

PRODUCT LIABILITY LAW

Basic Theories and Recent Trends

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John W. Reis
COZEN O'CONNOR
One Wachovia Building, Suite 2100
301 S. College Street
Charlotte, NC 28202
Phone: 704-376-3400
Toll Free: 800-762-3575
Fax: 704-334-3351

Product Liability Law: Basic Theories and Recent Trends

By John W. Reis

I. INTRODUCTION

What does it take to prove a product liability claim? Just because a fire or flood emanates from a product, does it necessarily follow that the manufacturer is liable for the damages that result? This article provides an overview of the standards for proving a claim of product liability against the seller or manufacturer of the product, including a discussion of some of the emerging trends in product liability law.

II. THEORIES OF LIABILITY

A products liability claim normally involves injury or damage caused by a defective product. Proving the claim usually involves one or more of three basic theories of liability: negligence, breach of contract/warranty, and strict liability. The first two theories of liability require proof of a defect in the product. In a strict liability claim, the plaintiff must prove that the product was defective by virtue of being “unreasonably dangerous” despite precautions taken by the manufacturer in its manufacture or design.

Any of these three theories of liability can then be used to prove that the product was defectively designed, or defectively manufactured, or that the manufacturer failed to adequately warn about a known danger associated with using the product.

A. Negligence

The elements of negligence are duty, breach of duty, proximate cause, and damages.

1. North Carolina

In the product liability context, the element of duty has been more particularly described as a duty by the manufacturer “to use reasonable care in the manufacturing process, including the duty to make sure the product is free of any potentially dangerous defect in manufacturing or design.” Red Hill Hosiery Mill v. Magnetek, Inc., 530 S.E.2d 321, 326 (NC Ct. App. 2000). The three remaining elements require proof that (1) the product was defective at the time it left control of the defendant, (2) the defect was the result of defendant’s negligence, and (3) the defect proximately caused plaintiff’s damage. M. Stuart Madden, *Products Liability* § 2.3 at 26 (2d ed. 1988) (hereinafter *Products Liability*).

The North Carolina product liability statute protects a manufacturer from liability so long as the manufacturer provides a written instruction on the safe use of the product:

§ 99B-4. Knowledge or reasonable care. No manufacturer or seller shall be held liable in any product liability action if: (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its

original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or (2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or (3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of. (1979, c. 654, s. 1; 1995, c. 522, s. 1.)

The product liability statute further protects the manufacturer from claims for inadequate warning or instruction, as follows:

§ 99B-5. Claims based on inadequate warning or instruction. (a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following: (1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant. (2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances. (b) Notwithstanding subsection (a) of this section, no manufacturer or seller of a product shall be held liable in any product liability action for failing to warn about an open and obvious risk or a risk that is a matter of common knowledge. (c)

2. South Carolina

In the product liability context, whether the claim is based in negligence, warranty, or strict liability, determining liability of the manufacturer requires proof that (1) plaintiff was injured by the product, (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the use, and (3) the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant. Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (SC Ct. App. 1995). Under a negligence theory, however, “plaintiff bears the additional burden of demonstrating that the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.” Id. at 326.

B. Warranty

1. North Carolina

A product liability claim based in warranty requires proof that (1) the defendant warranted the product (express or implied) to plaintiff, (2) there was a breach of that warranty in that the product was defective at the time it left the control of the defendant, and (3) the defect proximately caused plaintiff damage. *Products Liability* § 2.7 at 32-33. Plaintiff need not prove that the defendant acted negligently.

2. South Carolina

As noted in the Negligence section, above, whether the claim is based in negligence, warranty, or strict liability, the plaintiff in South Carolina must meet the same three elements noted in the Bragg case. Under a warranty claim, plaintiff must also show that (1) the defendant warranted the product (express or implied) to plaintiff and (2) there was a breach of that warranty in that the product was defective at the time it left the control of the defendant. Plaintiff need not prove that the defendant acted negligently. Under the Uniform Commercial Code, adopted in South Carolina, certain implied warranties extend to any purchaser or a member of the purchaser's household, including the warranty of merchantability and fitness for a particular purpose, unless such warranties are conspicuously disclaimed.

C. Strict Liability

The doctrine of "strict liability" is a theory of liability set forth in the Restatement of Torts 2d. §402A, which states as follows:

[O]ne 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.

This rule applies even though "(a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Comment j to the § 402A states, among other things, that "where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Some jurisdictions do not subscribe to the doctrine of strict liability. Other jurisdictions apply modified forms of § 402A.

