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## Breaking Legal Developments in Fire Investigation



### Breaking Legal Developments

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#### EXECUTIVE SUMMARY: This weekly newsletter covers:

- [Arkansas Court Upholds Expert's Exclusion for Failure to Rule Out Other Causes of Fire](#)

#### (1) ARKANSAS COURT UPHOLDS EXPERT'S EXCLUSION FOR FAILURE TO RULE OUT OTHER CAUSES OF FIRE

In [Nationwide Mutual Insurance Company v. Fleetwood Homes of Tennessee, Inc.](#), (Nov. 11, 2005) Court of Appeals of Arkansas, Division One (unpublished), Appellant Nationwide Mutual Fire Insurance Company brought a products liability action against appellee Fleetwood Homes of Tennessee, Inc. Fleetwood moved for summary judgment, and the trial court granted its motion. Nationwide appeals the trial court's order, arguing two points on appeal: (1) the trial court erred in granting summary judgment to Fleetwood and (2) the trial court abused its discretion in excluding and/or limiting the testimony of Nationwide's expert. Fleetwood cross appeals, arguing that the order granting summary judgment should have been entered with prejudice. The Court of Appeals affirmed the trial court's award of summary judgment, and reversed on cross-appeal to direct the trial court to enter the order with prejudice.

Fleetwood manufactured and assembled a mobile home owned by Mark and Amy Askins. The Askins purchased the mobile home in 2001 from a dealer in Pine Bluff. In the early morning hours of February 17, 2003, Amy Askins awoke and heard the central heat running. On her way to turn it off, she also heard a noise coming from the spare bedroom that sounded like sleet hitting the roof. Amy looked into the bedroom, and she saw and smelled smoke but did not see flames. Amy alerted her husband and daughter, and they left the home. Once outside, the Askins saw flames coming out of the roof over the spare bedroom. The Beebe Fire Department responded to the fire. The mobile home and contents were a total loss. In the incident report, the fire department noted that the fire originated in the spare bedroom.

Nationwide insured the Askins' mobile home. Nationwide hired Richard West, a certified fire investigator, to determine the fire's origin and cause. West first inspected the scene two days after the fire. At that time, West talked with the Askins and examined the premises. West determined that the fire originated in the spare bedroom.

West examined the scene again a month later. At this inspection, West removed debris, eliminated some other possible ignition sources, and further inspected the premises. He examined the branch circuit wiring in the spare bedroom and located a section in the exterior wall that showed evidence of

arcing and beading which, according to West, signal an electrical malfunction. West also found several siding staples along the sides and corner of the mobile home. The staples were used by the manufacturer when installing the siding, although the area in which the fire originated had been completely consumed, West noted that one of these staples had penetrated the wall and punctured the wiring's insulation near the origin of the fire. West reached the conclusion that a misplaced staple had come in contact with one of the wires within the branch circuit, creating a heat source. In West's opinion, it was this heat source that ultimately caused the fire. He testified that resistance heat caused by the staple would cause the insulation on the wire to carbonize or chemically decompose and harden, eventually ignite, and in turn ignite the two-by-four, felt board and mobile home siding. West prepared a written report detailing his inspection, findings, and conclusions.

Nationwide brought suit against Fleetwood, alleging products liability and negligence in the manufacture of the Askins' mobile home. Nationwide sought to recover those monies paid over to the Askins. Nationwide designated West as an expert witness as to the fire's cause and origin.

Fleetwood moved for summary judgment. In its motion, Fleetwood sought to exclude the testimony of West, arguing that it was not sufficiently reliable under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Fleetwood further argued that it was entitled to summary judgment, as Nationwide could not prove its case without the expert testimony of West. Following a hearing, the trial court granted summary judgment to Fleetwood and dismissed Nationwide's complaint without prejudice. Nationwide appealed the trial court's decision, raising two points on appeal: (1) the trial court erred in granting summary judgment to Fleetwood and (2) the trial court abused its discretion in excluding and/or limiting the testimony of Nationwide's expert. Fleetwood cross-appealed, arguing that the order granting summary judgment should have been entered with prejudice.

In a products liability action, a plaintiff must show that a product was manufactured in a defective condition that proximately caused harm. Ark. Code Ann. § 4-86-102 (Repl. 2001). Arkansas has adopted a strict products liability theory. *Southern Co. Inc. v. Graham Drive-In*, 271 Ark. 223, 607 S.W.2d 677 (1980). Under a strict liability theory, a plaintiff is not required to prove negligence. *Id.* A plaintiff must show that the product as supplied was defective at the time it left the hands of the manufacturer. *Nationwide Rentals Co. v. Carter*, 298 Ark. 97, 765 S.W.2d 931 (1989). In absence of direct proof that the product is defective because of a manufacturing flaw, the plaintiff must negate the other possible causes of failure of the product for which the defendant would not be responsible in order to raise an inference that the dangerous condition existed while the product was still in the control of the defendant. *Crawford v. Sears Roebuck & Co.*, 295 F.3d 884 (8th Cir. 2002); *Campbell Soup Co. v. Gates*, 319 Ark. 54, 889 S.W.2d 750 (1994); *Yielding v. Chrysler Motor Co.*, 301 Ark. 271, 783 S.W.2d 353 (1990); *Higgins v. General Motors Corp.*, 250 Ark. 551, 465 S.W.2d 898 (1971).

