INVESTIGATING AND DEFENDING PRODUCTS LIABILITY AND TOXIC TORT CLAIMS

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I. COMMON PRODUCTS LIABILITY CLAIMS

The term “products liability” is a phrase used to define the liability of a manufacturer, processor, non-manufacturing, lessor or seller for injury caused by the product to the person or property of a consumer or third party. Depending on the facts, several theories of recovery may be asserted in a products liability suit. Generally, an injured claimant may assert tort claims for negligence or strict liability or contract claims for breach of either implied or express warranties. Some products liability claimants may have additional claims based on state or federal statutes or administrative rules or regulation. In sum, defense of a products liability action requires the examination of many claims, their elements and their associated defenses.

The law of products liability is changing. There are numerous excellent sources to research and explore how the law has evolved over the past several decades. Steenson, A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability, 24 Wm. Mitchell L. Rev. 1 (1998). An entire edition of a law review was devoted to products liability law. 27 Wm. Mitchell L. Rev. 1 (2000). For an explanation of the Minnesota law on products liability and the jury instructions given in a case controlled by Minnesota law, one should look to the jury instruction guides. Minnesota Dist. Judges Ass’n Comm. on Jury Instruction Guides, Minnesota Jury Instruction Guides (Civil), JIG Introductory Note and CIV JIG 75.10 through 75.65 (Steenson and Knapp, Reporters) 4A Minn. Practice, 98 (4th Ed. 1999) (hereinafter referred to as CIV JIG ____).

This section will address some of the common product liability claims; namely, negligence claims, breach of warranty claims, strict liability claims and claims based on an alleged failure to warn. Bailment and entrustment claims are also covered. In practice, some or all of these claims may be pled by the plaintiff. However, in some instances, courts will force a claimant to choose one legal theory to submit to the jury.

The next sections will address the common products liability claims. Remember that each claim has its own set of elements that must be met to establish defendant’s liability.

A. Negligence Claims

In order to state a cause of action in a products liability action based on negligence, the plaintiff has the burden of proving:

1. That the defendant owed the plaintiff a duty or standard of care;
2. That the defendant breached that standard of care;
3. That the breach or violation of some standard was in fact the legal or proximate cause; and
4. That the plaintiff was damaged or injured.
See, Bilotta v. Kelley, Co., 346 N.W.2d 616 (Minn. 1984); Holm v. Sponco Mfg. Inc., 324 N.W.2d 207, 212 35 A.L.R. 4th 848 (Minn. 1982). The plaintiff must prove each of these elements to prevail, but that proof can be through either direct or circumstantial evidence. See, Hudson v. Snyder Auto Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982). Each element must be proved by a preponderance of the evidence without resorting to conjecture or speculation. Thudium v. Allied Products Corp., 36 F.3d 767, 769 (8th Cir. 1994).

There are two major types of products liability negligence claims: negligent design and negligent manufacture. The distinction is based upon the period in the product development cycle in which the alleged negligence occurred. The manufacturer must design a product that is reasonably safe when put to its intended use. It must also produce a product that is reasonably safe when used for any unintended but reasonably foreseeable use. See generally, CIV JIG 75.25, pp. 126-34 and see, 2006 Pocket Part CIV JIG 75.25, pp. 13-19.

Under either theory, to prove a defect existed, the plaintiff must show that:

[The product] fails to perform reasonably, adequately and safely in the normal, anticipated or specified use to which the manufacturer intends that it be put, and it is unreasonably dangerous to the plaintiff.

Hudson v. Snyder Auto Body, Inc., 326 N.W.2d 149, 155 (Minn. 1982) (quoting Daleiden v. Carborundum Co., 438 F.2d 1017, 1021-22 (8th Cir. 1971)). While not a requirement, as a practical matter, almost every successful plaintiff claiming a design defect also introduces evidence that the defendant could have made the product safe without serious impact on the product's price or utility. Kallio v. Ford Motor Co., 407 N.W.2d 92, 96 n.6 (Minn. 1987). CIV JIG 75.20, pp. 113-25. The plaintiff's case must be established without conjecture or speculation and must demonstrate circumstances that point to the desired conclusion. Thudium v. Allied Products Corp., 36 F.3d 767 (8th Cir. 1994). Therefore, the plaintiff usually needs to provide expert testimony as to the defect.

1. Negligent Design Claims

In design defect cases, the manufacturer has consciously chosen a design and, in doing so, has deliberately determined the composition of the product, presumably making its decision after balancing a variety of factors. Essentially, the plaintiff's claim is that the design and/or the design factors themselves that were used are inadequate and the cause of the injury. See, generally, Rosin v. International Harvester Co., 262 Minn. 445, 115 N.W.2d 50 (Minn. 1962). The issue, then, is whether the manufacturer used reasonable care in the design of the product.

Regarding design defect, a new Jury Instruction has been proposed. The current instruction is based on the former Civil JIG 117. The proposed new instruction reads as follows:
DESIGN DEFECT

Manufacturer’s duty as to product design

A manufacturer has a duty to use reasonable care to design a product that is not unreasonably dangerous to (buyers) (users) (those exposed to) (property exposed to) the product when the product:

1. Is used as intended, or
2. Is used in a way that the manufacturer could reasonably have anticipated.

Evaluating manufacturer’s design choices

A manufacturer must keep up with scientific knowledge and advances in the field.

A manufacturer’s duty to design products must be judged according to the knowledge and advances that existed at the time the product was designed.

In deciding whether a manufacturer’s design choices resulted in a product that was in a defective condition unreasonably dangerous to those who (buy) (use) (are exposed to) the product, consider all the facts and circumstances, including:

1. The danger presented by the product
2. The likelihood that harm will result from use of the product
3. The seriousness of the harm
4. The cost and ease of taking effective precautions to avoid that harm
5. Whether the manufacturer considered the scientific knowledge and advances in the field
6. Other factors.

[A product manufacturer may not avoid its duty to design a safe product by letting others make decisions affecting the safety of the product.]

CIV JIG 75.20, pp. 113-114

This Jury Instruction highlights the merger of negligence and strict liability theories in Minnesota. See, Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 622 (Minn. 1984). The end result is that a manufacturer must satisfy two duties: (1) its duty to design a product that is reasonably safe when used as intended; and (2) its duty to design a product that is reasonably safe when used in an unintended, but reasonably foreseeable manner.

In some jurisdictions outside of Minnesota, there is still a distinction between a strict liability defective design case and a negligent design case. This distinction has been defined where strict liability involves the condition (dangerousness) of an article which is designed in a particular way, while negligence involves the reasonableness of the manufacturer's actions in designing and selling the article. See, Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (Or. 1974).

By definition, whether a manufacturer acted reasonably under the circumstances should be a question of fact.

In Drager by Gutzman v. Aluminum Industries Corp., 495 N.W.2d 879 (Minn. App.1993), the court addressed the two duties owed by a defendant to the plaintiff. In November 1987, plaintiff, then six years old, fell back in his chair and came in contact with a window screen hung approximately 24 inches above the floor. He claimed the screen dislodged without offering any resistance, and, as a result, he fell out of the apartment's second-story window. Plaintiff suffered severe injuries.

The court analyzed the two duties the defendant owed the plaintiff. It then ruled that the window screen's intended purpose was to allow ventilation while preventing insects from entering. As a result, the screen was well within its design limits. As to the issue of foreseeable, yet unintended use, the court found that the plaintiff fell against the screen by accident and did not make a conscious decision to use the screen in any manner. Therefore, the court held that it could not be said that plaintiff subjected the screen to a foreseeable, yet unintended use. Id. at 883.

The Minnesota Supreme Court has held that the duty of reasonable care is not delegable. Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624 (Minn. 1984). Based on this case, an optional paragraph may be added to the Jury Instruction stating a product manufacturer may not avoid its obligation to design safe products by relying on other persons to make design choices that will affect the safety of the product.
The third element of a negligent design claim is causation. The plaintiff must show that there is a causal link between the alleged defect and the injury, regardless of whether the action is based on negligence or strict liability. See, Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982).

Causation is defined in CIV JIG 75.50 as follows:

**Definition of “direct cause”**

A “direct cause” is a cause that had a substantial part in bringing about the (collision) (accident) (event) (harm) (injury).


In Rients, 346 N.W.2d 359, the court was faced with determining whether the accident was directly caused by a defect as the plaintiff claimed. The plaintiff was driving a tractor when a tie-rod pin jumped out of the front axle. The right wheel fell off and plaintiff lost control of the tractor. Upon examination of the tractor, it was proven that numerous modifications and repairs had been made to the front axle, the brakes were worn, the steering gear arm broke at a weld, the tie-rod and steering knuckles were bent. The plaintiff introduced an expert's opinion that the axle was defective because a cotter key was used in the design to hold the tie-rod pin where allegedly safer designs existed. Id. at 362. Based on the multitude of other problems with the tractor, the court held it would be sheer speculation for a jury to find that the design defect alleged by plaintiff caused the accident rather than any other of these problems. Id. A plaintiff's claim must arise from the product or its preparation, container or packaging. Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984). However, it should be noted that the method used to secure a load or product for shipment is not part of the package for product liability purposes. Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co., 493 N.W.2d 146, 149 (Minn. App. 1992).

Obviousness of the danger is also a factor in assessing liability. The obviousness of the danger is used to examine the issue of whether the plaintiff exercised the degree of reasonable care as was required under the circumstances. Holm, 324 N.W.2d at 212.

2. **Negligent Manufacture Claims**

Under this theory, a plaintiff alleges that a product has emerged from the manufacturer that is different and more dangerous than if the product was
made properly. Essentially, the defect occurs sometime after the design stage and may occur at the machining, assembly, inspection, packaging or testing stages. CIV JIG 75.35 reads as follows:

LIABILITY OF MANUFACTURER OR SELLER OF GOODS-NEGLIGENCE

Duty of the manufacturer or seller to use reasonable care

A (manufacturer) (seller) of a product has a duty to use reasonable care to protect (people who are) (property that is) likely to be exposed to unreasonable risk of harm.

A (manufacturer) (seller) must use reasonable care in the (manufacture) (assembly) (inspection) (packaging) (testing) of the product to protect (users or consumers) (users’ or consumers’ property).

“Reasonable care” is the care a reasonable person would use under the same or similar circumstances.

[A manufacturer must keep up with scientific knowledge and advances in the field. You should judge whether the manufacturer used reasonable care in the light of that duty.]

CIV JIG 75.35, pp. 137-139. See also, Heise v. J. R. Clark Co., 245 Minn. 179, 71 N.W.2d 818 (Minn. 1955); Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (Minn. 1956); Rosin v. International Harvester Co., 262 Minn. 445, 115 N.W.2d 50 (Minn. 1962).

This duty of reasonable care in manufacturing the product coexists with the manufacturer's duty regarding the product's design.

Note that a manufacturer is not relieved of any duty that he may have had because a third party had a duty to inspect the article before delivery. See, Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 624-25 (Minn. 1984); Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977). This concept does not mean that the manufacturer is automatically liable for negligence created farther down the chain of distribution. It simply means that the manufacturer must always establish that he did not breach the duty to inspect. Schweich v. Ziegler, Inc., 463 N.W.2d 722 (Minn. 1990).

A party asserting a negligent manufacturing claim must prove that the negligence was the cause of his injury just as in a negligent design case. This causation issue also is a question for a jury to decide. See, CIV JIG 75.50; Rients v. International Harvester Co., 346 N.W.2d 359, 362 (Minn. App. 1984). Absent proof of causation, there will be no negligent
manufacturing. Of the two negligence claims, plaintiffs rarely plead or go to a jury on a claim of manufacturing defect.

3. **Negligent Entrustment**

Minnesota recognizes the tort of negligent entrustment. *See*, *Ruth v. Hutchinson Gas Co.*, 209 Minn. 248, 296 N.W. 136 (Minn. 1941). Negligent entrustment has also been recognized in the Restatement (Second) of Torts §390 (1977), which states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to be endangered by its use, is subject to liability for physical harm resulting to them.

The negligence in entrusting a chattel to someone who is incompetent creates only the potential for liability on the part of the supplier. Comment c, Restatement (Second) of Torts § 390. In order for liability to attach to the negligent entruster, the entruster's negligence must be accompanied by negligence on the part of the entrustee. In other words, the negligence of the supplier of the chattel must be found to be the "legal cause" of the bodily harm.

In *Axelson v. Williamson*, 324 N.W.2d 241 (Minn. 1982), the court discussed the issue of proximate cause when reviewing a plaintiff's verdict in a wrongful death action involving a one-car accident. The supreme court upheld the verdict, first finding that the jury properly determined that the defendant negligently allowed a 15 year old to drive an automobile vehicle knowing she did not have a license or even a learner's permit. *Id.* at 242. The defendant's liability was based on the ability to foresee that the fifteen year old would operate the car negligently. *Id.* at 245.

The *Axelson* court then upheld the jury's determination that the negligence of the owner in loaning the vehicle continued to the time the fifteen-year-old operator drove negligently and combined with her negligence to cause her death. *Id.* at 242. In response to the defense argument that the driver's negligent was a superseding/intervening cause, the court disagreed and noted that:

Any possible break in the causal chain between [the defendant's] and [the plaintiff's] negligence must arise from an intervening, superseding cause. There is no indication in the record that anything other than the decedent's lack of skill caused the car to leave the road and crash.
Negligent entrustment claims could arise where a design or manufacturing defect is asserted against a manufacturer of a power tool or machinery and that machinery or tool is entrusted by its owner to another.

In such cases, the causal fault of the entruster, the entrustee, the manufacturer and the plaintiff all may need to be considered when determining all the causal fault that caused a given accident.

4. **Bailments**

The new Jury Instruction Guide has a section that expressly deals with bailments. It reads as follows:

**BAILMENTS**

**The duty of a person providing or leasing an article**

A person (providing) (leasing) an article for pay must use reasonable care to make sure that the article is safe when the article:

1. Is used as intended, or
2. Is used in a way that could reasonably have been anticipated.

To be safe, the article must be free from:

1. Defects that the (provider) (lessor) knew about, or
2. Defects that he or she would have known about if he or she had done a reasonable inspection of the article, or
3. Defects that could have been eliminated by reasonable (preparation) (repair) of the article.

“Reasonable care” is the care you would expect a reasonable person to use in the same or similar circumstances.


A bailment is a legal relationship arising upon the delivery of goods without transferring ownership with the express or implied agreement that the goods
will be returned. Wallinga v. Johnson, 269 Minn. 436, 131 N.W.2d 216, 218 (Minn. 1964). Colwell v. Metropolitan Airports Com'n, Inc., 386 N.W.2d 246, 247 (Minn. App. 1986); Clark v. Rental Equipment Co., Inc., 300 Minn. 420, 220 N.W.2d 507 (Minn. 1974). The bailee's duty to return to goods includes a duty to "exercise the degree of care which the nature of the bailment would require from ordinarily prudent persons." Central Mut. Ins. Co. v. Whetstone, 249 Minn. 334, 81 N.W.2d 849, 851 (Minn. 1957); Production Credit Ass'n of St. Cloud v. Fitzpatrick, 385 N.W.2d 410, 412 (Minn. App. 1986). A plaintiff asserting negligence would have to demonstrate, as well as prove, that the defendant somehow breached that duty of reasonable care, damages and causation between the breach and injury suffered. Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380 (Minn.Ct.App. 2004), rev. denied August 25, 2004.

The United States Court of Appeals, for the 8th Circuit, thought the Minnesota Supreme Court would apply strict products liability to lessors of equipment. Wagner v. International Harvester Co., 611 F.2d 224, 232 n.10 (8th Cir. 1979). However, the Minnesota Supreme Court has never applied strict products liability to lessors of equipment. Clark v. Rental Equipment Co., Inc., 300 Minn. 420, 220 N.W.2d 507, 511 (Minn. 1974); Wegscheider v. Plastics, Inc., 289 N.W.2d 167, 170 (Minn. 1980).

B. Strict Liability Claims

Strict liability, also known as liability without fault, was originally developed as a cause of action to protect parties from "ultrahazardous" conditions or activities. In product liability cases, a plaintiff need not show that the supplier or manufacturer was negligent; they need only prove that the product was "unreasonably dangerous."

Note that strict liability claims may only be valid when the defendant is a manufacturer or has done the following:

1. exercised some significant control over the product,

2. actual knowledge of the defect, or

3. created the defect.

Minn. Stat. §544.41. (See, infra, Defenses, Middleman Statute). While never directly addressed in Minnesota, this statute may be specifically relevant to seller's of used goods as protection from strict liability claims. For example, Wynia v. Richard-Ewing Equipment Co., Inc., 17 F.3d 1084 (8th Cir. 1994) (applying South Dakota law); Harber v. Altec Industries, Inc., 5 F.3d 339 (8th Cir. 1993) (applying Missouri law); Burrows v. Follett and Leach, Inc., 340 N.W.2d 485 (Wis. 1983) (applying Wisconsin law).

Just as two forms of negligence claims exist, courts generally recognize strict liability claims for Defective Design and Defective Manufacture.
1. **Defective Design Strict Liability Claims**

The initial standard for determining the existence of an unreasonably dangerous defect in strict liability was found in Restatement (Second) of Torts §402 A which stated:

a. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if:

   (1) The seller is engaged in the business of selling such a product, and

   (2) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

b. The rule stated in §(i) applies although:

   (1) The seller has exercised all possible care in the preparation and sale of his product, and

   (2) The user or consumer has not bought the product from or entered into any contractual relation with the seller.


To establish strict liability under the Restatement (Second) and under Minnesota law, a plaintiff must show:

   (1) That the defendant's product was in a defective condition unreasonably dangerous for its intended use;

   (2) The product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold;

   (3) That the defect was the proximate cause of the injuries sustained; and

   (4) Plaintiff must show that the injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff.

As stated earlier for design defect cases, negligence and strict liability theories have essentially merged under Minnesota Law. Under either action, the first element is to prove the existence of the defect and the unreasonably dangerous condition of the product. To make this determination, Minnesota the courts apply a reasonable care balancing test.

This balancing test was formally adopted in Bilotta v. Kelley Co., Inc., 346 N.W.2d 616 (Minn. 1984). The plaintiff in Bilotta was a 24 year old temporary worker who received permanent and severe brain damage when a forklift truck tipped over onto him at a warehouse loading dock. The product in question was a dock board used to bridge the gap between the loading dock and a truck bed. A major hazard facing the manufacturer was that the board might become separated from the truck, leaving no support on one side, while equipment and personnel were on board. The plaintiff claimed that there was a design defect in the dock board since the company offered an optional safety device which could have prevented the accident, had it been standard equipment.

Before the adaptation of the reasonable care balancing standard, the court used the "consumer expectation test" which focused on what the consumer knew and expected from a product in determining whether the manufacturer was strictly liable. Put another way, if a consumer does not expect certain performance from a product, lack of expectation that would mitigate against finding the manufacturer liable since the product performed as expected.

To change from the "consumer expectation" formula to the present "balancing" test, the Bilotta court cited the holding in Holm v. Sponco, 324 N.W.2d 207, 212, 35 A.L.R. 4th 848 (Minn. 1982), in which it adopted the "reasonable care balancing test." The court quoted the following language from Holm:

The manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended as well as unintended yet reasonably foreseeable use.

What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve a "balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of precaution which would be effective to avoid the harm."

Holm, 324 N.W.2d at 212, (quoting Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571 (N.Y. 1976)).

The Bilotta court agreed that a consumer expectation standard did not adequately reflect a manufacturer's duty of care in claims of defective
product design. *Id.* at 622. It is appropriate, the court stated, to focus on a product in a manufacturing flaw claim since there is an objective standard with which to compare the allegedly defective product, i.e., a flawless product. *Id.* In design defect cases, however, the manufacturer consciously chooses the design and the focus, said the court, needs to be on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors. *Id.*

The reasonable care balancing test examines a series of factors which include:

1. The usefulness and desirability of the product;
2. The availability of other and safer products to meet the same needs;
3. The likelihood of injury and its probable seriousness;
4. The obviousness of the danger (here the latent/patent distinction becomes merely a factor in the reasonable care balancing test);
5. Knowledge and normal public expectations of the danger (consumer expectation test is thus reduced to one factor in this analysis);
6. The avoidability of injury by care and use of the product, including the effect of instructions or warnings; and
7. The ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

*Holm v. Sponco*, 324 N.W.2d 207, 212, 35 (Minn. 1982)

The court in *Bilotta* assumed that manufacturers balanced these factors in designing products and that the jury should also weigh the same factors and decide whether the risk/utility balance struck by the manufacturer was reasonable.

The second element of strict liability defective design claims is that the product is not substantially changed when it reaches the user or consumer. “In such a case, the “defect” lies in a consciously chosen design.” *See* *Bilotta*, 346 N.W.2d at 622. It has been suggested that whether a product was substantially changed is a legal issue. “CIV JIG 75.15 recommends no instruction on that issue. If the issue arises, it should be submitted according to an appropriate special verdict question.” CIV JIG, p. 98.
The third element of strict liability defective design claims relates to direct causation and is the same as in the negligence actions. The party claiming injury must show that the alleged product's defective condition was a direct cause of the plaintiff's injury.

Finally, as in the negligent design claim, a party must establish that the product was used at the time of its accident, for its intended purposes or for an unintended yet foreseeable use. See, Drager v. Aluminum Corp., 495 N.W.2d 879, 882-84 (Minn. App. 1993).

2. Defective Manufacture Strict Liability Claims

The elements for strict liability claim based on defective manufacture are:

a. That the defendant's product was in a defective condition unreasonably dangerous for its intended use;

b. The product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold;

c. That the defect was the proximate cause of the injuries sustained; and

d. Plaintiff must show that the injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff.

Rients v. International Harvester Co., 346 N.W.2d 359 (Minn. App.1984); see, Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 623, n. 3 (Minn. 1984) (citing Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426, 432 (Minn. 1971)).

The Minnesota Supreme Court has noted that the consumer expectation test is well suited for manufacturing flaw cases because "an objective standard exists--the flawless product--by which the jury can measure the alleged defect." See, Bilotta v. Kelley Co., Inc., 346 N.W.2d 616, 622 (Minn. 1984). Thus, in cases involving manufacturing flaws, the conduct of the manufacturer is irrelevant. If the product is dangerous and defective because of a manufacturing flaw, and the product caused injury, the manufacturer is liable unless the plaintiff appreciated the danger, or grossly misused the product.

Of these four requirements, there is usually very little argument over the first condition, due to plaintiff's alleged injury. It is far more likely to have a dispute over the second element, whether the defect existed when the product left the defendant's control. Under this theory, a plaintiff is not arguing that the defendant was negligent but rather that there was an inconsistent manufacturing flaw. Therefore, the likely problem under this theory is that the product may have been used for a period of time before the
claim was brought. This time issue raises the issue of whether alteration, misuse or improper maintenance arose.

The final two elements, direct causation and normal use, are evaluated the same under the theory of defective manufacturing as they are under a defective design claim.

Where the theory of recovery is based on a manufacturing flaw, the following instruction should be given:

**MANUFACTURING DEFECTS**

**Deciding when a product is defective**

A product is in a defective condition unreasonably dangerous to (the ordinary user or consumer) (the ordinary user’s or consumer’s property) if he or she could not have anticipated the danger the product created.

In deciding if the danger could have been anticipated, assume the user or consumer had the knowledge common to the community about the product’s characteristics and common use.

The defect in the product may be caused by the way it was (manufactured) (assembled) (inspected) (packaged) (tested).

CIV JIG 75.30, pp. 135-36. This instruction would not appropriate for design defect, warnings or negligence cases.

3. **Entrustment Strict Liability Claims**

Wisconsin, unlike Minnesota, recognizes a claim based in strict liability against persons or entities who are in the business of leasing products to the general public. In *Kemp v. Miller*, 154 Wis.2d 538, 453 N.W.2d 872 (Wis. 1990), the supreme court held that a commercial lessor of consumer products could be sued in strict liability for damages resulting from a defective product if it neither manufactured nor sold.

The facts of *Kemp* focus on a woman who rented a Ford Tempo from Budget Rent-A-Car and was involved in a single car accident, allegedly due to the defective condition of the car. *Id.* The plaintiff sued Budget Rent-A-Car without joining Ford as a defendant. *Id.* Budget Rent-A-Car then brought Ford into the case on a third-party complaint for contribution or indemnification.
The court reviewed §402A of the Restatement (Second) of Torts and noted that a number of jurisdictions are beginning to allow plaintiffs to recover against commercial lessors, who are then able to pursue the manufacturers or other potentially responsible parties for contribution or indemnification. Kemp, 453 N.W.2d at 550. The court reviewed the seminal case of Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (N.J. 1965), where a strict liability claim was first applied to commercial lessors and found its reasoning persuasive. The Kemp court stated:

Like manufacturers and sellers, persons in the business of leasing continually introduce potentially dangerous instrumentalities into the stream of commerce. A commercial lessor is in a far better position than the lessee to distribute the cost of compensating product-related injuries by purchasing liability insurance and by adjusting the rent paid for the leased product to reflect this cost.

* * *

Further, by placing products into the stream of commerce and by advertising, the commercial lessor impliedly represents to the lessee that those products are safe for use during the term of the lease.

Kemp, 453 N.W.2d at 554-555.

The new Jury Instruction Guide does have a bailment jury instruction. Relying on the Restatement (Third) of Torts: Product Liability Section 20, it has been suggested that the Minnesota Courts ought to allow strict products liability claims to be asserted against lessors. CIV JIG 75.45, p. 147 and see 2006 Pocket Part at p. 21.

C. Failure to Warn Claims

The duty to warn has resulted in considerable litigation. There is an obligation to provide adequate warnings and instructions at the time the product is manufactured and sold and, under other circumstances, there may be a post-sale duty to warn. Failure to warn claims are a blend of strict liability and negligence according to the Minnesota Supreme Court. Where such claims are asserted it is recommended that the current Jury Instruction Guides be reviewed. CIV JIG 75.25, pp. 126-34 and see Pocket Part at pp. 13-14.

The duty to warn consists of the duty to give adequate instructions for safe use and the duty to warn of dangers inherent in the improper use of the product. See, Frey v. Montgomery Ward & Co., 258 N.W.2d 782 (Minn. 1977).

Generally, it is up to the court to determine whether the defendant manufacturer or supplier has a duty to warn. See, Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 925 (Minn. 1986). The standards for making that determination are as follows:
The court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseen, the courts then hold as a matter of law a duty exists.

Ibid. at 924.

In Bilotta, the Minnesota Supreme Court determined that in both design defect and failure to warn cases, the plaintiff could attempt to prove his case either through strict products liability or negligence, or both, but the plaintiff had to choose one and only one theory to submit to the jury. See, Bilotta, 346 N.W.2d at 622. The court attempted to distinguish between strict liability and negligence by stating that in strict liability cases, knowledge of the condition of the product and the risk involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be shown. Ibid.

That distinction, however, did not prove to be a workable one. Both the Minnesota Court of Appeals and the Minnesota Supreme Court have determined that an action based upon a failure to warn under strict liability is essentially a negligence action. See, Germann, 395 N.W.2d at 926 n. 4 and Willmar Poultry Co. v. Carus Chemical Co., 378 N.W.2d 830, 836-37 (Minn. App. 1985).

While formally maintaining a distinction between the two theories, the Minnesota Supreme Court has determined that a party asserting both negligent warning/instruction claim and a strict liability warning/instruction claim may plead both theories, but must select one theory for submission to the jury. Hauenstein v. Loctite Corp., 347 N.W.2d 272, 275 (Minn. 1984).

In the court's view, when a plaintiff brings a strict liability claim based on a failure to warn, knowledge of the dangerous condition and the risks related to it can be imputed to the manufacturer. In negligence cases, those elements must be proven. Bilotta, 346 N.W.2d at 622.

The proposed jury instruction for duty to warn claims is broken into two parts. The first part concerns whether the warnings or instructions that accompany the product made the product reasonably safe and the second concerns whether warnings should have been given.

The instructions read as follows:
THE DUTY TO WARN (STRCT LIABILITY AND NEGLIGENCE)

PART A

A manufacturer’s duty to provide adequate warnings and instructions

A manufacturer has a duty to provide reasonably adequate (warnings) (instructions) for its products to those who use the product when the product:

1. Is used as intended, or

2. Is used in a way that the manufacturer could reasonably have anticipated.

Adequate warning

A manufacturer must keep up with scientific knowledge and advances in the field.

A manufacturer’s duty to provide reasonably adequate (warnings) (instructions) must be judged according to the scientific knowledge and advances that existed at the time the product was designed.

In deciding whether the manufacturer’s (warnings) (instructions) were reasonably adequate, consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product

2. The seriousness of the harm that would result

3. The cost and ease of providing (warnings) (instructions) that would avoid the harm

4. Whether the (warnings) (instructions) are in a form the ordinary user could reasonably be expected to notice and understand

5. Whether the manufacturer considered the scientific knowledge and advances in the field
6. [Other factors].

A product that is not accompanied by reasonably adequate (warnings) (instructions) is unreasonably dangerous to whoever uses or is affected by the product.

The product must be reasonably safe for use if the (warnings) (instructions) are followed.

**PART B**

**Decide if warnings and instructions had to be provided**

A manufacturer has a duty to use reasonable care in deciding whether (to warn of dangers involved in using its product) (to provide instructions for safe use of the product).

**Reasonable care**

“Reasonable care” is the standard of care you would expect a reasonable person to follow in the same or similar circumstances.

You must decide if a manufacturer using reasonable care would have provided (warnings) (instructions) for the safe use of the product.

A manufacturer has a duty to keep up with scientific knowledge and advances in the field. This duty to provide reasonable (warnings) (instructions) must be judged according to the knowledge and advances that existed at the time the product was manufactured.

In deciding whether the manufacturer should have provided (warnings) (instructions), consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product

2. The seriousness of the harm that would result

3. The cost and ease of providing (warnings) (instructions) that would avoid the harm
4. Whether the manufacturer considered the scientific knowledge and advances in the field

5. [Other factors].

A product that is not accompanied by reasonably adequate (warnings) (instructions) is unreasonably dangerous to (whoever uses or is affected) (property placed at risk) by the product.

CIV JIG 75.25, pp. 126-34 and see Pocket Part at pp. 13-14.