North Carolina has expressly rejected the version of strict liability represented in the Restatement of Torts 2d §402A. *See* N.C. Gen. Stat. §§99B-1.1 through 99B-6.

South Carolina has adopted the Restatement of Torts 2d §402A of the doctrine of strict liability by statute. S.C. Code Ann. §§ 15-73-10 through 15-73-30.

III. EMERGING TRENDS

A. The Meaning of “Defective”

Regardless of whether one is faced with a defective design or defective manufacturing case, jurisdictions have different standards on what level of evidence must be introduced to prove the defect. Some courts require the plaintiff introduce evidence of the particular aspect of the product that caused the malfunction. *E.g.*, MacDougall v. Ford Motor Co., 214 Pa.Super. 384, 257 A2d 676, 678 (1969), *overruled on other grounds*, REM Coal C., Inc. v. Clark Equipment Co., 386 Pa.Super. 401, 563 A.2d 128 (1989). Other jurisdictions subscribe to the “malfunction theory” which allows the jury to infer the product defect so long as there is evidence that the product malfunctioned in the course of its ordinary use. *E.g.*, Mitchell v. Maguire Co., Inc., 151 A.D.2d 355, 542 N.Y.S.2d 603, 604 (1 Dept. 1989). A good compilation of cases subscribing to the malfunction theory can be found in Annotation, Strict Products Liability: Product Malfunction Or Occurrence Of Accident As Evidence Of Defect, 65 A.L.R.4th 346 (1988). The following is an excerpt:

The following strict products liability cases support the view that a prima facie case of defectiveness can be made by proof of the fact of a malfunction, failure, or occurrence of an accident in conjunction with other circumstantial evidence such as a lack of an abnormal use of the product and the lack of a reasonable secondary cause not attributable to defectiveness (citing Tenn--Browder v Pettigrew (1976, Tenn) 541 SW2d 402; Motley v Fluid Power of Memphis, Inc. (1982, Tenn App) 640 SW2d 222, CCH Prod Liab Rep 9221, 35 UCCRS 1141; Fla--¶Worsham v A. H. Robins Co. (1984, CA11 Fla) 734 F2d 676, CCH Prod Liab Rep 10101, 15 Fed Rules Evid Serv 1670 (applying Florida law); Cassisi v Maytag Co. (1981, Fla App D1) 396 So 2d 1140, CCH Prod Liab Rep 8943; Zyferman v Taylor (1984, Fla App D4) 444 So 2d 1088, CCH Prod Liab Rep 10015, *review den* (Fla) 453 So 2d 44; Gencorp, Inc. v Wolfe (1985, Fla App D1) 481 So 2d 109, 11 FLW 15, CCH Prod Liab Rep 10909, *review den* (Fla) 491 So 2d 281 (recognizing view)).

B. Proving the Defect By The Product’s Failure

The general public often believes that if a product catastrophically failed, it must have been defective. The courts do not have the same view. Usually the mere fact that a product catastrophically failed is not proof that the product was defective. Most jurisdictions still require some proof of the defect.

a. North Carolina adopts the Malfunction Theory

In Red Hill Hosiery Mill, Inc. v. Magnetek, Inc., 530 S.E.2d 321 (NC Ct. App. 2000), the North Carolina Court Appeals adopted the malfunction theory as a method of proving the defect “in a products liability action, based on tort or warranty...” However, this inference is not sufficient to establish the elements of negligence, which requires proof that the manufacturer did something wrong. In a footnote, the court in Red Hill stated, “It is not, however, permissible to infer manufacturer negligence from a product defect which has been inferred from a product malfunction.” The opinion makes it clear that there is no inference of negligence merely because there is an inference of defect by proof of malfunction during ordinary use.¹

In DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140 (2002), the North Carolina Supreme Court approved the use of circumstantial evidence to infer a defect under a warranty count – rather than requiring proof of specific defect. However, the Court set forth a list of factors to consider in deciding whether the circumstantial evidence was sufficient to get the case to jury:

Accordingly, the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant; (4) similar incidents, “when[] accompanied by proof of substantially similar circumstances and reasonable proximity in time,” (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. When a plaintiff seeks to establish a case involving breach of a warranty by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether, as a matter of law, they are sufficient to support a finding of a breach of warranty. The plaintiff does not have to satisfy all these factors to create a circumstantial case, and if the trial court determines that the case may be submitted to the jury, “[i]n most cases, the weighing of these factors should be left to the finder of fact[.]”

Id. at 689-90, 565 S.E.2d at 151 (citations omitted); *see also* Red Hill Hosiery Mill, Inc., v. Magnetek, Inc., 582 S.E.2d 632 (N.C. Ct. App. 2003) (affirming jury verdict in favor of plaintiff).

