EMERGING DEFENSE TRENDS IN SUBROGATION CASES

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I.

SPOLIATION OF EVIDENCE

If an insurance carrier fails to invite a target defendant to a fire scene for purposes of conducting an independent investigation, does that omission constitute spoliation of evidence which will serve to bar the insurer's subrogation action? Defendants increasingly argue that the entire fire scene is evidence which should be preserved for examination by a defendant.

To counter this argument, we have made a conscientious effort to identify a target defendant at a very early stage in order to place the target on notice of the potential subrogation claim while the scene is still in existence. This is perhaps the easiest way to avoid the spoliation defense. However, identification of the target defendant may prove difficult due to circumstances surrounding the fire loss.

In many cases where a product is identified as being the most probable source of ignition, it is extremely difficult to identify the manufacturer of the product. Certainly, the insured is entitled to begin reconstruction of his residence in a reasonable time following the loss and should not be prevented from doing so by the insurer's attempts to pin down the identity of the target

manufacturer. In other cases, the source of ignition may be narrowed down to four or five items found in the area of origin. The common practice in that situation is to either invite an electrical expert to the scene or to have the cause and origin investigator simply gather the four or five potential sources of ignition and forward them to an electrical engineer for a non-destructive forensic examination. Again, once the items have been removed from the scene, the target defendant may claim that its investigation has been prejudiced. In addition, it may take two to four weeks for the forensic engineer to complete a comprehensive examination of all of the items found at the scene and therefore it may be impractical to preserve the scene for examination by the target defendant under those circumstances.

The majority of the case law deals with a situation where a plaintiff throws out a product and later files a product liability action against the manufacturer. The plaintiff then offers expert testimony that the product was defective based upon the expert's examination of the product. The defendant files a motion *in limine* to prevent the expert from testifying as a remedy for the prejudice suffered by the defendant in not being able to conduct its own independent examination. The courts have proven increasingly receptive to either precluding the plaintiff's experts from testifying or in entering a summary judgment against the plaintiff under this scenario. The court in Fire Ins. Exchange v. Zenith Radio Corp., 163 Nev. 648, 651, 751 P.2d 911, 914 (1987) held that a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. In the Fire Ins. Exchange case, the court held that duty arises as soon as a potential claim is identified.

Whether or not spoliation results in sanction depends upon an analysis of three considerations:

1. The degree of fault of the party who altered or destroyed the evidence;

2. The degree of prejudice suffered by the opposing party; and

> 3. Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

See Schmidt v. Milwaukee Electric Tool Corp., 13 F.3d 761 (3d Cir. 1994). In Schmidt, the plaintiff's injuries occurred when the defendant's circular saw "kicked back" and permanently injured his hand. The plaintiff's expert disassembled the guard and photographed the entire product and eventually concluded that the product had a design defect in the guard mechanism. The trial court granted summary judgment because of the plaintiff's alteration to the product. The trial court held that the defendant's expert was denied an opportunity to inspect the condition of the saw as it existed at the time of the accident. The Third Circuit Court of Appeals reversed the summary judgment order holding that dismantling by the plaintiff's expert was necessary to determine whether or not there was a meritorious claim. The Third Circuit was impressed with the documentation by the plaintiff's expert through photographs prior to and during the disassembly.

The issues are much cloudier when the argument deals, not with the disposal of a product, but with the fire scene in general. Many defendants have argued that the fire scene constitutes important evidence which must not be destroyed before the defendant has an opportunity to examine ft. Each fire scene contains unique burn patterns and other indicators of a fire's origin. It is imperative for an insurer's cause and origin investigator to photograph each indicator at a fire scene in order to "preserve" those indicators for examination by a target defendant. This writer is not aware of any published decision which holds that the failure to preserve a fire scene constituted spoliation of evidence justifying dismissal of the case or exclusion of an expert's testimony. In a recent unpublished memorandum decision by the District Court for the Middle District of Pennsylvania, Judge McClure held:

> Plaintiff's failure to preserve these items does not bar it from offering expert testimony at trial that those items were not the cause of the fire. Defendants are not unfairly prejudiced by plaintiff's failure to preserve the overhead lights and wiring. A

> number of features, such as the burn patterns and other evidence, can be used to isolate and determine the probable origin of a fire. Thus, as is evident by their theory that the fire started overhead, defendants are not without means or evidence of where the fire originated. Further, no culpability attaches to plaintiff's failure to preserve the overhead wiring and light fixture. Two experts examined the fire scene on plaintiff's behalf. Both eliminated those items as possible sources of the fire.
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> It would be impractical to impose on plaintiff the obligation of preserving all items, fixtures, wiring, etc. eliminated by its own experts as likely causes of the fire. This would impose on plaintiff essentially the burden of preserving the entire building intact until such time as it could be examined by defendant's experts as a precaution that their opinion may differ from that of plaintiff's experts on this point.