A product is in an unreasonably dangerous or defective condition if the manufacturer or seller knew or reasonably could have discovered the problem. See, CIV JIG at 75.20, pp. 118-19. Note that a manufacturer must keep informed of scientific knowledge and discoveries in its field for this knowledge will be imputed as reasonably discoverable. Id. (citing Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975)).

Of course, a manufacturer has no duty to warn of non-existent dangers, or dangers that are obvious to everyone. Hart v. FMC Corp., 446 N.W.2d 194, 198 (Minn. App. 1989) (manufacturer under no duty to warn of environmental conditions in which the product was installed when it was not responsible for installation). See, also, Mix v. MTD Products, Inc., 393 N.W.2d 18 (Minn. App. 1986) (manufacturer under no duty to warn users not to reach under lawn mower while engine was running).


The court in Peppin v. W.H. Brady Co., 372 N.W.2d 369 (Minn. App. 1985), summarized the defense perspective in its observation:

There is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger.

The Peppin court then determined as a matter of law that there is no duty to warn that aluminum conducts electricity. Moreover, a great many courts have held that there is no duty to warn a knowledgeable user of a hazard of which he should be aware. See, Travelers Ins. Co. v. Federal Pacific Elec. Co., 211 A.D.2d 40, 625 N.Y.S.2d 121, (N.Y.A.D. 1 Dept. 1995).

To establish causation, a plaintiff arguing inadequacy of the warning must show plaintiff's reliance on that warning. J & W Enterprises, Inc. v. Economy Sales, Inc., 486 N.W.2d 179 (Minn. App. 1992). Reliance on the warning presupposes that the warning was read. Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1225 (8th Cir. 1981). For example, where plaintiff could not remember reading a warning on a fire extinguisher, he could not argue that the warning was inadequate. J & W Enterprises, 486 N.W.2d at 181. The court granted summary judgment for the defendant because plaintiff could not establish the causal link between the allegedly inadequate warning and the injury. Id. Yennie v. Dickey Consumer Products, Inc., 2000 WL 1052175 (Minn. Ct. App. 2000).

The Minnesota Appellate Courts have not adopted a rebuttable presumption that if adequate warnings were provided, the plaintiff would have needed them. See, Kallio v. Ford Motor Co., 407 N.W.2d 92, 99-100 (Minn. 1987). In Ramstad v. Lear Siegler Diversified Holdings Corp., 836 F.Supp. 1511, 1516 (D. Minn. 1993), the court concluded that Minnesota state courts would not adopt such a presumption. Thus, in Minnesota, to prove a failure to warn claim, a plaintiff must present evidence establishing that the proposed warning would have been read, relied upon, and prevented the claimed injury. Young v. Pollock Engineering Group, Inc., 428 F.3d 286 (8th Cir. 2005).

D. Post-Sale Duty to Warn

Under certain circumstances, there may be a post-sale duty to warn. The proposed jury instruction reads as follows:

**MANUFACTURER'S DUTY TO PROVIDE POST-SALE WARNINGS**

Duty of a manufacturer to provide post-sale warnings

A manufacturer has a duty to use reasonable care to provide post-sale warnings of product dangers to (persons who) (property that) may be exposed to harm when the product:

1. Is used as intended, or

2. Is used in a way that the manufacturer could have reasonably anticipated.

Deciding if the manufacturer used reasonable care

“Reasonable care” is the care a reasonable person would use under the same or similar circumstances.

You must decide if a manufacturer using reasonable care would have provided post-sale (warnings) (instructions) for the safe use of the product.
A manufacturer must keep up with scientific knowledge and advances in the field. The duty to use reasonable care to provide post-sale (warnings) (instructions) must be judged by the scientific knowledge and advances reasonably available between the time the product was manufactured and the date of the injury.

In deciding whether the manufacturer should have provided post-sale (warnings) (instructions), consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product
2. The seriousness of the harm that would result
3. The costs and ease of providing post-sale (warnings) (instructions) that would avoid the harm
4. Whether the manufacturer considered scientific knowledge and advances in the field.

CIV JIG 75.40, pp. 140-41.

Under special circumstances, a post-sale duty to warn exists. In Hodder v. Goodyear Tire & Rubber Company, 426 N.W.2d 826 (Minn. 1988), the Minnesota Supreme Court recognized a post-sale duty to warn based on the manufacturer's knowledge that the product was dangerous, that the manufacturer continued in the same line of business after gaining that knowledge, continued to advertise the product and undertook a duty to warn concerning the product's dangers.

However, in Ramstad v. Lear Siegler Diversified Holdings Corp., 836 F.Supp. 1511, 1517 (D. Minn. 1993), the court concluded that there was no post-sale duty to warn under the circumstances of an absence of a significant history of prior accidents, an obvious danger known to users, no pre-sale warnings, and the manufacturer's implementation of a new design.

In McDaniel v. Bieffe USA, Inc., 35 F.Supp. 2d 735 (D. Minn. 1999), the United States District Court for the District of Minnesota had before it negligence, strict liability, breach of express and implied warranty and post-sale duty to warn claims before it. Very briefly, in this wrongful death action, the plaintiff alleged that the retention system on a motorcycle helmet was defective allowing the helmet to come off during impact and to cause a fatal head injury. 35 F. Supp. 2d at 736.
After the helmet had been sold to the decedent, a non-profit corporation that researches and tests helmets advised the manufacturer that this helmet’s Velcro strip may induce users to attach the chin strap improperly. *Id.*

As a result of the not-for-profit corporation’s research, it no longer certified the Bieffe helmets with Velcro on chin straps.

The county medical examiner testified that he performed an autopsy and that the decedent did not have a helmet on at the time his death causing injuries were sustained. The coroner further testified that a helmet would have prevented the injuries that resulted in death.

The United States District Court noted that the plaintiff’s burden was to “Prove that the defect probably, more likely than not, caused the injury.” 35 F. Supp. 2d at 739. While there could have been other possible causes of death, the medical testimony indicated that the “More probably cause, was the head injury that could have been prevented had the decedent had the helmet on.” 35 F. Supp. 2d at 739.

The next issue in *McDaniel* concerned whether the helmet manufacturer had a post-sale duty to warn about hazards that could be encountered with the use of the helmet. The United States District Court in *McDaniel* talked about what factors are determinative in deciding whether to impose a post-sale duty to warn and noted that “Continued service, communication with purchasers, or the assumption of a duty to update purchasers is a necessary element in determining whether a post-sale duty to warn attaches.” 35 F. Supp. 2d at 741.

The court in *McDaniel* rendered the following guidance on post-sales duty to warn:

> When a manufacturer of a mass produced, widely distributed product becomes aware that there is a danger associated with the product creating a risk of serious injury or death, the manufacturer may have a duty to take reasonable steps to notify users of that danger. It would be unreasonable to require such a manufacturer to track down every purchaser and user. It may be appropriate in certain circumstances, however, to require a manufacturer to take the steps that are reasonable under the circumstances to disseminate widely notice of the danger. What constitutes reasonable notice is a question of fact. 35 F. Supp. 2d at 742.

Even if there is a post-sale duty to warn, there remained a question of causation.

The next issue concerned a duty to recall. In this regard, the *McDaniel* court ruled as follows:

> While no Minnesota court has addressed this issue directly, this court is convinced that Minnesota would refuse to impose a duty on manufacturers to recall and/or retrofit a defective product because the overwhelming majority of other jurisdictions have
rejected such an obligation.

35 F. Supp. 2d at 743.

E. Breach of Warranty Claims

Besides the usual tort claims, a plaintiff in a products liability action may plead claims based on breach of warranty. There are two basic types of warranties: implied warranties and express warranties. To establish a warranty claim, the plaintiff must prove: 1) the existence of a warranty, 2) a breach, and 3) a causal link between the breach and the alleged harm. See, Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50, 52-53 (Minn. 1982).

Despite their similarities, claims for breach of warranty and those for negligence are separate and distinct: a breach of warranty claim does not require the plaintiff to prove that the manufacturer's actions were deficient in any way. See, Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (Minn. 1971).

The Jury Instruction Guide has all of the proposed jury instructions and some comments and authorities on warranty claims. CIV JIG 22.10 through 22.92, pp. 81-116.

It is important to remember that even though warranty remedies are based on a contract, there need not be privity between the plaintiff and defendant. What this means is the warranty runs with the good (product) and not necessarily with the buyer. Minn. Stat. §336.2-318 states:

A seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.

Implied warranties may be disclaimed or excluded by a prominent disclaimer. In Dubbe v. A.O. Smith Harvestore Products, Inc., 399 N.W.2d 644 (Minn. App.1987), a disclaimer clause was upheld because it was prominent, the buyer stated that he had read the disclaimer section and indicated he was aware of the implications of the disclaimer.


1. Implied Warranty of Merchantability

Implied warranties are imposed by law for the protection of the buyer and arise independent of the contract. They are essentially an equity-based doctrine favored by the courts. See, Asbestos Products, Inc. v. Ryan Landscape Supply Co., 163 N.W.2d 767 (Minn. 1968); Moosbrugger v. McGraw-Edison Co., 284 Minn. 143, 157, 170 N.W.2d 72, 80 (Minn. 1969); In re Shigellosis Litigation, 647 N.W.2d 1, 11-12 (Minn. Ct. App. 2002).
An implied warranty of merchantability is defined as requiring that goods be fit for the ordinary purposes for which such goods are used. See, Minn. Stat. §336.2-314 (2)(c) 1980. This claim supports the policy that when a merchant who deals in a certain kind of good sells such goods, there is an implied warranty that they are merchantable.

"Merchantable" means that the goods are of a quality equal to that generally acceptable among those who deal in similar goods and are generally fit for the ordinary purposes for which such goods are used. See, Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50, 53 (Minn. 1982).

Implied warranty provisions do not apply to the sale of services. LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342, 346 n. 6 (8th Cir. 1981).

Courts will use a "predominant factor" test to determine whether a transaction was a sale of goods. Valley Farmers' Elevator v. Lindsay Bros. Co., 398 N.W.2d 553 (Minn. 1987) overruled on other grounds by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990). See, also, McCarthy Well Co., Inc. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987).

To prove a breach of an implied warranty of merchantability, a plaintiff must show that the product is defective, and that the plaintiff is a normal buyer making ordinary use of the product. See, Peterson v. Bendix Home Systems, Inc., 318 N.W.2d at 53. Conversely, these requirements highlight the applicable defenses to the implied warranty claim. The goal of the defendant is to show that the buyer was somehow abnormal or used the product in a non-ordinary way.

A breach of implied warranty of merchantability may occur even if the merchant is unaware of the defect as shown in Christenson v. Milde, 402 N.W.2d 610 (Minn. App. 1987). There the defendant building contractor was found liable for supplying a defective waterproofing agent. The court found that because defendant never checked the waterproofing agent, and the house leaked, a jury could find that the product was clearly not fit for the ordinary purpose of waterproofing. Id. at 613.

Note that the implied warranty of merchantability merges with the theory of strict liability when both are pled because of the common elements of proof.

The Introductory Note concerning Warranty in the Jury Instruction Guides talks about the need to not give warranty instructions where the claim lies in strict products liability. The Introductory Note reads as follows:

Implied warranty of merchantability theory is merged with strict liability and negligence into a single theory of recovery. Piotrowski v. Southworth Products Corp., 15 F.3d 748 (8th Cir. 1994) (citing Westbrock v. Marshalltown Mfg. Co., 473 N.W.2d 352, 356 (Minn. App. 1991); Gross on Behalf of
and noting that those cases cited *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616 (Minn. 1984) for the merger proposition, even though *Bilotta* did not specifically hold that implied warranty theory was merged with strict liability and negligence. However, in cases where the plaintiff in a products liability case asserts products liability theories of recovery, whether the plaintiff’s theory of defect is design defect, inadequate warnings, or manufacturing flaw, the plaintiff is entitled in an appropriate case to also assert theories of recovery based on express warranty or implied warranty of fitness for a particular purpose. Those theories rely on statements or representations made by the seller. Those theories are not preempted by products liability theory.

CIV JIG 75.25, pp. 126-134 and see Pocket Part at pp. 13-19

Therefore, it is not appropriate to provide the jury with instructions on strict liability and negligence and also implied warranty of merchantability. The facts of the case will dictate which instructions should be provided.

2. **Implied Warranty of Fitness For A Particular Purpose**

Minnesota has adopted the implied warranty of fitness for a particular purpose provision of the Uniform Commercial Code. *See*, Minn. Stat. §336.2-315. This statute is embodied in CIV JIG 22.35 which states:

**IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE**

Definition of “Implied warranty of fitness for a particular purpose”

There is an implied warranty that the goods are fit for a particular purpose if, at the time of the sale:

1. The seller knew or had reason to know the particular purpose of the goods were being used for,

2. The seller knew or had reason to know the buyer would rely on the seller’s skill and judgment in selecting or providing goods suitable for that purpose, and

3. The buyer relied on the seller’s skill or judgment in
selecting or providing goods suitable for that purpose.

CIV JIG 22.35, pp. 95-97.

The first element requires the plaintiff to show that defendant had reason to know of plaintiff's particular purpose. It is not necessary that the buyer expressly tell the seller what his particular purpose is. The seller's knowledge of a buyer's needs can be inferred from the circumstances surrounding the transaction. Willmar Cookie Co. v. Pippin Pecan Co., 357 N.W.2d 111 (Minn. App. 1984).

Once the existence of an implied warranty of fitness is proven, a plaintiff must still show that the warranty was breached and, secondly, that the breach had a substantial part in bringing about the plaintiff's harm.

Secondly, the plaintiff must be able to show that he relied on the warranty of the buyer. For example, in an action by a buyer of pecans, a jury can infer reliance of the buyer on the seller's skill or judgment from the fact that the buyer had previously received, approved and processed shipments of pecans from the seller. Willmar Cookie Co., 357 N.W.2d 111.

The last requirement entails the buyer's actual reliance on the seller's skill or judgment as evidenced by the transaction being processed.

A potential defense for defeating an implied warranty of particular fitness claim exists when the buyer insists on a particular brand. However, if the buyer insists on a particular brand or trade name, the warranty may still exist if the article had been recommended by the seller as adequate for the buyer's purposes. See, Uniform Commercial Code §2-315, Comment 5.

This cause of action remains independent of strict liability unlike the implied warranty of merchantability. The implied warranty of fitness is treated much like an express warranty because it addresses "the particular purpose for which goods are required." Piotrowski v. Southworth Products Corp., 15 F.3d at 751 (citing Minn. Stat. §336.2-315).

3. Express Warranty

Minnesota Statute §336.2-313 states that an express warranty may be created by:

(a) Any affirmation of fact or promise made by the seller to the buyer, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise;
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description; and

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

The buyer need only establish that the affirmation of fact, promise, description, sample, or model is part of the basis of the bargain. There is no requirement that it be the central aspect of the bargain. Minn. Stat. §336.2-313.

Express warranties are addressed in CIV JIG 22.10, which states:

**EXPRESS WARRANTY**

**Proof of express warranty by affirmation or promise**

An express warranty by affirmation is created if:

1. The seller makes an affirmation of fact or promise to a buyer, and

2. The affirmation or promise relates to the goods, and

3. The affirmation or promise becomes part of the basis for the bargain.

**Definition of “affirmation”**

An “affirmation of fact” is a statement of facts relating to the subject matter of the sale.

**Basis of the bargain**

A statement of facts or promise is part of the “basis of the bargain” if it played a part in the agreement between the seller and the buyer.

**Effect of the express warranty by affirmation or promise**

With the express warranty by affirmation or promise, the seller warrants to the buyer that the goods will conform to the affirmation or promise.
This instruction contains any number of potential fact situations and can be modified to fit those situations.

Therefore, in order to present a claim for breach of warranty, a plaintiff must show a warranty, that the product did not conform to the express representations concerning the product, and that a causal link exists between the defective product and plaintiff's injury.

Exclusive express warranties provided at the time of the sale may be used to exclude implied warranties. Barclays American/Business Credit, Inc. v. Cargill, Inc., 380 N.W.2d 590 (Minn. App. 1986). Finally, express contractual warranties may be modified by the actions of the seller. In Mattson v. Rochester Silo, Inc., 397 N.W.2d 909 (Minn. App. 1986), the plaintiff farmer bought a concrete silo from the defendant where the contract included an express warranty excluding incidental and consequential damages. After a season, plaintiff complained to defendant of excessive spoilage. Two years after the sale defendant coated the inside of plaintiff's silo with plastrete, a sealing material, for no charge. Id. at 915. The court found that by furnishing an item not ordered, defendant had modified the provision that excluded liability for spoilage and consequential and incidental loss. Id.
II. DEFENSES

The following section deals with strategies used by the defense to remove or restrict liability depending upon the individual case. It is important to develop a strong understanding of the facts as early as possible so that a pertinent defense is not lost and before the expenses of discovery grow.

A. Statutory Defenses Common to All Products Liability Cases

The applicability of the following two defenses, Statute of Limitations and Notice of Possible Claims, should be analyzed for every products liability suit. These defenses are statutory creations which require plaintiff to perform certain actions within a definite time frame.

1. Statute of Limitations

The first defense to look at is whether the action began within the statute of limitations. This time limit, created by statute, requires a plaintiff to bring an action within a certain period or else be barred from ever commencing suit. For example, under Minnesota law, a plaintiff must file suit for personal injuries on claims of negligence, fraud and misrepresentation within six years after the claim accrues. See, Minn. Stat. §541.05, subd. 1. Statutes of limitations extinguish rights to commence actions and create rights to claim that actions are time-based.


a. Negligence Claims – Six Years

For claims based on negligence, the statute begins to run when a plaintiff has suffered some damage as a result of the alleged negligence. In Hildebrandt v. Allied Corp., 839 F.2d 396, 398 (8th Cir. 1987), the court held that a claim involving personal injuries caused by a defective product accrues when two elements are present: 1) A cognizable physical manifestation of the disease or injury, and 2) evidence of a causal connection between the injury or disease and the defendant's product, act or omission. Plaintiff then has six years to commence the action. Minn. Stat. §541.05, subd. 1. Tuttle v. Lorillard Tobacco Company, 377 F.3d 917 (8th Cir. 2004).
b. **Strict Liability Claims – Four Years**

If plaintiff makes a claim based on strict liability arising out of the "manufacture, sale, use or consumption of a product," the action must commence within four years. Minn. Stat. §541.05, subd. 2.

c. **Warranty Claims – Four Years**

When plaintiff's cause of action is based on a breach of warranty, then Minn. Stat. §336.2-725 controls the statute of limitations. Under the statute, a party has four years to commence the action. The time limit may be reduced to not less than one year if the parties agree. A breach of warranty occurs, "when tender of delivery is made." Minn. Stat. §336.2-725 (2). This is a substantial difference compared with the accrual under a negligence cause of action. Here, the cause accrues when the product is purchased regardless of whether the plaintiff is aware of the defect.

In most situations, the breach will have occurred at the time of delivery. For a cause of action based on breach of warranty to exist after delivery, there must be an explicit warranty relating to future performance. Because the majority of contracts do not contain such language, the normal statute will begin running at the time of delivery.

The four year time limit may be increased or tolled if certain facts exist. The statute of limitations may extend longer than four years when; 1) the defendant makes a representation of future action that will remedy the situation, 2) the plaintiff relies on that representation, and 3) the plaintiff will be harmed if estoppel is not invoked. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6-7 (Minn. 1992); overruled on other grounds, Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000).

In Marvin Lumber and Cedar Company v. PPG Industries, Inc., 223 F.3d 873 (8th Cir. 2000) the United States Court of Appeals for the Eighth Circuit considered a number of claims and whether they were controlled by the Uniform Commercial Code.

For several years, Marvin treated its wood products with Penta but starting in the 1970’s, Marvin started to use a product called PILT. Marvin claimed that the PILT did not meet its expectations in preventing wood rot and deterioration in Marvin’s wood doors and wood windows. It sued the manufacturer of PILT, PPG. 223 F.3d at 875.

The decision thoroughly explores the Uniform Commercial Code and the law as it concerns fraudulent concealment and other issues. In part the decision states as follows:
The Uniform Commercial Code (UCC), adopted in Minnesota establishes that Article II, Contract Claims must be brought within four years of their accrual [Citations omitted]. Ordinary warranty claims generally accrue upon tender of delivery [Citations omitted].

223 F.3d at 876.

There are two ways to get around the four year limitation statute. One is to prove fraudulent concealment of a breach or that the supplier of the goods expressly warranted the future performance of the goods. *Id.*

The Eighth Circuit concluded that there were fact questions as to the existence of a warranty for future performance and that there were fact questions as to whether Marvin’s claims of that breach of the warranty were timely under the limitation statute. 223 F.3d at 881-82.

The Eighth Circuit then turned to the Economic Loss Doctrine. The Eighth Circuit dealt with the economic loss doctrine as it existed before the 1991 legislative changes. The Economic Loss Doctrine “precludes a commercial purchaser of a product from recovering economic damages through at least some tort actions against the manufacturer or seller of a product.” 223 F.3d at 882.

Given the Economic Loss Doctrine, the Eighth Circuit dismissed Marvin’s negligence and strict liability claims. The question remaining was whether the intentional fraud and misrepresentation claims should also be dismissed. 223 F.3d at 884.

Ultimately, the Eighth Circuit found that Marvin’s general fraud claim is redundant of its warranty claims and would not support an independent tort (for intentional misrepresentation or fraud) in light of the Economic Loss Doctrine. Hence, the Eighth Circuit held that “Such an independent fraudulent concealment claim will not lie where the fraudulent concealment relates to a promisor’s duties under the contract.” 223 F.3d at 887.

In addition to the UCC claims and the tort claims, Marvin asserted claims under three different Minnesota statutes for unlawful trade practices and false advertising. Ultimately, the Eighth Circuit held that those statutes would not apply to a sophisticated merchant such as Marvin Windows. 223 F.3d at 887-88.
d. Wrongful Death Claims – Three Years

If plaintiff brings an action for wrongful death, the statute of limitations is dictated by Minn. Stat. §573.02. The statute provides that actions for wrongful death must be commenced within three years after the date of death and no more than six years after the act or omission which allegedly caused the death. The statute also requires that all wrongful death actions may only be pursued by a duly appointed trustee. Thus, both the appointment of the trustee and the commencement of the wrongful death action must necessarily take place prior to the expiration of the statute's limitations period. Regie de l'assurance Automobile du Quebec v. Jensen, 399 N.W.2d 85 (Minn. 1987). Under the hierarchical statutory system, the four year wrongful death action statute takes precedent over the general statute of limitations based on negligence, strict liability or breach of warranty theories. The general rule is that the more specific statute controls. See, Minn. Stat. §645.26, subd. 1.

e. Improvements to Real Property – Two Years

The last specific topic under the statute of limitations law deals with causes of action related to the improvements to real property. Minn. Stat. §541.051 encompasses actions brought based on contract and tort where the action arose from defective or an unsafe condition to an improvement to real property. Under this statute, the action must be initiated within two years of discovery of the injury and no more than ten years after substantial completion of the construction. Id.

First, to apply this statute, the court must determine what exactly constitutes an improvement to real property. The court has defined an improvement to real property as:

A permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

See, Kloster-Madsen, Inc. v. Tafi's, Inc., 226 N.W.2d 603, 607 (Minn. 1975). The Supreme Court tries to follow a common sense approach in determining what is an improvement to real property. See, Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977), superseded by statute as stated in O'Brien v. U.O.P., Inc., 701 F.Supp. 714 (D.Minn. 1988). However, the Minnesota state appellate and federal courts' interpretations of what constitutes an improvement to real property for purposes of the application of this statute of limitations/statute of repose do not always appear to be consistent. For example, an overhead rail crane in a production building at a mining facility was found to be an
improvement to real property. Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988). However, a steel tube mill in a metal tube manufacturing plant was found not to constitute an improvement to real property. Ritter v. Abbey-Etna Machine Co., 483 N.W.2d 91 (Minn. App. 1992). A generator at an electrical power plant was found to be an improvement to real property, Hartford Fire Insurance Co. v. Westinghouse Electric Corp., 450 N.W.2d 183 (Minn. App. 1990), but an electrical utility company's distribution equipment was found not to be an improvement to real property. Johnson v. Steele-Waseca Co-op. Electric, 469 N.W.2d 517 (Minn. App. 1991). Removable pipes covering a grain auger were found to constitute an improvement to real property, Farmham v. Nasby Agri-Systems, Inc., 437 N.W.2d 759 (Minn. App. 1989), but a water slide designed to be removed for winter storage was found not to constitute an improvement to real property. Massie v. City of Duluth, 425 N.W.2d 858 (Minn. App. 1988). The following are additional examples of items found to be improvements to real property:

- Garage door opener [Henry v. Raynor Mfg Co., 753 F. Supp. 278 (D. Minn. 1990)]; and

In 1990, the Minnesota Legislature amended Minn. Stat. §541.051 to exclude the manufacturer or supplier of any "equipment or machinery installed upon real property." The goal here was to return the statute to its original intent which was to eliminate suits against architects, designers and contractors. See, Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988).

As a final note, the Middleman Statute, Minn. Stat. §544.41, (discussed in Section II, Defenses), which limits the liability of non-manufacturers, contains language affecting the statute of limitations:

The commencement of a products liability action based in whole or in part on strict liability in tort
against a certifying defendant shall toll the applicable statute of limitation relative to the defendant for purposes of asserting a strict liability in tort action.

Minn. Stat. §544.41.

2. Notice of Claim

a. General Claims

For claims of damage arising out of personal injury, death or property damage based on the manufacture, sale, use or consumption of a product, plaintiff's attorney must give notice of the relief sought within six months of entering into the attorney/client relationship. Minn. Stat. §604.04, subd. 1. (See, Appendix 1). This notice must be given to all likely defendants. Id. Note that the plaintiff is not responsible for tracking down every party in the chain of distribution. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6 (Minn. 1992); overruled by Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000). Those defendants receiving notice must advise plaintiff of the identity of others in the chain. Violation of this statute, by either side, may result in a recovery of damages and attorneys' fees. Minn. Stat. §604.04, subd. 3. Smothers v. Insurance Restoration Specialist, Inc., 2005 WL 624511 (Minn. Ct. App. 2005).

b. Breach of Warranty Claims

Similarly, in order to assert a claim for breach of warranty, a plaintiff must notify the seller of the breach within a reasonable time after the breach is, or should have been, discovered. Minn. Stat. §336.2-607 (3). While notice within two months of delivery may be reasonable, notice six months after discovery of the defect is not. See, Stewart v. B.R. Menzel & Co., 232 N.W. 522 (Minn. 1930), Willmar Cookie Co. v. Pippen Pecan Co., 357 N.W.2d 111 (Minn. App. 1984). Further, note that oral notification is sufficient to satisfy the statute. Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 6 (Minn. 1992); overruled by Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000). Unlike the notice requirement for product liability claims, violation of Minn. Stat. §336.2-607 (3) bars a buyer from any remedies.

3. Conflict-of-Laws Issues

a. Statutes of Limitations Periods – Procedural or Substantive?

Traditionally, when faced with conflicting statutes of limitations laws between Minnesota and other states, Minnesota courts have held that statute of limitations issues are procedural in nature, and therefore apply the law of the forum state. See In re Daniel’s
However, there are some exceptions to the foregoing traditional view that statutes of limitations issues are procedural. A limitation period is substantive when it applies to a right created by statute, as opposed to a right recognized at common law. Fredin v. Sharp, 176 F.R.D. 304, 308-09 (D.Minn.1997) (citing In re Daniel’s Estate, 294 N.W. at 470 (Minn. 1940). Where the limitation period is from the statute creating the right, the limitation period is a condition of the right rather than as an actual statute of limitations. Id.

The aforementioned traditional approach has not existed without some ambiguity, however. Since 1974, there has been a trend within Minnesota courts to treat statute of limitations issues, within the conflict of laws context, as substantive, and therefore evaluate those issues according to the “choice-influencing consideration” approach. See Myers v. Gov’t Employees Ins. Co., 225 N.W.2d 238, 241 (1974) (applying the choice-influencing approach to evaluating the statute of limitations conflicts of laws); Davis v. Furlong, 328 N.W.2d 150, 153 (Minn.1983) (holding statute of limitations issues are procedural, but referencing Myers in a footnote); and Danielson v. Nat’l. Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003) (treating statute of limitations conflict as substantive and therefore analyzing under the “choice-influencing consideration” approach).

This modern trend to view limitation periods as substantive, and therefore analyzing the conflict of laws issue with the “choice-influencing consideration” approach, has most recently been articulated by the Minnesota Court of Appeals in Danielson v. Nat’l. Supply Co., 670 N.W.2d 1 (Minn. Ct. App. 2003).


In Danielson, the Court of Appeals departed from the traditional Minnesota courts’ decisions that statute of limitations issues, in a choice-of-laws context, are procedural and therefore the law of the forum state applies. Utilizing a “choice-influencing consideration” approach, the Court reversed and remanded the lower court’s ruling, and held that Minnesota’s statute of limitations should be applied to Danielson’s claim, and was therefore not barred under the statute of limitations laws in Texas and Arizona. Further, the
Court held that the district court abused its discretion by dismissing Danielson’s claim on the grounds of forum non conveniens.

Danielson was a Minnesota resident that purchased a step ladder in Texas, and was injured when he fell off the same in Arizona on February 13, 2000. Danielson commenced the subject action on February 13, 2002. Danielson, 670 N.W.2d 1, 4 (Minn. Ct. App. 2003).

Regarding Danielson’s cause of action, the statutes of limitations were two years in Texas and Arizona. The statutes of limitations had run in both of those states by the time Danielson commenced his lawsuit. For negligence actions in Minnesota, however, the statute of limitations was six years. Id. Danielson’s claim was timely commenced under Minnesota law. Clearly, there was a conflict of the statute of limitations law in the forum state, Minnesota, and the states of Texas and Arizona.

Recognizing the tradition and holdings in In re Daniel’s Estate, 294 N.W. 465 (Minn. 1940); Am. Mut. Liab. Ins. Co. v. Reed Cleaners, 122 N.W.2d 178 (Minn. 1963); and United States Leasing Co. v. Biba Info. Processing Servs., Inc., 436 N.W.2d 823 (Minn. Ct. App. 1989)(all holding that statutes of limitations issues are procedural), the Court analyzed the subject statutes of limitations conflict-of-laws under the more modern, “choice-influencing-consideration” approach.