¹ The Red Hill case involved the alleged malfunction of a fluorescent lighting fixture (ballast) in a warehouse. The plaintiff relied on the opinion of an expert who concluded that the ballast was the cause of the fire, not the mere victim of an external fire. His opinion was based, in large part, on the burn patterns at the fixture in comparison to the burn patterns to surrounding fixtures. The decision notes that the other ballasts were not preserved by Red Hill Hosiery. Plaintiff also retained an electrical engineer, who concluded that the ballast malfunctioned and overheated, basing his conclusions on the fact that the suspect ballast displayed a specific area of heat intensity and over one-half of the potting compound within the ballast had seeped out; from this the electrical engineer concluded that the ballast improperly overheated to such an extent that the potting compound located within the ballast liquefied and leaked out of the ballast. However, the Red Hill opinion notes that the electrical engineer “could not identify any specific defect within the ballast” leading to the overheating.

b. South Carolina:

1. Rejects the Malfunction Theory

Two tests have evolved in South Carolina to determine whether product is in defective condition unreasonably dangerous for its intended use:

The first test is whether the product is unreasonably dangerous to the ordinary consumer or user given the conditions and circumstances that foreseeably attend use of product. ... Under the second test, a product is unreasonably dangerous and defective if the danger associated with use of product outweighs the utility of the product. ... State of art and industry standards are relevant to show both the reasonableness of design and that the product is dangerous beyond the expectations of the ordinary consumer.

Bragg, 462 S.E.2d at 328. Under either test, South Carolina law holds that the mere fact that a product malfunctioned does not demonstrate the manufacturer's negligence or tend to establish that the product is defective. Sunvillas Home Owners Association, Inc. v. Square D Company, 301 S.C. 330, 391 S.E.2d 868 (SC Ct. App. 1990) (affirming directed verdict for defendant where plaintiff only pled negligence but plaintiff's expert opined that he could not identify the specific defect in the breaker panel); *see also* Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (SC Ct. App. 1995).

2. For Defective Design Must Show Safer Alternate Design

Not only must plaintiff prove the specific defect, but also in a defective design case, the trend in South Carolina is to require plaintiff to also offer an alternative design that would have prevented the injury caused by the alleged defect. For example, in Little v. Brown & Williamson Tobacco Corporation, 2001 WL 34064612, __ F.Supp.2d __, (D.S.C.), the court, in rather ominous language, indicated that summary judgment will be entered in favor of the defendant in a products liability case if the plaintiff cannot demonstrate such an alternative design within a reasonable cost that would have prevented the damage:

"[F]ailure to provide such proof can doom a case as a matter of law. *See Sunvillas Homeowners Assoc. v. Square D Co.*, 301 S.C. 330, 391 S.E.2d 868, 870 (1990) (noting, while upholding the trial court's grant of summary judgment in favor of the defendant, that the plaintiff failed to offer any evidence of an alternative design); Gasque v. Heublein, Inc., 281 S.C. 278, 315 S.E.2d 556, 559 (1984) (holding that the issue of negligent design was properly submitted to the jury where plaintiff introduced expert testimony that a feasible, safer alternative design existed and two company reports of the defendant which stated that a safer alternative design existed). Thus, the existence of a safer alternative design is a crucial aspect of a product liability case in South Carolina. [I]t is clear the South Carolina law requires that Plaintiff provide such evidence in order to survive summary judgment."

Note that such proof is not needed in a defective manufacturing case. In such a case proof that the manufacturer's own design was not followed suffices as proof of the defect.

South Carolina's view is consistent with the newer version of the Restatement of Torts – the Restatement (3d of Torts, Product Liability -- adopted in 1997. To prove a design defect, the Third Restatement, unlike the Second Restatement, requires a plaintiff to demonstrate the existence of a reasonable alternative product design. The Third Restatement defines reasonable alternative product design in terms of the risk-utility balancing test: “[W]hether a reasonable alternative design would, at a reasonable cost, have reduced the foreseeable risk of harm posed by the product and, if so, whether the omission of the alternative design by the seller ... rendered the product not reasonably safe.” Comment f lists factors relevant to determining whether the omission of a reasonable alternative design renders a product not reasonably safe, including the magnitude and probability of the foreseeable risks of harm; the instructions and warnings accompanying the product; consumer expectations regarding the product and the relative advantage of the alternative design, including its production costs, its effect on product longevity, maintenance, repair, and aesthetics; and the range of consumer choice among products.