In Washington, the issue of spoliation was recently addressed by the appellate court in the case of Henderson v. Tyrell, 80 Wn. App. 592 (1996). In the Henderson case, the issue came down to whether the plaintiff or defendant was driving the vehicle. The defendant, Steven Tyrell, was in a coma when the plaintiff told the police department that Tyrell was driving the vehicle at the time of the collision. Tyrell's family was suspicious and, while Tyrell was still in a coma, his brother scraped blood samples from the car's passenger door and gave them to Tyrell's mother. Tyrell's mother lost the samples and the car was disposed of approximately two years after the accident and one year after the plaintiff's attorney directed a letter to the defendant's attorney requesting that the car be preserved. At trial, the defendants prevailed and plaintiffs appealed claiming that they were denied the opportunity of a fair trial due to the missing evidence.

The Washington Court of Appeals looked at two primary considerations: 1) whether the missing evidence is important or relevant, and 2) whether the loss or destruction of the evidence resulted in an investigative advantage for one party over another. In the Henderson case, the court determined that preservation of the car would have been of dubious value. A forensic scientist testified that the blood would have degraded quickly unless it was stored property. A consulting engineer testified that the photographs taken of the car documented its physical condition

extremely well and that it was not unusual for an owner to dispose of a wrecked vehicle. The Henderson court found it significant that neither party presented testimony of experts who examined the car before its destruction even though each had nearly two years in which to do so. Id. at 608.

The Henderson court also found that there was no culpability on the defendant's part for disposal of the vehicle. The court found that Mr. Tyrell did not act in bad faith and therefore there was no basis for “the inference of consciousness of a weak cause". Id. at 609. The court also considered whether the actor (Tyrell) violated a duty to preserve the evidence. In Henderson, Tyrell testified that he was unaware of defense counsel's request that the car be preserved. However, the court charged him with knowledge through his attorney. Because the vehicle was not disposed of until one year after the letter was forwarded to defense counsel, the court concluded that the plaintiff had ample opportunity to obtain the evidence that they now claim was essential to their case and that the defendant should not bear the burden of their failure to do so. The appellate court held that the trial court did not abuse its discretion by refusing to dismiss the case or limit Mr. Tyrell's evidence at trial. Finally, the court addressed the issue of whether or not a jury instruction on negative inference would have been appropriate under the circumstances. The following instruction was proposed:

> When evidence is within the control of a party whose natural interest it would be to produce that evidence, and that party destroys the evidence without adequate cause, it may be inferred that such evidence would be unfavorable to that party. A party has control of evidence when the evidence is in the actual physical custody of the party.

The trial court refused to give the instruction and the appellate court upheld the trial court's decision. The appellate court held that the instruction was not supported by the evidence and "unfairly would have created the suspicion that Mr. Tyrell had willfully attempted to deny jurors access to the adverse evidence.” Id. at 613.

Many states have begun to recognize an independent tort for destruction of evidence. See Pullman v. Eddy Potash, Inc., 43 N.M. Bar Bulletin, No. 34 at 16 (1995); Panich v. Ironwood Products, 445 N.W.2d 795, 798 (Mich. 1989). These include Alaska, California, Florida, Illinois, Minnesota, New Mexico and Ohio. However, even in the absence of a decision allowing a tort claim for destruction of evidence, a court is empowered to sanction a party under Rule 37 or under its inherent power. See Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979).

II.

CONTRACTUAL WAIVERS

Contractual waivers have always been an issue in subrogation cases. However, in the last two years this writer has been involved in two significant motions involving the aggressive use of contractual waivers.

