that the duty to warn and instruct is continuing, not based alone on facts evident at the time of sale. . . . Where a manufacturer learns that previously distributed products pose dangers to users, its duty is mixed: the manufacturer must give additional warnings adequate for reasonable safety of users, or must take other remedial steps to the same end.

Id. at 864 (citations omitted). The supreme court, however, reversed the court of appeals decision, rendering the precedential effect of the post-sale duty to warn discussion questionable.

The Minnesota Supreme Court faced the issue for the first time in *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988). In *Hodder*, plaintiff was injured when a multi-piece rim of a truck tire explosively separated when plaintiff was mounting the tire. The rim was manufactured in 1955, 26 years before the accident. At the time of its sale, there were no warnings on or accompanying the rim of the possibility of its explosive separation. After 1955, however, Goodyear became aware of the danger of pressurized separation of its multi-piece rims. Plaintiff alleged that Goodyear was negligent because it did not provide adequate warnings of the danger after its discovery.

The supreme court sustained the jury's finding that Goodyear was negligent for failure to warn, holding that "[o]n the facts of this case, . . . a continuing post-sale duty to warn existed . . . ." *Id.* at 833. The court did not discuss the parameters of a continuing duty to warn, but noted that it "arises only in special cases," and *Hodder* was "such a case." *Id.* The factors that apparently influenced the supreme court in its finding were:

1. *Knowledge of the danger.* Goodyear became aware by the late 1950s that the type of rims involved in the case "could be temperamental." *Id.* Plaintiff offered evidence of 134 post-1955 rim explosion accidents.

2. *Hidden nature of the danger.* The supreme court appeared to be influenced by the fact that the danger was not known or discoverable by product users. The court noted that "the margin for error in servicing the K-rim assembly was dangerously small and it might explosively separate with seemingly little provocation." *Id.*

3. *Degree of danger.* The result of an explosion was often extreme; "serious injury or death usually resulted." *Id.*

4. *Advertisement and service of product.* The court was influenced by Goodyear's continued business in tire rims, continued advertising of the subject model rim as late as 1977, and continued sale of tires and tubes for use with the rim.

5. *Undertaking a duty to warn.* Finally, the court found that Goodyear had undertaken a duty to warn of rim dangers by distributing warnings and instructions before the plaintiff's accident.

In *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96 (Minn. 1989), the supreme court considered whether a corporation which had purchased the assets of the manufacturer of the press brake involved in the case had a duty to warn of defects in the product. The product was manufactured and sold in 1973, defendant's subsidiary purchased the assets of the manufacturer in 1977, and soon thereafter the subsidiary was dissolved and its assets assumed by defendant. Under rules of successor liability, the court held that defendant was not liable for alleged defects in the press brake. Plaintiff alleged, however, that defendant had an independent duty to warn product users of its dangers.

Clearly, . . . the supreme court has reserved the post-sale duty to warn only for "special cases" in which the factors identified in *Hodder* or *Niccum* are present.

In deciding the claim, the supreme court adopted "a list of factors to be examined in determining whether a duty to warn should be imposed" on a successor corporation, set forth in *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977):

> Succession to a predecessor's service contracts, coverage of the particular machine under a service contract, service of that machine by the purchaser corporation, a purchaser corporation's knowledge of defects and of the location or owner of that machine, are factors which may be considered in determining the presence of a nexus or relationship effective to create a duty to warn.

Niccum, 438 N.W.2d at 100 (quoting *Travis*, 565 F.2d at 449). The supreme court found that none of the factors listed in *Travis* were present in *Niccum*, and held that "[t]he facts of [the *Niccum*] case do not support the imposition of a duty to warn under the *Travis* analysis." *Niccum*, 438 N.W.2d at 100.

Although the supreme court in *Hodder* and *Niccum* did not cite *Germann*, in both cases the court performed an analysis similar to that specified in *Germann* for cases involving claims of failure to warn at the time of sale of the product. In the post-sale duty to warn cases, the court identified several factors to be analyzed in determining as a matter of law whether the defendant had a post-sale duty to warn. If a court imposes such a duty, then issues of adequacy of the defendant's efforts to warn and causation are left for the jury. Clearly, however, the supreme court has reserved the post-sale duty to warn only for "special cases" in which the factors identified in *Hodder* or *Niccum* are present.

