

# the Firm Inquiry

Winter 2008

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## Product Liability – Is Circumstantial Evidence of a Defect Enough?

Brad Hansmann



Does testimony from a fire investigator concerning the allegedly defective product's location in the purported area of origin constitute sufficient

evidence to get a case to a jury on a product liability claim? What if the fire investigator testified that he eliminated every other possible cause in the origin area? What if the product worked fine for six months before the fire? According to the United States Court of Appeals for the Eighth Circuit in a very recent decision, *Hickerson v. Pride Mobility Products Corp.*, juries may infer causation and the existence of product defects based on circumstantial evidence under a *res ipsa*-type theory such that "some" product liability claims may be submitted to juries without expert testimony identifying specific product defects.

The fire investigator in *Hickerson* testified that he determined the area of origin based on, among other things, his observations of the relative degrees of damage, the pattern and direction of damage, and the type of damage. He further testified he was able to eliminate all other possible causes of the fire, although he did find some damage to the home's wiring system. He opined that the only source of ignition in the area of origin was a motorized scooter, which did show some signs of damage on its wiring and, therefore, the scooter could not be eliminated as the fire's cause. At the time of the fire, the scooter was six months old.

To prove a product liability claim by inference from circumstantial evidence without proof of a specific defect, a plaintiff must offer evidence (1) tending to eliminate other possible causes of the injury and property damage, (2) demonstrating that the product was in the same basic condition at the time of the occurrence as when it left the defendant's hands, and (3) that the injury or damage is of a type that normally would not have occurred in the absence of a defect in the product. The Eighth Circuit in *Hickerson* held that a case may be submitted to a jury if the circumstantial evidence is strong enough to support reasonable inferences necessary to support the plaintiff's case without recourse to speculation. In *Hickerson*, the court held there was only one powered item at the point of origin – the scooter – because the fire investigator defined an area of origin and eliminated other possible sources of ignition. The court further noted that common experience tells us that some accidents do not ordinarily occur

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## Illinois Court Expands Recoverable Damages

John L. McMullin



The Fifth District of the Appellate Court of Illinois, in the case of *Bauer v. Memorial Hospital*, decided on November 27, 2007, has greatly expanded recoverable damages under Illinois law. The *Bauer* decision addressed a medical malpractice action originally tried in the St. Clair County Circuit Court in Belleville, Illinois. The action concerned injuries sustained to an infant. The defendant, in hopes of reducing the amount of damages for future care-taking expenses, put into evidence that the infant's life expectancy had been significantly reduced as a result of the infant's injuries caused by the alleged malpractice. The plaintiff's attorney then asked the judge to submit a jury instruction to the effect that the plaintiff should be entitled to damages for the infant's reduced life expectancy and the judge allowed it. The jury returned a \$7.5 million verdict. The Appellate Court of Illinois affirmed, even though the Court pointed out in its decision that there was no prior Illinois case law that specifically allowed recovery for reduced life expectancy damages.

The Appellate Court's decision in *Bauer* greatly expands the damages recoverable under

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# Case Law Update

Jennine D. Adamek Moore

**Breach of Fiduciary Duty** was not an "accident" and, therefore, there was no covered "occurrence" under a CGL policy. *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337 (8th Cir. 2007).

**Possible Future Medical Complications are Admissible** to aid the jury in assessing "the nature and extent" of the plaintiff's injuries, even if the future risks were not reasonably certain to occur. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127 (Mo. banc 2007).

**No Tortious Interference with Business Expectancy** by an insurance company with the company's fired agents'

relationships with policyholders occurred because those relationships would not exist absent the insurance company and were not the type of business relationship protected by the law. *Kelly v. State Farm Mut. Auto. Ins. Co.*, 218 S.W.3d 517 (Mo. App. W.D. 2007).

**Workers' Compensation Law** did not govern case where the plaintiff was injured in a car accident on a public street on his way to work at a hotel, even though the other driver was also employed by the same hotel, because the plaintiff was not working at the time of the accident. *Harris v. Westin Mgmt. Co.*, 230 S.W.3d 1 (Mo. banc 2007).

**Public Nuisance** cases require the plaintiff to show a causal link between the defendant's conduct and the

alleged nuisance. Since the plaintiff failed to identify the lead paint product used on private houses, which proof was necessary to show causation, summary judgment for the lead paint manufacturers was properly granted. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. banc 2007).

