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Qualified Litigation Attorneys

Battle of the Experts: When the Opinion of a Plaintiff's Expert Witness is Worthless

By Darwin S. Williams

It is quite common in product liability cases to obtain the opinion of multiple expert witnesses. In the case of a catastrophic fire loss, it is quite common for all potential parties to retain a fire investigator, forensic chemist and/or a mechanical and/or electrical engineer. As discovery progresses, an expert might be needed to conduct testing or to provide an opinion on damages. Products cases can be complex and winning or losing a case — whether by summary judgment, settlement or at trial — will often depend on the testimony of expert witnesses.

The Role of the Expert Witness

The proper function of an expert witness is "to assist the jury in reaching a correct conclusion from the facts in evidence."[1] The Court cannot permit a jury to speculate as to the responsibility for the origin of a fire.[2] Therefore, the expert witness must base their opinion on facts sufficient to form an adequate foundation for an opinion and should not be allowed to speculate.[3]

Minnesota evidentiary rules allow an expert to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.[4] The expert witness is qualified as long as they have "knowledge, skill, experience, training, or education" in the subject area for which they are to testify. But, first and foremost, the rule requires that the expert testimony have "foundational reliability."

Foundational Reliability

The rules do not attempt to describe what "foundational reliability" must look like.[5] It will vary from case to case depending upon the type of testimony that one is seeking to admit. Generally, if the expert opinion is based upon a scientific test, then the Court must ensure that the proponent establish that "the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability."[6] If the expert opinion is based upon "novel" scientific theory, the Minnesota Supreme Court requires the proponent of the testimony to establish that the evidence is generally accepted in the relevant scientific community.[7]

Reasonable Probability

It is well-established in the Minnesota courts that the standard for expert opinion testimony adheres to the "reasonable probability" test in *Walton v. Jones*, 286 N.W.2d 710 (Minn. 1979).[8] In *Walton*, the court stated that:

> expert testimony must **demonstrate** a reasonable probability that defendant's negligence was the proximate cause of the injury. Testimony must show that it was **more likely** that [the injury] occurred from defendant's negligence than anything else.[9]

The National Fire Protection Association's *NFPA 921 Guide for Fire and Explosion Investigations* uses a very similar standard, requiring fire investigators to set standards for the level of certainty of their opinions as either "probable" or "possible."[10] The level of certainty for a "probable" finding is to be "more likely true than not."[11] The level of certainty for a "possible" finding is to be feasible, but not probable.[12] If two or more hypotheses are equally likely, then the level of certainty of each must be "possible."[13]

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THE MIDDLEMAN STATUTE - A BRIEF REVIEW

By Jason A. Koch

Under Minnesota law, a product manufacturer and suppliers in the chain of distribution are strictly liable for injuries caused by a design defect, manufacturing defect, or a failure to warn.[1] The practical effect of strict-liability in products liability litigation is to hold a faultless seller jointly and severally liable for the causal fault of the manufacturer.[2] Fortunately, Minnesota product liability statutes set forth certain exceptions for non-manufacturers of products in the chain of distribution.[3] A supplier against whom strict-liability claims have been made, may file an affidavit with the court certifying the identity of the manufacturer of the product allegedly causing injury. After the plaintiff has filed a complaint against the manufacturer, a court must order the dismissal of strict-liability claims against the supplier. But the court may not dismiss strict-liability claims until after the alleged manufacturer is properly joined in the litigation.[4] "Dismissal is not appropriate if the plaintiff's action cannot reach a manufacturer or the manufacturer is insolvent."[5]

The purpose of the seller's exception statute is to ensure that the manufacturer can be joined in the lawsuit before the passive sellers are dismissed from strict-liability claims.[6] But the statute sets forth specific exceptions to this rule in circumstances when the seller is not truly passive.[7]

If the supplier files an affidavit identifying the manufacturer, the plaintiff can prevent the supplier from being dismissed if the plaintiff can show that the supplier exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury.[8] But a consumer was unable to maintain a strict products liability claim against tobacco distributors who received cigarettes from manufacturers and distributed them, unopened and unaltered, to retailers. This was true even though some distributors may have aggressively promoted and sold cigarettes and received money from manufacturers to promote and lobby on behalf of tobacco products.[9] There, the court noted that the "promotion" described by the plaintiff did not constitute "significant control over the design or manufacture of the product."[10]

The plaintiff can also avoid dismissal of the supplier if the plaintiff can show that the supplier had actual knowledge of the defect in the product which caused the injury.[11] To preclude the dismissal of a passive supplier based upon the supplier's actual knowledge of a defect, the plaintiff must prove that the supplier possessed information that the product was defective. Simply establishing that the supplier possessed information commonly known to the public regarding risks of a product is not sufficient to impute actual knowledge to a defendant supplier under the non-passive seller exceptions.[12] Finally, the plaintiff can prevent dismissal of the supplier if the plaintiff can prove that the supplier created the defect in the product which caused the injury.[13]

The exceptions set forth in Minn. Stat. § 544.41 are intended to soften 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."[14] Essentially, dismissal is only allowed if the seller is truly passive.