The “choice-influencing-consideration” approach begins by analyzing the following five, choice-influencing considerations: 1) predictability of result; 2) maintenance of interstate order; 3) simplification of judicial task; 4) advancement of the forum’s governmental interests; and 5) application of the better rule of law. Under this analysis, the Court determined that Minnesota’s six-year statute of limitations should apply because of the factors of advancement of Minnesota’s governmental interests and the Court’s interpretation that the rule of law was better in Minnesota than Texas and Arizona. Id. at 8-9. The Court declined to evaluate the conflict of statutes of limitations laws in the case by the traditional view that statute of limitations conflicts are procedural, and therefore the law of the forum state automatically applies.

Finally, the Court also ruled that Minnesota was a convenient/appropriate forum. Id. at 9-10. It stated, “There is no ideal forum. Minnesota has a legitimate tie to this case (Danielson is a Minnesota resident), and it was an abuse of discretion for the district court to dismiss Danielson’s claim on the ground of forum non conveniens.” Id. at 10.
B. Product Identification

It is a fundamental principle of products liability law that the plaintiff must prove that the defendant made the product which caused the injury. Bixler by Bixler v. Avondale Mills, 405 N.W.2d 428 (Minn. App. 1987). Therefore, it is an absolute defense to the action if plaintiff fails to positively identify the defendant manufacturer as the producer of the product.

The case of Ruiz v. Whirlpool, Inc., 12 F.3d 510, 515 (5th Cir. 1994), makes the importance of product identification plain. The plaintiffs in Ruiz brought a products liability suit alleging that a defective component in a heating and air-conditioning system started a fire and damaged their home. *Id.* at 512. The plaintiffs sued Whirlpool and other defendants. Whirlpool and Inter-City, another alleged manufacturer of a system component, successfully moved for summary judgment on plaintiff's failure to prove product identification. *Id.* That determination was upheld on appeal.

The summary judgment evidence revealed that Inter-City had manufactured some but not all of the Ruiz heating and air-conditioning components. *Id.* at 513. Experts from Inter-City testified about several design differences between the various Ruiz system components and those Inter-City produces. The court held that this was sufficient to satisfy Inter-City's burden to show an absence of proof on an essential element of the claim. *Id.* The burden then shifted to the plaintiffs to demonstrate by specific facts that Inter-City built the electric heater, which they could not prove. *Id.* Moreover, the plaintiff's own experts could only agree that one of two products caused of the fire, only one of which was manufactured by Inter-City. *Id.* at 514. The court then held that there was insufficient evidence to support a rationale non-speculative finding of the cause of the fire. *Id.*

Finally, as to the plaintiffs' case against Whirlpool, the court again held that Whirlpool had submitted sufficient evidence to demonstrate that it did not manufacture any of the allegedly defective components. *Id.* at 515. The plaintiff then failed to provide specific facts, as required by Fed.R.Civ.P. 56(e), that Whirlpool manufactured any part of the Ruiz's system. *Id.*

For other product identification cases, please see the following unpublished decisions:


C. Market Share, Enterprise and Alternative Liability Theories

The most frequent issue encountered under the product identification defense is when a plaintiff knows that two or more manufacturers make the product but is unable to pinpoint which is the actual manufacturer. In Bixler by Bixler v. Avondale Mills, 405 N.W.2d 428 (Minn. App. 1987), the plaintiff was severely burned when his homemade cotton flannel nightshirt ignited. The plaintiff however could not identify which of four textile mills actually manufactured the fabric. Plaintiff
unsuccessfully asked the court to recognize and apply the theory of alternative liability. This theory now embodied in the Restatement of Torts states:

Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

Restatement (Second) of Torts, §433 B (3) (1965).

The common rebuttal to this theory is that it is unfair to shift the burden which is normally held by the plaintiffs to the defendants to establish their own innocence. Minnesota rejected this theory of alternative liability. Bixler, 405 N.W.2d at 432. In addition, in Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647, 650 (8th Cir. 1991), the Court of Appeals for the Eighth Circuit held that the doctrine of alternative liability was not available under Minnesota law for an asbestos wrongful death claim. It is possible that the Minnesota courts would recognize a claim under a market share, enterprise, or alternative theory of liability, if the product in question was uniform and intrinsically defective no matter who manufactured it, such as the case with the drug, DES.

D. Subcomponent Manufacturer

This defense, like product identification, requires the identification of what component part of a machine failed and resulted in injury. Furthermore, the plaintiff has to establish that the component part was defective at the time of sale. In re Temporomandibular Joint (TMJ) Implant Products Litigation, 97 F.3d 1050 (8th Cir. 1996). The Minnesota court addressed this issue in Westerberg v. School Dist. No. 792, Todd County, 276 Minn. 1, 148 N.W.2d 312 (Minn. 1967):

If a chattel is sold that is free from defects in manufacture and design and is not dangerous if used as intended, the manufacturer is not liable for results caused by improper use of the chattel or changes made in its construction without the manufacturer's knowledge which makes it dangerous. Nor is there any duty to warn of non-existing dangers, or dangers that are obvious to anyone. If the chattel is safe when sold, a manufacturer is not required to anticipate or foresee that a user will alter its condition so as to make it dangerous, or that he will continue to use it after it becomes dangerous due to alterations in safety devices intended to protect the user from harm.

The subcomponent manufacturer is under no duty to investigate what the ultimate use is or foresee all possible applications of the product. See, Childress v. Gresen Mfg. Co., 888 F.2d 45, 49 (6th Cir. 1989) (Under Michigan law component part supplier has no duty to analyze design of completed machine incorporating supplier's non-defective part.) Sperry v. Bauermeister, Inc., 4 F.3d 596, 598 (8th Cir. 1993). (Under Missouri law suppliers of non-defective component parts are not responsible for accidents that result when parts are integrated into a larger system that the component part supplier did not design or build.) Therefore, it is established
law in Minnesota that a manufacturer who merely supplies a component part subsequently assembled by another in a manner creating a dangerous condition is not liable to one injured by the product. Hauenstein v. Loctite Corp., 347 N.W.2d 272 (Minn. 1984).

One common issue that arises when this defense is utilized is whether the product that caused the harm is really a component part. In the Westerberg case the plaintiff was injured in an accident involving a mechanical power press. The court was looking for evidence that the punch press which caused the injury was really part of a larger system thus within the meaning of component part. Westerberg, 148 N.W.2d at 359. Therefore, affidavits or technical drawings regarding the characteristics of the specific system are needed to prove that a component part is involved in order to remove liability.

E. Comparative Fault

The comparative fault defense is a means to reduce defendant's liability by showing plaintiff's unreasonable conduct contributed to the harm or injury. This defense is applicable against plaintiff's claims of negligence and strict liability. Under the comparative fault principle, plaintiff's recovery is reduced in proportion to the degree of negligence attributable to the plaintiff. Minn. Stat. §604.01, subd. 1 states:

Contributory fault shall not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, an injury to person or property, or an economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.

This contributory fault statute means that if plaintiff and defendant are each found 50% at fault, plaintiff will still recover.

It is up to the jury to determine the percentages of fault for the plaintiff and the defendant. Fault is defined by Minn. Stat. §604.01, subd. 1a (1996) as:

Acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of the risk not constituting an express consent or primary assumption of the risk, misuse of a product and unreasonable failure to avoid injury or to mitigate damages, and defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the
damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

The Supreme Court has created one exception to the rule applying comparative fault against plaintiffs in strict liability actions where the only negligence of the plaintiff was failure to inspect the product or to guard against any defect. See, Busch v. Busch Const., Inc., 262 N.W.2d 377, 393-94 (Minn. 1977). The court went on to state however that, "[A]ll other types of consumer negligence, misuse, or assumption of the risk must be compared with the defendant's strict liability under the statute." Id. The basis for this exception is that a manufacturer has a duty to provide a safe product to the consumer. See, Omnetics, Inc. v. Radiant Technology Corp., 440 N.W.2d 177, 182 (Minn. App. 1989). Therefore, while a consumer always has a duty to exercise reasonable care in the use of a product, he does not have a duty to inspect it.

The next subsections will address theories which the defense may argue which effect the percentage of plaintiff's fault.

1. Misuse

This defense concerns misuse of a product by the plaintiff or by any party other than the defendant manufacturer or seller as a defense to a products liability action. Issues to consider include what conduct constitutes misuse and the effect of such misuse.

Evidence of misuse may be used to defeat plaintiff's claim under two theories. First, misuse may be used to argue that a plaintiff's injury was caused not by the product but by the acts of the plaintiff. Establishing lack of proximate cause will defeat plaintiff's claim.

In Magnuson, the plaintiff, a mechanic, removed the cover from a spark plug on his snowmobile. Magnuson v. Rupp Mfg. Inc., 171 N.W.2d 201 (Minn. 1969). Later he had an accident and his knee smashed into the protruding spark plug. A manufacturer or supplier is liable only for the defects existing at the time the product leaves the control of the manufacturer or supplier. The court found that an element of liability involved plaintiff proving that the injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff. Here, plaintiff misused the product by removing the spark plug cover thus relieving defendant from strict liability. Id. at 208.

Second, mishandling by a consumer may also be a factor in determining plaintiff's fault. See, Magnuson v. Rupp Mfg. Inc., 171 N.W.2d 201 (Minn. 1969). In Balder v. Haley, 390 N.W.2d 855 (Minn. App. 1986); reversed by Balder v. Haley 399 N.W.2d 77 (Minn. 1987), the court addressed misuse as factor in determining whether the "defect" posed an identified "unreasonable risk", an essential element of any product's liability action. Here, plaintiff was injured when a water heater he was attempting to repair exploded. The consumer used dental wax to seal a leak, a ball point pen spring to replace a reset spring, and adhesive blocked the shutoff valve. Id. at 863.

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The court found that mishandling by the consumer was relevant to the issue of causation. *Id.* at 862. It determined that evidence of misuse may be used to negate the argument that plaintiff’s injury was foreseeable to the seller or manufacturer. For a discussion regarding unreasonable and foreseeable risks determining a manufacturer's or supplier's duty, see, *Magnuson v. Rupp Mfg. Inc.*, 171 N.W.2d at 207-08.

Misuse also plays a part as a defense in failure to warn cases, as evidence of unforeseeable behavior. Generally, a manufacturer has a duty to warn the consumer of the dangers of any foreseeable use or misuse of the product. The standard for making the determination as to whether a duty to warn exists are as follows:

The court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the court's then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.

*Germann v. F. L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986). If the court determines the misuse in question is unforeseeable, then the failure to warn claim is defeated.

2. **Useful Life of the Product**

The Minnesota Legislature enacted Minn. Stat. §604.03 based on their concern that products liability actions were expanding, and they, therefore, intended to limit the open-ended liability for aging products. The jury instruction for this defense states as follows:

**USEFUL LIFE**

**Definition of “useful life”**

The fact that the product may have outlived its useful life should be considered along with all the other evidence in deciding fault.

The “useful life” of a product is not how long it lasts but how long it is reasonably safe for use.
Deciding useful life

Decide the useful life of this product by considering the experience of users of similar products, taking into account:

1. Normal wear and tear
2. Deterioration from natural causes
3. The progress of the art, economic changes, inventions, and developments within the industry
4. The climate and other local conditions peculiar to the user
5. The policy of the user and similar users on repairs, renewals, and replacements
6. The useful life, stated by the designer, manufacturer, distributor, or seller in brochures or pamphlets provided with the product or in a notice attached to the product
7. Any modification of the product by the user.


The leading Minnesota case, Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), involved an accident where an employee was injured when a truck tire rim assembly exploded. The rim which injured the plaintiff was manufactured in 1955, 26 years before the accident. Id. at 829. After 1955, Goodyear became aware of the danger of this multi-piece rim assembly. By the 1970's, Goodyear was making an attempt to warn users of the danger associated with the repair of this model rim. Id.

The court determined that the expiration of a product's useful life, under the statute, is only a factor to be weighed by the jury in determining the fault of the manufacturer and the fault of the user. Id. at 832. Essentially, the statute has become a part of comparative fault. The court stated, "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.
3. **Assumption of the Risk**

Assumption of the risk encompasses two theories of relief. In 1971, the Minnesota Supreme Court recognized both primary and secondary assumption of risk. Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979). The distinction between the two lies with whether the plaintiff knew of the specific risk, yet still chose to proceed. Despite the enactment of the Comparative Fault Act, Minn. Stat. §604.01, the doctrine of assumption of risk is still applicable in Minnesota.

a. **Secondary Assumption**

Secondary assumption of the risk is an affirmative defense to an established breach of duty whereby the plaintiff voluntarily encounters a known and appreciated hazard created by the defendant. Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223, 226 (Minn. 1986) (citing Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974)). The question of plaintiff's contributory negligence thus involves plaintiff's general knowledge and appreciation of the danger created by defendant's negligence. Schneider ex rel. Schneider v. Erickson, 654 N.W.2d 144 (Minn. App. 2002). Secondary assumption of the risk is a jury issue under the broad definition of fault defined in Minn. Stat. §604.01, subd. 1a.

b. **Primary Assumption**

Primary assumption of the risk bars recovery. It indicates that defendant did not owe the plaintiff any duty of care and therefore prevents a finding of negligence. Armstrong v. Mailand, 284 N.W.2d at 348. Thus, primary assumption of the risk is a defense which preempts the comparative fault issue.

To establish this bar to recovery the court must find (1) that plaintiff had knowledge of the risk, (2) an appreciation of the risk, and (3) a choice to avoid the risk but voluntarily chose to chance the risk. Andren v. White-Rodgers Co., a Div. of Emerson Electric Co., 465 N.W.2d 102, 104 (Minn. App. 1991).

This principle of no duty applies to only a small segment of cases. In Minnesota, the courts have rarely applied primary assumption of the risk. In Goodwin v. Legionville School Safety Patrol Training Center, Inc., 422 N.W.2d 46 (Minn. App. 1988), the plaintiff was a volunteer roofer who understood the danger and risks of working on a roof before she fell. In Andren v. White-Rodgers Co., a Div. of Emerson Electric Co., 465 N.W.2d 102, 104 (Minn. App. 1991), plaintiff, who knew specifically not to light a match when he smelled LP gas, voluntarily undertook the risk by absent-mindedly lighting a cigarette after smelling the gas.
The classic example of a plaintiff assuming the primary risk involves athletics. When a plaintiff decides to ice skate at a rink some risk of injury is present. The rink management still maintains the duty to safely supervise and maintain the premises in a safe condition. Wagner v. Thomas J. Obert Enterprises, 396 N.W.2d 223, 226 (Minn. 1986). When the facts are disputed, the jury must decide whether primary or secondary risk applies. Id.

In Walk v. Starkey Machinery, Inc., 180 F.3d 937 (8th Cir. 1999) the United States Court of Appeals for the Eighth Circuit affirmed, with a vigorous dissent, the dismissal of a products liability action based on the claimant’s primary assumption of the risk.

In Walk, the claimant was working as a mixer that mixes various types of clay. At the end of each day, the trough was cleaned and excess clay is removed. In order to clean the mixer, Walk would disengage the auger, remove its protective cover, use a scraper to push excess clay toward a vacuum, would then engage the auger and scrap the residual clay from the auger blades. While cleaning the trough, Walk’s hand became entangled in the auger. As a result, his arm needed to be amputated. The Eighth Circuit noted that the sole issue was the trial court’s application of the Doctrine of Primary Assumption of the Risk. As to the rule of law concerning primary assumption of the risk, the Eighth Circuit stated as follows:

Primary assumption of the risk applies when a plaintiff manifests his or her acceptance of the risk and his or her consent to undertake the lookout for himself and relieve the defendant of the duty [Citations omitted]. The doctrine is applicable to inherently risky activities [Citations omitted]. Thus, the classes of cases involving an implied primary assumption of the risk are not many [Citations omitted]. The elements of primary assumption of the risk that the plaintiff 1) knew the risks; 2) appreciated the risk; and 3) voluntarily chose to accept that risk, even though he or she had a choice to avoid it. 180 F.3d at 939.

In Walk, the plaintiff was experienced. He worked for 10 years in clay production. He watched his co-workers and supervisors use the same cleaning method. He knew the method was dangerous. He was told the method of cleaning was dangerous. He believed the trough could be adequately cleaned with the auger disengaged. Walk further knew the auger was running and that the auger was capable of injuring him. With all of this knowledge and experience, the Eighth Circuit affirmed the district court’s decision that Walk assumed the risk.
4. Open and Obvious Dangers

Under this theory, defendant argues that a buyer or user of a product has a duty to discover a defect in the product that should have been discovered by reasonable diligence. When a seller proves that the claimant, while using a product, was injured by a defective condition that would have been obvious to an ordinary reasonable prudent person, the claimant's damages are subject to reduction.

While obviousness is a not a total bar to recovery, it may be considered in determining whether plaintiff acted with reasonable care such that was required under the circumstances. See, Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212, 35 A.L.R. 4th 848 (Minn. 1982). What constitutes reasonable care will vary with the surrounding circumstances and involve a "balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." Id. (citations omitted). The goal of the court was to offer manufacturers some relief from open and obvious defects while still discouraging manufacturers from consciously adding open and obvious defects to remove themselves from liability. Thus, the open and obvious danger defense is a balancing test.

The court in Holm laid out the seven factors which are used in balancing the risk and utility of the product: 1) the usefulness and desirability of the product, 2) the availability of other 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 expectations of the danger (particularly for established products), 6) the avoidability of the injury by care and use of the product (including the effect of instructions or warnings), and 7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. Id. at 212.

The reasonable care balancing test is therefore applied under a theory of comparative fault. A defendant would make arguments based on the seven factors listed above as proof that plaintiff should share in the liability of the accident.

F. Modification or Alteration

A manufacturer or seller may be exonerated from liability when the product is altered or modified after leaving their hands. Modification/alteration is a defense to claims based on negligence, strict liability or warranty. Specifically, the alteration or modification must take place after the product has left defendant's control, but prior to plaintiff's injury. A manufacturer or seller may be relieved of liability where plaintiff's damages are proximately caused by modification or alteration of the product. Am. Law Prod. Liab. 3d., §1.91 (1987).
Under the Restatement, a plaintiff claiming strict liability must show not only a defect causing injury, but also that the product:

Is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

See, Restatement (Second) of Torts §402A (1966). The key words here are "substantial change." The burden is on the plaintiff to prove that the product arrived without substantial change in the condition in which it was originally sold. Rients v. International Harvester Co., 346 N.W.2d 359 (Minn. App. 1984).

In Unterburger v. Snow Co., Inc., 630 F.2d 599, (8th Cir. 1980), plaintiff was injured when his left arm became entangled in the main drive shaft of a grain auger manufactured by defendant. The court found that plaintiff's removal of a guard shielding the pulley and drive belt mechanism was not evidence sufficient enough to raise the issue of substantial change. Defendant failed to present evidence that plaintiff's arm became entangled in any of the mechanisms where the shields had been removed. The court denied giving any jury instruction based on modification because the change involved did not cause the accident. But see, Hyjek v. Anthony Industries, 133 Wash. 2d 414, 944 P.2d 1036 (1997); Forma Scientific, Inc. v. BioSera, Inc., 960 P.2d 108 (Colo. 1998); Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993).

As for breach of warranty and negligence claims, this theory may serve as a defense to either by attacking proximate causation, as an intervening cause, or by attacking the elements of fault (See, Misuse, supra).

G. Recalls and Retrofits

It is unclear whether a manufacturer has a post-sale duty to remedy a condition that after manufacture is discovered to be unsafe. In Hodder v. Goodyear Tire & Rubber Company, 426 N.W.2d 826 (Minn. 1988), the Minnesota Supreme Court recognized a post-sale duty to warn based on the manufacturer's knowledge that the product was dangerous, that the manufacturer continued in the same line of business after gaining that knowledge, continued to advertise the product and undertook a duty to warn concerning the product's dangers. Theoretically, a plaintiff could use the same argument to advance a post-sale duty to recall/retrofit. However, as stated above, the Minnesota courts have not recognized such a duty.

Letters of recall do play a part in products liability law in two other ways. First, letters of recall may influence the period of the statute of limitations (See, Statute of Limitations, supra). In Bressler v. Graco Children's Products, Inc., 43 F.3d 379 (8th Cir. 1994), the court found that the parents may not have been aware that the death of their baby was product related until they received the recall letter. Thus, accrual of the action was tolled until the parent's were warned of the product's dangers. Id.

Secondly, letters of recall may be entered into evidence to show defects based on certain fact situations. Generally, there are three arguments to exclude recall letters. First, based on a public policy argument that the manufacturers would be
discouraged from their post-sale duties if their recall letters would be admitted. This is the same argument used to limit admissible evidence under the theory of subsequent remedial measures. Secondly, letters of recall are not always probative of the case. This means that a letter of recall dealing with the suspension system of a car for example would not be probative if the accident involved was a head-on collision. Third, letters of recall are not admissible to show that the defect stated in the recall existed at the time of the accident in the car in question.

Letters of recall are admissible if they are required by federal law such as 15 U.S.C.S. §1412. They are also admissible if the defendant can show that the accident was caused by the failure stated in the recall letter. For a discussion of recall evidence, see Pesce v. General Motors Corp., 939 F. Supp. 160 (N.D.N.Y. 1996) (recall letter admitted into evidence after appropriate foundation supplied in defective seat belt case).

H. Subsequent Remedial Measures

The general rule of law in Minnesota is that evidence of subsequent remedial measures are not admissible at trial to prove previous neglect of a duty. This is an evidentiary exclusion rule rather than a true defense but exclusion of such evidence may limit liability. Myers v. Hearth Technologies, Inc., 621 N.W.2d 787 (Minn. Ct. App. 2001), rev. denied March 13, 2001.

Like most general legal rules, however, there is an exception. Minnesota Rules of Evidence, Rule 407 states:

   When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence which subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures if controverted, or impeachment.

There are two strong public policy reasons for the general rule. First, is to encourage 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. See, Kallio v. Ford Motor Co., 407 N.W.2d 92, 98 (Minn. 1987).

The second policy reason is that many times a remedial measure or change does not go to the negligence but is simply an evolutionary design change in a product. For this reason, the court must also apply Minnesota Rules of Evidence Rule 403 which states:

   Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion
of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.

Thus, even evidence that fits within the exceptions listed in Minnesota Rule 407, evidence of subsequent remedial measures still must outweigh the danger of unfair prejudice or the chance of misleading the jury.

In Kallio, a truck owner brought a strict products liability action against the manufacturer, alleging a defect in the automatic transmission. The Supreme Court held that evidence of subsequent remedial actions taken by manufacturers in design defect cases is inadmissible only if the manufacturer concedes that, at the time of the manufacture of the product alleged to be defective, an alternative design was feasible. Id. at 98. The court further stated that:

Unless the concession is made by the manufacturer, the evidence normally will be admissible, but even then it is admissible only for the limited purpose of showing feasibility at the time of manufacture, and then only if a limiting instruction to that effect is given by the court.

Id.

The result of this case is that the manufacturer is forced to make a concession that the subsequent alternative design was feasible. On the other hand, should a manufacturer decide not to make such a concession, the evidence of subsequent remedial measures may be introduced if that evidence withstands the Rule 403 balancing test. While the Kallio decision requires the judge to give an instruction to the jury considering the use of the subsequent remedial evidence, the outcome is almost as bad as a concession to begin with. The resulting jury instruction sends the jury into deliberation with evidence that the manufacturer could change the design.

Recently, in Ford Motor Co. v. Nuckolls, 894 S.W.2d 897 (Ark. 1995), the Arkansas Supreme Court held that in a products liability action, evidence of activities that may commonly be considered "subsequent remedial measures" was not a "subsequent remedial measure" because the measure was taken by a third party and not the defendant manufacturer. The court continued to recognize that such actions, if taken by the defendant, would be excludable under Rule 407 of the Arkansas Rules of Evidence.


I. Middleman Statute and Seller Liability – Strict Liability Avoidance

The Middleman Statute, Minn. Stat. §544.41, is a statutory means to remove a non-manufacturing defendant from a products liability action.

When a products liability action based, in whole, or in part, on a strict liability claim is filed against a non-manufacturing defendant, the non-manufacturing defendant
may file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. Minn. Stat. §544.41, subd. 1. (See, Appendix 2). Following the filing of a complaint against the manufacturer by the plaintiff, the court shall order dismissal of strict liability claims against the certifying defendant. Minn. Stat. §544.41, subd. 2.

Exceptions to the dismissal order occur when the plaintiff can show one of the following:

1. That the defendant has exercised some significant control over the design or manufacturer of the product or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage;

2. That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

3. That the defendant created the defect in the product which caused the injury, death or damage.

Minn. Stat. §544.41, subd. 3. In essence, Minn. Stat. §544.41, subd. 3 requires the non-passive middleman to remain in the case. The court denied liability when the plaintiff was unable to show that defendant seller exercised significant control over design, had knowledge of the defect, or modified the machine. Gorath v. Rockwell Intern., Inc., 441 N.W.2d 128 (Minn. App. 1989). Note, however, that a middleman will not be liable if his modification does not create the defect which caused injury. Schweich v. Ziegler Inc., 463 N.W.2d 722 (Minn. 1990).

Even if the application of Middleman Statute results in the dismissal of the strict liability claims against the non-manufacturing defendant, any negligence claims against that defendant still remain. However, Minnesota applies Restatement (Second) of Torts, §402, to define a seller's duty to inspect any products it sells:

A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

Thus, in Minnesota, sellers have no duty to inspect the products they sell unless they know or have reason to know that the products are dangerous. Gorath v. Rockwell International, Inc., 441 N.W.2d 128, 132 (Minn. App. 1989). The issue of a seller's duty to warn is a legal question for determination by the court, Id. at 133, and is governed by the same considerations discussed previously in section I(c), "Failure to Warn Claims", on page 15.
J. Res Ipsa Loquitur

Res ipsa loquitur is a doctrine to prove liability in a products liability action where the plaintiff is ignorant regarding the cause of injury. While that definition is very broad, in actuality, this doctrine is used sparingly by the courts.

In Minnesota, there are three requirements the plaintiff must establish in order to apply the res ipsa loquitur doctrine. They are as follows: 1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. See, Spannaus v. Otolaryngology Clinic, 242 N.W.2d 594, 596 (Minn. 1976).

The limited use of this doctrine comes into play because of the requirement that the character or nature of the accident determines the application of the doctrine, not the fact that an accident occurred due to a defective product.

Res ipsa loquitur is not really a defense as much as a means of proving liability under special circumstances. The essential factor needed to apply this doctrine is that the event must be the kind which does not occur in the absence of negligence or strict liability. This doctrine allows a plaintiff to use circumstantial evidence to establish liability. In a products liability action where plaintiff relies on res ipsa loquitur, the plaintiff must still show that the product in question is defective and that the defect in the product proximately caused the accident or injury.

For example, a plaintiff was injured when his front headlight exploded after he tapped the center of the light three or four times. See, Western Sur. & Cas. Co. v. General Electric Co., 433 N.W.2d 444 (Minn. App. 1988). Here, plaintiff's expert was unable to state that a defect in the headlight existed. Furthermore, because plaintiff could not prove a defect, he could not prove causation. Id. at 448.

Based on the three requirements necessary to apply res ipsa loquitur, the court has consistently limited the application to cases where the cause of injury is reasonably certain. Raines v. Sony Corp. of America, 523 N.W.2d 495 (Minn. App.1994).

In Raines, the plaintiff's home burned to the ground allegedly based on faulty wiring in their Sony television set. The television was destroyed by the fire and was unavailable for examination. Id. at 497. At trial, defendants presented expert testimony that their television could not have caused the fire. They argued that the house was wired in the 1950's and therefore that was just as likely a cause as the television. Therefore, because the accident could reasonably be attributable to one or more causes for which defendant is not responsible, the doctrine does not apply. Id. at 498.

In summary, to apply this doctrine, a plaintiff must show (1) that the product in question is defective, (2) that a defect in the product proximately caused the accident or injury, (3) that the event must be a kind which does not normally occur without negligence, (4) that the injury causing event must fall within the defendant's
responsibility or duty to plaintiff, and, (5) there must not have been any contribution or voluntary action on the part of plaintiff to cause the accident. Remember that for the last three factors to be considered, plaintiff must be able to show to a reasonable certainty what product caused the injury.

K. Fire Cases

As stated in the previous section certain fact situations raise specific legal issues. When plaintiff's injury is caused by a fire, the plaintiff must satisfy specific burdens to prove the case. The leading Minnesota case concerning fire damage is Rochester Wood Specialties, Inc. v. Rions, 176 N.W.2d 548 (Minn. 1970). Here, the court stated that in an action for fire loss the burden of proof is on the plaintiff to establish the origin of the fire. Id. at 552. As to establishing the cause the court stated:

Liability for the fire must be based on inferences reasonably supported by the evidence and not upon speculation based solely on the occurrence of the fire.


Note that the plaintiff does not have to possess the actual component that caused the fire. In Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc., 495 N.W.2d 216 (Minn. App. 1993), the insurer brought suit for damages caused by a defective space heater. In reviewing the sufficiency of the evidence supporting plaintiff's theory of the fire's origin, the court held:

Because a large-scale destructive fire tends to consume the evidence of its origin, it is inherently difficult to establish with certainty that it was caused by negligence or the negligence of particular persons; inferences must necessarily be drawn from circumstantial evidence. The inference must, nevertheless, be reasonably supported by the available evidence; sheer speculation is not enough and the inference of negligent causation must outweigh contrary inferences.

Id. at 221 (quoting Raymond v. Baehr, 163 N.W.2d 54 n.2 (Minn. 1968)). Even though plaintiff's expert was unable to test the fitting that allegedly caused the fire, he did review descriptions of the fire, the reports of the fire inspector and the origin and cause experts, the manufacturer's components and construction techniques, and the physical remains of similar heaters. Id. The evidence was sufficient to support the jury's verdict because the plaintiff's expert eliminated all other causes of the fire. Id.

In Raines v. Sony Corporation of America, 523 N.W.2d 495 (Minn. App. 1994) the Court of Appeals of Minnesota held that it was error to submit a products liability case on the theory of res ipsa loquitur.

