OREGON

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I. ADMISSIBILITY OF PLAINTIFF EXPERT TESTIMONY

A. Does a plaintiff warning expert have an obligation to actually test the effectiveness of a proposed warning in order to satisfy the Daubert and Kuhmo Tire requirements or other admissibility criteria within your jurisdictions?

This question has not been specifically addressed by Oregon's appellate courts. However, general principles of Oregon law suggest that it is unlikely that the failure to test the effectiveness of a proposed warning would render a plaintiff's warning expert's testimony inadmissible solely on that basis.

Under Oregon law, a "seller is required to give warning of a danger when the danger is not generally known and if the seller has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the danger." *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 454, 61 P3d 257 (2002) (internal quotations omitted). However, if the danger is an obvious one, a warning is not required. *Seeborg v. General Motors Corporation*, 284 Or 695, 704 588 P2d 1100 (1978).

The leading case in Oregon governing the admissibility of expert testimony is *State v. O'Key*, 321 Or 285, 291, 899 P2d 663 (1995). In the trial court's role as the "gatekeeper" of expert testimony, it considers whether the expert's opinion or theory: (1) "can and has been tested," (2) "has been subjected to peer review and publication," (3) "has a known or potential rate of error," and (4) to what degree the opinion has gained "acceptance in the relevant scientific community." *O'Key*, 321 Or at 303-05. The focal point of the analysis is on whether the evidence is based on "scientifically valid principles." *Id*. at 301-02 and n 19.

Although *O'Key* adopted a decisional process analogous to *Daubert*, as a practical matter, it is more difficult under Oregon law to exclude expert testimony. *See, e.g., Marcum v. Adventist System/West,* 345 Or 237, 244, 193 P.3d 1 (2008) (physician's expert opinion that patient's medical condition was caused by the gadolinium that was injected into her hand to perform MRI was

admissible); *Kennedy v. Eden Advanced Pest Technologies*, 222 Or App 431, 193 P3d 1030 (2008) (allowing expert testimony that the plaintiff suffered from "multiple chemical sensitivity" syndrome under *O'Key*, notwithstanding multiple federal court decisions under *Daubert* excluding similar expert testimony). Thus, under *O'Key*, Oregon courts are more likely to focus more broadly on whether the expert's opinion, as a whole, demonstrates "appropriate scientific validation," as opposed to placing significant emphasis on whether the effectiveness of the proposed warning was tested by the expert.

B. When a plaintiff expert testifies regarding a feasible alternative design does the expert have an obligation to "produce" the alternative design or is a mere "concept" sufficient to satisfy the Daubert and Kuhmo Tire or your jurisdiction's admissibility requirements?

This question has not been specifically addressed by Oregon's appellate courts. In a design defect case in Oregon, a plaintiff must show "an available alternative, safer design, practicable under the circumstances." *Wilson v. Piper Aircraft Corp*., 282 Or 61, 67, 577 P2d 1322 (1978). A "technical possibility of a safer design" is insufficient. *Id*. at 68. However, assuming: (1) the plaintiff's concept is more than a mere "technical possibility," and (2) the expert's testimony about the alternative design otherwise satisfies *O'Key's* mandate that the expert's opinion be the product of appropriate scientific validation, it is unlikely that an Oregon court would reject expert testimony on an alternative design solely on the basis that the design is only a concept.

C. Does an obligation to "test" the alternative design exist if the expert is saying that a competitor's product or component contains the alternative design proposed?

This question has not been specifically addressed by Oregon's appellate courts. Assuming the expert's testimony is sufficient under *Wilson* and *O'Key*, it is unlikely that a court would exclude the expert's testimony on this basis.

II. In your jurisdiction, what is the liability of the component part manufacturer vis-à-vis the whole product manufacturer and plaintiff, where the component part manufacturer actually did the design, testing and quality control as part of a contract with the whole part manufacturer?

Under Oregon law, strict liability claims extend to component-part manufacturers for the sale of defective components. *See, e.g., Smith v. J.C. Penney Co.*, 269 Or 643, 525 P2d 1299 (1974) (fabric manufacturer held liable because of flammable character of fabric, even though fabric was sold to coat manufacturer before reaching the consumer). However, Oregon also follows the "raw material supplier" doctrine that bars a strict liability claim if the product is

not unreasonably dangerous in itself, but becomes unreasonably dangerous only when incorporated into certain uses. *See Hoyt v. Vitek, Inc.*, 134 Or App 271, 284-86, 894 P2d 1225 (1995) (Du Pont Teflon was not unreasonably dangerous until it was used in a medical prosthetic device, and Du Pont had warned the manufacturer of the prosthetic that the FDA had not approved Teflon for surgical use).