Following dismissal of the passive seller, a plaintiff may move to vacate the order of dismissal and reinstate the supplier if the plaintiff can establish one of the following:

(a) That the applicable statute of limitation bars the assertion of a strict liability in tort cause of action against the manufacturer of the product allegedly causing the injury, death or damage;

(b) That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect. Once the correct identity of the manufacturer has been given by the certifying defendant the court shall again dismiss the certifying defendant;

(c) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this state, or, despite due diligence, the manufacturer is not amenable to service of process;

(d) That the manufacturer is unable to satisfy any judgment as determined by the court; or

(e) That the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with the plaintiff.[15]

Minn. Stat. § 544.41 allows a strict-liability claim to be "reinstated against the seller at any time the injured party cannot maintain an action against the manufacturer because the manufacturer no longer exists, is insolvent, is not subject to jurisdiction, or cannot be sued."[16] Therefore, a plaintiff may establish a cause of action against a passive seller, if the plaintiff cannot maintain a cause of action against the manufacturer. A faultless seller can seek and recover indemnity from the defect-causing party in the chain of distribution.[17] But practically this will likely be difficult because in most cases, the manufacturer will be judgment proof, or not subject to jurisdiction.

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[1] Minn. Stat. § 544.41 (2008).
[2] *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 158 (Minn. 1982).
[3] Minn. Stat. § 544.41.
[4] *In re Shigellosis Litigation*, 647 N.W.2d 1, 7-8 (Minn. Ct. App. 2002).
[5] *Id* at 7.
[6] *Id.* at 6-7.
[7] Minn. Stat. § 544.41.
[8] Minn. Stat. § 544.41, subd. 3(a).
[9] *Masepohl v. Am. Tobacco Co., Inc.*, 974 F. Supp. 1245, 1254 (D. Minn. 1997).
[10] *Id.*
[11] Minn. Stat. § 544.41, subd. 3(b).
[12] Masepohl, 974 F. Supp. at 1254.
[13] Minn. Stat. § 544.41 subd. 3(c).
[14] *In re Shigellosis Litigation.*, 647 N.W.2d at 6.
[15] Minn. Stat. § 544.41, subd. 2.
[16] *In re Shigellosis Litigation*, 647 N.W.2d at 7.
[17] *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 89, 179 N.W.2d 64, 68 (1970). •

Firm News

Congratulations Len!

JLO is pleased to announce that **Leonard Schweich** has been made a **partner** in the firm.

The Minnesota Department of Labor and Industry has published new rates effective October 1, 2008.

The annual adjustments of benefits per Minn. Stat. § 176.645 are:

A. for workers injured prior to October 1, 1992: 5.20%
B. for workers injured between October 1, 1992 and September 30, 1995: 4%
C. for workers injured on or after October 1, 1995: 2%

The supplementary benefit rate, per Minn. Stat. § 176.132, is $553.00, and the minimum rate for permanent total disability benefits, per Minn. Stat. § 176.101, is $552.50.

In addition, for injuries and illnesses occurring on or after October 1, 2008, the maximum weekly benefit is $850.00, and the maximum duration of temporary total disability benefits is 130 weeks. There is no change in the minimum weekly benefit level.

The JLO 2009 Periodic Table of Basic Workers' Compensation Elements containing this and other updated information will be mailed out shortly.

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The Effect of Two or More Inconsistent Inferences by Plaintiff's Expert

In an alleged negligent product case, the burden is on the Plaintiff to prove each of the four essential elements of negligence: (1) duty; (2) breach of duty; (3) injury; and (4) that the breach of duty was the proximate cause of the injury.[14]

Minnesota case law is clear that when an expert testifies that a hypothesis on causation is merely "possible," that is not enough to avoid summary judgment dismissal or a judgment as a matter of law.[15] Additionally, where the evidence sustains inconsistent inferences as to the cause, a defendant responsible for only one such cause cannot be held liable.[16]

So, at the end of the day, if the Plaintiff's expert cannot determine a "more likely than not" cause, the case should be over.

But wait. What if Plaintiff's expert simply picks a possible cause and then quotes the magic words? Will that keep Plaintiff in the case long enough to seek a settlement?