The Minnesota Supreme Court has limited “the application of res ipsa loquitur to
cases where the cause of injury is reasonably certain.” 523 N.W.2d at 497.

Because of fire rekindled destroying the television, experts were unable to have evidence to closely examine whether the fire was the result of defective wiring in the television set, careless cigarette smoking or some other cause.

L. Compliance with Standards

The standards created by the American National Standard Institute (ANSI) and the Occupational Safety and Health Administration (OSHA) are not substitutes for the court determining the existence of a legal duty. Westbrook v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. App. 1991). However, the standards are admissible under a variety of theories.

In Bilotta v. Kelley Co., Inc., 346 N.W.2d 616 (Minn. 1984) the court addressed the implications of an employer violating OSHA standards. The defendant manufacturer attempted to relieve himself of liability by arguing that the violations were a "superseding cause." Id. However, a defendant remains liable if the superseding cause is foreseeable. Id. (citing W. Prosser, Handbook of the Law of Torts §44 at 272 (4th Ed. 1971)). Here, the manufacturer admitted that safety education was difficult to maintain because of high employee turnover. Id. Therefore, if a manufacturer can foresee an employer violating standards with regards to its product, the manufacturer will not find refuge in arguing the existence of a superseding cause. See, Westbrook v. Marshalltown Mfg. Co., 473 N.W.2d 352 (Minn. App.1991).

Standards may also be admitted under the comparative negligence statute, Minn. Stat. §604.01. If violation of a standard is evidence of conduct constituting negligence, such evidence should be submitted to the jury. Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1226 (8th Cir. 1981).

Some violations of a statute may be used to establish the negligence of the defendant. For example, in 1990, Minnesota adopted the federal OSHA regulations by statute. Minn. Stat. §182.65, subd. 2(f). It is well established in Minnesota that a breach of a statute may constitute negligence per se. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977), Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281 (Minn. App. 1992) but see Banovetz v. King, 66 F.Supp.2d 1076 (D. Minn. 1999).

However, a defendant is not automatically liable for violating a statute. Whether a violation of statute constitutes negligence per se is a question of law for determination by the court. Mervin v. Magney Constr. Co., 416 N.W.2d 121, 123-124 (Minn. 1987). The applicable two part test examines whether:

(1) The persons harmed by that violation are within the intended protection of the statute; and

(2) The harm suffered is of the type the legislation was intended to prevent.
Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d at 558. If the court determines that the statute was enacted for the benefit of plaintiff, the issue is passed to the jury to determine whether, in fact, defendant violated the statute. See, Zorgdrager v. State Wide Sales, Inc., 489 N.W.2d 281, 284 (Minn. App. 1992). Note that plaintiff must still establish proximate cause and damages.

The existence of ANSI and OSHA standards may be introduced so a jury may determine whether a product was sold in a defective condition unreasonably dangerous when put to reasonably anticipated use. In Miller v. Yazoo Mfg. Co., 26 F.3d 81 (8th Cir. 1994), the introduction of the ANSI standard, which specified the stop time for a lawn mower blade, was found to be relevant for it helped the jury determine whether the lawn mower was unreasonably dangerous.

When standards are used by an expert witness to support testimony as in Miller, the manner of the presentation of the standards is controlled by the rules of evidence. If a judge finds such evidence relevant, Minn R. Evid. 803 (18) states "the statements may be read into evidence but may not be received as exhibits." Therefore, the jury applies the standard in their deliberations based only on their personal recall of the testimony.

Lastly, these standards, if adopted after the sale of a product, may be relevant evidence concerning plaintiff’s claim of a continuing duty to warn. Am. Law Prod. Liab. §1.66 3d.

M. Preemption of State Common Law Tort Claims

1. General Background

Article 6, Clause 2 of the United States Constitution provides that the federal laws are the supreme law of the land. One of the first cases ever heard by the U.S. Supreme Court determined that state law that conflicts with federal law is "without effect." M’Culloch v. State, 17 U.S. 316, 427 (1819). The process of nullifying state laws through the operation of the supremacy clause is called preemption.

Under our Federalist system, the powers of the federal government are limited, and most police powers are reserved by the States. Since the preemption of a state law tort claim is a substantial infringement on the powers of the State, there is a general presumption against such preemption. Therefore, under the Supremacy clause, the police powers of the state are only superseded by federal act when it can be determined that such a result is the clear and manifest purpose of Congress. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 2617 (1992).

Preemption analysis requires the court to determine the intent of Congress when a federal law conflicts with a state law. The court examines both the express language of an act and the intent implicitly contained in the structure and purpose of an act. Engvall v. Soo Line Railroad Company, 632 N.W.2d 560 (Minn. 2001).
The implied preemption takes three forms. First, it can be implied if federal law so thoroughly occupies a legislative field "as to make reasonable inference that Congress left no room for the States to supplement it." *Id.* Second, it can be implied if the federal interests are so strong that they require state laws in the field to be preempted. *Id.* As used in products liability cases, preemption is a defense to the application of state common law claims.

For example, one well known area of federal preemption involves the medical field. *Witczak v. Pfizer, Inc.*, 377 F.Supp. 726 (D. Minn. 2005). The Medical Device Amendment (MDA) to the Food, Drug and Cosmetic Act, 21 U.S.C. §360 (c)-(k), §379, and §379a, provides regulations for all phases of the product cycle for specific types of medical devices.

Due to the stringent regulations and approval processes contained in the Act, Congress included an express exemption. 21 U.S.C. §360k provides:

a. **General Rule**

   Except as provided in (b) of this section, no state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement -

   (1) Which is different from, or in addition to, any requirement applicable under this chapter to the device, and

   (2) Which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

The FDA interprets §360k(a) as providing:

State . . . requirements are preempted only when the [FDA] has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the [MDA] . . . making any existing divergent [s] state . . . requirement applicable to the device different from, or in addition to, the specific [FDA] requirements.

The Supreme Court has clearly stated that the word "requirement," in the context of an express preemption provision, includes state law claims. *Cipollone*, 505 U.S. 504, 112 S.Ct. 2608.

Therefore, the courts may preempt state law tort claims based on strict liability, defective design, negligent design, implied warranty, negligence,
product misbranding, misrepresentation, failure to warn/inadequate warning, and fraud when the claim involves devices, like heart valves, with the highest level of regulation (Class III devices §360c(a)(1)(C)). *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1421-22 (5th Cir. 1993), *King v. Collagen Corp.*, 983 F.2d 1130, 1134 (1st Cir. 1993). *But see, R. F. v. Abbott Laboratories*, 162 N.J. 596, 745 A.2d 1174 (2000).

For medical devices, the extent of regulation is proportional to the danger inherent in the use of the product. For example, Class I devices such as tongue depressors are devices which generally pose little or no threat to public health and are subject only to general controls on manufacturing. See, 21 U.S.C. §360c(a)(1)(A). Class II devices, such as oxygen masks, pose a slightly greater risk of injury to patients, and accordingly, the MDA subjects them to performance standards, post-market surveillance, guidelines for use and other appropriate controls. See, *Id. §360c(a)(1)(B)*.

The defense of federal preemption is applicable to many product areas besides medical devices. For example, the Courts have analyzed the express preemption provisions of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-1431, with regards to air bags and antilock brakes. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994). Furthermore, claims involving pesticide exposure and labeling may be controlled by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§136-136y, *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994).

Note that the limits of the federal preemption doctrine are still evolving as the courts struggle to determine the extent of implied preemption analysis.

2. **The Medtronic, Inc. v. Lohr Decision**

The most recent Supreme Court Case in this area is Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S. Ct. 2240 (1996), *on remand, Lohr v. Medtronics, Inc.*, 98 F.3d 618 (11th Cir. 1996). This case addressed the question of whether the Medical Device Amendments of 1976 (MDA) preempts a state law tort suit against the manufacturer of a medical device.

In coming to a decision in Medtronic, the United States Supreme Court considered the following specific issues: (1) whether the claims against Medtronic for negligent design are preempted by the MDA; (2) whether 21 U.S.C. §360k(a) preempts state rules that are duplicative of the FDA's rules regulating both manufacturing practices and labeling; and (3) whether the presence of a damages remedy amounts to an additional or different "requirement" under 21 U.S.C. § 360k(a).

a. **Factual Background of Medtronic, Inc. v. Lohr**

This case centers around malfunctioning "leads" of a pacemaker which were blamed for the failure of Ms. Lohr's pacemaker, resulting in a "complete heart block" and emergency surgery. "Leads" from a
pacemaker are those wires that extend out of the pacemaker unit and contact the heart itself to transfer the pacemaker's electric signal to the heart. The Lohrs filed suit against Medtronic, the manufacturer of the leads, in Florida state court.

b. Preemption of Negligent Design Claim

Medtronic argued that the lower court was incorrect in its decision that the Lohr's claim of negligent design were not preempted by 21 U.S.C. §360k(a). See, Medtronic, 1996 WL 88789 at *16-22. It argued that any common law action would constitute a "requirement" that would in effect be different from and/or in addition to the general federal standards of the MDA.

The Court disagreed and determined that such a reading of the statute was implausible. It noted that the MDA did not give an express private right of action for violation of its regulations and that an implied cause of action had never even been argued. The Court noted that "it would take language much plainer than the text of §360k to convince us that Congress intended [preemption]."

c. Preemption of Other Claims

Medtronic argued that even if all common law claims are not preempted by §360k, the Lohr's claims were preempted by the pre-marketing and other procedures and processes found at § 510(k) of the MDA. See, 21 U.S.C. §510(k). Those arguments were not successful.

3. Implications of the Medtronic, Inc. v. Lohr Decision

This decision removes almost any hope of a medical device manufacturer from successfully arguing that a state common law claim is preempted by 21 U.S.C. §360k, because it is not clear that any common law duty would be deemed sufficient to trigger 21 U.S.C. §360k preemption.

It is not altogether clear how this decision may affect preemption analysis under different circumstances. It is likely that this decision will not be of much assistance in cases that are presented under a federal statute other than 21 U.S.C. §360k due to the Court's reliance on the MDA's specific language and legislative history.


In Brooks v. Howmedica, Inc., 273 F.3d 785 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit considered federal preemption and failure to warn claims. Howmedica made a product called Simplex
which was a bone cement used in orthopedic procedures such as joint, hip, knee and elbow replacement surgeries. Simplex is mixed prior to surgery and quickly hardens. When mixed, it releases vapors. Nurses and surgical technicians who mix Simplex inhale these vapors.

Simplex was a product that was subject to Pre-Market Approval (PMA) which meant it was subject to a specific federal regulation.

Brooks was a nurse who regularly mixed bone cement for surgical procedures. She was eventually diagnosed with occupational asthma attributable to mixing Simplex. She brought suit against Howmedica claiming that they failed to warn her of the danger of contracting occupational asthma. She also made a claim Howmedica failed to comply with FDA labeling regulations. At the trial court level, Howmedica successfully brought a summary judgment motion dismissing all claims against it.

The Brooks decision concerned the Medical Devices Amendments and the United States Supreme Court’s decision in Medtronic, Inc., 518 U.S. 470 116 S. Ct. 2240.

Two main common law preemption principles arise from Lohr: first, a Court must consider whether there are any device-specific federal requirements imposed on the medical device manufacturer; second, if there are such requirements, the Court must determine whether the state common-law claim would “impose a requirement different from or in addition to” the specific federal requirement. Lohr, 518 U.S. at 511; Brooks, 273 F.3d at 794. The federal and state requirements must be “carefully compared” to ascertain whether a conflict exists. Lohr, 518 U.S. at 500; Brooks, 273 F.3d at 794.

The Brooks court considered these principles in the case of the PMA approved product, as opposed to the Lohr court’s § 510(k) approval. The Brooks court found the two processes “by no means comparable,” Brooks, 273 F.3d at 795 (quoting Lohr, 518 U.S. at 478). The Eighth Circuit recognized that, while the § 510(k) process usually takes 20 hours, “PMA review typically requires 1,200 hours of rigorous testing for device safety.” Brooks, F.3d 273 at 795. As the FDA, through its PMA process, had issued specific directives concerning the product labeling in Brooks, the court found plaintiff’s failure to warn claim would interfere with federal requirements. Brooks, 273 F.3d at 796. Therefore, the court ultimately determined that a jury finding of negligent failure to warn would effectively impose a different labeling requirement from that established by the FDA; thus, the claim was preempted. Id.

In Moe v. MTD Products, Inc., 73 F.3d 179 (8th Cir. 1995) the United States Court of Appeals for the Eighth Circuit considered preemption issues, failure to warn, defective design and causation issues in a lawn mower products liability case.
In Moe, 17 year old Moe was mowing his neighbor’s lawn with a walk behind self-propelled mower. The mower became clogged with wet grass and Moe stuck his hand into the side grass chute to unclog it. The blade brake/clutch system was to stop the rotation of the cutting blade within 3 seconds of release of the control lever. When he was about to reach his hand into the mower, the blade brake/clutch system did not stop the blade from rotating. Apparently the cable that would disengage the cutting blade could become frayed, according to the claimant, based on design.

At the trial court level, the trial court ruled that all of Moe’s claims were preempted by the Consumer Products Safety Commission Act, 15 U.S.C. §2053.

On appeal, the plaintiff argued that the CPSA preemption clause did not preempt their failure to warn and design defect claims. The purpose of the preemption, in part, is to develop “Uniform safety standards for consumer products and to minimize conflicting state and local regulations.” 73 F.3d at 183.

The Eighth Circuit found that the tort claim “Based on the defective design of an installed BBC would not create a different standard for more safety or impose additional requirements on the manufacturer. Instead it would create an incentive for manufacturers to install a BBC that works and is properly designed, and thus insure that the federal standard has meaning. The most defective claim is not preempted by the CPSA and should not have been dismissed on that ground.” 73 F.3d at 183.

The Eighth Circuit affirmed the dismissal of the preempted claims but reversed the dismissal of the design defect claim and remanded the case for proceedings consistent with its decision.

In Scholtz v. Hyundai Motor Company, 557 N.W.2d 613 (Minn. App., 1997) the Court of Appeals of Minnesota held that the common law crash worthiness claim against a car manufacturer was preempted by federal law and that Minnesota seatbelt gag rule barred crash worthiness claim based on manufacturer’s failure to install lap belts. The purpose of the federal statute is to create “Uniform Motor Vehicle Safety Standard.” When a state law claim conflicts with the federal statute, it is preempted. The Court of Appeals of Minnesota concluded that the claimant’s claims were preempted because “A court decision creating the common law liability for Hyundai’s failure to install lap belts would, in effect, force manufacturers to choose a lap belt option over other options approved under “federal law.” 557 N.W.2d at 617. The Court of Appeals of Minnesota also concluded that “The plain language of the seatbelt gag rule bars crashworthiness actions grounded on the installation or failure of installation of seatbelts. . . .” 557 N.W.2d at 618.

See, also, Anker v. Little, 541 N.W.2d 333 (Minn. App., 1995); Cellucci

N. Learned Intermediary Defense

The learned intermediary defense has been recognized where a claims asserted for failure to warn of the dangers of a drug. The Supreme Court has concluded that “the failure of a drug manufacturer to warn a physician of the dangers of a drug was not the proximate cause of the injury to the patient where the physician acknowledged that he was fully aware of its potentially dangerous effects.” Gray v. Badger Mining Corporation, 676 N.W.2d 268, 276 (Minn. 2004) citing Mulder v. Parke Davis & Co., 288 Minn. 332, 335-36, 181 N.W.2d 885 (1970).

The concept of learned intermediary has been extended to design professionals such as architects. Gray, 676 N.W.2d at 276. The bases for distinguishing physicians as intermediaries and industrial employers as intermediaries has been summarized by the Minnesota Supreme Court and the Eighth Circuit Court of Appeals. Gray, 676 N.W.2d at 276, n. 5. Thus far, the Minnesota Supreme Court has declined to extend the learned intermediary defense to the employer/employee relationship in the industrial context. Simply put, a manufacturer or other party subject to strict products liability claims will not exculpate itself from liability arguing learned intermediary where the learned intermediary is an employer in the industrial context. Such defense has been extended to the pharmaceutical area and design professional area only.

The learned intermediary doctrine has been successfully used to excuse drug manufacturers, and in some circumstances, chemical manufacturers from a duty to warn end users of their products. Officer v. Teledyne Republic/Sprague, 870 F. Supp. 408, 409 (D. Mass., 1994). The rationale for this defense lies in special fact situations, where a consumer may only obtain the product through a qualified professional. Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013 n.9 (8th Cir. 1989). Gray v. Badger Mining Corporation, 676 N.W.2d 268 (Minn. 2004). A prescription drug, for example, must be prescribed and only persons trained in medicine, who are licensed and regulated by the state, are permitted to write prescriptions. Officer, 870 F. Supp. at 410.

Comment n to Restatement (Second) of Torts §388 (1965), addresses when a supplier's duty to warn an ultimate consumer can be discharged by a warning given to an intermediary. Stuckey v. Northern Propane Gas Co., 874 F.2d 1563, 1568 (11th Cir. 1989). To determine whether a supplier can reasonably rely on the intermediary's knowledge regarding the potential risk of the product, the Restatement provides this five-part balancing test:

1. The burden of requiring a warning;
2. The likelihood that the intermediary will provide a warning;
(3) The likely efficacy of such a warning;

(4) The degree of danger posed by the absence of a warning; and

(5) The nature of the potential harm.

Id. (See, Comment n at 310). The supplier's duty to warn turns on whether the intermediary's knowledge was sufficient to protect the ultimate user. Id.

In Mozes v. Medtronic, Inc., 14 F.Supp.2d 1124 (D. Minn., 1998) the United States District Court for the District of Minnesota granted a summary judgment to the defendant manufacturer of a pacemaker. A patient brought negligence, strict liability and failure to warn claims which were dismissed with prejudice. This case concerned a man who had a Medtronic pacemaker and ventricular lead implanted in 1991. In 1993 the pacemaker and lead manufacturer Medtronic issued a “Health Safety Alert” which was sent to the patient’s physician and to some patients but not to this plaintiff. The alert advised that insulation failure in leads would occur. In 1994, more than a year after the defendant pacemaker issued its alert, the patient was hospitalized and all of the 1991 implanted leads were replaced.

14 F.Supp. 2d at 1126.

The federal district court noted that it “was not aware of any Minnesota case law requiring the use of expert testimony in products liability cases . . . .” 14 F. Supp. 2d at 1128. In this case, however, the standard of care would not be within the general knowledge and experience of lay persons and, accordingly, “the standard of care that a medical manufacturer must exercise in designing a pacemaker lead and the various risks that must be balanced in exercising the standard of care are not within the general knowledge and experience of lay people. Without expert testimony, a jury would be forced to speculate . . . .” 14 F. Supp. 2d at 1128.

In Mozes, the plaintiff did not produce the conventional engineering expert to testify as to the standard of care owed by the pacemaker lead manufacturer. 14 F. Supp.2d at 1128. Ultimately, the federal court found that the doctrine of res ipsa loquitur was not applicable. It dismissed the plaintiff’s products liability claims brought under the theories of strict liability and negligence. That left the remaining claim for failure to warn. The federal court noted that “under Minnesota law, a manufacturer has a duty to warn users of its products of all dangers associated with those products of which it has actual or constructive knowledge.” [Citations omitted.] Failure to provide such a warning will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability and tort. [Citations omitted.] The question of whether a duty to warn exists is a question of law for the court. [Citations omitted.] 14 F. Supp. 2d at 1129. Here it was clear that Medtronic had issued the “Health Safety Alert” and had provided that alert to the plaintiff’s physician. The defendant pacemaker lead manufacturer took the position that under the “learned intermediary doctrine” its obligation to warn was discharged when it advised the
plaintiff’s physician with the Health Safety Alert. The federal district court agreed. 14 F. Supp. 2d at 1130.

O. Sophisticated User

The Minnesota Supreme Court has recognized that under the sophisticated user defense “A supplier has no duty to warn the ultimate user if it has reason to believe that the user will realize its dangerous condition.” Gray v. Badger Mining Corporation, 676 N.W.2d 268, 276 (Minn. 2004).

The Minnesota Supreme Court cited Comment k to §388 of the Restatement (2nd) of Torts as follows:

... a dangerous condition may be one with only persons of special experience would realize to be dangerous. In such case, if the supplier, having special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose they will realize.

Gray, 676 N.W.2d at 277.

The sophisticated user defense, in the employer/employee context is difficult to prove. Too often, the employer may have more knowledge of a given product than its employee. Hence, while the employer may be somewhat more sophisticated or have more knowledge, its employee’s knowledge may be inferior to that of the employer.

P. Sophisticated Intermediary

The Minnesota Supreme Court has defined the sophisticated intermediary defense but has not decided the full applicability or scope of the sophisticated intermediary defense. Gray, 676 N.W.2d at 278.

The sophisticated intermediary defense is defined as follows:

... a products supplier has no duty to warn the ultimate user where either of two situations is present: (1) the end user employer already has a full range of knowledge of the dangers, equal to that of the supplier or (2) supplier makes the employer knowledgeable by providing adequate warnings and safety instructions to the employer.

Gray, 676 N.W.2d at 277-78.

For this defense to apply, the supplier must show that it used reasonable care in relying upon the intermediary to give the warning to the end user. Id.
Determining whether reasonable care has been exercised requires:

- consideration of the purpose for which the product is to be used;
- the magnitude of the risk;
- the burden of providing direct warnings to the end users; and
- the reliability of the intermediary as a conduit.

Because of the significant burden on the bulk supplier to give a warning directly to end users, some courts have recognized the sophisticated intermediary defense. *Hegna v. E. I. DuPont de Neomours & Co.*, 806 F.Supp. 822 (D. Minn. 1992).

The Minnesota Supreme Court has ruled that “a drug manufacturer is not relieved of a duty to warn the patient when its instructions to the physician are inadequate.” *Lhotka v. Larson*, 307 Minn. 121, 124-25, 238 N.W.2d 870, 873-74 (1976); cited in *Gray*, 676 N.W.2d at 279.

**Q. Bulk Supplier Defense**

The bulk supplier defense is a specialized version of the sophisticated intermediary defense and is based on the Restatement 2nd of Torts §388. “Because of the difficulty in reaching the end user, a supplier of material that is delivered in bulk can discharge its duty to warn the end user by warning the buyer of the dangerous condition of the materials.” *Gray*, 676 N.W.2d at 280. This bulk supplier defense is overcome by arguing that the warnings provided by the bulk supplier to the sophisticated intermediary were inadequate.

**R. Raw Materials/Components Products Supplier**

A supplier of ray material may be exculpated from liability when its raw material is integrated as a component into a finished product if its raw material or component itself is not dangerous. The defense is stated as follows:

> When a sophisticated buyer integrates a component into another product, the component seller owes no duty to warn either the immediate buyer or the ultimate consumers of dangers arising because the component is *unsuited* for the special purpose to which the buyer puts it.

*Gray*, 676 N.W.2d at 281.

As with many learned intermediary and sophisticated user defenses, the adequacy of a warning to the ultimate purchaser is usually a fact question precluding summary judgment.

**S. Restatement (Second) §402A, Comment k**

Plaintiffs asserting strict liability claims may cite §402A of the Restatement (Second) of Torts as the foundation for their claims. That section states:
One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

However, in Comment k to this section, Dean Prosser recognizes that some products are necessarily and inherently dangerous even when properly manufactured, distributed and labeled. That section may therefore be used as a shield in a defending against strict liability products claims.


T. Spoliation of Evidence

Spoliation of evidence was recently addressed in the strict liability products-case of Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995). In Patton, the owners of a motor home destroyed by fire brought suit against the manufacturer of the motor home on a defective design theory. Id. at 117.

In 1988, while the plaintiffs were traveling across California, they experienced a fire in the motor home during which Mrs. Patton allegedly injured her back exiting the vehicle. Id. After the fire, the vehicle was towed to an auto salvage yard in Arizona. Id. Approximately six months later, plaintiffs' counsel retained a fire expert who examined the vehicle, took may photographs, and removed an retained several unidentified components. Id. The Pattons later filed suit in 1991 alleging that the manufacturer was strictly liable for their damages due to a negligently designed fuel system. Id. at 119.

When the defendant asked to inspect the vehicle, plaintiffs stated that the location of the motor home was unknown. Id. at 118. The defendant was further informed that the unidentified components that had been removed and retained by plaintiffs' expert had been lost. Id.

In response, the defendant then moved for summary judgment on several grounds and argued (1) that by virtue of lost or missing evidence, the plaintiffs could not demonstrate that the vehicle was in an unreasonably dangerous condition at the time it left the defendant's control; (2) that there was insufficient evidence that any defect or negligence caused the injuries alleged; (3) that either the action should be dismissed as a sanction for spoliation of the evidence or that any testimony of the
plaintiffs' expert based upon his investigation of the misplaced or destroyed motor home and its parts should be precluded. *Id.*

The defendant's motion for summary judgment was granted. The trial court held that the plaintiffs knew or should have known that the remains of the vehicle were important and other important evidence should have been preserved. *Id.* The trial court excluded all evidence derivative of the plaintiffs' expert investigation because of the prejudice to the defendant caused by its inability to perform crucial and necessary tests on all of the evidence. *Id.*

On its review, the Minnesota Supreme Court upheld the trial court's decision and stated that trial courts are "vested with considerable inherent judicial authority" in this area. *Id.* at 119. It then held that the prejudice to the opposing party should dictate the appropriate sanction to apply in a spoliation of evidence situation. *Id.*; (citing Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263 (8th Cir. 1993)).

This type of decision reinforces the well-established rule in Minnesota that evidence of an incident during use of a product is insufficient by itself to prove that the product was defective. Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426, 432.


III. FOOD RELATED CLAIMS

In food cases, the plaintiff usually brings claims based on simple negligence, negligence per se, strict liability in tort and in warranty (quasi-contract) theory ranging from breach of implied warranty of fitness for particular purpose (such as digestion) or breach of warranty of merchantability. Most claims are brought under common law, but could, in certain circumstances, be based upon the Uniform Commercial Code. However contract claims are not typically brought.

Food claims generally concern prepackaged food goods that are sold to the customer who later opens the package and discovers some sort of defect or problem with the food. Other common claims may involve a customer who is served a meal on the premises and encounters a problem ranging from food poisoning to foreign objects in the food product.

The Minnesota law in this area has been rather limited and until April 2005, no appellate court in the state had determined the standard to be applied when determining whether food is defective. Up until that time, food and food products may be defective because of a manufacturing defect, design defect, failure to warn or a statutory violation. There were two prevailing tests, either of which could have been applied: the “foreign-natural” test and the “reasonable expectation” test.

The foreign-natural test drew a distinction between the “foreign” and “natural” characteristics of a food product ingredient. Under the test, if an object or substance in a food product was natural to any of the ingredients of the product, there was no liability for injuries caused; and if the object or substance was foreign to any of the ingredients, the seller or manufacturer of the product may be liable for any injury caused.

Comparatively, the reasonable expectation test focuses on what is reasonably expected by the consumer in the food product as served, not what might be foreign or natural to the ingredients of that product before preparation. As applied to common law negligence, the expectation test is related to the foreseeability of harm on the part of the defendant. That is, the defendant has the duty of ordinary care to eliminate or remove in the preparation of food served such harmful substance as the consumer of the food, as served, would not ordinarily anticipate and guard against.

The majority of jurisdictions that have dealt with the defective food products issue have adopted some formulation of the reasonable expectation test.

In Shafer v. JLC Food Systems, Inc., 695 N.W.2d 570 (2005), the Minnesota Supreme Court followed the Restatement (Third) of Torts: Products Liability §7 (1998) and rejected the so-called “foreign-natural” test and adopted the majority “reasonable expectation” test for determining whether a food product is defective.
Section 7 of the Restatement reads as follows:

One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under §2, §3 or §4 is subject to liability for harm to persons or property caused by the defect. Under §2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

The Minnesota Supreme Court explained its position as follows:

Having considered the two tests and the approach taken by the Restatement, we conclude that the reasonable expectation test is the more appropriate test to follow. Instead of drawing arbitrary distinctions between foreign and natural substances that caused harm, relying on consumers’ reasonable expectations is likely to yield a more equitable result. After all, an unexpected natural object or substance contained in a food product, such as a chicken bone in chicken soup, can cause as much harm as a foreign object or substance, such as a piece of glass in the same soup. Therefore, we agree with the majority view and expressly adopt the reasonable expectation test as the standard for determining defective food products liability claims in Minnesota. Accordingly, when a person suffers injury from consuming a food product, the manufacturer, seller, or distributor of the food product is liable to the extent that the injury-causing object or substance in the food product would not be reasonably expected by an ordinary consumer. Whether the injury causing object or substance in the food product is reasonably expected by an ordinary consumer presents a jury question in most cases.

695 N.W.2d at 575-76.

Therefore, the law in Minnesota now provides that food (a food product) is in a defective condition reasonably dangerous if an ordinary consumer would not reasonably expect the food (food product) to contain the object/substance that caused the harm. CIV JIG 75.60.

The primary issue in Schafer, however, concerned the problem of proof in food cases. The plaintiff ate a piece of a muffin at a restaurant and when she swallowed she felt a sharp pain in her throat and a choking sensation. The scratch on her throat led to an infection. The court concluded that, consistent with its prior decisions, see Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 330-31, 188 N.W.2d 426, 433 (1971) and Holkestad v. Coca-Cola Bottling Co., 288 Minn. 249, 257, 180 N.W.2d 860, 865 (1970), and section 3 of the Restatement (Third) of Torts: Products Liability (1998), circumstantial evidence MAY be used to establish a prima facie defective food product case when the specific object or substance that caused the harm cannot be identified, Schafer, 695 N.W.2d at 576, but that there are limitations on the use of circumstantial evidence:

[W]e hold that in defective food products cases a plaintiff may reach the jury, without direct proof of the specific injury-causing object or
substance, when the plaintiff establishes by reasonable inference from circumstantial evidence that: (1) the injury-causing event was of a kind that would ordinarily only occur as a result of a defective condition in the food product; (2) the defendant was responsible for a condition that was the cause of the injury; and (3) the injury-causing event was not caused by anything other than a food product defect existing at the time of the food product’s sale. In order to forestall summary judgment, each of the three elements must be met.