C. Statute of Repose

A statute of repose, unlike statute of limitations, does not begin to run when the loss occurs but begins to run when the product is sold. For example, assume a car catches fire from a defect within the car itself. Assume the owner purchased the car five years and 364 days before the fire. If the car was sold and caught fire in a state that has a six-year statute of repose, the owner has one day to file suit or else the claim will be barred. If the fire occurred six years and one day after the sale, the owner's suit was barred even before the fire happened.

Some states have statutes of repose for both products and buildings. For example, North Carolina's six-year statute of repose applies not only to products but also to improvement to real property. N.C.G.S. § 1-50(6). The only recognized exception to this rule is if the defendant committed wanton and wilful misconduct. Cacha v. Montaco, 554 SE2d 388 (Ct App 2001).

Other states, including South Carolina and Virginia, have only a statute of repose for improvements to real property, but no such statute or repose for product. S.C.Code Ann. § 15-3-640 (Supp. 2000); Virginia Code § 8.01-250.

In states like South Carolina that only have statutes of repose for buildings, but not for products, an interesting question can arise when a component of the building causes the loss. For example, suppose a toilet malfunctions and floods a fifteen-year-old house in South Carolina. If there is no statute of repose for products, but there is a thirteen-year statute of repose for buildings, is the claim viable or barred? The answer depends on whether the product is considered an “improvement to real property.” Below are some examples of building components that have been deemed by courts to be improvements to real property subject to the statute of repose applicable to the building.

a. Gas pipeline

In South Carolina Pipeline Corp. v. Lone Star Steel Company, 546 S.E.2d 654 (SC 2001), the owner of a gas natural pipeline that exploded, resulting in property damage and personal injuries, brought a products liability action against the manufacturer of the pipe. The South Carolina Supreme Court held that gas transmission line was "improvement to real property" for purposes of thirteen-year statute of repose, S.C.Code Ann. § 15-3-640 (Supp. 2000), applicable to defective or unsafe condition of improvement to real property.

b. Electrical equipment

In Grice v. Hungerford Mechanical Corp., 236 Va. 305, 374 S.E.2d 17 (1988), the court held that an electrical panel box and its component parts received from the manufacturer without instructions for their use and installation were ordinary building materials and not equipment within the meaning of the Virginia statute of repose for improvements to real property.

c. Fire protection equipment

In Kallas Millwork Corp. v. Square D Company, 225 N.W.2d 454 (Wisc. 1975), the court held that the issue of whether a fire protection system constituted an "improvement to real property" was a matter of law to be determined by the court. In holding that a fire protection system is as a matter of law an improvement to real property, the court first looked to the definition of an "improvement" in Webster's *Third International Dictionary* (1965) which defines it 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.

The court then cited to similar definitions of "improvement" in 1 Bouvier's *Law Dictionary* (Rawles 3d rev., 1914), page 1517, and Black's *Law Dictionary* (West, rev. 4th ed., 1968), page 890. The court determined that, pursuant to these commonly accepted usages, it was apparent that a high-pressure water pipe system designed for fire protection was an "improvement to real property" so as to be afforded protection under the Wisconsin statute of repose.

In Qualitex, Inc. v. Coventry Realty Corp., 557 A.2d 850 (R.I. 1989), the court held that the installation of fire protection equipment constitutes "improvement to real property." The court cited to decisions which have held that heating, refrigeration and electrical systems were consistently found to be improvements to real property. *E.g.*, Mullis v. Southern Co. Services, Inc., 296 S.E.2d 579 (Ga. 1982); Milligan v. Tibbetts Engineering Corp., 461 N.E.2d 808 (Mass. 1984); Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977). The court also cited to the dicta in Agus v. Future Chattanooga Development Corp., 358 F.Supp 246 (E.D. Tenn. 1973)(examining the Tennessee statute of repose and concluding that installation of a sprinkler system was an "improvement to real property" without completing full analysis of that element of the statute.). Fire protection equipment was thus deemed improvement to real property under the Rhode Island statute of repose.

In The Travelers Insurance Company v. Guardian Alarm Co. of Michigan, 586 N.W.2d 760 (Mich. Ct. App. 1998), a subrogation claim alleging negligent installation of fire alarm system, the court cited to Qualitex and Kallas in deeming the system an “improvement to real property under Michigan’s statute of repose. The court noted that the fire alarm system, like a fire sprinkler system, is installed to limit the damage to the plaintiff’s insured’s facility. The court further stated that the alarm system added value to the insured’s facility as it was intended to protect not only the facility itself, but also the contents contained therein.