VII. The Causation Defense to Failure to Warn Claims

As noted in *Returning Negligence Principles*, the Minnesota appellate courts have recognized in several cases that a manufacturer's alleged failure to warn, as a matter of law, did not cause plaintiffs' injuries. "The causation issue . . . focuses on the individual product user, whether it be the plaintiff or another person using the product when the plaintiff is injured. Thus, failure to warn is not the cause of an accident or injury when the product user is actually aware of the danger." *Returning Negligence Principles* at 10-11.

The court of appeals has applied this principle in several recent cases. In *Hart v. FMC Corp.*, 446 N.W.2d 194

(Minn. Ct. App. 1989), plaintiff was aware of the risk of an overhead obstruction on the route of a tripper car. He raised his head as the car went under the structure and was killed. The court explained that "[t]he foreman's testimony establishes that James was specifically warned of the low clearance hazard just minutes before his death. Any additional warning would have been of no avail, since the danger was made known to James." *Id.* at 198. Based in part on this causation defense, the court of appeals reversed the jury verdict against FMC for failure to warn, and ordered dismissal of the claim.

In *Priefer v. Michelin Tire Corp.*, No. C2-90-79, 1990 WL 68624 (Minn. Ct. App. May 29, 1990), plaintiff was injured in an explosion caused by a mismatch between a rim and tire. Plaintiff had worked as an automobile mechanic for several years and knew that a tire and rim mismatch would be dangerous. Before the accident, plaintiff failed to examine the dimension of the rim printed on its face. Based on these facts, the court of appeals sustained the trial court's summary judgment, dismissing plaintiff's failure to warn claim on causation grounds.

> Where the presence of a warning would not have altered the user's conduct, the failure to warn is not a proximate cause of the injury. . . . Also, if despite the lack of warning, a user is fully aware of the danger of which the manufacturer should have warned, there is no causal connection between the lack of warning and the injury. . . .
>
> By his own testimony, [plaintiff] admitted that if he would have examined the replacement rim, he would have known there was a mismatch. Despite his knowledge of the dangers of a mismatch, appellant did not examine the rim. Thus, any warning of the danger of a mismatch would not have prompted [plaintiff] to examine the rim because any additional warnings would have added nothing that he did not already know.

Id. at *2-3 (citations omitted); *see also Audetat v. Blaschke*, No. C4-89-434, 1989 WL 131560 (Minn. Ct. App. Nov. 7, 1989) (sustaining summary judgment dismissing failure to warn claim when plaintiff was aware of the dangers of a log splitter). *Compare Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352 (Minn. Ct. App. 1991) (disputed fact questions concerning causation from alleged failure to warn of dangers of a punch press precluded summary judgment dismissing claim).

While the Minnesota appellate courts have considered what evidence may defeat the causation element of a failure to warn claim, e.g., undisputed evidence that a plaintiff was aware of the danger against which plaintiff claims a warning should have been given, the courts have not analyzed in significant depth the other side of the issue, that is, what affirmative evidence must the plaintiff offer to show that an accident *was* caused by a failure to warn. The Minnesota Supreme Court briefly considered the issue in *Kallio v. Ford Motor Co.*, 407 N.W.2d 92 (Minn. 1987). In *Kallio*, plaintiff claimed that Ford had failed to warn of an "illusory park" problem with automatic transmissions, which allegedly caused plaintiff's park-to-reverse accident. On appeal, Ford contested the jury's finding that this failure to warn was a cause of plaintiff's accident. Ford argued that plaintiff "was aware that the truck might move if the shift lever was not completely in the 'park' position." *Id.* at 99. The court acknowledged that "[n]o evidence was presented as to how [plaintiff] might have acted on this occasion had Ford provided an adequate warning." *Id.* Thus, Ford argued, there was no evidence that its failure to warn was a cause of plaintiff's accident.