Schafer at 577.

A failure to warn claim is separate and distinct from a design defect claim. Huber v. Niagara Mach. And Tool Works, 430 N.W.2d 465, 467 (Minn. 1988). There is no duty to warn if the user knows or should know of a potential danger. Where the alleged danger is open and obvious, Minnesota courts do not require a warning. In Holowaty v. McDonald’s Corp., 10 F. Supp.2d at 1084 (D. Minn. 1998), the plaintiffs contended that “a duty to warn exists if the foreseeable risk of injury is more severe than a reasonable person would anticipate, even if the risk of a less severe injury of the same type is open and obvious.” 10 F. Supp.2d at 1085. The federal district court noted that the Minnesota Supreme Court would likely reject this argument because “an alleged difference in the anticipated degree of danger does not make the risk associated with the use of the product any less obvious.” Id. On the issue of causation, the failure to warn claim failed, as well because Plaintiffs failed to present any testimony that they would have acted differently had they been warned that this coffee was especially hot. Id.

The remaining two claims of the plaintiffs in Holowaty were for negligence and implied warranty of merchantability. Because Minnesota has blended strict liability and negligence claims for design defects, dismissing the strict liability design defect claims concomitantly dismissed the negligence claims. 10 F. Supp.2d at 1086. As to the implied warranty of merchantability claim, the court stated the law as follows:

The implied warranty of merchantability requires that goods be “fit for the ordinary purpose for which such goods are used” [citations omitted]. The implied warranty of merchantability is breached when a product is defective to a normal buyer making ordinary use of the product [citations omitted]. A defect is “any condition not contemplated by the user which makes the product unreasonably dangerous to him” [citations omitted]. A product is not defective when it is safe for normal handling and consumption.

10 F. Supp.2d at 1086. The plaintiffs failed to prove the food product was defective. Therefore, all of the plaintiffs’ claims were dismissed with prejudice.

The Minnesota Supreme Court adopted the concept of strict tort liability against the manufacturer of a defective product in McCormack v. Hanksraft Co., 278 Minn. 322, 333-34, 154 N.W.2d 488, 497-98 (1967). Three years later, the court clarified that an injured person may also maintain an action for strict liability in tort against the commercial seller of a defective product, even if the seller has no active fault or negligence. Farr v. Armstrong Rubber Co., 288 Minn. 83, 89, 179 N.W.2d 64, 68 (1970) (citing Restatement (Second) of Torts § 402A 91965) (stating commercial seller who sells defective product is liable for physical harm even if seller is
Strict liability in tort developed from strong public-policy considerations to protect consumers from harm caused by defective products and to impose the cost of defective products on the maker, who presumably profits from the product. See, McCormack, 278 Minn. at 338, 154 N.W.2d at 500; Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 327-28, 188 N.W.2d 426, 431-32 (1971). A key rationale for strict liability in tort is a “risk bearing economic” theory in which merchants and manufacturers have the capacity to distribute their losses among the many purchasers of the product.

The practical effect of strict-liability principles is to hold a faultless seller jointly and severally liable for the causal fault of the manufacturer. But the faultless seller can seek and recover indemnity from the defect-causing party in the product’s chain of distribution. See, Farr, 288 Minn. at 96-97, 179 N.W.2d at 72 (noting a passive-middleman retailer may recover indemnity from the manufacturer who furnished the defective product); see also Tolbert, 255 N.W.2d at 366-67 (noting common law indemnity shifts entire loss from a party who has no personal fault, but is nevertheless liable in tort, to the at-fault party).

The seller’s-exception statute, Minn. Stat. § 544.41, tempers the harsh effect of strict liability as it applies to passive sellers, while ensuring that a person injured by a defective product can recover from a viable source. The seller’s-exception statute permits dismissal of strict-liability claims against a seller of a defective product who certifies the correct identity of the manufacturer, but only after a complaint is filed against the manufacturer. Minn. Stat. §544.41, subds. 1, 2. The seller may not be dismissed, however, if it has played an active role in creating the product defect or had actual knowledge of the defect. Id. at subd. 3(a-c); Gorath v. Rockwell Int’l, Inc., 441 N.W.2d 128, 131-32 (Minn. App. 1989), rev. denied (Minn. July 27, 1989). The seller’s exception statute sets forth a specific procedure. The plain language of the seller’s-exception statute requires that the identified manufacturer be served with process prior to dismissal of strict-liability claims against the passive seller. Id., at subd. 2. And it further requires that, before dismissal, the manufacturer must have responded or have the obligation to respond. Dismissal is not appropriate if the plaintiff’s action cannot reach a manufacturer or the manufacturer is insolvent. Bastian v. Wausau Homes, Inc., 638 F.Supp. 1325, 1327 (N.D.Ill. 1986) (applying similar Illinios statute). The evident purpose of the seller’s-exception statute is to ensure the manufacturer can be joined in the lawsuit before the passive sellers are dismissed from strict-liability claims.

The statutory language contemplates that: (1) a seller will certify the correct identity of the manufacturer; (2) the plaintiff (i.e. the affected consumers) or the certifying defendant will join the identified manufacturer; and (3) strict-liability claims will be dismissed against the certifying defendant. Minn. Stat. §544.41, subds. 1, 2. The seller’s-exception statute allows a non-manufacturing defendant who did not contribute to the alleged defect to defer strict liability to the manufacturer, but it does not permit the seller to avoid responsibility when the manufacturer cannot be sued.
IV. SUCCESSOR LIABILITY

Since the indoctrination of products liability litigation, courts and legislatures have struggled with the issue of liability of a successor entity for actions based on a defective product manufactured, distributed or sold by the successor entity's predecessor. This struggle originates, in part, due to the conflict between the traditional rules of successor liability arising out of corporate law and the relatively new tort law principles of strict liability. Because the traditional corporate law rules were established prior to the advent of modern products liability law, its emphasis on successor non-liability contradicts modern strict liability theory, which favors shifting the costs associated with defective products from injured consumers to manufacturers. Tort Law - Towards A Legislative Solution to the Successor Products, 16 Wm. Mitchell L. Rev. 581 (1990).

Minnesota follows the traditional approach to corporate successor liability. The general rule is that a corporation which acquires all or part of the assets of another corporation does not acquire the liabilities and debts of the predecessor. Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989) citing J. F. Anderson Lumber Company v. Myers, 296 Minn. 33, 206 N.W.2d 365 (Minn. 1973); State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244, 251 (Minn. 1980); Standal v. Armstrong Cork Co., 356 N.W.2d 380, 382 (Minn. App., 1984).

The Minnesota Courts have recognized the following four exceptions to the general rule:

1. The purchaser expressly or impliedly agrees to assume such debts;

2. The transaction amounts to a consolidation or merger of the corporation;

3. Where the purchasing corporation is merely a continuation of the selling corporation; and

4. Where the transaction is entered into fraudulently in order to escape liability for such debts.

Niccum, 438 N.W.2d at 98.

A. Express or Implied Agreement to Assume Debt

The first general exception deals with an expressed or implied agreement to assume the debt. Evaluation of this exception begins by examining any contracts between the successor and predecessor corporation for language that evidences an agreement to assume debts. While some plaintiffs have argued that a successor corporation's agreement to honor the warranties of the predecessor is assumption of debt, the courts have generally held that this argument to be insufficient. Schwartz v. McGraw–Edison Company, 14 Cal. App.3d 767 (Cal. App. 2 Dist., 1971) (overruled
on other grounds - See, discussion, infra., regarding Minnesota non-adherence to the "product line" exception).

B. De Facto Merger

Under the second exception, liability will be found where a merger or consolidation has occurred. In T.H.S. Northstar Associates v. W.R. Grace and Company, 840 F. Supp. 676 (D.Minn. 1993) the court applied the de facto merger doctrine to determine if the successor merged with the predecessor. The elements of a de facto merger are as follows:

1. Where there is a continuity of management, personnel, assets and operations;

2. Continuity of shareholders which result from the purchasing corporation paying for the acquired assets with shares of its own stock;

3. The seller ceasing operations, liquidating and dissolving as soon as legally and practically possible; and

4. The purchasing entity assumes the obligations of the seller necessary for uninterrupted continuation of business operations.

Niccum, 438 N.W.2d at 98.

Recent court decisions have remained consistent to the Niccum court holding. In Costello v. Unipress Corp., 1996 WL 106215 (Minn. App., 1996) (unpublished decision), the Minnesota Court of Appeals refused to assess successor liability on the basis of the de facto merger exception even though the successor corporation acquired the predecessor partnership's product lines, customer lists, goodwill, physical assets, some employees, managers and trademark. Id. at *1. In rejecting the plaintiff's argument in favor of de facto merger, the court stated that the plaintiff presented no evidence that the owners of the predecessor partnership remained owners of the successor corporation. Id. Without this "key element of shareholder continuity", the plaintiff failed to present a genuine issue of material fact showing that the transfer of assets constituted a de facto merger. Id.

C. Continuation of the Entity

The third exception concentrates on the aspect of continuation of the entity. Pursuant to the Minnesota Supreme Court in Niccum, under the traditional rule, mere continuation "refers principally to a 'reorganization' of the original corporation under federal bankruptcy law or through state statutory devices." (Niccum, supra, at 99, citing J. F. Anderson, supra, at 369). The Supreme Court went on to say:

Continuity of business name, and management alone, is not, we think, sufficient basis for holding a transferee liable for the debts of
the transferor. If there is no continuation of the corporate entity—shareholders, stock and directors—the successor corporation is not liable (Emphasis supplied).


Unfortunately, a traditional application of the "mere continuation" exception was not before the Minnesota Supreme Court in Niccum. Instead, the appellant sought to have the Minnesota Supreme Court expand the mere continuation exception to include cash-for-asset sales. _Niccum_, 438 N.W.2d at 99.

Expansion of the "mere continuation" exception focuses on the continuity of the business operation, not the corporate entity. _Id_. However, the Minnesota Supreme Court specifically declined to expand the mere continuation exception to include cash for asset sales. In so deciding, the Supreme Court noted that eight other states had declined to do so, and found these other states' reasons compelling. These were:

1. The successor corporation did not create the risk by putting the defective product on the market;
2. Any profit realized on the product is only received in a remote way; and
3. The predecessor has not represented to the public the safety of the predecessor's product.

_Id_. Accordingly, the "mere continuation" exception was not expanded to focus on the continuity of the business operation.

Because the Minnesota Supreme Court has not specifically made an analysis of what constitutes continuity of the business entity for purposes of successor liability, case law from other jurisdictions adopting the _Niccum_ exceptions provide useful guidance in making such an analysis. Wisconsin courts have held that there must be a common identity of directors, officers and shareholders in the buying and selling corporations. The question to be asked is whether it is the same business organization as the predecessor corporation. Fish v. Amsted Industries, Inc., 126 Wis.2d 293, 376 N.W.2d 820, 824 (Wis. 1985). Iowa Courts have determined that a mere intermingling of officers and directors alone does not mean a mere continuation exception exists. _Weaver v. Nash Intern., Inc._, 562 F. Supp 860, 863 (S.D.Iowa, 1983).

Therefore, under the "mere continuation" exception, the Minnesota Supreme Court in _Niccum_ concluded that there must be a continuation of the corporate entity—shareholders, stock, and directors.
D. The "Product Line" Exception

The Niccum court also expressly rejected the imposition of the product line exception which was adopted by the California Supreme Court in Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977). Under the product line theory, a successor corporation which continues to manufacture a product of the business it acquires, regardless of the method of acquisition or any possible attribution of fault, assumes strict liability for products manufactured and sold before the change of ownership. Niccum, 438 N.W.2d at 99.

The Niccum court followed the lead of the majority of other courts which had examined this theory, rejecting it on the basis of three contentions. First, the exception is inconsistent with elementary products liability principles, and strict liability principles in particular, in that it results in an imposition of liability without a corresponding duty. Second, the exception threatens small successor businesses with economic annihilation due to ensuing difficulty in obtaining insurance for potential defects of predecessor products. Finally, and perhaps most importantly, the "product line" exception represents a radical departure from the traditional principles of corporate law. Id. As such, any acceptance of this radical departure should be done by the legislature. Id.

E. Successor Duty to Warn

The remaining issue of concern to a successor corporation is that of a duty to warn. In determining whether the relationship between a successor corporation and its predecessor is sufficient to create a duty to warn, the courts focus on the actual or potential economic advantage to the successor corporation. Am. L. Prod. Liab. 3d § 7:33 (2006).

In attempting to discern whether the successor has a duty to warn, Minnesota courts have stated that relevant considerations in determining the existence of a duty to warn include whether the successor: (1) took over its predecessor's service contracts, (2) contracted to perform or actually performed service of the product at issue; (3) knew of defects in the machine at issue; and (4) knew the location or owner of the product at issue. Costello, 1996 WL 106215 at *1 (citing Niccum 438 N.W.2d at 100). Otherwise stated, if the successor entity has no knowledge of defects and no knowledge of the location of the machine, there is no known entity to warn and nothing to warn against. Id. (citing Travis v. Harris Corp. 565 F.2d. 443, 449 (7th Cir. 1977)).

F. Minnesota Business Corporations Act, Minn. Stat. §§302A.727 (replaced repealed §302A.729) and 302A.781

Minn. Stat. §302A.727 establishes the procedure and requirements a corporation may follow when providing notice to its creditors and claimants regarding its dissolution. Minn. Stat. §302A.727 (2006). Pursuant to subd. 3(c) of this statute, a creditor or claimant to whom notice is given, who fails to file a claim according to the procedures set forth by the corporation on or before the date set forth in the notice, is barred from suing on that claim or otherwise realizing upon
or enforcing it, except as provided in section 302A.781. *Id.*, subd. 3(c).

The exceptions to the aforementioned bar on creditor and claimants’ claims are contained in Minn. Stat. §302A.781. A creditor or claimant may bring a claim against a dissolved corporation: 1) within one year after the corporation files its articles of dissolution, and demonstrates good cause for the delay in bringing the claim; or 2) prior to the applicable limitations period expiring, against the officers or shareholders for all known contractual debts, obligations or liabilities the corporation incurred in the course of winding up the corporation’s affairs. Minn. Stat. §302A.781, subd. 3 (2006). In recent years, the Minnesota Court of Appeals helped to define the phrase of “liabilities incurred during dissolution proceedings” in *Podvin v. Jamar Co.*, 655 N.W.2d 645 (Minn. Ct. App. 2003).


The Court in *Podvin* held that the claimant’s asbestos related tort and contractual claims against the defending corporations, that voluntarily dissolved 16 years prior to the commencement of the action, were barred by the Minnesota Business Corporations Act. More importantly, the Court also held that Podvin’s claims did not fall under the exception contained in Minn. Stat. §302A.781, for liabilities incurred during a corporation’s dissolution proceeding. *Podvin v. Jamar Co.*, 655 N.W.2d 645 (Minn. Ct. App. 2003).

In December 2001, Podvin filed a complaint for negligence, products liability and breach of warranty against the two manufacturing defendants, “Jamar II” and “Walker Jamar”. *Id.* at 647. The defendant(s) filed its articles of dissolution back on August 12, 1985. The manufacturing defendant in *Podvin* claimed that service of process under Minn. Stat. §5.25, subd. 5, could not be accomplished because the claims against dissolved corporations were barred under the applicable 1984 version of Minn. Stat. §§302A.729, .781. *Id.* at 646.

The crux of the Court’s determination that Podvin’s claims were barred under Minnesota law relied upon its interpretation of what constituted “liabilities incurred in the course of winding up the corporation’s affairs”. The Court limited the application of this phrase by stating, “…the language ‘liabilities incurred’ plainly applies to a debt or obligation that the obligor was legally obligated to pay at the time of the dissolution proceedings, rather than to an unmatured tort or contract claim.” *Id.* at 650.

Further, the Court inferred that the Minnesota Legislature

…intended to limit corporate liability under this provision to matured claims that corporations could identify during the dissolution process, so that payment could be made and the winding up of corporate affairs could proceed in an orderly and definite fashion. To hold otherwise would create lingering liability
for claims arising after dissolution that could conceivably extend corporate accountability in perpetuity.

*Id.* at 651 (citing Onan Corp. v. Indus. Steel Corp., 770 F.Supp. 490, 493-95 (D. Minn.1989)).
V. EXPERTS AND EXPERT OPINIONS

A. General Discussion

In products and toxic tort cases, lay and expert opinion testimony are absolutely necessary. Lay opinions based on personal observation or experience that are helpful to a jury are admissible. Expert opinion from qualified witnesses that assists a fact finder in the areas of scientific, technical or other specialized knowledge are also admissible. *Fireman’s Fund Insurance Company v. Canon U.S.A., Inc.*, 394 F.3d 1054 (2005).

Experts must be selected and disclosed before trial. Failure to disclose an expert is a basis for precluding that expert's testimony. *Norwest Bank Midland v. Shinnick*, 402 N.W.2d 818 (Minn. App. 1987); *Vaughn v. Love*, 347 N.W.2d 818 (Minn. App. 1984); *Fritz v. Arnold Mfg. Co.*, 232 N.W.2d 782 (Minn. 1975); *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401 (Minn. 1986); see, also, Minn. R. Civ. P. Rule 26.05.

In *Trost v. Trek Bicycle Corporation*, 162 F.3d 1004 (8th Cir. 1998) the Eighth Circuit Court of Appeals considered whether it was appropriate to exclude an expert’s affidavit based on the untimely disclosure of the expert. In *Trost*, a metallurgical engineering expert hired by the plaintiff looked at the bicycle and disclosed a late opinion.

Whether the trial court abused its discretion in excluding the claimant’s expert was the issue on appeal. 162 F.3d at 1008.

Clearly *Trost* had the burden of proof in the products liability suit. *Trost* could not explain why they had an untimely expert disclosure. *Trost* could not substantially justify the untimely disclosure nor could they show its untimely disclosure was harmless. Whether *Trost* expert conformed to the discovery rule 26 requirements and whether *Trost*'s expert had foundation for his opinions, were not even considered. Because of the untimeliness, the opinion was excluded. Because the opinion was excluded, *Trost* did not have sufficient competent evidence to withstand summary judgment. The case was dismissed.


In determining whether to admit or suppress late disclosed expert testimony, the trial court will consider the following factors:
1. The extent of preparation required by an opposing party in preparing for cross-examination or rebuttal of expert witnesses;

2. When the expert agreed to testify;

3. When the party calling the expert notified the opposing party of the expert's availability;

4. When the attorney calling the expert assumed control of the case;

5. Whether a party intentionally and willfully failed to disclose the existence of a trial expert; and

6. Whether the opposing party sought a continuance or other remedy.

Dennie, 387 N.W.2d at 406.

The trial court has broad discretion. "The question of whether to admit or exclude evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990) (citing Reinhardt v. Colton, 337 N.W.2d 88, 93 (Minn. 1983)).

When a trial lawyer forgets to designate a witness as an expert and to provide answers to expert witness interrogatories, it may still be possible to admit that witness' "expert" testimony. Evidentiary Rule 701 allows some witnesses to offer opinions, conclusions and inferences. One author described the rule as follows:

Rule 701 may serve as a route for expert testimony otherwise barred. For example, if the expert was not included on the list of expert witnesses complying with a pretrial order, this witness may still give a "lay" opinion based on personal perception.

Lane's Goldstein Trial Techniques §14.29 (3d Ed.). See, also, Teen-Ed, Inc. v. Kimball Int'l., Inc., 620 F.2d 399 (3rd Cir. 1980) (an accountant's personal knowledge of a party's balance sheet satisfy the requirements of Evidentiary Rule 701); U. S. v. Kelley, 615 F.2d 378 (5th Cir. 1980) (bank officials should be allowed to testify that documents at issue may influence the loan decision of the bank); Brown v. J. C. Penney Co., Inc., 64 Or. App. 293, 667 P.2d 1047 (Or. App. 1983) (lay witnesses may testify to personality changes in the plaintiff); City of Hartford v. Anderson Fairoaks, Inc., 7 Conn. App. 591, 510 A.2d 200 (Conn. App. 1986) (witnesses were allowed to testify as "fact witnesses" without giving any expert opinion, after the court had disallowed their testimony as experts).

B. Witness Selection

Products and toxic tort cases can be expensive to try. However, once properly prosecuted or defended, they offer tremendous rewards. The first step in investigating is the location and identification of witnesses and the preservation of
those witnesses' observations for later use at trial. Unfortunately, these cases frequently require several "liability" and "damage" experts. Many persons, including eyewitnesses, technical experts and medical experts should be consulted.

C. Lay Witnesses

Whether a person is competent to be a witness is a legal question. Minn. R. Evid. Rule 104. If a lay witness lacks personal knowledge of a fact of consequence, that lay witness may not testify as to that fact. Minn. R. Evid. Rule 602. "Expert witnesses provide the only exception to the rule that witnesses must testify from firsthand knowledge." Rule 602, Committee Comment - 1977, Minn. R. Evid.

The requirement that a witness must testify from firsthand, personal knowledge allows some lay witnesses to offer opinions, conclusions and inferences. Minn. R. Evid. Rule 701. Lay witnesses may testify in the form of opinions, conclusions or inferences when those opinions, conclusions or inferences are:

Rationally based on the perception of the witness, and

Helpful to a clear understanding of the witness' testimony or to the determination of a fact of consequence.

Minn. R. Evid. Rule 701.


For example, while a lay witness may not be able to testify as to the cause of a fire, a lay person may offer testimony critical to determining a fire's origin or origins and to a determination of causation. The person who discovered the fire, and who has personal, firsthand knowledge of a fire, who saw and perceived the flames of the fire or explosion, saw the color of its smoke and smelled its burning, heard the explosion, should be allowed to testify as to those facts, the areas involved in the fire or explosion, what the fire, smoke and explosion looked like, what the fire, explosion and smoke smelled like, whether the fire was slow burning or rapidly spreading. These are all things that a person could "rationally perceive" and would be helpful to the jury.

There are numerous cases that discuss what opinions, conclusions or inferences, rationally based and helpful to a jury, are allowed:

- In Brandt Distributing Co., Inc. v. Federal Insurance Company, 247 F.3d 822 (8th Cir. 2001) the United States Court of Appeals for the Eighth Circuit held that it was not err for the trial court to allow the testimony of a St. Louis fire department captain that a fire was a "fraud fire." The fire captain’s name and his report had been disclosed. The fire captain was not retained as an expert by either side. The discovery rules regarding the identity of persons and experts were not violated.
- In Meuhlhauser v. Erickson, 621 N.W.2d 24 (Minn. App. 2000) the Court of Appeals of Minnesota considered whether it was appropriate to limit the testimony of a lay witness. The opinion testimony was not allowed because the lay person only briefly saw the vehicles involved.

- In Children’s Broadcasting Corporation v. The Walt Disney Company, 245 F.3d 1008 (8th Cir. 2001) the Eighth Circuit Court of Appeals held that it was improper to exclude the testimony of an accounting expert because that expert applied an “[u]ncontroversial accounting method called Discounted Cash Flow.”

- Employees sitting in a building, preceding a fire, may testify that they detected a warm, metal smell emitting from a forced air register, and that the duct work above the register would get warm on cold days, and that when the register was first hooked up, long before the fire, it blew dust all over the building (indicating that the duct work may not have been a cold air return but was a forced air heating duct). Daltex, Inc. v. Western Oil & Fuel Co., 275 Minn. 509, 148 N.W.2d 377 (1967).

- A city fire marshal employed by a fire department for 22 years, who attended seminars concerned with the techniques for detection of fire causes, who had personally observed the fire and had elicited information from employees concerning combustible materials being near a forced air duct had foundation to offer an opinion on causation. Daltex, 148 N.W.2d at 381.

- An experienced police officer trained in drug recognition protocol, who personally observed and arrested a defendant, and, who, prior to the arrest, had gone through a recognition protocol, may offer an opinion as to whether a person is "under the influence" of some drug. State v. Klawitter, 518 N.W.2d 577 (Minn. 1994). Klawitter stated, in part, as follows:

  The state urges abandonment of the Frye standard in favor of the standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). Because we affirm the determination that the Frye standard has been met here, we do not address the effect of the Daubert decision on the use or application of the Frye rule in Minnesota.

Klawitter, 518 N.W.2d at 585, n. 3.

- Experienced firemen may state their opinion that some flammable substance "other than that of which the building was constructed or which it contained contributed to the manner and speed with which the fire burned and spread . . . testified from what they observed when they reached the fire in its early stages . . . that appeared to
burn and spread like a 'boosted' fire." State v. Lytle, 214 Minn. 171, 7 N.W.2d 305 (1943).

- It is error to not allow a witness to testify as to who was the observed "aggressor" in a shooting incident. State v. Post, 512 N.W.2d 99 (Minn. 1994), which decision thoroughly discusses Minn. R. Evid. 701, by stating that pursuant to Evidentiary Rule 701, "the emphasis is not on how a witness expresses himself or herself - i.e., whether in the form of an opinion or a conclusion - but on whether the witness personally knows what he or she is talking about and whether the testimony will be helpful to the jury. 3 J. Weinstein, Evidence - U. S. Rules § 701[02] (1992)." Post, 512 N.W.2d at 101.

- A lay witness may render an opinion regarding someone's handwriting. State v. Glidden, 459 N.W.2d 136, 142 (Minn. App. 1990); Minn. R. Evid. 901 (b)(2).

- Where, subsequent to an accident, a witness acquires the experience and other foundation necessary to offer an opinion on liability facts, the decision as to whether the witness has sufficient foundation for the admission of a lay opinion is for the trial court to decide. Marsh v. Henriksen, 213 Minn. 500, 7 N.W.2d 387 (Minn. 1942).

- A witness must have personal knowledge of his own property before testifying as to its value or the damages sustained. Foot v. Yorkshire Fire Ins. Co., 205 Minn. 478, 286 N.W. 400 (1939).

- A person may offer his own testimony as to the diminished value of property. LaValle v. Aqualand Pool Co., Inc. 257 N.W.2d 324, 328 (Minn. 1977).

- A close friend of a plaintiff may testify that they saw the plaintiff almost daily for four years prior to the accident and that the plaintiff's health was good. Van House v. Canadian Northern Ry. Co., 155 Minn. 57, 192 N.W. 493 (1923).

- A state official and former employee of the defendant may offer their opinions about what the real estate developer knew or intended to do based on their past experiences with him, where both the state official and former employee knew from their professional dealings, discussions and experience with the real estate developer that the developer never intended nor ever followed through with promises he made to others regarding real estate development. Winant v. Bostic, 5 F.3d 767, 772 (4th Cir. 1993).

- Evidence of common practices, customs and standards, described by persons with knowledge of those customs is admissible. Schmidt
In sum, those witnesses who have firsthand, personal knowledge of facts of consequence may testify as to those facts of consequence in the form of an opinion, conclusion or inference, provided that testimony is helpful to the jury.

D. Minnesota Rules of Evidence Re: Experts

Rules 702, 703, 704, 705 and 706 of the Minnesota Rules of Evidence deal with expert witnesses. Rule 702 has been interpreted as a threshold inquiry as to whether expert testimony will assist the jury and whether the expert is qualified to offer an opinion. Rule 703 concerns the bases of expert testimony and whether the expert's bases may be received in evidence. Rule 704 talks about whether an expert may testify as to the ultimate fact question to be determined by the jury. Rule 705 talks about whether an expert may testify as to opinion, conclusion or inference, without first detailing the bases for that opinion, conclusion or inference.

1. Rule 702 - Helpfulness and Qualifications

"Expert witnesses may testify to assist trier of fact in understanding the evidence." State v. Helterbride, 301 N.W.2d 545, 547 (Minn., 1980). Normally, for example, in strict products liability cases an expert must testify. Peterson v. Crown Zellerbach Corp., 296 Minn. 438, 209 N.W.2d 922 (1973). Generally speaking, if the subject matter and/or the facts of consequence, are outside the knowledge or experience of lay people, expert testimony may be allowed. However, there are cases where expert testimony is not needed. Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995); Dahlbeck v. DICO Company, Inc., 355 N.W.2d 157 (Minn. App. 1984).

Where a plaintiff had knowledge of escaping gas and knew that igniting a cigarette would cause the gas to explode but chose to light the cigarette in the presence of gas anyway, no expert would be needed to show that the plaintiff had primarily assumed a risk. Andren v. White-Rodgers Co., 465 N.W.2d 102, 104 (Minn. App. 1991).

Under Rule 104 and 702 of the Minnesota Rules of Evidence, evidentiary determinations of the qualifications of an expert witness are reviewed using an abuse of discretion standard. Fairview Hosp. and Health Care Services v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995). While the abuse of discretion standard of review seems to prevail whether expert testimony will be helpful and whether an expert is qualified to testify, case law also indicates that an erroneous view of the law or a ruling that is not justified by the evidence may be utilized as well. Hueper v. Goodrich, 263 N.W.2d 408, 411 (Minn. 1978). In Hueper, the Minnesota Supreme Court stated as follows:
It is generally not necessary that an expert witness be the most qualified person in his field in order to render his opinions at trial. All that is necessary is that he has some specialized knowledge or training which will be of some assistance to the jury.

*Id.*

The expert ought to possess some practical knowledge or experience in the area of expertise. *Fiedler v. Spoelhof*, 483 N.W.2d 486 (Minn. App. 1992).

Great deference will be accorded to the trial court's determination as to whether an expert's opinion should be excluded. *Benson v. Northern Gopher Enterprises, Inc.*, 455 N.W.2d 444, 445-46 (Minn. 1990).

If the expert's testimony is speculative or lacks foundation, it should not be admitted. *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. App. 1987). In this regard, if the expert has the requisite qualifications, testimony pertinent to the lawsuit which can be provided to a reasonable degree of probability, should be allowed. *Block v. Target Stores, Inc.*, 458 N.W.2d 705 (Minn. App. 1990).

2. **Rule 703 - Basis for Expert Opinion**

The bases of expert opinion can be many-fold. However, the trial court should scrutinize some of the bases from the hearing of the jury when the bases are irrelevant, misleading or confusing. *Finchum v. Ford Motor Co.*, 57 F.3d 526, 530-32 (7th Cir. 1995). For example, safety standards and manuals which were recognized by an expert as learned treatises, may be read to the jury, but may not be received in evidence as exhibits. *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511 (D. Minn. 1993).

