

## THE PRODUCT MALFUNCTION THEORY LIVES ON

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### INTRODUCTION

The malfunction theory permits a plaintiff in a products liability action to pursue a product failure matter based on circumstantial evidence even when the product has been destroyed. This theory was recently reaffirmed in Pennsylvania in *Liberty Mutual Fire Insurance Company v. Sharp Electronics*, 2011 WL 2632880 (M.D. Pa. July 5, 2011, Jones, J.) permitting a cash register failure to be pursued under circumstances discussed below.

### LIBERTY MUTUAL DECISION

In *Liberty Mutual Fire Insurance Company v. Sharp Electronics*, 2011 WL 2632880 (M.D. Pa. July 5, 2011, Jones, J.), Judge John E. Jones, III of the U.S. District Court for the Middle District of Pennsylvania denied defendants' motion for summary judgment affirming that Pennsylvania law recognizes the "malfunction theory" of products liability whereby a plaintiff "can assert a successful strict liability claim based purely on circumstantial evidence in cases where the allegedly defective product has been destroyed or is otherwise unavailable." *Barnish v. KWI Bldg. Co.*, 602 Pa. 402, 408, 980 A.2d 535 (Pa. 2009).

Under Pennsylvania law, a malfunction of a product in the absence of evidence of abnormal use or reasonable secondary causes is evidence of a defect. *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102 (3<sup>rd</sup> Cir. 1992); *Walters ex rel. Walters v. Gen. Motors Corp.*, 209 F. Supp. 2d 481 (W.D. Pa. 2002); *Gordner v. Dynetics Corp.*, 862 F. Supp. 1303 (M.D. Pa. 1994); *Rogers v. Johnson & Johnson Prods.*, 523 Pa. 176, 565 A.2d 75 (1989); *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A.2d 489 (Pa. Super. 1997).

*Liberty Mutual v. Sharp Electronics* arises out of a May 22, 2006 fire at the Authentic China Wok in State College, Pa., that was discovered shortly after the restaurant closed for the evening. The fire caused extensive damage to the restaurant and to an adjacent shopping center. Plaintiffs claimed that the fire originated in a cash register due to an electrical defect. However, the fire had destroyed the cash register with the exception of the metal cash drawer and the heavy metal power transformer, thus the cause of the alleged internal electric fault could not be positively identified because the fire had consumed all of the internal evidence that started the fire.

Defendant Sharp, alleged to be the manufacturer of the cash register, moved for summary judgment contending that plaintiffs failed to produce evidence supporting an inference that a defect in the cash register caused the fire. Plaintiffs countered that they had properly asserted a malfunction theory under Pennsylvania law as plaintiffs' expert provided sufficient circumstantial evidence of a product defect to support plaintiffs' strict liability claims, and plaintiffs had further provided evidence eliminating or otherwise ruling out the potential alternative sources of ignition.

In denying defendant's motion for summary judgment, Judge Jones observed that " ... often, as here, there are situations in which direct evidence of a product's malfunction is unavailable. Thus, Pennsylvania has developed the 'malfunction theory' of products liability ..." Judge Jones went on to state that to successfully assert a malfunction theory, a plaintiff must present sufficient evidence from which a jury can infer that the injury was caused by a defect in the product beyond mere speculation, citing *Barnish v. KWI Bldg.*

Co., 602 Pa. 402, 408, 980 A.2d 535 (Pa. 2009). Thus, similar to the logic of *res ipsa loquitur*, the malfunction theory permits a plaintiff to prove a defect in a product with evidence of “the occurrence of a malfunction and eliminating abnormal use or reasonable, secondary causes for the malfunction.” *Dansak v. Cameron Coca Cola Bottling Co.*, 703 A.2d 489 (Pa. Super. 1997).

Judge Jones went on to observe that plaintiffs’ fire investigator’s conclusion that the cash register was the most probable ignition source and/or the cause of the fire combined with the local fire marshal and state police investigator’s conclusion that the fire originated in the cash register together with plaintiffs’ forensic engineering consultant’s conclusion that because the fire consumed most of the internal evidence within the cash register that the fire was caused by a defect in the cash register, and the common sense that electrical devices such as cash registers should not catch fire, that sufficient circumstantial evidence existed, namely that the fire was not caused by any other source, to put the question before the jury, concluding “while this will not be an easy path for plaintiffs to follow, and we [the court]

express no opinion on the likelihood of a success, we [the court] shall not deprive plaintiff of the opportunity to do so.”

**CONCLUSION:**  
**Careful Analysis Needed when Evaluating Malfunction Theory Cases**

This case highlights the importance of a strong fire origin investigation and the ability to identify and eliminate all alternative potential sources of ignition in order to support a products liability claim based upon the malfunction theory. Further, Judge Jones’ opinion may be relied upon in appropriate circumstances to support a malfunction theory claim where all alternative sources of ignition have been identified, considered, and eliminated even though the fire itself has destroyed the evidence of the specific malfunction within the product.

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*Cozen O’Connor is available to discuss losses incurred involving product failures and determine whether any recovery opportunities exist.*