While admitting that "the issue of causation is troublesome," *id.*, the supreme court sustained the failure to warn verdict. Although citing evidence only that plaintiff was not aware of the "illusory park" condition, and not that plaintiff would have acted differently if there had been a warning of that condition, the supreme court "deem[ed] it sufficient to observe that in the instant case facts existed justifying submission to a jury of the issues of breach of duty to warn and causation." *Id.* at 100. The court sustained plaintiff's failure to warn verdict "[w]ithout deciding whether a rebuttable presumption exists that a warning would have been heeded." *Id.* at 99.

Although evidence of causation in *Kallio* was, at most, weak, the court did purport to decide the causation issue on the facts of the case, without resorting to presumptions or other legal bases. The argument that the trial record contains no evidence upon which to base a conclusion that the plaintiff or product user would have acted differently if the manufacturer had provided an adequate warning — and thus that plaintiff as a matter of law failed to prove the causation element of the failure to warn claim — therefore remains available to the product manufacturer or seller. *See Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987) (trial court properly refused to instruct jury on failure to warn claim when plaintiff "presented no evidence at trial that he would have acted differently had GMC provided a warning").

The Minnesota Court of Appeals recently addressed the question of causation in the closely-related context of a plaintiff's inadequate warning claim in *J & W Enterprises, Inc. v. Economy Sales, Inc.*, No. C6-91-2461, 1992 WL 137734 (Minn. Ct. App. June 23, 1992). The manufacturer in *J & W Enterprises* had attached a warning

on its fire extinguisher which read "RECHARGE IMMEDIATELY AFTER USE"; the plaintiff contended that this warning was inadequate because "it did not instruct the user to recharge after any use." *Id.* at *2. Both sides acknowledged, however, that the plaintiff's employee did not actually read the attached warning before using the fire extinguisher.

In affirming the trial court's summary judgment in favor of the defendant, the court of appeals noted that the issue of a warning's adequacy is a jury question. Nonetheless, the appellate court agreed with the trial court that, as a matter of law, the plaintiff must first demonstrate that he relied on the warning before the question of its adequacy reaches the jury. The court reasoned that, "'[i]n any theory of products liability, the plaintiff must show a causal link between the alleged defect and the injury.'" *Id.* (quoting *Rients v. International Harvester Co.*, 346 N.W.2d 359, 362 (Minn. Ct. App. 1984)). Thus, in order to demonstrate that an alleged warning defect caused an injury, it must be shown that the plaintiff in fact read the warning. *J & W Enterprises*, 1992 WL at *2.

Thus, in order to demonstrate that an alleged warning defect caused an injury, it must be shown that the plaintiff in fact read the warning.

VIII. Punitive Damages — Substantive Standard and Threshold Requirement

Minnesota law on punitive damages centers around two statutes. Section 549.20 of the Minnesota Statutes sets the substantive standard that plaintiffs must meet to prevail on a punitive damages claim. Section 549.191 requires a threshold showing before a plaintiff may amend the complaint to claim punitive damages. The sections below outline these statutes and recent amendments, as well as certain cases interpreting them. Although the statutes apply to all types of cases, this article focuses on their application in product liability cases.

The Substantive Standard

The legal standard used to measure the defendant's conduct has undergone several changes and interpretations over the years. Initially, the area of punitive damages in products liability cases was governed by common law. *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), *cert. denied*, 101 S. Ct. 320 (1980), was decided during this time and remains a landmark decision on various punitive damages issues. In 1978, the Minnesota Legislature enacted Minn. Stat. § 549.20, which required plaintiff to show "willful indifference" by the defendant. Section 549.20 was amended in 1990 to change the standard from "willful indifference" to "deliberate disregard."

Before 1978 — The *Gryc* Case

In *Gryc*, plaintiff sued a textile manufacturer to recover damages for injuries her daughter received when the young girl's flannelette pajamas, which were not treated with flame retardant, caught on fire. The jury awarded $750,000 in compensatory damages and $1 million in punitive damages.