In personal injury actions, it is generally thought that a medical expert may rely on medical records, education, training and experience to offer opinions on permanent injuries and future pain and suffering. Annotation, "Necessity of Expert Testimony on Issue of Permanence of Injury and Future Pain and Suffering", 20 A.L.R. 5th 1 (1994). However, expert testimony on hedonic damages and treatises concerning the same, should not be allowed. *Ayers v. Robinson*, 887 F. Supp. 1049 (N.D. Ill., 1995). Medical records, clinical experience and education are sufficient for a medical expert to testify as to a novel area, such as "shaken baby syndrome." *Wood v. State*, 1995 WL 697532 (Minn. App. 1995).

Where expert's testimony was based upon the inspection of an accident site, the instruments involved and their observation of the operation of the instruments and dismantling of specific products, that circumstantial evidence, those inferences, are reasonably supported by the evidence and not upon speculation. *Dahlbeck*, 355 N.W.2d at 164.
Minnesota has attempted to restrict the use of inadmissible, underlying bases for an expert's opinion. Rule 703(b). In this regard, one author has stated as follows:

The lesson for the trial lawyer is that Rule 703 is a potent weapon on several levels. It allows an opinion to be based on otherwise inadmissible but 'reliable' data. It then may permit the jury to hear information normally considered improper evidence.

Some states have demonstrated their concern over this issue. Minnesota, for example, recently amended its code to add the following Rule 703(b):

Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the bases for the expert's opinion . . .

This provision was thought necessary to clarify the language in Ramsey County v. Miller, 316 N.W.2d 917 (Minn. 1982), which stated that the hearsay basis for an expert opinion on market value should be admissible on direct examination.


In essence, if the bases of the expert's opinion is inadmissible and unreliable, those bases should not come into evidence at all. In addition, an expert's opinion should be excluded if its bases are without sufficient factual basis. Thornhill v. City of Detroit, 369 N.W.2d 871, 874 (Mich. App. 1995).

Comparative risk evidence is sometimes used by experts to show that the product is not defective and unreasonably dangerous. Bittner by Bittner v. America Honda Motor Co., Inc., 194 Wis. 2d 122, 533 N.W.2d 476 (Wis. 1995). In Wisconsin, such evidence is considered irrelevant and non-probative and, further, confusing to a jury. It is error to consider such evidence.

In Finchum v. Ford Motor Company, 57 F.3d 526 (7th Cir. 1995) the trial court’s decision to exclude dynamic sled tests conducted by an expert and other tests and basis for expert opinion was affirmed.

In Elkins v. Syken, 672 S.2d 517 (Fla. 1996) the Florida Supreme Court limited the breath of cross examination of a defense expert’s income and
business records. The Florida Supreme Court held that experts can be required to reveal the percentage of their time spent as an expert witness, each case they have testified in the preceding three years, how much they are being paid in the pending case and the approximate percentage of their testimony that has been used for plaintiffs or defendants.

In Rail Intermodal Specialists, Inc. v. General Electric Capital Corporation, 154 F.R.D. 218 (N.D. Iowa 1994) the district court held that the Work Product Doctrine outweighed the interests of discovery such that discovery of an attorney’s letter to expert witnesses were held protected from discovery. The letters need not be produced.

Rule 1006 of the Minnesota Rules of Evidence and its federal counterpart allow the admission of summaries of voluminous data. Experts frequently utilize such summarized information as a basis, in part, for their opinions.

3. **Rule 704 - Expert's Opinion on Ultimate Issue**

In certain instances, an expert may give an opinion on an ultimate issue to be decided by the jury. Formally, questions seeking opinions on ultimate fact issues were objected to as "Invading the province of the jury." In some instances, that objection will be sustained. Conover v. Northern States Power Co., 313 N.W.2d 397, 403 (Minn. 1981); Breezy Point Co-op., Inc. v. Cigna Property & Cas. Co., 868 F. Supp. 33 (E.D. N.Y. 1994); Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1312 (11th Cir. 1987) (trial court refused to allow a police detective to testify as to his conclusion as to who intentionally set a fire).

In fact, Minnesota has had a long tradition of excluding opinions and conclusions on ultimate fact issues, whether those opinions and conclusions are offered by an expert testifying live or there is an attempt to admit those opinions and conclusions under the public records exception of the hearsay rules. Barnes v. Northwest Airlines, Inc., 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951); Dahlbeck v. DICO Co., Inc., 355 N.W.2d 157, 164 (Minn. App. 1984); see, also, Hines v. Brandon Steel Decks, Inc., 754 F. Supp. 199, 200-01 (M.D. Ga. 1991); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S. Ct. 439 (1988). Regardless of whether an expert is allowed to testify on the ultimate fact issues in a case, the jury is not required to accept the expert's opinions. Stahlberg v. Moe, 283 Minn. 78, 85, 166 N.W.2d 340, 345 (1969).


In Minnesota an expert may express opinions, conclusions or inferences without stating the basis for those opinions, conclusions or inferences. Rule 705, Minn.R.Evid., Committee Comments - 1989.

Where there has been inadequate disclosure of an expert's opinions, the trial court may require that an expert to detail a basis of his or her conclusions,
opinions and inferences before testifying as to those conclusions, opinions or inferences.

a. The Daubert Decision

In 1993 the United States Supreme Court rendered its decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993). So far, it has only been applied to expert opinion based on science. That decision is important for a number of reasons. First, it stresses the role of the trial court to act as a "gatekeeper" to assure that scientific methodology upon which expert opinions are based is reliable. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 732 (3d Cir. (Pa.), 1994). Daubert makes clear that Evidentiary Rule 104 is to be used by the trial court as part of that gatekeeper function. In every instance, under Rule 104, it is a legal question for the court to determine alone as to whether an individual may testify and as to what the individual may testify to upon trial.

Daubert is not uniformly applied throughout the Federal Circuit Courts of Appeals and the District Courts. A number of factors are weighed when considering whether to admit expert testimony based on science. However, there is a consensus that the Daubert factors include the following:

1. Whether a scientific basis or method of an expert consists of a testable hypothesis;
2. Whether the scientific basis or method of an expert has been subject to peer review;
3. The known or potential rate of error;
4. The existence or maintenance of standards controlling the technique's operation;
5. Whether the scientific basis or method of an expert is generally accepted;
6. The relationship of the technique to methods which have been established to be reliable;
7. The degree to which the expert is qualified;
8. Non-judicial uses to which the method has been put.

Paoli, 35 F.3d at 742, n. 8.

To date, these factors have only been applied to "scientific evidence."
Under Rule 702, a witness must be qualified to testify and must offer testimony that is helpful to the fact finder. The opinions, conclusions and inferences to be offered by the expert must be supported by good grounds. *Id.*

Not every expert, nor every expert opinion or the bases of expert opinions, must go through a Rule 104 hearing to determine whether the evidence is admissible.

Much has been written about *Daubert* and its application. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn.L.Rev. 1345 (1994) and Sanders, *Scientific Validity, Admissibility and Mass Torts After Daubert*, 78 Minn.L.Rev. 1387 (1994). If the case is in federal court, *Daubert* will control the admissibility of scientific testimony.

b. **Application of Daubert in Minnesota**

Minnesota has followed the Frye test concerning scientific evidence. *See*, Frye v. U. S., 293 F. 1013, 1014 (D.C. Cir. 1923); State v. Kalwitter, 518 N.W.2d 577, 588 n.1 (Minn. 1994). The Minnesota Supreme Court ducked the opportunity to expressly adopt *Daubert* in *Fairview Hosp. & Healthcare Services v. St. Paul Fire & Marine Insurance Co.*, 535 N.W.2d 337, 340 n. 4 (Minn. 1995) stating that the expert’s conclusions’ accuracy would be better addressed through cross and direct examination. *Id.*

The rationale behind *Daubert* has been applied in Minnesota. *See*, e.g., Ross v. Schrantz, 1995 WL 254409 (Minn. App. 1995). In *Ross*, the Minnesota Court of Appeals affirmed a trial court determination that the use of quantitative electroencephalography evidence to diagnosing closed head injuries was not reliable and an opinion based on quantitative electroencephalography could not be admitted.

Statutorily, Minnesota's Rule 703(b) is, in essence, an attempt to exclude unreliable and untrustworthy bases for expert opinion. Hence, though *Daubert* has not been adopted in Minnesota, Minnesota's Evidentiary Rules 703(b) and 104 may be used to exclude proposed expert testimony.

In *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) concerned expert opinion evidence. At the trial court level, the claimant’s expert’s opinions were excluded because their methodology was not generally accepted under *Frye-Mack* or the United States Supreme Court’s decision in *Daubert*. 615 N.W.2d at 803. The claimants brought their lawsuit against a pest control company and Dow Chemical based on their belief that some pesticides used in their home caused them injury. 615 N.W.2d at 803-04. There
were questions as to whether the plaintiff’s claims were preempted.

The Minnesota Supreme Court noted that Goeb presented the question of whether Minnesota “Should abandon the two prong standard for the admissibility of novel scientific evidence.” 615 N.W.2d at 809.

The first prong of the Frye-Mack standard was that of general acceptance. The federal rule does not require “general acceptance.” The Frye general acceptance standard “Insures that the persons most qualified to assess scientific validity of a technique have the determinative voice.” 615 N.W.2d at 813.

The Minnesota Supreme Court held that “When novel scientific evidence is offered, the district court must determine whether it is generally accepted in the relevant scientific community [Citations omitted] . . . That particular scientific evidence in each case must be shown to have foundation of reliability [Citations omitted]. Foundation reliability requires the proponent of a test to establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to insure reliability [Citations omitted] [and] as with all testimony by experts, the evidence must satisfy the requirements of Minn. R. Evid. 402 and 702 – be relevant, be given by a witness qualified as an expert, and be helpful to the trier of fact.” 615 N.W.2d at 814.

In Sentinel Management Company v. Aetna Cas. and Sur. Co., 615 N.W.2d 819 (Minn. 2000). In Sentinel, the Minnesota Supreme Court was considering whether it was appropriate to admit an expert’s testimony. More precisely, the question was whether the Minnesota court should adhere to the Frye-Mack standard concerning the admission of evidence “based on novel scientific techniques or principles.” 615 N.W.2d at 824.
VI. TOXIC TORT CLAIMS

A. Lead Paint Claims

1. Common Law Negligence - Landlord Liability

Generally, lead paint cases involve minor children as the allegedly injured parties. This may be because children are more vulnerable to the effects of lead and are more likely to ingest paint chips or contaminated soil in "hand-to-mouth" behavior.

Cases against landlords regarding lead paint generally contain claims for common-law negligence and negligence per se based upon Minnesota Statutes and City Ordinances.

a. Historical Overview

In Minnesota, a landlord's liability is limited. Historically, a tenant took over possession of the rental premises at his or her own risk:

This rule of caveat emptor required a tenant to investigate the premises in order to determine their adaptability to the purpose for which they had been rented. Likewise, in the absence of fraud, misrepresentation or deceit, a landlord was not responsible to his tenant for injuries resulting from the defective condition of the premises.


Currently, Minnesota follows the majority of jurisdictions recognizing that a landlord is not an insurer against defects on the premises. See, Hanson v. Roe, 373 N.W.2d 366, 370 (Minn. App. 1985); Oakland v. Stenlund, 420 N.W.2d 248, 251-52 (Minn. App. 1988). In Michigan, for example:

The common law duty [of a landlord] is predicated upon the concept that a lease is equivalent to a sale. The lessor, absent agreement to the contrary, surrenders possession and holds only a reversionary interest. Under such circumstances, he is under no obligation to look after, keep and repair premises over which he has no control. . . .

b. Exceptions Creating Limited Duty

In Broughton v. Maes, 378 N.W.2d 134 (Minn. App. 1985), the court held that in order to impose liability upon a landlord, a plaintiff must establish that one of the following four circumstances exist:

1. There is a hidden dangerous condition on the premises of which the landlord is aware, but the tenant is not;
2. The land is leased for purposes involving admission to the public;
3. The premises are still in the control of the landlord; and
4. The landlord negligently repairs the premises.

The first exception was discussed in Johnson v. O'Brien, 258 Minn. 502, 506, 105 N.W.2d 244, 247 (1960), where the court held that a landlord may be held liable for injuries sustained by a tenant as a result of a defect only when the landlord knew of the danger, or had information that would lead a reasonably prudent person to suspect the danger, and when the tenant exercising due care would not discover it for himself. *Id.*

c. Generally - No Duty Owed by Landlord

The Johnson case and others like it created the general rule in Minnesota: a landlord's only duty to his tenant is to warn of a defective condition if the landlord knows or should know the danger and if the tenant, while exercising due care, would not discover it. *See, Broughton v. Maes, 378 N.W.2d 134, 1361 (Minn. App., 1985).*

Absent a written lease agreement, a landlord owes no duty to repair the premises. *Johnson, 258 Minn. 502, 105 N.W.2d 244.* If a written lease agreement exists, that agreement specifies the various duties of the parties. In many lead paint cases, there are no express agreements, written or verbal, between the landlord and the plaintiff to repair the premises.

Moreover, there is no affirmative duty under Minnesota law for a landlord to continually inspect inhabited premises for existing dangerous conditions. *Id.* In fact, just the opposite is true. Under common-law, the lease of property inherently includes the covenant of quiet enjoyment for the benefit of the lessee. *See Wilkinson v. Clauson, 29 Minn. 91, 12 N.W. 147, 148 (1882).* As a result, the tenant's right to enjoyment of the property prevents the landlord from entering onto the property to investigate whether repairs are necessary or to actually make those repairs unless there is an express or implied agreement to do so between the landlord and tenant. *See,
Significantly, Minnesota courts have consistently refused to expand the common-law duties of a landlord:

> The rule in Minnesota, as to defective conditions of the premises, is that a landlord who has not agreed to repair the leased premises has only a duty to warn a tenant of a defective condition that the landlord knows or should known of the danger, and that the tenant, given due care, would not discover it.


1. **Duty to Guests and Others**

   A residential landlord's duty to the guests of a tenant or others on the residential rental premises is no greater than the duty owed to the tenant. *Johnson*, 258 Minn. at 505, n. 1, 105 N.W.2d at 246, n. 1.

2. **No Duty Where Parents Are Aware**

   An argument can be made that landlords owe no duty to children to warn them of or to remove a dangerous condition when the children are being watched by their parents, or entrusted persons, in supervision. *See, generally, Sirek by Beaumaster v. State, Dept. of Natural Resources*, 496 N.W.2d 807 (Minn. 1993).

   In *Sirek*, the Minnesota Supreme Court held that the State owed no duty to the Sireks and their minor child as a matter of law when the child crossed a highway to the State park and was struck by a van. The Sireks brought suit against the State, Department of Natural Resources (DNR), and the driver of the vehicle. The DNR moved for summary judgment asserting that it was immune from liability pursuant to Minn. Stat. §3.736, subd. 3(h) (1992). The trial court denied the motion finding material fact questions regarding the DNR's breach of a statutory duty of care under either the child trespasser standard or the adult standard. *Id.* at 809. The DNR appealed as a matter of right. The Court of Appeals affirmed the trial court and held the child trespasser standard applied. The Minnesota Supreme Court reversed.

   The Minnesota Supreme Court noted that this was the first opportunity for the Court to definitively determine "whether
trespassing children accompanied by adults in State parks can avail themselves of the heightened standard owed to 'child trespassers' under section 339 of the Restatement or whether they are instead limited to the general trespasser standards of section 335." *Id.* at 809-10. The respondent argued that the presence or absence of parents should not affect the Court's analysis of the landowner's duty to trespassing children. The Minnesota Supreme Court disagreed. The Minnesota Supreme Court stated that the cases relied upon by the Sireks were distinguishable because in those cases, the child wandered away from parents in business places where their unsupervised presence could reasonably be anticipated.

The Court held that the DNR owed no duty as a matter of law. *Id.* at 811. In so holding, the Court reasoned:

> We agree with Illinois courts which have recognized that '[W]hile children are being watched by their parents, or entrusted persons in supervision, landowners may be relieved of a duty to warn them of or remove dangerous instrumentality [sic] the danger from which is apparent,' *Strode v. Becker*, 206 Ill. App.3d 398, 564 N.E.2d 875, 880 (Ill. App. 4 Dist., 1990), and have stated that 'if a child is too young chronologically or mentally to be 'at large,' the duty to supervise that child as to obvious risks lies primarily with the accompanying parent.' *Salinas v. Chicago Park Dist.*, 189 Ill. App.3d 55, 545 N.E.2d 184, 188 (Ill. App. 1 Dist., 1989).

*Sirek*, 496 N.W.2d at 811.

Holding that the trespassing standard for children did not apply, the *Sirek* court held that since there was no evidence that the Sireks failed to discover the highway, the DNR did not owe any duty to the Sireks or their minor child, as a matter of law. *Id.* at 812.

In *Sirek*, the Minnesota Supreme Court cited with approval Illinois law in its decision. Illinois cases have also addressed the issue of a landowner's duty to minor children when in the care of their parents in the landlord tenant context. For example, Illinois courts have held that the landlord is not liable for injuries to a tenant's child when the landlord had no knowledge of the defect and the child was supervised by the parent. See, e.g., *Best v. Services for Co-op.* and

In Best, the plaintiff's son sustained injuries when he fell through an open-screened window. In affirming the trial court and the Illinois Court of Appeals, the Supreme Court held that the defendant owed no duty to the plaintiff as a matter of law. The Court summarized other Illinois Appellate opinions concluding that a landlord owes no duty to maintain any window in an apartment he leases to tenants which is sufficiently strong to support the weight of a tenant's minor child leaning against the screen. Id. 629 N.E.2d at 123-24.


"[T]he law should not impose a duty on the landlord to ensure the safety of a toddler who is left free to roam and give vent to his curiosity." Id.; see, also, Shull v. Harristown Township, 223 Ill. App. 3d 819, 585 N.E.2d 1164 (Ill. App. 4 Dist., 1992) (property owner relieved of liability for minor child's injuries to obviousness of danger to both parents and child); Stevens v. Riley, 219 Ill. App. 3d 823, 580 N.E.2d 160 (Ill. App. 2 Dist., 1991) (property owner relieved of liability for injury to minor child due to parents' knowledge of obvious danger); Strode v. Becker, 206 Ill.Ct.App.3d 398, 564 N.E.2d 875 (Ill. App. 4 Dist. 1990) (property owner relieved of liability for injury to minor child because child was under parent's supervision); Salinas v. Chicago Park District, 189 Ill. App. 3d 55, 545 N.E.2d 184 (Ill. App. 1 Dist., 1989) (city park relieved of liability for injury to minor child because danger was obvious to parents and child was under parent's supervision).

d. Causation

Proof of a causal connection between the alleged negligence and resulting damages must be something more than merely consistent with the Plaintiff's theory of the case. Bernloehr v. Central Livestock Order Buying Co., 296 Minn. 222, 225, 208 N.W.2d 753, 755 (1973).
Where expert testimony must be solely relied on to show the causal connection between the alleged cause and the subsequent result, disability or injury, the plaintiff must show more than a mere possibility, suspicion or conjecture that such a causal connection exists. Otherwise, the expert's testimony lacks proper foundation for a finding of causal connection. Bernloehr, 296 Minn. at 225, 208 N.W.2d at 755.

The Minnesota Supreme Court described the proper foundation necessary for finding causal connection in Saaf v. Duluth Police Pension Relief Ass'n., 240 Minn. 60, 65, 59 N.W.2d 883, 886 (1953):

[I]n order to have a proper foundation for a finding of causal connection, in cases where such connection must be established solely by expert testimony, the medical expert must upon an adequate factual foundation testify not only in his professional opinion the injury in question might have caused or contributed to the subsequent death of the injured person but further that such injury did cause or contribute to his death, but such medical testimony may not be couched in any particular words.

In Anderson By and Through Anderson v. City of Coon Rapids, 491 N.W.2d 917 (Minn. App. 1992), the trial court granted summary judgment for the defendants on the grounds that the plaintiffs failed to produce evidence establishing that inhalation of nitrogen dioxide caused their lung problems to the exclusion of other possible causes. The Court of Appeals affirmed this decision.

In Canada By and Through Landy v. McCarthy, 567 N.W.2d 496 (Minn. 1997) was a lead poisoning personal injury case. In Canada, a young girl was diagnosed with lead poisoning at about age 2. She lived in a couple of different apartments as of the time of her diagnosis. In one of the apartments, there had been an attempt to remove lead paint and to warn tenants, pregnant women and children to not be in the apartment building during paint removal.

The proximate cause may be proved by direct or circumstantial evidence. 567 N.W.2d at 506. Arguments were made that the negligence of the grandmother and the lead burden child’s mother was an intervening superseding cause of her lead poisoning. The Minnesota Supreme Court held that the mother’s and grandmother’s negligence was not an intervening, superseding cause of the lead poisoning.

The defendant wanted to apportion damages for the lead poisoning between two events or time periods. The burden was on the
e. Breach and Damages

Breach of any duty is generally considered to be a fact question dependent upon the circumstances of the case. Therefore, breach must be analyzed on a case by case basis. A plaintiff's damages will generally will rely heavily upon expert testimony. It is therefore subject to attack that it is based on speculation, conjecture or unsound scientific principles.

2. Negligence Per Se - Landlord Liability

Whether a violation of a particular statute or ordinances constitutes negligence per se is a question of law. Mervyn v. Magney Constr. Co., 416 N.W.2d 121, 123-24 (Minn. 1987). When determining whether negligence per se should apply, the courts generally follow a two part test: (1) have the plaintiffs demonstrated that they are members of a particular class of persons which the ordinance was designed to protect?; and (2) are the injuries sustained resulting from hazards which the ordinance is specifically designed to avoid? Johnson v. Farmers and Merchant State Bank of Balaton, 320 N.W.2d 892, 897 (Minn. 1992).

Although ordinances and other local laws that define specific duties of care can form the basis for a negligence per se claim, when the result is to alter the common law duties, those provisions should be carefully scrutinized for legislative intent. See, e.g., Mattson v. Flynn, 216 Minn. 354, 363, 13 N.W.2d 11, 16 (Minn. 1944) (public policy of the state is determined by the Legislature). Absent clear legislative intent, a statutory duty should not give rise to negligence per se actions. "The obvious conclusion must be that when a legislature said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it." W. Page Keaton, Prosser & Keaton On the Law of Torts §36 at 221 (5th Ed. 1984).

Finally, it can be argued that after the Minnesota Supreme Court's decision in Bills v. Willow Run I Apartments, 547 N.W.2d 693, 695 (Minn. 1996), a plaintiff alleging negligence per se must prove that: (1) the landlord or owner knew or should have known of the code or statutory violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage.

a. Minn. Stat. §504.18

Plaintiffs in lead paint cases have asserted negligence per se claims by alleging that a landlord's failure to comply with Minn. Stat. §504.18 (1992) is negligence per se. Subdivision 1 of that statute states:

defendant to present competent apportionment evidence. 567 N.W.2d at 508.
In every lease or license of residential premises, whether in writing or parol, the lessor or licensor covenants:

(1) That the premises and all common areas are fit for the use intended by the parties.

(2) To keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under the direction or control of the lessee or licensee.

(3) To maintain the premises in compliance with the applicable health and safety laws of the state, including weatherstripping, caulking, storm window, and storm door energy efficiency standards for renter-occupied residences prescribed by section 216C.27, subdivisions 1 and 3, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under the direction or control of the lessee or licensee.

The parties to a lease or license of residential premises may not waive or modify the covenants found in this section.

While this subdivision of Minn. Stat. §504.18 seems to alter the common-law duties of a landlord, the legislature and courts of Minnesota have clearly stated that the statute was not intended to alter a landlord's common law duties. Indeed, Minn. Stat. §504.18 states "Nothing contained herein shall be construed to alter the liability of the lessor or licensor of a residential premises for injury to third parties." See also Meyer v. Parkin, 350 N.W.2d 435 (Minn. App. 1984).

The Court of Appeals interpreted Minn. Stat. §504.18 in Meyer, where the plaintiff brought a claim against a landlord and asserted liability based upon violation of Minn. Stat. §504.18 after one of plaintiff's children developed a neurological illness, which experts found was caused by toxic poisoning from formaldehyde in the apartment. The trial court granted summary judgment in favor of the
defendant, holding that the landlord is not strictly liable under Minn. Stat. §504.18 for conditions which he may well not be able to monitor. *Id.* at 436.

On appeal, the Minnesota Court of Appeals affirmed, stating that:

> The legislature did not intend to eliminate the element of scienter from the rule that a lessor has a duty to warn a lessee of a concealed defect the lessor knew or should have known existed.


Minnesota courts have already held that Minn. Stat. §504.18 does not create an independent cause of action for personal injuries. In **Meyer**, the court held that violations of the covenants of habitability set forth in Minn. Stat. §504.18 only provided a defense for a tenant in an unlawful detainer action rather than a private and independent action for damages. 350 N.W.2d 439. The Meyer court reasoned that to hold otherwise would be to "impose a type of strict liability upon the landlord." *Id.* at 438 (citing Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973)). See also Hanson v. Roe, 373 N.W.2d 366 (Minn. App. 1985).

**b. Uniform Building Code Violations**

In **Bills v. Willow Run I Apartments**, 547 N.W.2d 693 (Minn. 1996), the plaintiff brought suit against his landlord under a negligence *per se*/strict liability theory, claiming that violations of the Uniform Building Code ("UBC") caused his injuries. Plaintiff slipped and fell on his apartment landing when he left for work during the height of a sleet storm. *Id.* at 693. He was aware of the storm and admitted that the exit was well-lit. *Id.* Nevertheless, he claimed that the lack of handrails and non-compliant risers in the apartment stairway, violations of the UBC, caused his fall. *Id.* at 694.

The trial court granted the Willow Run's motion for directed verdict at the close of the plaintiff's case in chief, and held that the plaintiff failed to show that Willow Run had either actual or constructive knowledge of the allegedly defective condition and UBC violation. *Id.* The trial court also expressed an opinion that the accident probably would have happened regardless of the alleged violations due to the inclement weather. *Id.*

On appeal, the violation of the UBC was found to be negligence *per se* because it created a "hidden or unanticipated danger[]." See **Willow Run**, 534 N.W.2d at 290. The court of appeals held that there was sufficient evidence to present a question of fact as to the proximate cause of the plaintiff's injuries. *Id.*
The Supreme Court of Minnesota reversed the court of appeals. *Willow Run*, 547 N.W.2d at 694. It then reinstated the trial court's determinations that the common-law standards of landlord liability apply. *Id.* The supreme court stated "[w]e disagree with the court of appeal's decision that a UBC violation impliedly creates hidden or unanticipated dangers, thus somehow imputing knowledge to the landlord and owner." *Id.* It then re-stated the common-law formula regarding landlord liability relating to UBC or other code violations:

A landlord or owner is not negligent *per se* for a violation of the UBC unless (1) the landlord or owner knew or should have known of the Code violation; (2) the landlord or owner failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage.

*Willow Run*, 547 N.W.2d at 695.

The *Willow Run* decision was consistent with a number of cases in which negligence *per se* in landlord-tenant cases involving code violations has been rejected. *See*, e.g., *Broughton v. Maes*, 378 N.W.2d 134 (Minn. App., 1985), *rev. den* (Minn., Feb. 14, 1986); *Oakland v. Stenlund*, 420 N.W.2d 248 (Minn. App., 1988), *rev. den* (Minn., Apr. 20, 1988).

The *Willow Run* decision is also consistent with cases from other jurisdictions which have specifically addressed lead paint ordinances and refused to find that a violation of an ordinance alters the landlord's common law liability. *See* *Winston Properties v. Sanders*, 565 N.E.2d 1280 (Ohio App. 1 Dist. 1989) (landlord cannot be held liable under a negligence *per se* theory where the existence of lead-based paint on the premises where the landlord did not know about the presence of lead paint and the tenant did not inform the landlord of the specific problem); *Garcia v. Jiminez*, 539 N.E.2d 1356 (Ill. App. 2 Dist. 1989) (no strict liability for violation of lead paint ordinance absent a showing that the landlord had knowledge of the presence of the violation).

c. **City Ordinances**

The decision in *Willow Run*, 547 N.W.2d at 695, would require the landlord to know or have reason to know of the violation and still fail to remedy the violation before a prima facie case of negligence per se could be presented.
Even if the plaintiff is able to meet the Willow Run standards, he would have more requirements to satisfy before he could recover in a negligence per se claim based on ordinances. The plaintiff must prove that the injury suffered was of the type the ordinance was meant to prevent (discussed below) and that the ordinance violation was the proximate cause of the injury.

Chapters 240 and 244 of the Minneapolis Housing Code specifically relate to lead poisoning prevention. A defendant faced a negligence per se claim based on the Minneapolis Housing Code should argue that Chapter 244 of the Minneapolis Housing Code does not provide a basis for negligence per se in lead poisoning cases because it lacks an express intent to protect children from lead poisoning.

In §240.10, the Minneapolis city council found that lead "is a toxic element that does not naturally occur in the human body at high levels" and that "excess lead in the human body is harmful and impairs biochemical reaction which can result in neurobehavioral and growth defects, negative metabolic effects, central nervous system function impairment...." Minneapolis Housing Code, §240.10. This section acknowledges that children and fetuses are the most susceptible to physiological damage. This section, however, does not state that excess lead only presents a health hazard to children. The findings note several potential health hazards to "the human body"; adult or children. Based on these findings, the City Council sets forth procedures for abatement when the lead paint is at a toxic level and in deteriorated condition.

Other provisions contained in those ordinances specifically state "the purpose of the housing maintenance code is to protect the public health, safety and welfare." Minneapolis Housing Maintenance Code §244.20. Because ordinances and statutes that are intended to protect the general public do not create a duty to each individual comprising that public, there is no duty to an individual minor plaintiff. See, Sternitzke v. Donahue's Jewelers, 249 Minn. 514, 83 N.W.2d 96 (1957).