The first is an Idaho case where an owner retained a general contractor to build his residence. The general contractor then signed a proposal for a paint subcontractor's services. Contained in the boilerplate of that proposal is a provision which stated: "Owner will carry fire insurance." The house burned down during the construction process as a result of the paint contractor's negligence. Counsel for the paint contractor filed a motion arguing that this provision rendered the paint contractor an implied coinsured under the owner's insurance policy, thereby barring subrogation. We argued that the general contractor had no authority to make such a bargain on the part of the owner and that there was no privity between the owner and the subcontractor for enforcement of this provision. We also argued that the paint contractor had no insurable interest in the property and therefore could not be an insured for purposes of barring subrogation. Fortunately, the court agreed with both of our arguments and successfully defeated the summary judgment motion. The order of the Idaho court is attached to these materials.

The second significant case involved the defense of a subrogation action against a fire protection engineer who conducted a loss survey of a plywood/veneer plant in Oregon. The insured's parent corporation was a huge conglomerate which had a manuscript policy through Lloyd's. That policy included in its definition of "insured": “Contractors as their interests may appear.” We were retained to defend the fire protection engineering firm and filed a motion with the court arguing that the fire protection engineer was a contractor and therefore was a coinsured under the policy barring subrogation. The federal court agreed that the engineer was a contractor but held that the contractor had no insurable interest in the property and therefore subrogation would not be barred.

Both the Idaho trial court and Oregon Federal Court were convinced that an insurable interest is necessary to bar subrogation against a party not specifically named in the policy. There is authority on both sides of this issue and the trend out west appears to be heading in favor of barring subrogation even without an insurable interest. As these two unpublished decisions show, a court may be convinced to buck the trend under the right set of facts.

III.

THE ECONOMIC LOSS DOCTRINE

The economic loss doctrine provides that a party may not recover in product liability for damage to the product itself. Essentially, the rationale is that damage to the product should be covered under warranty claims through use of the Uniform Commercial Code or through the contractual/purchase agreement. In the case of Washington Water Power Co. v. Graybar Electric Co., 112 Wn.2d 847 (1989), the Washington Supreme Court held that whether economic losses are recoverable within the context of the WPLA is determined by applying a risk of harm analysis, rather than by assessing the actual damages sustained. If a defect is so hazardous that a tort claim is justified even in the. absence of injuries to person or property, the economic loss doctrine will

not preclude a products claim. Stanton, 866 P.2d at 19. We have used this decision to argue that because a fire has the potential for damaging human life, then fire damage to a product caused by the product's defect should be compensable under products liability law.

Maritime law is much more restrictive with respect to the economic loss doctrine. See East River SS Corp. v. Transamerica Delavel, Inc., 476 U.S. 858 (1986); and Stanton v. Bayliner Marine Corp., 866 P.2d 15 (Wash. 1993). Maritime law does not recognize the risk of harm analysis which has become an exception to this doctrine. Therefore, when a product such as an engine on a vessel fails and damages the engine, there is no recovery under maritime law for damage to the engine under a tort theory. If the warranty has expired or been appropriately limited by the manufacturer, there is no remedy for the plaintiff.

We have been advised that there is currently an economic loss doctrine case before the U.S. Supreme Court and we are expecting a decision shortly.

IV.

THE EMPTY CHAIR DEFENSE - DOES IT APPLY TO A COMPONENT PART MANUFACTURER?

When Washington adopted RCW 4.22.070, there was little guidance as to how it would interact with the Product Liability Statute (RCW 7.72). Lately, we have faced arguments by product manufacturers that, when a component part of the product is responsible for the product's failure, that component part manufacturer must be brought in or it will be pointed to as an “empty chair.” To our knowledge, there is not yet a decision by the Washington courts which specifically addresses this issue. This argument presents many difficulties for a plaintiff in Washington.

In many cases, it is impossible to identify the component parts manufacturer until a great deal of discovery has been taken from the actual manufacturer. The manufacturer may have purchased component parts from several different suppliers, and therefore identification of the precise component parts supplier may be problematic. In addition, many of the products currently

on the market are manufactured in either mainland China or Taiwan. Pursuing a claim against an overseas component parts manufacturer may be difficult, if not impossible.

If we are unable to pursue a component parts manufacturer, then if the court accepts the manufacturer's argument, whatever portion of fault is attributed to the component parts supplier will go unrecovered. We believe that there was no intention on the part of the legislature to force plaintiffs to bring in every potential component parts supplier which. may have fault in connection with a product's failure. Language contained in the products liability statute (RCW 7.72) provides that a product seller which places its name on the product (i.e., holds itself out as a manufacturer) will be considered a manufacturer. See RCW 7.72.010(2) and RCW 7.72.040(2)(e). In addition, if the court determines that there is no other solvent manufacturer subject to service of process under Washington law, a product seller may be held liable as a manufacturer for product liability defects. These provisions are consumer-oriented and indicate an intent by the legislation that the consumer's ability to recover for product liability injuries not be unduly impaired.