In analyzing the jury's decision, the Minnesota Supreme Court developed the common law standard of conduct required to support a punitive damages award. (The accident at issue happened in 1969; the punitive damages statute enacted in 1978 applied only to causes of action arising on or after April 15, 1978. *See* Minn. Stat. Ann. § 549.20, Historical Note (1988).) According to the court, the plaintiff must establish that the defendant acted with *"willful,* wanton and/or malicious *disregard* of the rights of others." *Gryc*, 297 N.W.2d at 739 (emphasis added). Not surprisingly, the court's formulation was a precursor to the "willful indifference" standard, codified in the 1978 legislation, and the "deliberate disregard" standard, codified in the 1990 amendment. *See* Minn. Stat. Ann. § 549.20 (1988 and West Supp. 1992).

The court found ample evidence to meet its standard. First, the court considered the inherent danger of the product itself. At trial, plaintiff's expert had "demonstrated the instantaneous ignition and rapid burning rate of the untreated cotton flannelette." *Gryc*, 297 N.W.2d at 739. Second, the court considered the feasibility of reducing the danger, as other companies had applied flame retardant products to cotton flannelette before the defendant manufactured the pajamas. *See id.* Third, and perhaps most significant, the defendant manufacturer had knowledge of several similar prior accidents involving the flannelette. At least 13 years before the accident,

one of the manufacturer's top officials sent an internal memorandum to the manufacturer's research department head stating that "the company was sitting on a 'powder keg' with respect to the flammability of their flannelette." *Id.* at 740. Another document, a letter to a chemical company prepared more than a year and a half before the accident, stated that the defendant was not going to use flame retardant products until federal law required it because of "the cost factor." *Id.* Based upon this evidence, the court quickly concluded that the manufacturer's conduct rose to the level necessary to impose punitive damages.

1978 - 1990 — "Willful Indifference"

In 1978, the Minnesota Legislature enacted the state's first punitive damages statute, which set forth the standard of conduct required to recover punitive damages. Pursuant to that statute, punitive damages were "allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show[ed] a *willful indifference* to the rights or safety of others." *See* Minn. Stat. Ann. § 549.20 (1988) (emphasis added).

Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), was decided under the "willful indifference" standard. The accident in *Hodder* happened when Hodder was mounting a tire on a logging truck and the metal rim of the tire (the "K-rim") explosively separated. Hodder sued the tire rim manufacturer, claiming design defect and negligent failure to warn. The jury found liability for failure to warn, but not design defect. It awarded $3,368,916 in compensatory damages and $12.5 million in punitive damages. One of the issues on appeal was the validity of the punitive damages verdict.

The court acknowledged that this was not a case where the manufacturer completely failed to give any warnings. Indeed, the content of the warnings was "generally adequate." *Id.* at 835. Where the manufacturer failed in this case was in the limited distribution of the warnings. The court cited several examples: (1) information from the defendant's representatives was not widely distributed in northern Minnesota, where the accident happened; (2) the defendant manufacturer failed to send safety material to tire shops unless those shops requested the material in writing; (3) the defendant did not undertake a warnings program until at least a year after a study had reported that K-rims were inherently dangerous; (4) the defendant's budget for the warning program was minimal; (5) the discount offered by the defendant to trade in used K-rims on the purchase of new rims was too small; and (6) the defendant wrongfully assumed that OSHA's regulations absolved it of pursuing its own warning program. *Id.* Also significant, although not mentioned by the court in its analysis of the punitive damages award, was evidence of 134 similar post-manufacture explosion accidents. Given that the defendant manufacturer had "deliberately downplayed and obscured the dangers of the K-rim to protect its tube and tire sales," the court found that the plaintiff had established "willful indifference." *Id.* at 836. (The court did, however, reduce the punitive damages award from $12.5 million to $4 million.)

After 1990 — "Deliberate Disregard"

In 1990, the Minnesota Legislature amended the punitive damages statute to change the standard from "willful indifference" to "deliberate disregard." The amendment defines the new standard as follows:

> A defendant has acted with deliberate disregard for the rights and safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. Ann. § 549.20, subd. 1(b) (West Supp. 1992). The new standard applies to all causes of action arising on or after May 4, 1990. *See id.* Historical and Statutory Notes.