A defendant could argue that if chapters 240 and 244 of the Minneapolis Housing Code were intended to prevent children from being exposed to lead based paint, the ordinances would require all premises where children reside to be lead free. There is no such requirement. Nothing in the ordinances prevents children from residing in premises known to have lead based paint. Nor do the ordinances require landlords to remove all lead based paint. Instead, the ordinances merely require a landlord to repair or remove paint containing a toxic level of lead that is "blistered, cracked, flaked, or chalked away." See, Minneapolis Housing Code § 244.510. Therefore, it can be argued that the individual minor plaintiff's reliance on the Minneapolis Housing Code is insufficient to satisfy

3. Defenses

a. Statutes of Limitation/Repose

Statutes of limitations and repose are justified by necessity and practicality and are needed to protect the court system from the litigation of stale claims. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137 (1945). Minnesota Statute §541.051 provides the applicable statute of limitations and repose relating to improvements to real property:

Subd. 1. (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing the design, planning, supervision, materials or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.


In Pacific Indemnity Co. v. Thompson-Yaeger, 260 N.W.2d 548 (Minn. 1977), superseded by statute as stated in O’Brien v. U.O.P., Inc., 701 F.Supp. 714 (D.Minn. 1988) the court explained its common-sense definition of an improvement to real property as follows:

An improvement to real property is a permanent addition to or betterment of real property that changes
its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.

*Id.* at 554 (quoting Kloster-Madsen v. Tafl's Inc., 303 Minn. 59, 226 N.W.2d 603 (1975)). See also, Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co., 870 F.2d 443 (8th Cir. 1989). Materials otherwise considered to be improvements to real property remain improvements to real property even though they have a finite useful life. Thorp v. Price Bros. Co., 441 N.W.2d 817 (Minn. App. 1989).


It can be argued that the paint that covered the surfaces of a defendant landlord's property was an improvement to real property. Paint is costly, requires an expenditure of labor and money and makes the property more useful and valuable. Accordingly, the two year statute of limitations from the date the injury was discovered and the ten year statute of repose also applies. However, some trial courts have found that paint is merely repair and maintenance.

Finally, in most lead paint cases, the rental premises are located in older buildings. Often, all of the plaintiff's claims are barred by the statute of repose governing improvements to real property. Minn. Stat. §541.051 provides that in no event shall a claim be brought more than ten years from the date of substantial completion of the construction. The Minnesota Court of Appeals held in Boyum v. Main Entree, Inc., 535 N.W.2d 389 (Minn. App. 1995) that Minn. Stat. §541.051 bars negligence per se claims under the Uniform Building Code for the violations originating more than 10 years prior to the injury. Generally speaking, lead paint application was done before 1977, the year in which lead paint was banned by the Consumer Products Safety Division.

### b. Parents' Own Negligence

Where the parents cause harm to their children through their own negligence, they may be held liable. Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); Romanik v. Toro Co., 277 N.W.2d 515, 518-20 (Minn. 1979). See also, Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (Minn. 1968), overruled by Anderson v. Stream,
Where the minor's parents were aware of the presence of lead paint and their child's elevated lead levels, their lack of supervision of the child may constitute a superseding intervening cause relieving the landlord from any liability. See, Medved v. Doolittle, 220 Minn. 352, 19 N.W.2d 788 (Minn. 1945), overruled in part Strobel v. Chicago, 255 Minn. 201, 96 N.W.2d 195 (Minn. 1959).

B. Asbestos and Other Claims

Minnesota has statutes governing the harmful substances such as formaldehyde, Minn. Stat. §§144.495 and 325F.18 and asbestos, Minn. Stat. §325F.01 (banning use or sale of powdered asbestos or triable asbestos products since August 1, 1973). Claims for injuries related to formaldehyde, asbestos and similar substances are commonly plead in negligence, strict liability, and failure to warn as well as breach of express and implied warranties of merchantability and fitness for a particular purpose. The defenses discussed in earlier portions of this document would also be applicable in cases involving claims of exposure to asbestos or other toxic substances. See, e.g., Zimprich v. Stratford Homes, Inc., 453 N.W.2d 557 (Minn. App. 1990) (negligence and strict liability personal injury claims based on urea-formaldehyde insulation). However, with respect to actions for removal or abatement of asbestos from buildings, the Minnesota Legislature eliminated the statute of limitations defense that otherwise would have barred any such actions not asserted before July 1, 1990. (Minn. Stat. §541.22).

Since December of 1987, all asbestos-related claims filed in Minnesota State courts have been assigned to a single judge appointed by the Minnesota Supreme Court for handling all pre-trial and trial proceedings. A Case Management Order issued by that judge governs all phases of pleading, discovery, motions, settlement, and trial. The Case Management Order also provides for an Inactive Docket for protection for "pleural disease" cases from a possible statute of limitations defense. Since there is no case law in Minnesota indicating whether Minnesota would allow separate actions for separate diseases arising out of the same exposure to asbestos or other toxic substances, e.g., asbestos-related pleural disease and mesothelioma, the existence of the Inactive Docket combined with the fact that plaintiffs' counsel in Minnesota asbestos cases frequently attempt to include cancer waivers in settlement negotiations for asbestos claims, lead to the conclusion that in the absence of an express ruling on the issue, a properly documented settlement of one disease claim could very well bar the assertion of a second disease claim arising out of the same toxic substance exposure.

In Sopha v. Owens-Corning Fiberglas Corp., 230 Wis.2d 212, 601 N.W.2d 627 (Wis. 1999) the Wisconsin Supreme Court was considering whether a surviving spouse could bring a wrongful death action for death caused by a spouse's mesothelioma after that spouse had previously brought suit for a non-malignant condition and had settled such claim. 601 N.W.2d at 630. The Wisconsin
Supreme Court held that “a person who brings an action based on a diagnosis of non-malignant asbestos-related condition may bring a subsequent action upon a later diagnosis of a distinct asbestos-related condition. The diagnosis of a malignant asbestos-related condition creates a new cause of action and the statute of limitations governing the malignant asbestos-related condition begins when the claimant discovers, or with reasonable diligence should discover, the malignant asbestos-related condition.” Id.

Consolidated trials of asbestos cases have been approved by the Minnesota Supreme Court. Minnesota Personal Injury Asbestos Cases v. Keene Corp., 481 N.W.2d 24 (Minn. 1992).

Toxic tort cases also present unique circumstances of a plaintiff's comparative fault, due to the disease processes involved. For example, a plaintiff's smoking history can be considered in allocating fault to the plaintiff in certain toxic exposure cases, such as asbestos or TDI, when lung diseases are claimed to result from the exposure.

C. Unique Damage Claims In Toxic Tort Cases

Beyond the usual damage claims of personal injury cases, including the costs of medical treatment, past and future wage loss, permanent disability, and past and future pain and suffering, toxic tort claims present some unique forms of damage claims, due to the latency of the disease processes involved.

1. Fear Of Cancer

"'Fear of cancer' is a term generally used to describe a present anxiety over developing cancer in the future." Potter v. Firestone Tire and Rubber Co., 863 P.2d 795, 804 (Cal. 1993). In essence, it is an emotional distress claim.

Proof of some form of physical injury is still required for emotional distress claims in Minnesota, either as a direct result of negligent conduct, or as a physical manifestation of the emotional distress. Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26, 31 (Minn. 1982). Thus, in State by Woyke v. Tonka Corp., 420 N.W.2d 624, 627 (Minn. App. 1988) rev. den. (May 4, 1988), the Minnesota Court of Appeals upheld a trial court's dismissal of a negligent infliction of emotional distress claim arising out of exposure to hazardous waste in the absence of objective medical evidence establishing physical manifestation of emotional distress.

In Werlein v. U.S., 746 F. Supp. 887 (D.Minn., 1990), vacated in part, 793 F. Supp. 898 (D. Minn. April 21, 1992), the plaintiffs, users of water allegedly polluted by chemical discharges from the Twin Cities Army Ammunition Plant, claimed damages for emotional distress caused by increased risk of future disease. Judge Renner, purporting to apply Minnesota law, allowed the claim, concluding that the subcellular harm to the plaintiffs caused by the toxic exposure constituted a sufficient physical injury to allow the emotional distress claim to survive. Werlein, 746 F. Supp. at 906. The parties subsequently settled the case and the defendants

The Minnesota Supreme Court considered an emotional distress claim arising out of fear of future disease in a case involving fear of AIDS. K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995), involved a claim against a physician for emotional damages allegedly suffered upon learning that the physician had performed two gynecological procedures upon the plaintiff when the physician was HIV positive. The Minnesota Supreme Court restated the Minnesota law requiring a plaintiff claiming negligent infliction of emotional distress in the absence of a contemporaneous physical injury to show: (1) placement within the zone of danger of physical injury; (2) reasonable fear for safety; and (3) severe emotional distress with attendant physical manifestation. The court held that the plaintiff's failure to establish actual exposure to HIV precluded the plaintiff from meeting the zone of danger requirement. The decision is of little significance to fear of cancer claims resulting from toxic substance exposure, because the potential means of actual exposure to HIV are so limited. Exposure to other toxic substances, which in some cases can be accomplished simply by inhaling ambient air, present a far different analysis.

Thus, it appears that Minnesota courts will require a showing of a physical injury to sustain a fear of cancer claim, either as a direct result of the toxic exposure, or as a manifestation of the emotional distress if established objectively by medical evidence. Whether the Minnesota courts will adopt Judge Renner's conclusion in the Werlein case -- that subcellular damage caused by the toxic exposure is a sufficient injury to meet that requirement for an emotional distress claim -- is at this point uncertain. Notably, in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424, 117 S.Ct. 2113 (1997), a recent United States Supreme Court decision arguably limited to FELA actions, the United States Supreme Court held that a railroad worker exposed to asbestos but without any symptoms of disease, could not assert an emotional distress claim for his fear of cancer allegedly caused only by his exposure to asbestos. Thus, this decision supports the position that a physical injury is required for assertion of a fear of cancer claim.

Consequently, the defense of a fear of cancer claim depends in part on the plaintiff's theory of physical injury. If the claim is a physical injury caused by the toxic exposure, medical expert testimony will be required to contest the allegation of an actual physical injury. In addition, a legal argument raising the issue of what constitutes a physical injury may be advisable, especially when it is debatable whether the plaintiff has suffered any present impairment. See, e.g., In re Hawaii Federal Asbestos Cases, 734 F. Supp. 1563, 1567-70 (D. Haw. 1990) (pleural plaques or pleural thickening caused by asbestos exposure without functional impairment not sufficient physical injury to allow emotional distress claim). On the other hand, if the plaintiff claims a physical manifestation of the emotional distress, the focus of the
defense should be on the Woyke requirement of objective medical evidence establishing that physical manifestation.

Beyond the physical injury requirement of the emotional distress claim, defense counsel should address the extent of plaintiff's actual fear by establishing through discovery: plaintiff's failure to seek counseling for the emotional distress; the failure to discuss the emotional distress with the plaintiff's treating physician; the absence of any significant changes in plaintiff's lifestyle; the lack of any noticeable change in plaintiff's work performance or home life; plaintiff's ability to maintain social relationships; and the absence of an adverse impact on plaintiff's physical activities as a result of the emotional distress. Defense counsel should also look in plaintiff's medical or employment records for any health questionnaires completed after the lawsuit was commenced, in which plaintiff failed to identify the physical injuries, the physical manifestations of emotional distress, or the emotional distress that plaintiff claims to be suffering from in support of the fear of cancer claim.

A plaintiff's smoking history is a critical component of the defense. Counsel should emphasize that a plaintiff who smoked after the Surgeon General's warnings appeared on cigarette packages in the mid-1960's, voluntarily ingested a known carcinogen without any fear. This undercuts the credibility of a present fear of cancer from exposure to some other substance. Such a defense can backfire in asbestos cases, however, since studies demonstrate a synergistic impact of the combination of smoking and asbestos exposure on an individual's risk of developing lung cancer. See, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1138-39 (5th Cir. 1985). However, counsel can still assert that fear tends to be greater among those who are at passive risk, e.g., a risk created by unknown and involuntary toxic exposure, than those who engage in active risk behaviors, such as smoking, excessive drinking, and avoiding regular checkups for cancer. Those individuals engaged in such active risk behaviors are actually managing their cancer fears by denying or ignoring the risks. W. Reid, A Psychiatrist Looks at Fear-of-Cancer Claims, 6-7 (appearing in written materials for DRI Defense Practice Seminar "Asbestos Medicine" (1990).

Defense counsel should also consider retaining expert witnesses to assist in defending fear of cancer claims. Experts should include a psychiatrist with experience in the treatment of stress who can testify that stress is a frequent occurrence for all individuals. An oncologist who can educate the jury on the vast number of Americans that get cancer, which creates a fear of that disease among the general population, not just those exposed to toxic substances, is also helpful to the defense of fear of cancer claims. Recent statistics indicate that one-half of all men and one-third of all women will develop cancer. American Cancer Society, Cancer Facts & Figures -- 1997, p.l.

Finally, defense counsel should use every opportunity to create the impression that the true source of the plaintiff's emotional distress is not the
exposure to the toxic substance, but the plaintiff's attorneys and medical experts and the lawsuit itself.

[O]ne should assume that plaintiff's attorneys and the litigation process often exacerbate fears and anxieties in persons at risk of cancer. Each time topics of the likelihood of cancer, recurrence of cancer, pain, mutilation or dying are brought up, the patient's internal coping mechanisms must come down a bit. The repression necessary to unconscious defense mechanisms is breached, and the less-effective ignoring, avoiding or activity-based coping must take its place. At the same time, the patient's ignoring or avoiding activities are breached as well. The wound is necessarily reopened.

W. Reid, supra, at 8, (emphasis original).

The defense of a fear of cancer claim essentially requires only a specialized version of the traditional defense approach of addressing every element of the claim. Defense counsel should focus on the following: (1) whether there is an actual physical injury; (2) the actual extent of the fear; (3) the reasonableness of the fear; and (4) the true cause of the fear.

See, also, Bryson v. Pillsbury Company, 573 N.W.2d 718 (Minn. App. 1998).

2. Increased Risk of Cancer

In contrast to the fear of cancer claim, the increased risk of cancer claim asserts no present injury, but only the increased risk of developing a future injury in the form of cancer. Relying on the general prohibition against awarding damages for future harm because such damages are speculative, the courts have been much more reluctant to allow claims for the increased risk of cancer than for the fear of cancer or medical monitoring claims. This is somewhat curious in light of the general acceptance of future risk claims in other contexts, such as claims of increased risk of arthritis in bone and joint injury cases.

In Minnesota, there appears to be some conflict as to whether increased risk of cancer claims are recognized. However, this conflict is more apparent than real. In State by Woyke v. Tonka Corp., 420 N.W.2d at 625, the Minnesota Court of Appeals noted that the trial court rejected the plaintiffs' request to include an increased risk of cancer claim, "because Minnesota does not recognize this claim." Although this statement by the Court of Appeals was dicta, Judge Renner cited Woyke to support the proposition that Minnesota law does not recognize a cause of action for increased risk of cancer. Werlein, 746 F. Supp. at 901.
Notwithstanding the comments in Woyke and Werlein, in Herbst v. Northern States Power Co., 432 N.W.2d 463 (Minn. App. 1988), the Minnesota Court of Appeals upheld an award to a burn victim for, among other things, an increased risk of skin cancer. The court based its decision on medical testimony that it was generally well-accepted in medical literature that recurrent breakdown in skin may cause an increased risk of skin cancer and that the plaintiff had recurrent breakdown in skin covering her elbows. The court cited Dunshee v. Douglas, 255 N.W.2d 42 (Minn. 1977) to support its finding that this testimony was sufficient foundation for a compensable claim. In Dunshee, it was claimed that the plaintiff had an increased risk of a stroke or aneurysm as a result of a scar formation on the carotid artery. The Minnesota Supreme Court held that the plaintiff must establish, to a reasonable degree of medical certainty, that plaintiff suffered a present injury, and as a result of that injury, the plaintiff had an increased risk of a stroke. The court explained:

In so holding, we do not retreat from the requirement that injuries be proven to a reasonable medical certainty. The injury in this case is not a stroke, but scar formation in the artery. Dr. Hauser's testimony was sufficient to prove to a reasonable medical certainty that there was scar formation and that as a result the plaintiff runs an increased risk of stroke or aneurysm.

Dunshee, 255 N.W.2d at 47.

Dunshee and Herbst indicated that under Minnesota law, a claim for increased risk of a future separate disease, such as cancer, requires proof of a present physical injury and further proof, to a reasonable degree of medical certainty, that as a result of that injury, the plaintiff is at an increased risk of developing another medical problem in the future. In addition, it has been held in Minnesota asbestos cases that communication by a medical expert to the plaintiff of an increased susceptibility to cancer as a result of the asbestos disease contracted is a prerequisite for fear of cancer and increased risk of cancer claims. Anderson v. Amchem Products, Inc., et al, Dakota County Court File No. 103740. Thus, the same issues with respect to whether the plaintiff is suffering from a present physical injury that were addressed in the context of fear of cancer claims also arise in claims for increased risk of cancer, and should be defended in the same manner.

In addition, to the extent appropriate, defense counsel should retain expert witnesses to demonstrate the absence of a connection between the cancer the plaintiff is claiming to be at increased risk of developing and the plaintiff's present physical injury. For example, in asbestos cases, evidence can be presented that non-cancerous asbestos diseases and cancers are entirely separate and distinct disease processes. See, e.g., Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1025 (Md. 1983) ("[A]sbestosis and lung cancer are separate and distinct latent diseases that are not medically linked.")
Defense counsel should further argue for a heightened standard of proof for an increased risk of cancer claim. Counsel should consider filing a motion in limine to preclude plaintiff's expert from testifying on chemical causation or to give a specific opinion that plaintiff has an increased risk of cancer in the absence of a specific quantification of that increased risk.

Defense counsel should also focus on plaintiff's exposures to other carcinogens, e.g., smoking, to shift the attention away from the toxic substance the defendant was responsible for to other toxic substances that could be more responsible for any increased risk of cancer. For example, in Potter v. Firestone Tire & Rubber Co., 863 P.2d at 825, the California Supreme Court noted that cigarette smoke contains 40,000 to 60,000 parts per billion of benzene, which was more than 2,500 times the concentration detected in plaintiffs' well water.

3. Medical Monitoring

"In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of future periodic medical examinations intended to facilitate early detection and treatment of disease caused by a plaintiff's exposure to toxic substances." Potter v. Firestone Tire & Rubber Co., 863 P.2d at 821. As the Court of Appeals for the Third Circuit stated in In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849-50 (3rd Cir. 1990):

Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances. Often, the diseases or injuries caused by this exposure are latent. This latency leads to problems when the claims are analyzed under traditional common law tort doctrine because, traditionally, injury needed to be manifest before it could be compensable.

916 F.2d at 849-50 (Footnote omitted).

Although a medical monitoring claim is treated as separate and distinct from an increased risk of cancer claim, proof of increased risk of cancer appears to be integral to a medical monitoring claim. In Herber v. Johns-Manville Corp., 785 F.2d 79, 83 (3rd Cir. 1986), the Court of Appeals for the Third Circuit stated:

It is, of course, impossible to demonstrate that greater than normal monitoring for cancer will be necessary in the future without presenting evidence that the plaintiff has a greater than average risk of contracting cancer.

In that case, although the court rejected the claim for increased risk of cancer, the court allowed evidence of the increased risk to support the medical monitoring claim. Id. In re Paoli R.R. Yard PCB Litig., 916 F.2d at
850-51, the Court of Appeals for the Third Circuit distinguished the claim of medical monitoring from the increased risk claim by concluding that the claim for medical monitoring is much less speculative, since the issue for the jury is the less conjectural question of whether the plaintiff needs medical surveillance.

One of the leading cases on medical monitoring claims is Ayers v. Jackson Township, 525 A.2d 287 (N.J. 1987). That case involved claims arising out of well water contamination by toxic chemicals. The New Jersey Supreme Court refused to recognize the claims for increased risk of disease, but upheld an award of over $8.2 million for future medical surveillance. The court concluded that recognition of the medical surveillance claim was not necessarily dependent on recognition of the enhanced risk claim. In upholding the award for medical surveillance, the New Jersey Supreme Court cited Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975), to support the proposition that the public health interest may justify judicial intervention even when the risk of disease is problematic. Ayers, 525 A.2d at 312. The court listed several factors to consider when determining the reasonableness of a medical monitoring claim, including the likelihood of disease, the significance and extent of plaintiff's exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, and the value of early diagnosis. Id., but see National Audubon Soc. v. Department of Water, 869 F.2d 1196 (9th Cir. 1988).

In Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991), the Court of Appeals for the Fourth Circuit held that in the absence of a showing of present physical injury, the plaintiffs were not entitled to medical monitoring relief. The court affirmed the reasoning of the trial court which held that the physical injury requirement created a necessary line for the allowance and disallowance of medical monitoring claims, and that any redrawing of that line should be done by the state legislature. In that connection, the trial court observed:

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. ** Allowing today's generation to exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless. ** This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.
States Supreme Court recently followed this same line of reasoning in
denying a medical monitoring claim by a railroad worker exposed to
asbestos but without any symptoms of disease. Metro-North Commuter
Supreme Court held that in the absence of a compensable injury, there was
no basis for the medical monitoring claim.

The only case purporting to apply Minnesota law to a medical monitoring
claim is Werlein, which, as previously discussed, is of dubious value in
determining the status of Minnesota law on this issue. For whatever its
value, Judge Renner held that the plaintiffs were entitled to recover the costs
of future medical monitoring as tort damages under the common law:

Assuming that a given plaintiff can prove that he has present
injuries that increases his risk of future harm, medically
appropriate monitoring is simply a future medical cost, which
is certainly recoverable.

Werlein, 746 F. Supp. at 904.

The absence of Minnesota appellate decisions addressing medical
monitoring claims in toxic tort cases leaves the door open to defense counsel
to assert the absence of a legal basis for such a claim. In making such
arguments, defense counsel should point out that alleged tort victims in all
other areas of the law, e.g., traffic accidents, product defects, or slip and fall
cases, are required to incur their own medical expenses, and can only recoup
those expenses after proving fault, causation, and injury. Further, defense
counsel should use the policy argument contained in the United States
Supreme Court decision in Metro-North Commuter Railroad Co., v.
F. Supp. 1344 (S.D. W.Va. 1990) to contend that, at the very least, a
showing of a present physical injury is required for a medical monitoring
claim.

Alternatively, defense counsel should address the issue of whether medical
monitoring would have any productive value in the particular case being
defended. For example, the Mayo Clinic conducted a study to see if medical
monitoring for lung cancer should be implemented for smokers. The study
concluded that the clinical outcome of monitored patients was not better than
those not monitored. The results of that study have been used to justify the
decision not to monitor smokers for lung cancer. See, S. Fontana, D. R.

In addition, defense counsel may wish to consider whether expert testimony
could be used to contend that the potential harm from medical monitoring
could outweigh its value. For example, periodic x-rays could cause a greater
risk than the original carcinogenic exposure. Defense counsel should also address the issue of whether the necessary and reasonable medical monitoring required for plaintiff is anything more than would be reasonably recommended for the general population, regardless of toxic exposure. See, Potter v. Firestone Tire & Rubber Co., 863 P.2d at 825.

As a final alternative defense to a claim for a lump sum award for medical monitoring, defense counsel should, in the interest of limiting the amount of potential liability, propose a court-supervised, actuarially sound fund, to which the plaintiffs could apply in the future for the costs of medical surveillance. Such a court-supervised fund was recommended by the New Jersey Supreme Court in Ayers, 525 A.2d at 313-14, and by the California Supreme Court in Potter v. Firestone Tire & Rubber Co., 863 P.2d at 825 n.28. In addition, the Arizona Court of Appeals in Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. App. 1987), actually approved such a court-supervised fund in lieu of a lump sum award. In support of a court-supervised fund, the California Supreme Court in Potter stated:

[I]n contrast to a lump-sum payment, a fund remedy will encourage plaintiffs to spend money to safeguard their health by not allowing them the option of spending the money for other purposes. The fund remedy will also assure that medical monitoring damages will be paid only to compensate for medical examinations and tests actually administered, thus serving to limit the liability of defendants to the amount of expenses actually incurred. (Ibid.) In turn, this should tend to reduce insurance costs, both to potential defendants and the general public alike.

Potter, 863 P.2d at 825 n.28. Other advantages of such a court-supervised fund include the provision of a method for offsetting a defendant's liability by payments from collateral sources, the provision of a convenient method for establishing credits in the event insurance benefits were available for some, if not all of the plaintiffs, and limiting the liability of the defendant to the amount of expenses actually incurred. Ayers, 525 A.2d at 314.
VII. PERSONAL JURISDICTION

When a defendant challenges personal jurisdiction, the burden is on the plaintiff to prove that sufficient contacts exist with the forum state. *Dent-Air, Inc. v. Beech Mountain Air Servs., Inc.*, 332 N.W.2d 904, 907 n.1 (Minn. 1983). The plaintiff's allegations and supporting evidence are taken as true. *Id.* In Minnesota, the issue of whether there is personal jurisdiction over a foreign defendant requires a two-part analysis. First, the facts must satisfy the requirements of the Minnesota long-arm statute. Minn. Stat. § 543.19. Second, the exercise of long-arm personal jurisdiction must comply with the Due Process requirements of the United States Constitution. *Kreisler Mfg. Corp. v. Homstad Goldsmith, Inc.*, 322 N.W.2d 567, 569 (Minn. 1982).

Under Minnesota’s long-arm statute, Minnesota may assert personal jurisdiction over a foreign corporation if the corporation:

(a) owns, uses, or possesses any real or personal property situated in this state; or

(b) transacts any business within the state; or

(c) commits any act in Minnesota causing injury or property damage; or

(d) commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:

(1) Minnesota has no substantial interest in providing a forum; or

(2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or

(3) the cause of action lies in defamation or privacy.


Due process requires that the defendant have “certain minimum contacts” with the forum state and that the court's exercise of jurisdiction over the defendant in maintaining the suit “does not offend traditional notions of fair play and substantial justice.” *Int'l Shoe Co. v. Wash.*, 362 U.S. 310, 316, 66 S.Ct. 154, 158 (1945) (quotation omitted). Generally, to support personal jurisdiction there must be “some act by which the defendant purposely avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). It is vital that the defendants “conduct in connection with the foreign state are such that he should reasonably

Personal jurisdiction may be general or specific. *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674 (Minn. App. 2000) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9, 104 S.Ct. 1868, 1872 nn. 8-9 (1984)). General jurisdiction exists when the defendant has “continuous and systematic” contacts with the forum state. *Id.* (citing *Helicopteros Nacionales*, 466 U.S. at 415-16, 104 S.Ct. 1872-73). Specific jurisdiction exists when the cause of action is related to or arises out of the defendant's contacts with a forum. *Id.* (citing *Helicopteros Nacionales*, 466 U.S. at 414 n.8, 104 S.Ct. 1872 n.8). A single contact with the forum can give rise to specific jurisdiction if the cause of action arose out of that contact. *Id.* (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201 (1957); *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 295 (Minn. 1978)).

When a nonresident defendant has limited contacts with the state, Minnesota uses a five-factor test for determining whether the exercise of jurisdiction over a defendant is consistent with due process. *Juelich v. Yamazaki Mazak Optronics Corp.*, 682 N.W.2d 565, 570 (Minn. 2004). The five factors include:

1. the quantity of contacts with the forum state;
2. the nature and quality of those contacts;
3. the connection of the cause of action with these contacts;
4. the interest of the state providing a forum; and
5. the convenience of the parties.

*Id.* (quoting *Hardrives, Inc. v. City of LaCrosse, Wis.*, 307 Minn. 290, 294, 240 N.W.2d 814, 817 (1976)). “The first three factors determine whether minimum contacts exist and the last two factors determine whether the exercise of jurisdiction is reasonable according to traditional notions of fair play and substantial justice.” *Id.* “[I]n doubtful cases, courts should lean toward finding jurisdiction.” *Nat’l City Bank of Minneapolis v. Ceresota Mill Ltd. P’ship*, 488 N.W.2d 248, 252 (Minn. 1992) (citation omitted).

In the past, Minnesota courts have identified the first three factors as primary, while giving less consideration to the factors of state interest and convenience of the parties. *See Dent-Air, Inc.*, 332 N.W.2d at 907. But the supreme court recently stated:

> Although distinct, there is an interplay between the minimum contacts factors and the reasonableness factors because they all trace their origin to the holding of *International Shoe*, that a court cannot subject a person to its authority where maintenance of the suit would offend “traditional notions of fair play and substantial justice.”

*Juelich*, 682 N.W.2d at 570 (quoting *Int’l Shoe*, 326 U.S. at 316, 66 S.Ct. at 154). The supreme court further elucidated this interplay by quoting the First Circuit Court of Appeals, which stated:
We think ... the reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts].

Id. at 570-71 (quoting Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994)).
VIII. DAMAGES

A. Personal Injury Damages


The plaintiff has the burden of proving damages caused by a defendant and the proof must be by a fair preponderance of the evidence. Minnesota Dist. Judges Ass’n Comm. on Jury Instruction Guides, Minnesota Jury Instruction Guides (Civil), CIV JIG 90.15 p. 300 (Steenson and Knapp, Reporters) 4A Minn. Practice, pp. 289-365, (4th Ed. 1999). Normally, the plaintiff will seek damages up to the date of the trial and into the future which will include damages for pain, disability and emotional distress and may also include damages for disfigurement and/or embarrassment. Minnesota Dist. Judges Ass’n Comm. on Jury Instruction Guides, Minnesota Jury Instruction Guides (Civil), CIV JIG 91.10, p. 309-11 (Steenson and Knapp, Reporters) 4A Minn. Practice, pp. 289-365, (4th Ed. 1999). The plaintiff may also seek damages for medical supplies, hospitalization, health care services of every kind for past and future damages. Minnesota Dist. Judges Ass’n Comm. on Jury Instruction Guides, Minnesota Jury Instruction Guides (Civil), CIV JIG 91.15 and 91.30, pp. 312-17 (Steenson and Knapp, Reporters) 4A Minn. Practice, pp. 289-365, (4th Ed. 1999).

In Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131, 2001 WL 311271 (E.D. Pa. 2001) the plaintiff brought a wrongful termination action and claimed emotional damages. It was disclosed that the plaintiff had sought counseling for stress and other issues. In order to take the emotional distress damages out of the case, the plaintiff amended all of his discovery responses so as to preclude discovery of any psycho-therapist records. The trial court ruled that the privilege was waived and the records were discoverable. Very simply, the trial court ruled that the claimant’s had waived patient/psycho-therapist’s privilege by putting their emotional state into issue.


In Haynes v. Anderson, 304 Minn. 185, 232 N.W.2d 186 (1975) the Minnesota Supreme Court held that a physician conducting an independent medical examination of a claimant may administer the Minnesota Multi-facet Personality Inventory (MMPI) provided select answers to the questions would not be used to embarrass or intimidate the claimant.
B. Damage to Property


C. Economic Loss Doctrine

This is a statutory rule based on the common law which limits a plaintiff's recovery of economic damages to certain specific causes of action. Theories of recovery based on express or implied warranty are contractual in nature and permit recovery of contract damages but usually tort damages are not recoverable. Minn. Stat. §604.10 provides as follows:

(a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.

(b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.

(c) The economic loss recoverable in tort under this section does not include economic loss due to damage to the goods themselves. Indeed the economic loss recoverable in tort under this section does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods.

In Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990) the court stated:

There is no . . . reason in cases of property damage arising out of commercial transactions to keep tort theories of negligence and strict products liability atop those remedies already provided by the UCC . . . if the code is to have any efficacy, parties engaged in commercial activities must be able to depend with certainty on the exclusivity of the remedies provided by the code in the event of a breach of their negotiated agreements.

Id. at 688.
Basically the purpose of this statute is to prohibit a plaintiff who is a merchant from recovering from a source of recovery outside of the Uniform Commercial Code. The factors to look for are whether the plaintiff and defendant are merchants in goods of kind.


For claims brought on sales or leases consummated on August 1, 2000 or thereafter, the Economic Loss Doctrine statute to reference is Minn. Stat. §604.101 (2000). This statute does not have a retroactive effect. The 2000 statute, Minn. Stat. §604.101 eliminates the distinction between merchants and non-merchants, it simplified damages, and clarified the line between tort and contract law. Cases interpreting the 1991 Economic Loss Doctrine statute, Minn. Stat. §604.10 would include state and federal decisions. Lloyd F. Smith Co., Inc. v. Den-Tal-Ez, Inc., 491 N.W.2d 11 (Minn. 1992); Regents of the University of Minnesota v. Chief Industries, Inc., 106 F.3d 1409 (8th Cir. 1997); Jennie-O-Foods, Inc. v. Safe-Glo Products, 582 N.W.2d 576 (Minn. App. 1998) and the Marvin Windows decision cited earlier in these materials.


D. Punitive Damages

1. Pleading and Processes for Punitive Damages

Punitive damages may not be initially pled in the complaint. Instead, by operation of Minn. Stat. §§549.191-549.20, a party must request leave of a Court to pursue punitive damages by motion to amend the complaint. Case law shows that punitive damages must be accompanied by a tort. See, e.g., Jacobs v. Farmland Mut. Ins. Co., 352 N.W.2d 803 (Minn. App. 1984); judgment affirmed in part, reversed in part, 377 N.W.2d 441 (Minn. 1985).

The procedure of the motion to amend the complaint is set forth in Minn. Stat. §549.191:

The motion must allege the applicable legal basis under Minn. Stat. §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.

Next, Plaintiff must make a prima facie case that at trial, he will be able to show by clear and convincing evidence that the actions of the defendant evidence deliberate disregard for the rights or safety of others. In 1990, the standard was changed from "willful indifference" to the current "deliberate disregard" standard. Minn. Stat. §549.20, subd. 1. "Deliberate disregard for the rights and safety of others" is defined as the following:

   (b) A defendant has acted with deliberate disregard for the rights or 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 of 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. §549.20 (Emphasis added).

This procedure has been interpreted to mean that during the motion, plaintiff must show that he will be able to present clear and convincing evidence at trial that defendants acted with deliberate disregard for the decedent's rights or safety. McKenzie v. Northern States Power Co., 440 N.W.2d 183, 184 (Minn. App. 1989) (Emphasis added). See, also, Minn. Stat. §549.20, subd. 1. At this stage, the Court's inquiry is limited to whether plaintiff will be able to present clear and convincing evidence at trial. Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (D.Minn. 1994); but see, Hammond v. Northland Counseling Center, Inc., 1998 WL 315333 (D. Minn. 1998).

To be "clear and convincing," the evidence must be sufficient to permit the jury to conclude that it is highly probable that the defendant acted with deliberate disregard for the rights or safety of the plaintiff. Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978). "Deliberate disregard" has been interpreted to mean malicious, reckless or knowing disregard of the movant's rights. Bougie v. Sibley Manor, Inc., 504 N.W.2d 493, 500 (Minn. App. 1993) (citing Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990); but see, Hammond v. Northland Counseling Center, Inc., 1998 WL 315333 (D. Minn. 1998)). In this context, 'prima facie' simply means that the evidence which, if unrebutted, would support a judgment in the plaintiff's

While under Minnesota Rule of Civil Procedure 15.01, leave to amend a pleading "shall be freely given when justice so requires" the courts have recognized that punitive damages are extraordinary. The court in Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 268 (Minn. 1992), stated that a "mere showing of negligence is not sufficient." (citing Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980)). That sentiment was echoed in Ulrich, where the court stated that "punitive damages may only be awarded when a defendant's conduct reaches a threshold level of culpability." Ulrich v. City of Crosby, 848 F. Supp. at 867. It continued to state that "the mere existence of negligence or gross negligence does not rise to the level of willful indifference so as to warrant a claim for punitive damages." Id. at 868 (citations omitted).

The statute provides that a principal may be held liable for punitive damages based upon the conduct of his agent. Minn. Stat. §549.20, subd. 2. Finally, Minn. Stat. §549.20, subd. 4, requires that liability for compensatory and punitive damages be held in separate proceedings. For example, bifurcation allows a manufacturer to introduce evidence as to the exposure of other parties to the harm during the punitive portion of the trial to limit potential punitive damages. Without bifurcation, the manufacturer might be forced to introduce such potentially damaging evidence during the product liability stage of the trial, which would prejudice the defendant's liability case. See, Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989).

2. Statutory Standards for Assessing and Analyzing

The Minnesota punitive damage statute lists nine factors for measuring the amount of punitive damages. Minn. Stat. §549.20, subd.3. Those factors are:

(1) The seriousness of the hazard to the public arising from the defendant's misconduct;

(2) The profitability of the misconduct to the defendant;

(3) The duration of the misconduct and any concealment of it;

(4) The degree of defendant's awareness of the hazard and of its excessiveness;

(5) The attitude and conduct of the defendant upon discovery of the misconduct;

(6) The number and level of employees involved in causing or concealing the misconduct;
(7) The financial condition of the defendant;

(8) The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons;

(9) The severity of any criminal penalty to which the defendant may be subject.

Note that these statutory factors have been determined to be non-exclusive and jurors may consider other factors as well. Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1536 n. 18 (D. Minn. 1989).

Trial courts in Minnesota have broad discretion to put aside or reduce punitive damage awards. Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 813 (Minn. App. 1992).

Appellate courts also exercise control over punitive damages, which are subject to strict scrutiny because of their "open-ended and volatile nature." Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 837 (Minn. 1988). The legislature specifically directs all courts to review punitive damage awards in light of the nine statutory factors listed above. See Minn. Stat. §549.20, subd. 3.

3. BMW v. Gore Decision

One of the most recent national decisions regarding punitive damages is found in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996). In BMW/Gore, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment limits states from imposing "grossly excessive" punitive damage awards against tortfeasors. The Court vacated a $4 million punitive damage award against BMW in Alabama state court for failing to disclose that some "new" cars had been repainted. The buyer's compensatory damages were $4,000.

The Court noted that BMW's nondisclosure of the "repainting" done was legal in other states besides Alabama (Alabama had a strict requirement that dealers fully disclose pre-sale repairs), the Court ruled that the jury improperly based its award upon BMW's conduct in other states. The Court found that BMW's conduct in other states had no impact on the rights of Alabama's residents. Besides injecting this "state sovereignty" principle into the punitive damages analysis, the Court affirmed that Due Process requires that a punitive damage award take into consideration (1) the reprehensibility of the defendant's conduct, (2) the ratio between the injury suffered and the dollar amount awarded, and (3) other sanctions imposed.
Minnesota already has a punitive damage statute and case law limitations against grossly excessive awards. As a result, the effect of the Gore decision may be slight except to suggest that an excessive award should be challenged on both the United States and Minnesota constitutions.

E. Apportionment of Damages

In general, when two or more defendants have acted jointly, concurrently or successively and are found liable for plaintiff's injury, the defendants are individually and jointly responsible for the entire damage award. Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986). See, Steenson, Joint and Several Liability Minnesota Style, 15 Wm. Mitchell L. Rev. 969 (1989). Traditionally, this meant that if one defendant had declared bankruptcy, the other defendant would have to pay the full judgment.

1. Limitation on Joint Liability: Minn. Stat. §604.02

In Minnesota, there are two limitations to the general rule. First, the comparative fault statute reduces the judgment by the amount of fault attributable to the plaintiff (see, Defenses). Secondly, under the banner of tort reform, the Minnesota Legislature enacted Minn. Stat. §604.02, subd. (1) which states:

When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except **** a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.

For example if defendant 1 is found 10% liable and defendant 2 is 90% liable, and defendant 2 is bankrupt, the most defendant 1 is liable for is 40%.

However, after amendments made in 2003, the statute currently reads, in pertinent part:

When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:(1) a person whose fault is greater than 50 percent;(2) two or more persons who act in a common scheme or plan that results in injury;(3) a person who commits an intentional tort;…


This 2003 amendment to §604.02 also specifies that, “[t]his section applies to claims arising from events that occur on or after August 1,
As such, the aforementioned version of the statute would apply in claims that arose prior to August 1, 2003.

According to Minnesota statute, liability in multiple defendant cases is apportioned in the following way:

When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.


Minn. Stat §604.02 adopted a limitation to the joint and several liability rule. As mentioned, prior to the 2003 amendments, the statute provided that, in multiple defendant cases, the defendant whose fault is established at less than 15% can only be held liable for a percentage of the whole award that is not greater than four times that defendant's percentage of fault. This created an interesting issue in the context of Lambertson liability. In particular, one could have interpreted this modification of the joint and several liability rule as a modification of Lambertson rule in that it limits the recovery from a third party tortfeasor whose fault was established to be less than 15% to four times the amount of the established fault of that third party.

The Minnesota Court of Appeals was faced with this exact issue, and decided that the 1988 amendment to Minn. Stat. §604.02 did not modify the Lambertson contribution rule. In Decker v. Brunkow, 557 N.W.2d 360 (Minn. App. 1996), the plaintiff was injured while working for the employer, Oak Ridge Homes, in a building which it leased from the third-party tortfeasor, Brunkow. The jury assessed $125,020.93 in damages, finding Brunkow 5% negligent, and Oak Ridge 95% negligent. Id. at 361. The plaintiff moved to allocate liability for the entire verdict to Brunkow because Oak Ridge was immune from direct liability under the Workers' compensation act. Brunkow, in turn, argued that her liability was limited to four times her percentage of fault pursuant to Minn. Stat. §604.02, subd. 1. Id. at 362 (citing Kempa v. E.W. Coons Co., 370 N.W.2d 414 (Minn. 1985).

The Decker court rejected Brunkow's argument, stating that the Lambertson allocation formula governed this action rather than the formula set forth in the amended Minn. Stat. §604.02, subd. 1. Id. at 362. The court relied on the language of the Lambertson ruling, stating that any employer liability was fixed in the workers compensation system, while any third-party tortfeasor liability was available under common law tort theories. Hence, Brunkow and Oak Ridge were jointly liable under the traditional common law tort concepts contemplated in Minn. Stat. §604.02. While only 5% causally negligent, Brunkow was jointly liable with the causally negligent employer, Oak Ridge.
2. **Reallocation**

There is also a reallocation provision contained in Subd. 2 which allows a party to seek reallocation of the fault when the court determines a party's share is uncollectible. Reallocation can only be applied where there is more than one person against whom judgment can be entered. Schneider v. Buckman, 433 N.W.2d 98, 103 (Minn. 1988) (no reallocation where two of the three tortfeasors were not parties due to lapse of statute of limitations).

For example; a jury finds Plaintiff 20% at fault, bad Defendant 25%, badest Defendant 25%, and worst Defendant 30% at fault. Within one year of judgment being entered against all three defendants, Plaintiff moves for reallocation because worst Defendant's portion is uncollectible. After reallocation Plaintiff would be responsible for 20/70 of worst Defendant's share, while bad and badest Defendants would each be responsible for 25/70 of worst Defendant's share.

In Marcon v. Kmart Corporation, the Court of Appeals of Minnesota held a seller strictly liable for damages caused by a product that was defective due to a failure to warn. 573 N.W.2d 728 (Minn. App. 1998).

Twelve year old Marcon was sledding on a hill near his parents’ home. His sled struck a bump and stopped and he was thrown forward, laying face down in the snow, fracturing his neck and leaving him a quadriplegic. 573 N.W.2d at 729-30.

Marcon brought this products liability action against the manufacturer and K-Mart.

The jury attributed 100% of the causal fault for Marcon’s injuries to the manufacturer.

The Court of Appeals of Minnesota recited the law on strict products liability stating as follows:

> Minnesota courts . . . subject manufacturers to strict liability for injuries resulting from a defect in design or failure to warn [Citations omitted]. Minnesota courts have also extended this liability to persons who sell products that are in a defective condition and harm a user, even if the seller was not negligent. . . . 573 N.W.2d at 730.

The Court of Appeals of Minnesota noted that “a non-manufacturer defendant in a strict liability action can be absolved of its strict liability for injuries caused by a product defect over which it had no control [but] it can not be absolved (and therefore remains strictly liable) if the manufacturer of the defective product is unable to satisfy a judgment.” 573 N.W.2d at 731-32.
Here, in Marcon, the manufacturer was bankrupt and could not satisfy the judgment. The next entity in the change of distribution and manufacture was K-Mart. It picked up the manufacturer’s liability. On the failure to warn issue, the Court of Appeals of Minnesota stated that the Minnesota law provides that “When a manufacturer or seller knows, or should anticipate, that a product might be used in the manner that will increase the risk of injury, and the risk is not one normally comprehended by the user, there is a duty to warn.” 573 N.W.2d at 532.

In Tester v. American Standard, Inc., 590 N.W.2d 679 (Minn. App. 1999) was an asbestos related products liability action. The case on appeal concerned Minnesota’s reallocation statute. Very briefly, the plaintiff had more fault that two of the defendants from whom the plaintiff wanted to reallocate the verdict and make recovery. The plaintiff wanted to aggregate the fault of the two lessor at fault defendants. The Minnesota Court of Appeals stated that such could not be done.

Note there are exceptions to the above rule which exist for certain environmental tort claims, product liability actions and when a defendant is a municipality. When the claim involves product liability subdivision 3 states:

In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible 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 not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product.

Minn. Stat. §604.02, subd. 3. Here, when a defendant in the chain of manufacture is unable to pay its fair share of the judgment, that defendant's share is reallocated only among the other defendants in the chain, even if plaintiff was at fault.

3. Allocation In Lambertson Context

a. Application of §176.061, subd. 6(c) Formula

Minn. Stat. §176.061, subd. 6 provides an allocation formula for dividing the proceeds from a judgment when an injured employee recovers against a third-party tortfeasor (an entity other than his employer for employment-related injuries). See Albert v. Paper Calmenson Co., 524 N.W.2d 460 (Minn. 1994).

First, it should be noted that the amount of damages attributed to the employee's own fault are not recoverable and are eliminated "off the top" from the damage award. Next, the "reasonable costs of collection" - including reasonable attorneys fees - are deducted from
the gross recovery. Then, one-third of the net recovery is paid to the plaintiff-employee.

At this point, the employer is reimbursed from the remaining net recovery for workers’ compensation benefits paid to the employee (based upon its subrogation interests), less a proportionate amount of the costs of collection. This figure is the costs of collection divided by the total proceeds received by the employee from the third-party tortfeasor multiplied by all benefits paid by the employer.

Finally, any net recovery remaining is paid to the employee, and the employer receives a future credit for any benefits for which the employer is obligated to pay but has not yet paid. Minn. Stat. §176.061, subd. 6(d). The employer's recovery of the future credit is also reduced by his share of the collection costs calculated as below. See, e.g., Kealy v. St. Paul Housing & Redevelopment Authority, 303 N.W.2d 468, 475 (Minn. 1981).
IX. INVESTIGATION CHECKLIST

A. Personal Background Information

Name, alias, maiden name, name changes, address, age.
Present and past marital status.
Present and past roommates.
Name, business occupation, and address of spouse and former spouses.
If divorced, in what court and when was the judgment final.
Name and ages of children.
Present occupation, earnings.
Education.
Effect of injury on occupation, earnings.
Name and address of closest relative.

B. Medical Information

Nature and extent of injuries, pictures, if possible.
Nature and extent of permanent injuries.
Names and addresses of all treating physicians.
Names and addresses of all hospitals, clinics, with dates of admission.
Names and addresses of all nurses or therapists involved.
Obtain copies of medical bills, hospital records, and doctor's reports.
Names of prescriptions or other medical devices, date and price.
Names, addresses and agents of any personal, medical, hospital or homeowners insurance applicable.

C. Knowledge of Product Before Purchase

When did you first become familiar with the product?
How did you first become familiar with the product?
Did you see any advertisements or literature regarding the product prior to the purchase immediately preceding the injury?
Had you used the product prior to the pre-injury purchase?
If you used the product prior to the pre-injury purchase, were you then aware of any representations or statements as to its use or quality displaced on the product’s label or on its package?
For what purpose did you purchase the product?
Was the product requested sought by model or brand name?
D. **History of Acquisition of Product**

How did you acquire the product?
- a. Purchased?
- b. Borrowed?
- c. Furnished by employer?
- d. A gift?
- e. Acquired with premiums?

What was the date of purchase?

Where was the product purchased?

At what type of store was the product purchased?

How was the product displayed at the time of your purchase?

Were a number of competing products available?

Why did you select the particular product?

Was a sales person present?

If so, what did the sales person say?
- a. Did the sales person instruct you as to its use?
- b. Did he or she warn or advise of its proper use?
- c. Did he or she represent the product in any way, such as, “safe,” “foolproof,” “the best there is,” “needing no attention,” “highly recommended by the store”?

Did you disclose to the seller your intended use for the product?

How was the product packaged?

- a. Did the package bear any directions or instructions for use?
- b. Were any pamphlets or other informative materials included with the product?
- c. Was the product inspected before you left the store?
- d. Was the product received in a sealed container?

E. **Use of Product Prior to Injury**

When did you first open the product’s package?

Was there anything in the package other than the product?

If so, what?

- a. Were any instructions booklets, guarantees, or warranties in the package?
- b. Was any advertising literature in the package? If so, what was its content?

Did you inspect the package?

Did you inspect the product?

What was the product’s general appearance?

Describe your use of the product:

- a. When did you first use the product?
- b. What did you observe about it?
- c. How did you use it?
- d. For what purpose did you use it before the injury?
- e. How long did you use it before the injury?
- f. How frequently did you use the product?
g. Did you have any difficulties with the product prior to injury? If so, what were they?

h. Did you follow the directions for use, if any?

F. **Circumstances of Injury**

When did the accident occur?
Where were you at the time of the injury?
How did the accident occur?
  a. How was the product being used?
  b. Was the product in normal use at the time of the accident?
  c. Was it being used in the manner different from that recommended by the manufacturer?

G. **Client’s Conduct After Accident**

Is the product still available?
If so, where is it?
Is the original container still available?
Are the directions and other accompanying material available?
In what condition is the product at the present time?
  a. Is there an obvious defect in it at this time?
  b. Does the product still operate?
Have you used the product since the injury?
  a. Where?
  b. When?
  c. With what result?
How did you advise the seller of the accident?
  a. How?
  b. When?
Did you advise the manufacturer of your injuries?
  a. How?
  b. When?

H. **Recommendations to Client**

Secure the product, its original container, and all accompanying literature.
Locate any and all advertisements and all other material at your home that you saw prior to purchasing the product.

I. **Information Concerning Industry Producing Product**

Age of industry producing the type of product involved.
Is defendant company a newcomer or pioneer in the field?
List other firms producing similar products.
  Similarities and differences between defendant’s product and those of industry generally.
Claims made against industry generally or defendant’s competitors.
Standard texts or references used in industry.
Standards relating to industry.
   a. Published by industry
   b. Published by other organizations but with reference to industry.
   c. Is there any industry “bible”?

Criticisms of industry and its products.
   a. Who made the criticism?
   b. Where were they made?
   c. Were the criticisms published?
   d. If published, are copies available?
   e. Is defendant company aware of the criticism?

J. The Defendant Company

Company was founded _______________, _______.
The company was founded by ____________________________.
General nature of company’s business when founded.
General nature of company’s business at present.
   Is the product in question the principal product manufactured by defendant
or a sideline product?
Company’s general position in industry at present in terms of size.
Number of products manufactured by company.
Are defendant company’s products primarily consumer or industrial products?
Number of persons employed by defendant.
   Percentage of defendant’s employees engaged in research, development
and testing.
   Percentage of defendant’s budget earmarked for research, development
and testing.
Percentage of defendant’s budget earmarked for advertising.

K. The Product

Identification of product.
Size, shape, color, and description of product generally.
Characteristics distinguishing product in question from similar products.
Product was manufactured on ________________, ________.
Presence on product of any codes or symbols indicating date of manufacture,
descriptive words, lettering or directions.
Is product patented?
Ingredients or composition of product.
Specifications of finished product.
Industry or other standards followed in manufacturer of product.
Was product in question approved by a testing agency?
Changes made in product since approval given by testing agency?
Ranges of speed, heat, pressure, etc., that product is designed to withstand.
Safety features or devices incorporated into product.
Ultimate limits of product’s performance before failure.
Persons or class of persons for whom product was designed.
Anticipated uses of product:
   a. Class or type of person normally expected to buy and use product.
   b. Anticipated manner of use by average consumer.
   c. Abnormal uses anticipated.
   d. Experience regarding normal or expected life of product.
   e. Conditions and uses known to shorten life of product or cause failures.
   f. Effect of heat, moisture, time, sunlight, etc., on product.

Proper method of installing and using product.

Application of federal, state, or local statutes, regulations, or ordinances, such as:
   a. Federal Trade Commissions regulations.
   b. Flammable Fabric Act (15 USCS §§1191 et seq.)
   c. Food, Drug and Cosmetic Act (21 USCS §§301 et seq.)
   d. Clean Air Act (47 USCS §§1857 et seq.)
   e. Consumer Product Safety Act (15 USCS §2051)
   f. Federal Boat Safety Act (46 USCS §§1451-1489)
   h. Federal Food, Drug, and Cosmetic Act and Medical Device Statutes.
   j. Federal Hazardous Substances Act (15 USCS §§1261-1274)
   k. Federal Railroad Safety Act (45 USCS §433)
   l. Flammable Fabrics Act (15 USCS §§1191-1204)
   m. Highway Safety Act.
   n. Magnuson-Moss Warranty, Federal Trade Commission Improvement Act (15 USCS §§2301-2312)
   o. National Traffic and Motor Vehicle Safety Act (15 USCS §§1391-1431)
   p. Occupational Safety and Health Act
   q. Poison Prevention Packaging Act (15 USCS §§1471-1476)
   r. Radiation Control for Health and Safety Act (42 USCS §263)
   s. Refrigerator Safety Act (15 USCS §§1211-1214)

Existence and nature of warranties and disclaimers.

L. Production and Distribution

Nature of manufacturing process.
   a. Source of all raw materials.
   b. Source of all component parts.
   c. Subcontractors or sub-assemblers.
   d. Quality control on material and parts.
   e. Pre-testing procedures.
   f. Nondestructive testing engaged in by industry.
   g. Destructive testing engaged in by industry.
   h. Description of physical and chemical process used.
   i. Heat, time, pressure, etc., of processes used.
Nature of product inspection
   a. Description of inspection process.
   b. Names of inspectors and identification of records.
   c. Equipment used in inspection.
   d. Is each item inspected or is a spot check relied on?
   e. Types of defects that can be checked.
   f. Types of defects that cannot be checked.
Methods of distribution.
   a. Nature of franchise agreements, if any.
   b. Location of franchises.
   c. Manner of shipment.

M. Instructions and Warnings

Existence of written instructions on or accompanying product.
Persons who prepared instructions.
Were instructions approved by engineering department?
Anticipation by defendant company that consumer would rely on instructions.
Existence of warnings respecting product dangers.
Reason for warnings.
Did warnings accompany products as originally conceived?
If so, did those warnings differ from the present ones?
If present warnings differ, why?

N. Advertising

Nature of advertising.
Percentage of budget devoted to advertising.
Publications in which advertising appears.
Does defendant company engage in cooperative advertising with its retailers, distributors and jobbers?
Name of advertising agency responsible for advertising content.
Does defendant company maintain an advertising file?
Names of persons primarily responsible for advertising content.
Nature and existence of all sales literature distributed to salesmen, distributors, and jobbers.
Persons responsible for sales literature.

O. Other Accidents and Injuries

Company policy on adjustments for defective products.
Percentage of products returned.
Location of records concerning adjustments.
Types of failures observed.
Existence and location of records of consumer injuries.
Number of prior injuries resulting from product’s use.
How injuries occurred.
When company received notice of injuries.
Type of notice given.
Did defendant company investigate injuries?
Result of such investigations, if any.
Has defendant company been previously sued for product injury?
If so, by whom?
Names of attorneys who represented plaintiffs in each earlier suit.
Results of suits.

P. Design Changes

Has defendant company redesigned product since its original conception?
Date of design change.
How does redesigned product, if any, differ from original product?
Causal relation between change and notices of injury.
Defendant’s awareness of product criticism.
Cost differences, if any, resulting from change.
Could new design have been incorporated in product originally?

Q. Specific Product and Accident

Identification of specific product.
When and where was product manufactured?
Existence and nature of any and all records, correspondence, etc., pertaining to manufacture, inspection, sale and shipment of particular product.
Place where sale occurred.
Name and function of all persons or organizations owning, possessing, or controlling product from time it left defendant’s hands to time plaintiff acquired possession.
Nature of any first-hand knowledge by witness of facts surrounding accident.

R. Tests and Findings

Were any tests performed on product?
Nature of tests, if any.
Persons who performed tests, if any.
Findings resulting from tests.

CODES AND STANDARDS
SOURCES OF INFORMATION

National Safety Council
424 N. Michigan Avenue
Chicago, Illinois 60611
WEB SITE: www.nsc.org

American National Standards Inst.
1430 Broadway
New York, NY 10018
WEB SITE: www.ansi.org

American Society for Testing and Materials Standards
1916 Race Street
Philadelphia, Pennsylvania 19103
WEB SITE: www.astm.org

Underwriters Labs, Inc.
207 East Ohio Street
Chicago, Illinois 60611
WEB SITE: www.ul.com

Consumer Product Safety Commission
Washington, D.C. 20204
WEB SITE: www.cpsc.gov

Technical Reference Board
400 7th Street S.W.
Washington, D.C. 20590
Food and Drug Administration
Department of H.H.S.
Washington, D.C. 20204
WEB SITE: www.fda.gov

National Transportation Safety Board
800 Independence Avenue S.W.
Washington, D.C. 20591
WEB SITE: www.ntsb.gov

Office of Defects Investigation
Room 5326
400 7th Street S.W.
Washington, D.C. 20590
WEB SITE: www.nhtsa.dot.gov

A.T.L.A.
1050 31st Street
Washington, D.C. 20007
WEB SITE: www.atla.org
The Exchange
WEB SITE: http://exchange.alta.org/

(To obtain current fee and list of resources available.)
NOTICE OF CLAIM

TO: _______________________________________

____________________________________

CLAIMANT: ________________________________

____________________________

NOTICE OF CLAIM

Pursuant to Minn. Stat. §604.04, you are hereby given NOTICE that on ____________,
(date)

at approximately ____________, the claimant was injured by a ____________ which
(time)

(describe event causing injury).

The claimant seeks the damages for injury to person/property.

Note that pursuant to the statute any person in the chain of manufacture and distribution is
obligated to promptly furnish to the undersigned the names and addresses of all persons the person
knows to be in the chain of manufacture and distribution. Failure to provide this information may
subject you to personal liability.
Appendix 2

AFFIDAVIT OF MIDDLEMAN STATUS

STATE OF MINNESOTA )
COUNTY OF ) ss.

___________________________________, being duly sworn on oath says; that (he/she) is
the Defendant, or the attorney for the Defendant, and that pursuant to Minn. Stat. §544.41, to the
best of (his/her) knowledge, information, and belief, the full name(s) of the Manufacturer of the
product in the action above-entitled is as follows:

that the place(s) of business of said Manufacturer is as follows:

that the post office address(es) of said Manufacturer is as follows:

Subscribed and sworn to before me this

___ day of ____________, 2006.

Notary Public
Appendix 3

Who Whom It May Concern:

Under the Freedom of Information Act, we request the following:

Copies of all releasable documents from all case files for the following employer at the following site:

Employer:

Site:

In addition to the above-named employer, we request copies of all releasable documents from all case files which include an investigation of a fatality, catastrophe, accident or injury, for any and all employer(s) on the above-named site regardless of the reason such inspection was initiated or whether such inspection was programmed or unprogrammed.

These requests specifically include, but are not limited to:

- All Citations and Notifications of Penalty
- All Settlement Agreements
- Original prints of all photographs and/or slides
- Photocopies of all Photo Mounting Worksheets, OSHA Form No. 89
- Copies of all videotapes
- Documentation of Abatement

In the event a specific case is currently under Contest or where the 15 working day Contest Period has not yet elapsed, we request that the Citations and Notifications of Penalty be forwarded to us immediately. Please maintain a copy of this FOIA request in each respective case file and forward all other requested documents to us as soon as they become available.

Very truly yours,
Appendix 4

Who Whom It May Concern:

Under the Freedom of Information Act, we request the following:

Please send us a copy of the IMIS Report summarizing the inspection and citation history on a national scope for the following employer:

Employer:

Very truly yours,