D. Economic Loss Rule

The economic loss rule is a court-created doctrine holding that when a consumer purchases a product that malfunctions and causes purely financial/economic damages, the plaintiff cannot recover for those economic damages unless there is damage to “other property,” *i.e.*, property beyond the “product itself.” The rule is designed to limit recovery to contract or warranty theories when the product was something that was obtained pursuant to a contract or that came with a warranty and/or disclaimer. A growing body of jurisdictions has expanded the rule to include claims involving real property, not just products. North Carolina, Virginia, and Florida, for example, apply the rule to real property.

1. North Carolina

North Carolina’s version of the economic loss rule was best stated in the unpublished case of Terry’s Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998), as follows:

[W]hen a plaintiff seeks recovery for damage to a product that is the subject of the contract between the parties, a plaintiff is limited to a contract or warranty action.

Terry’s Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998) (citing Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C.App. 423, 432, 391 S.E.2d 211, 217 (1990) (adopting rule that “purely economic losses are not ordinarily recoverable under tort law” in context of products liability suit); AT&T Corp., 876 F.Supp. at 91 (noting that, with respect to losses recoverable in product liability suits, North Carolina follows the majority rule and does not allow recovery of purely economic losses in negligence actions); Ports Auth. v. Roofing Co., 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978) (“Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor.”), *rejected in part on other grounds*, Trustees of Rowan Tech. College. v. J. Hyatt Hammond Assoc., Inc., 313 N.C. 230, 328 S.E.2d 274 (1985)); and Spillman v. American Homes, 108 N.C.App. 63, 65, 422 S.E.2d 740, 741-42 (1992) (“a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.”))

Each of the above-listed cases involved products or construction of real property. In the more recent cases, the rationale for barring the tort claim for damage to the product was that the product in question was subject to UCC or warranty or contract law principles.

2. South Carolina

Recent federal decisions have interpreted the South Carolina view on the economic loss rule as follows: A party who has a commercial relationship or contract with another party cannot sue the other party in tort for purely economic damages to personal or commercial property. Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126 (4th Cir. 2000); Brendle's Store, Inc. v. OTR, 978 F.2d 150 (4th Cir. 1992) (commercial tenant cannot sue builder in tort for economic losses resulting from defective construction, even where there is no contract between the two commercial entities); Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F.Supp. 1027 (D.S.C. 1995) (purchaser of fuel metering system barred by economic loss rule from negligence claim against seller of the device that had ruptured resulting in large fuel spill).

This view draws from the following decisions: Tommy L. Griffin Plumbing and Heating C. v. Jordan, Jones and Goulding, Inc., 463 S.E.2d 85 (S.C. 1995) (if contract exists, then cannot sue in tort for purely economic damages, but can do so for breach of duty arising independently of any contract duties such as violation of statute); Koontz v. Thomas, 511 S.E.2d 407 (S.C. Ct. App. 1999) (the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed; a breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie; however, a breach of a duty arising independently of any contract duties between the parties may support a tort action, such that when there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort claim).

The case of Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126 (4th Cir. 2000) demonstrates how onerous the economic loss rule can be. The case involved an alleged malfunction of a chemical dispensing system within certain washing machines owned by a linen cleaning service company. The linen cleaning company incurred damages not only to the chemical dispensing system itself, but also to the linens. The cleaning company argued that the lines were “other property,” i.e., property outside the “product itself.” The Fourth Circuit Court of Appeals disagreed, reasoning as follows:

Palmetto finally argues that the “other property” exception to the economic loss rule permits it to proceed in tort. We reject this argument as well. Although the economic loss rule generally “does not apply where other property damage is proven,” *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369, 371 (S.C.1990), “courts have tended to focus on the circumstances and context giving rise to the injury” in determining whether alleged losses qualify as “other property” damage, *Myrtle Beach Pipeline Corp.*, 843 F.Supp. at 1057. Specifically, in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the

contract. *See id.* at 1058. In such cases the “failure of the product to perform as expected will necessarily cause damage to other property,” rendering the other property damage inseparable from the defect in the product itself. *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612, 620 (Mich.1992).

205 F.3d at 129-130.

IV. CONCLUSION

Proving liability when a product malfunctions can be difficult. Consultation with a fire investigator, electrical engineer, or other expert is often crucial to making the case. Early issue spotting is also critical in order to decide what evidence to save, what evidence to discard, and what evidence to examine more particularly. Hiring counsel to make those decisions should be done as soon as possible so that the investigation can be thoroughly conducted, defenses can be anticipated and diffused, and evidence of defects in the product (such as those in a recall) can be effectively presented.

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