**Underinsured and Excess Insurance Clauses** were ambiguous when read together; therefore, the policy was construed against the insurer and in favor of coverage. The court further allowed the stacking of the underinsured motorist coverages due to the perceived conflict between the two clauses in the policy. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129 (Mo. banc 2007). For more discussion on insurance policy ambiguity, see also *Chamness v. American Family Mut. Ins. Co.*, 226 S.W.3d 199 (Mo. App. E.D. 2007).

**Lease Form Including a Release Addressing "Any and All Claims"** was enforceable. The Missouri Court of Appeals held that a lease form that included a release by the lessee of "any and all claims" against the lessor and expressly released all claims for the lessor's negligence was enforceable because the lease form effectively notified the lessee that she was releasing the lessor from all future negligence claims. The management company, however, was merely the lessor's agent, not the lessor and, therefore, did not benefit from the release. *Milligan v. Chesterfield Village GP, LLC, d/b/a Chesterfield Village Apartments, LP*, 232 S.W.3d 683 (Mo. App. E.D. 2007). See also *Kaufold v. Chesterfield Village GP, LLC, d/b/a Chesterfield Village Apartments, LP, et al.*, 232 S.W.3d 699 (Mo. App. S.D. 2007).

**Insureds Entitled to Actual Cash Value**, and not the full cost of repair, under a policy containing provisions requiring actual repair before the insurer is required to pay full repair costs for partial losses. The insurance policy was unambiguous and, by its plain language, included a condition precedent requiring actual repair before the payment of repair cost without deduction for depreciation. Therefore, the policyholders were only entitled to the property's actual cash value absent repairs or replacement. *Porter v. Shelter Mut. Ins. Co.*, 2007 WL 2989000 (Mo. App. W.D. 2007).

**Faulty Construction was a Covered "Occurrence" under the Policy.** As the plaintiffs alleged facts supporting a products liability claim against the insured contractor, as well as property damage, the Missouri Court of Appeals held the contractor's insurer had a duty to defend the insured against the plaintiffs' lawsuit under the insured's CGL policy. The court reasoned that the insured's alleged faulty construction was an "occurrence" under the policy and, while the "damage to your product" exclusion applied, the "damage to your work" exclusion did not. *Columbia Mut'l Ins. Co. v. Epstein, d/b/a M & E Concrete Forms Co.*, 2007 WL 4233422 (Mo. App. E.D. 2007).

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## Product Liability – Is Circumstantial Evidence of a Defect Enough?

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in the absence of a defect and that the spontaneous ignition of a motorized scooter would be such an occurrence.

The Eighth Circuit, in support of its holding that juries may infer causation and the existence of product defects based on circumstantial evidence under a *res ipsa*-type theory, cited three Missouri cases, all of which involved a fire and, to some degree, the destruction of the product that was purportedly defective. The Eighth Circuit, in *Hickerson*, however, did not limit its holding to such cases. While the *Hickerson* decision did not change Missouri law, the facts of the case are such that it would appear that any case involving a fire, a purported origin, and the purported elimination of other causes will get to a jury despite the absence of expert testimony identifying a specific defect that caused the fire.

Because the Eighth Circuit in *Hickerson* did not limit its decision to fire cases, the *Hickerson* rationale, specifically the court's *res ipsa* analysis, may be extended to all product liability cases, even cases in which the product can be examined and tested by experts post accident or loss. Consider a case in which the driver of a motor vehicle testifies he applied the brakes and the vehicle did not stop. Does common experience tell us that when we apply the brakes, the vehicle stops, unless there is some type of defect, or does common experience also tell us that drivers sometimes run stop signs? Is this evidence enough to get to a jury?

In the end, each case may well be decided on the nature of circumstantial evidence and on the reasonable inferences that may be drawn from those circumstances. The *Hickerson* case may have opened a huge door for other products liability cases to be brought. In the face of *Hickerson*, the ability of manufacturers to defeat product liability cases in their early stages by challenging the plaintiff's expert witness under *Daubert* and seeking summary judgment may be impaired and substantially limited. Thus, many product liability cases that otherwise would have been dismissed may now survive to make it to a jury. ■