The legislative history of the ["deliberate disregard"] amendment . . . indicates that the legislature was highly motivated to tighten the rein on punitive damage claims and awards.

Some commentators have downplayed the significance of the amendment. *See* Howard Orenstein, *The New Punitive Damage Law*, Minnesota Trial Lawyer 19, 22 (Summer 1990). The legislative history of the amendment,

however, indicates that the legislature was highly motivated to tighten the rein on punitive damage claims and awards. *See* tape of Joan Morrow, Chairperson of the Minnesota Injury Compensation Study Commission (appointed pursuant to the 1988 Tort Reform Act), at Joint House and Senate Judiciary Committee Hearing (February 1, 1990) (The substantive standard "needs to be more stringent and clear for the protection of defendants."). According to the commission appointed by the legislature to study the issue, "the 'willful indifference' standard [was] not a stringent enough standard to separate the claims that justify an award of punitive damages from claims that may involve nothing more than reckless behavior." Report to the Minnesota Legislature of the Injury Compensation Study Commission 28. Indeed, the words "deliberate" and "disregard" both have stronger connotations than their counterparts "willful" and "indifference." *See Bucko v. First Minnesota Sav. Bank*, 471 N.W.2d 95, 101 (Minn. 1991) (Simonett, J., dissenting) (The new standard "clarifie[s] the test" by narrowing the meaning of the word "indifference," which has many meanings that do not "connote[] the state of mind requisite for punitive damages.").

The Minnesota Court of Appeals recently interpreted the new standard in *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. Ct. App. 1992), *rev. denied* (Minn. Feb. 27, 1992). In *Beniek*, the plaintiff sued a chain saw manufacturer for injuries he received when the chain saw "kicked back." Plaintiff claimed that the chain saw was defective because it was manufactured without a tip guard safety device. At issue on appeal was the propriety of the trial court's directed verdict in favor of the manufacturer on the punitive damages claim.

The court of appeals interpreted the amended statute to allow punitive damages only on a showing of "maliciousness, an intentional or willful failure to inform or act." *Id.* at 723 (citing *Wikert v. Northern Sand and Gravel, Inc.*, 402 N.W.2d 178, 183 (Minn. Ct. App. 1987)). Using this standard, the court affirmed the trial court's directed verdict because the plaintiffs had "failed to present clear and convincing evidence that [the defendant's] conduct was malicious." *Beniek*, 479 N.W.2d at 723. On the contrary, the evidence showed that the defendant had actively explored ways to avoid the risks associated with its product. For example, the defendant was the first chain saw manufacturer in the United States to equip all of its chain saws manufactured after 1976 with safety tip guards. *See id.* Although the subject machine was manufactured before this time, the defendant's safety efforts dating before the time of manufacture precluded a finding of "maliciousness." *Id.*

Although the substantive standard has changed over the years, the *Gryc, Hodder,* and *Beniek* cases offer some insight into the factors that will justify or preclude a punitive damages award. These considerations include: (1) the inherent dangerousness of the product itself; (2) the feasibility of reducing the danger; (3) the defendant's knowledge of the danger; (4) the existence and number of other similar incidents; and (5) the defendant's posture on safety measures. To the extent that the defendant can control any of these factors, e.g., by instituting safety programs and initiatives, the threat of a punitive damages award decreases.

Preliminary Motion to Amend — Minn. Stat. § 549.191

The Statutory Requirements

Section 549.191 of the Minnesota Statutes, adopted in 1986, prohibits plaintiffs from seeking damages in their complaints, requiring them to bring a motion to amend after the action has been filed. The statute provides in pertinent part:

> Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

Minn. Stat. Ann. § 549.191 (1988).

The Interplay Between the Procedural and Substantive Requirements

Section 549.191 is not entirely procedural in application. As decided by the Minnesota Court of Appeals in two recent cases, the substantive standard and burden of proof for recovering punitive damages necessarily come into play in determining whether the plaintiff has met the threshold requirements of § 549.191.