Nationwide compared this case to a case from Kansas, *Farmers Ins. Co. v. Smith*, 219 Kan. 680, 549 P.2d 1026 (1976), that Nationwide asserted is consistent with Arkansas law. In *Farmers*, two insurance companies brought a products liability action against a manufacturer and seller to recover for the fire loss of a mobile home. The issue was a circuit breaker box. The insurance companies offered the testimony of an expert who was a professor of electrical engineering. The expert investigated the fire and arrived at the opinion that the fire was caused by a loose connection at the breaker box.

In *Farmers*, the expert did not physically find a loose connection at or near the breaker box. He only deduced from the facts that there was a loose connection. The expert was unable to check any of the lines from the circuit box because it was completely destroyed by the fire. The expert conceded that the connection could have loosened after it left the control of the manufacturer. The manufacturer and seller objected to the introduction of the expert's opinion. They contended that no evidentiary basis existed for the expert's conclusion and that the opinion was based on inference and speculation. The trial court sustained the objection and limited the expert's testimony to the origin of the fire and to the cause being electrical. The expert was not permitted to explain that the source of the electrical cause was the loose connection.

On appeal, the insurance companies argued that the trial court erred in excluding the expert's opinion

as to the source of the fire. The Kansas Supreme Court agreed and held that a sufficient factual basis existed for the expert's conclusion as to the source of the fire. The evidence, particularly the elimination of other possible ignition sources, led the court to conclude that the expert's opinion was not speculative or uncertain. The supreme court held it error to exclude the expert's testimony simply because no direct evidence of the source of the fire remained. The court went on to affirm the judgment of the trial court, notwithstanding the fact that it held the expert testimony should not have been limited, because the insurance companies did not prove that a loose electrical connection in the mobile home existed at the time it left the possession or control of the manufacturer.

There was an important distinction between the Farmers case and the present case. Here, Nationwide failed to eliminate other possible ignition sources. Particularly, West was unable to eliminate improper installation of the mobile home's electric set up in contravention of the manufacturer's instructions as a cause of the fire. West acknowledged that he was not an electrician or engineer and thus could not rebut that the cause of the fire was improper installation by a third party of the box where wiring from the utility connected the home's system in direct contravention of Fleetwood's Connections Guide that stated that the three-feeder wire method utilized in the present case was illegal and unsafe. Because Nationwide had no direct proof that the product was defective because of a manufacturing flaw, it must produce evidence to negate other possible causes of failure of the product for which Fleetwood would not be responsible. See *Campbell Soup Co.*, *supra*; *Yielding*, *supra*; *Higgins*, *supra*. Nationwide, according to the testimony of West, was unable to do this. Thus, Nationwide lacked proof of proximate causation. One way a defending party can obtain summary judgment is by showing that the plaintiff lacks proof on a material element of its claim. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). Even if the trial court had admitted the testimony of West as to the specific cause of the fire, Fleetwood was entitled to summary judgment as a matter of law because Nationwide lacked proof on a material element of its claim.

Nationwide also argued that the trial court abused its discretion in limiting the testimony of its expert. The standard of review for the admission or exclusion of expert testimony is abuse of discretion. *Regions Bank v. Hagaman*, 79 Ark. App. 88, 84 S.W.3d 66 (2002). The trial court stated in its order that "West has limited experience" and "is not an electrical engineer or an electrician[,] [b]ut he offers an opinion as to `electrical malfunction in branch circuit wiring.'" The trial court noted that Nationwide cannot succeed on West's testimony alone. It stated, "He can give his opinion as to where the fire started and that it may be electrical in origin, but that would have to be the extent of his testimony. He is not qualified to opine as to what the electrical mechanism was that caused the fire, if any."

However, Nationwide had to make a prima facie case against Fleetwood with cause being a necessary element. Nationwide also had the burden of ruling out other possible causes for which Fleetwood could not be responsible. Because Nationwide could not do this even with the full testimony of West, the court did not address this argument. Even if the trial court abused its discretion in limiting West's testimony and even considering West's opinion as to the cause of the fire, Nationwide was unable to eliminate other possible causes of the fire; therefore, it failed to prove a necessary element of its case. The court affirmed the judgment for the defendant.

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