Simply Quoting the Magic Words is Not Enough

Merely using the right words—without having examined the scene or the artifacts or conducting any meaningful testing of the various hypotheses—should not be enough to meet the legal standard.

In *Truck Ins. Exchange v. MagneTek, Inc.*, the Tenth Circuit Court of Appeals affirmed the U.S. District Court's determination to strike an expert's testimony—that heat from a light ballast "was sufficient to cause" the formation of pyrophoric carbon which "most likely caused the fire"—because the testimony was not the product of reliable principles and methods.[17] The court noted that Plaintiff failed to introduce evidence of actual experiments conducted by its experts showing that the fur stripping that held the light could ignite at low temperature due to pyrolysis.

Further, in *The Hartford Insurance Co. v. General Electric Co.*, the U.S. District Court in Rhode Island held that, even though an expert was qualified to testify as to the origin of the house fire, where the expert did no testing of the artifact or an exemplar of the heating system, the expert's report did not provide a scientific basis for his opinion as to causation, and, thus, the opinion was inadmissible and summary judgment was appropriate.[18]

Minnesota courts tend to agree that in order to establish that an alleged product defect was the proximate cause of an injury, the proof must be such as to justify an inference of fact, not merely speculation or conjecture.[19] Inferences must be "reasonably supported by the available evidence; sheer speculation is not enough, and the inference of negligent causation must outweigh contrary inferences."[20]

In *Alling v. Northwestern Bell Telephone Co.*,[21] the Minnesota Supreme Court found that even though a Plaintiff's expert stated that in his opinion the "probable path of electricity was over this wire," in the court's opinion the expert's testimony fell "short of removing the question from the realm of conjecture and guesswork." The Supreme Court affirmed the order directing a verdict for defendant.

Ultimately, the Court Will Decide

As mentioned at the beginning of this article, it is up to the Court to determine on a case by case basis whether an expert witness' testimony has "foundational reliability."[22] If the expert's testimony is determined to be speculative or lacking foundation, it will not be admitted and the causal link cannot be established.[23] The testimony of the Plaintiff's expert is then worthless.

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1 *Albert Lea Ice & Fuel Co. v. United States Fire Insurance Co.*, 58 N.W.2d 614, 617 (1953) (citations omitted).

2 *Lares v. Chicago, B. & Q. R. Co.*, 174 N.W. 834, 835 (Minn. 1919).

3 *Id.* at 618.

4 Minn. R. Evid. 702.

5 *Id.* at *Advisory Committee Comment—2006 Amendments.*

6 *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (quoting *State v. Moore*, 458 N.W.2d 90, 98 (Minn. 1990)).

7 *Id.*

8 *Block v. Target Stores, Inc.*, 458 N.W.2d 705 (Minn. App. 1990).

9 *Id.* at 715 (emphasis added).

10 NFPA 921, § 18.6 (2004 ed.).

11 *Id.* at § 18.6(1).

12 *Id.* at § 18.6(2).

13 *Id.*

14 *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982).

15 *Peterson v. Crown Zellerbach Corp.*, 209 N.W.2d 922, 923-24 (Minn. 1973) (quoting *LaFavor v. American Nat. Ins.* Co., 155 N.W.2d 286, 291 (Minn. 1967)).

16 *Dalager v. Montgomery Ward & Co.*, 350 N.W.2d 391, 393 (Minn. App. 1984) (citing *E.H. Renner & Sons v. Primus*, 203 N.W.2d 832, 835 (Minn. 1973)).

17 360 F.3d 1206, 1211 n.5 (10th Cir. 2004).

18 526 F.Supp.2d 250 (D. R.I. 2007)

19 *Rochester Wood Specialties, Inc. v. Rions*, 176 N.W.2d 548, 552 (Minn. 1970).

20 *Illinois Farmers Ins. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 221 (Minn. App. 1993) (quoting *Raymond v. Baehr*, 163 N.W.2d 54 n.2 (Minn. 1968)).

21 15 Minn. 60, 64, 194 N.W. 313, 315 (1923).

22 Minn. R. Evid. 702.

23 *Kaplan v. Starr*, 400 N.W.2d 179, 183 (Minn. App. 1987); *but see Dahlbeck v. DICO Company, Inc.*, 355 N.W.2d 157 (Minn. App. 1984) (holding that where an expert's testimony was based upon the inspection of an accident site, the instruments involved and their observation of those instruments, that inferences from circumstantial evidence are reasonably supported by the evidence and not upon speculation). •

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. All of our attorneys are qualified to handle matters in Federal Court. We are trial lawyers dedicated to finding litigation solutions for our clients.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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