The court of appeals first dealt with the issue in *McKenzie v. Northern States Power Co.*, 440 N.W.2d 183 (Minn. Ct. App. 1989), a wrongful death case arising out of an electrocution. Plaintiff sought leave to amend to add a punitive damages claim, which the trial court

denied. Plaintiff then sought discretionary review of the trial court's denial of the motion.

The court of appeals began its analysis of plaintiff's motion by citing the "prima facie evidence" requirement of Minn. Stat. § 549.191. Under the statute, the plaintiff must present "prima facie evidence in support of the motion" to prevail on the motion. Prima facie evidence is "evidence which, if unrebutted, would support a judgment in that party's favor." *McKenzie*, 440 N.W.2d at 184 (citing Black's Law Dictionary 1071 (5th ed. 1979)). The only way to determine whether the evidence "would support a judgment in [the movant's] favor" is to look to the ultimate standard that plaintiff must meet to succeed on the punitive damages claim. In other words, the trial court necessarily "must consider the elements and burden of proof required to *recover* punitive damages." *McKenzie*, 440 N.W.2d at 184 (emphasis in original). A motion to amend should thus be denied if the "motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference [now 'deliberate disregard']." *Id.*; *see also Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988) (Section 549.191 "creates a preliminary evidentiary burden which plaintiff must meet before he may plead punitive damages."). Based upon this reasoning, the *McKenzie* court allowed the trial court's decision to stand, concluding that the affidavit of plaintiff's expert witness did not constitute the requisite prima facie evidence. *McKenzie*, 440 N.W.2d at 184.

In short, the limitations set forth in Minn. Stat. § 549.191 are intended to weed out frivolous punitive damages claims.

The court of appeals visited the issue again in *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151 (Minn. Ct. App. 1990), *rev. denied* (Minn. Oct. 5, 1990), a products liability lawsuit stemming from a bicycle accident. Swanlund claimed that the front wheel of his bicycle came loose, causing him to fall to the ground, rendering him a quadriplegic. Pursuant to Minn. Stat. § 549.191, Swanlunds filed a motion to amend their complaint to add a punitive damages claim. The trial court denied the motion and plaintiffs appealed. *Swanlund*, 459 N.W.2d at 153.

In reviewing the trial court's decision, the court of appeals followed the *McKenzie* analysis, i.e., incorporating the substantive standard and burden of proof for awarding punitive damages into the requirement that the movant present prima facie evidence in support of the motion. *See id.* at 154 (The statute requires that the trial court "'view the evidence presented through the prism of the substantive evidentiary burden.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). With this framework in mind, the court analyzed plaintiffs' claims, which basically amounted to simple negligence. The court found that plaintiffs' claim that the wheel improperly separated from the bicycle fork was nothing more than a manufacturing defect claim and a "single incident of a defectively manufactured product is insufficient to support a finding of willful indifference to the rights of others." *Swanlund*, 459 N.W.2d at 155. Moreover, the defendant was only a component parts manufacturer; another company had actually assembled the bicycle. According to the court, the defendant's "failure to assure that the bicycle assembler incorporated a [safety] device [was] at most negligence, which is insufficient to establish willful indifference." *Id.* at 156.

In short, the limitations set forth in Minn. Stat. § 549.191 are intended to weed out frivolous punitive damages claims. Together with the *McKenzie* and *Swanlund* cases, the message is clear that plaintiffs cannot simply make punitive damages claims without advancing some measure of "clear and convincing evidence" of "deliberate disregard" to support their allegations.

Application in Federal Court

Consistent with the court of appeals' view that § 549.191 is not entirely procedural in nature, federal courts have determined that the statute applies in federal diversity cases. *See, e.g., Security Sav. Bank v. Green Tree Acceptance, Inc.*, 739 F. Supp. 1342, 1353 (D. Minn. 1990); *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988); *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233, 235 (D. Minn. 1988). *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), dictates this result because "[p]ermitting plaintiff to allege punitive damages in the initial complaint consistent with the federal rule would encourage forum-shopping." *Fournier*, 678 F. Supp. at 1422. ▲