III. What is a manufacturer's liability for older equipment in the field (sometimes referred to a legacy equipment) where there have been advancements in safety?

A. Does the manufacturer have a duty to recall and/or retrofit the machine in view of the safety advancement?

This question has not been squarely addressed by Oregon's appellate courts. Further, under general principles of Oregon law, the answer might be different depending on whether the claim sounds in strict liability or negligence.

Oregon has codified its law on strict liability products liability claims. *See* ORS 30.900-927. Further, the Oregon Legislature intended these statutes to be interpreted consistently with *Restatement (Second) of Torts* § 402A Comments a-m. ORS 30.920(3).

Neither Oregon's statutory scheme nor the Restatement's comments impose a direct duty on manufacturers to recall and retrofit products. Rather, the manufacturer's duty is to avoid selling products that are "unreasonably dangerous" at the time of sale. ORS 30.920(1)(b). *See also* Oregon Uniform Jury Instruction No. 48.01 (the product has to be in a defective condition when it "left the defendant's hands"). However, the subsequent safety advancement could potentially be used in a design defect case as evidence that an alternative safer design was available and practicable at the time of the original sale. *See Wilson v. Piper Aircraft Corp*., 282 Or 61, 67, 577 P2d 1322 (1978) (discussing the elements of a plaintiff's *prima facie* case in a design defect claim).

If the products liability claims is premised on negligence, the duty of a supplier of chattel (which would include the manufacturer) under Oregon law is governed by *Restatement (Second) of Torts* § 388. *Waddill v. Anchor Hocking, Inc.*, 149 Or App 464, 474-75, 944 P2d 957 (1997), *overruled on other grounds*, 330 Or 376 (2000). Section 388 provides that if the supplier knows or has reason to know that the chattel is likely to be dangerous for its intended purpose, the supplier has a duty to inform the consumer of the dangerous condition or the facts that might make it dangerous. *Id*. Thus, it would appear that a manufacturer would only have a duty to advise the consumer of the safety advancement if the product was likely to be dangerous for its intended purpose without the safety advancement. Of course, if that were the case, the manufacturer would be liable independent of any duty to recall and retrofit the product. Further, and as

discussed above, a plaintiff could try to use the safety advancement as evidence that a safer alternative design was available when the product was originally sold (to argue that the manufacturer's failure to incorporate the safety improvement into the original product was negligent). *Wilson*, 282 Or at 67.

B. Does the manufacturer have a duty to alert or otherwise notify (warn) the customer of the safety advancement?

See discussion above.

C. Does the manufacturer have a duty to keep track of its products after sale so as to alert customers to safety advancements?

See discussion above.

D. What is the duty of the manufacturer who sells via distributors and not directly to the end user?

Oregon's products liability statutes do not differentiate between manufacturers who sell directly to consumers and those who use distributors. *See* ORS 30.900-927. Thus, it is unlikely that this factor would impact the question of whether or not the manufacturer has a duty to advise consumers of safety advancements in a strict liability claim.

This issue might impact the negligence analysis discussed above to the extent that the manufacturer only has a duty to exercise *reasonable* care to warn consumers of dangers, and under the facts of a particular case, reasonable care may not require the manufacturer to track down end users.

IV. Under what circumstances, if any, does a manufacturer owe indemnification to a non-manufacturing seller, and when can a non-manufacturing seller be liable for harm caused by that product

Although, as noted, Oregon has codified its product liability law, this issue has not been addressed by the legislature. *See* ORS 30.900-927. Thus, in the absence of a contract between the parties, principles of common-law indemnity would control.

If it is established that both the manufacturer and the non-manufacturing seller are liable to the plaintiff, the non-manufacturing seller would be entitled to indemnity if it establishes: (1) it has discharged a legal obligation owed to a third party; (2) the manufacturer was also liable to the third party; and (3) as between the non-manufacturing seller and the manufacturer, the obligation out to be discharged by the manufacture. *Fulton Ins. v. White Motor Corp.*, 261 Or 206, 210, 493 P2d 138 (1972); *see also Scott v. Francis*, 314 Or 329, 333-34, 838 P2d

596 (1992) (holding that third element of the claim turns on who was primarily responsible for the wrongful act).

In the event the manufacture is found liable and the non-manufacturing seller is not, indemnity for the seller's costs of defense may still lie if the following test can be met:

> "[A] party seeking common law indemnity [for defense costs] must plead and prove that a third party made a claim, that the party reasonably incurred costs in defending or satisfying the claim and that, as between the party seeking indemnity and the indemnitor, the costs incurred ought to be borne by the latter."

Martin v. Cahill, 90 Or App 332, 336-37, 752 P2d 857 (1988).