Nowhere is there any evidence that RCW 4.22.070 was meant to contravene RCW 7.72 with respect to product liability actions. In terms of the balancing of interests, a manufacturer who deals with component parts suppliers are free to fashion contractual remedies against those suppliers in the event that the component part fails. If a manufacturer is concerned with the difficulty of pursuing an action against an overseas component parts supplier, that manufacturer always has the right to utilize a U.S. component parts supplier. Placing the burden of pursuing the overseas component parts supplier upon the consumer is simply not reasonable under the circumstances.

The solution to this dilemma may lie within RCW 4.22.070(l)(a) wherein parties acting in concert are still jointly and severally liable. Arguably, a manufacturer acts "in concert" with its component parts supplier to create the overall product. Again, this issue has yet to be tested in Washington.

We are confident that when this issue finally comes before the Washington courts, reason will prevail and the courts will finally put an end to this illogical and illicit use of the empty chair defense.

V.

ATTACKING AN EXPERTS QUALIFICATIONS THROUGH SCHOOL TRANSCRIPTS AND THE *USE OF DAUBERT

It is standard for counsel to seek to discredit an expert through the use of the expert's professional and educational background. We certainly agree that verifying an expert's credentials is of the utmost importance before retaining the expert on a plaintiff's claim or before accepting their opinions when deposing the other side's expert. Recently, we have become aware of several experts who have exaggerated their professional and educational background in their resumes. Using an expert who has an exaggerated resume will lead to severe credibility problems at trial and, possibly, may result in the expert's being disqualified from testifying.

While verifying an expert's credentials is appropriate, we have recently seen this practice taken to the outer limits. Some defendants are actually attempting to subpoena high school transcripts of certain experts in an effort to establish poor grades in science classes such as chemistry or physics. Whether or not this practice has been countenanced by the Washington courts we have yet to determine. The relevance of this type of evidence is highly suspect and the evidence may otherwise be inadmissible under the Rules of Evidence. However, we do believe that proof of obtaining a high school degree is probably fair game. We also believe that even though a court should keep the evidence out, establishing that a forensic engineer or a cause and origin expert received a D in physics in high school may be effective cross-examination at trial.

We have also seen some unique attacks on an expert's testimony through the use of Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) (requiring that scientific testimony be reliable, i.e., falsifiable scientific theory capable of empirical testing). As you may be

aware, Daubert has not been formally accepted by the Washington courts which, instead, rely upon a modified Frye standard or an evaluation of whether or not the means of analysis being testified to by the expert has been generally accepted by experts in the field. (i.e., the novel scientific evidence must have a valid scientific basis.) See Reese v. Stroh, 907 P.2d 282 (Wash.1995); and State v. Cauthron, 846 P.2d 502 (Wash. 1993).

In a recent case, defense counsel asked a cause and origin expert whether or not fire investigation is an "art" or a "science". Fortunately, he truthfully responded that it is a combination of both. If the expert had testified that it is an "art", the defendant may have had a strong basis to exclude the expert's opinion testimony on the cause of the fire.

While expert fire investigation is arguably a combination of art and science, only objectively verifiable scientific opinions are admissible. Science is generally used to refer to the process of describing the laws of nature through the scientific method. The scientific method is basically a means of testing a theorem through control of all variables except one. If the results of a test are reproducible on a consistent basis, then, under the scientific method, there is a proven cause/effect relationship.

Scientific method has been used to discard a number of old wives' tales regarding fire investigation. For instance, many experts used to rely upon “alligator" patterns to determine the origin of a fire. Scientific testing has since determined that alligatoring is affected by a number of factors including the type of wood and moisture content of the wood, as well as the heat and duration of flame impingement. Most of the "rules of thumb" utilized by fire investigators have been tested in one form or another by scientific studies. An expert who fails to keep up with these studies may find that his investigation methodology is sorely outdated and without any proper scientific foundation. In this respect, cases like Daubert and its progeny will continue to be useful for cross-examination of experts.