An Overview of Oklahoma Product Liability Law

This scholarly article contains updated material concerning Oklahoma Product Liability Law. Phillips Murrah President and Director, Tom Wolfe co-authored the original article with former colleague, Chris Pearson, who is now a partner at the Law Firm of Germer, Beaman & Brown in Austin.

The first update, which garnered a 2003 Maurice Merrill Golden Quill Award from the Oklahoma Bar Association, featured Phillips Murrah Litigation Practice Group Leader and Director, Lyndon Whitmire and Ruth Anderson Gates, who is now senior in-house counsel at Nissan North America Inc.

The article, now in its second update, includes contributions from Phillips Murrah Associate Attorney, Cody Cooper.

This article was originally published in the Oklahoma Bar Journal.

By Chris Pearson, Thomas G. Wolfe, Lyndon Whitmire and Cody J. Cooper

---

Any discussion of Oklahoma product liability law must start where Oklahoma product liability law started, with the

Oklahoma Supreme Court's 1974 opinion in Kirkland v. General Motors Corp. 1 In Kirkland, the plaintiff was driving her friend's new Buick Opel on Interstate 44 in Tulsa County.2 It was alleged that the driver's seat back suddenly collapsed, leaving her unable to control the car. As a result, her vehicle hit the highway median and then struck an oncoming vehicle head-on.3 Approximately one month after the accident, General Motors (GM) issued a recall letter to all owners of Buick Opels concerning the "seat back adjustment mechanism."4

The plaintiff's pleadings alleged that her injuries were proximately caused by a defective seat and GM's breach of the implied warranty of fitness.5 During the trial, GM contended that the seat was not defective and that the accident was caused by the plaintiff driving while intoxicated and at excessive speeds, which GM claimed constituted a misuse of the product. Plaintiff appealed after the jury returned a verdict for GM.6

As Justice Doolin predicted in Kirkland, that case "set the pattern" in Oklahoma for product liability litigation. Some 40 years later, most Oklahoma federal and state court product liability opinions cite Kirkland at least once and it remains the leading case on various product liability issues. This article (an update on two previous iterations) discusses the developments in Oklahoma product liability law since the issuance of the Kirkland opinion.

WHO MAY BE A PLAINTIFF?

In Moss v. Polyco Inc.,7 an opinion rendered on the same day as Kirkland, the court dis cussed the reach of the product liability cause of action. In Moss, the plaintiff, a customer in a restaurant, was injured when a plastic container of drain cleaner fell from a bathroom shelf, causing the contents to come in contact with the plaintiff's body.8 The court noted there was no adequate rationale or theoretical explanation why nonusers and nonconsumers should be denied recovery against

the manufacturer of a defective product, and thus expressly included bystanders in the class of potential plaintiffs.9 In so doing, the court agreed that the manufacturer who places into commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to the one who sustains injury because of the defective condition.10 More than two decades later, Oklahoma extended the right of recovery to bystanders who: 1) are directly physically involved in an incident; 2) are injured from viewing the injury to another as opposed to learning of it later; and 3) had a familial relationship to the injured party.11

In a product liability cause of action involving death, the determination as to who may be a plaintiff is governed by statute.12

A significant restriction on the ability of an injured party to pursue a product liability cause of action may arise in "failure to warn" cases.13 The duty to warn extends to an ordinary consumer or user, which has been defined as "one who would foreseeably be expected to purchase the product involved."14 In Rohrbaugh v. OwensCorning Fiberglass Inc., 15 the court found that the wife of an insulator, whose only exposure to the asbestos insulation was her exposure to her husband's clothes, was not a foreseeable purchaser or user of the product. Thus, the court reasoned, the manufacturer had no duty to warn the wife of the danger of exposure to its products.16

WHO MAY BE A DEFENDANT?

Expanding on its use of the term "manufacturers' product liability," the Kirkland court included, within the meaning of "manufacturers," all "processors, assemblers, and all other persons who are similarly situated in processing and distribution."17 Later opinions have recognized that product liability causes of action may be brought against a product retailer18 as well as a commercial lessor,19 and, in the

proper situation, a product liability action may be available against the supplier of a component part.20 In short, Oklahoma courts have recognized that a product liability cause of action may properly be stated against those engaged in the business of buying and selling products who inject a defective product into the stream of commerce, whether through sale or other means.21 However, all defendants in the chain of distribution are not automatically liable for a defective product. Responsibility for the defect must be traced to the proper defendants.22 Additionally, a bailor may not be held liable under a product liability theory where the bailor maintains control of the product, and thus, does not inject it into the stream of commerce.23

Notwithstanding the breadth of Kirkland and its progeny, it is incumbent upon the plaintiff, even in a strict liability case, to establish a causal link between the defendant's acts and/or omissions and the plaintiff's injuries and damages. As the Oklahoma Supreme Court noted in Case v. Fiberboard Corp.,24 the public policy favoring recovery by an innocent plaintiff does not justify the abrogation of the defendant's right to have "a causative link proven between the defendant's specific tortious acts and the plaintiff's injuries where there is a lack of circumstances, which would insure there was a significant probability that those acts were related to the injury."25 In Case, the court refused to apply the market share liability, alternative liability, concert of action and enterprise liability theories that allow a plaintiff to circumvent the "significant probability" standard.26

It is clear that a product liability cause of action may not be brought against an ultimate consumer of the product in question. In Potter v. Paccar Co.,27 the court stated that the product liability theory was not "so expansive that it permits an injured party to require everyone to defend his or her relationship to the defective product."28 The court thus granted a motion to dismiss filed by the owner of a battery

that exploded and caused the plaintiff to lose sight in his right eye. In Allenberg v. Bentley Hedges Travel Serv. Inc., 29 the court held that product liability theory does not apply to the commercial seller of a used product if the alleged defect was not created by the seller, and if the product was sold in essentially the same condition as when it was obtained for resale.30 Likewise, a parent company that sold used equipment to a related entity whose employees were later injured using that same equipment was not considered a "seller" for purposes of product liability.31 The court defined a "commercial seller" as a seller who is in the business of selling used goods.32

Like courts in numerous other jurisdictions, the Oklahoma Supreme Court has held that a successor corporation may be liable on a product liability theory for injuries caused by the products manufactured or distributed by the acquired entity. In Pullis v. United States Electrical Tool Co.,33 the court stated that as a general rule, where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. However, exceptions to the rule exist where there is an agreement to assume such debts or liabilities, where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations, and where the purchasing corporation was a mere continuation of the selling company.34

Similarly, the Oklahoma Supreme Court has held that a claimant, injured by a defective product after the dissolution of the manufacturing corporation, may, under the proper facts, seek recovery against the former shareholders of the corporation to the extent of the assets received by them.35

WHAT ARE THE BASIC ELEMENTS IN A PRODUCT LIABILITY ACTION?

In Kirkland, the court noted that the plaintiff must prove three elements to prevail in a product liability action:

> Plaintiff must prove the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.
>
> Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. [Citation omitted.] If the action is against the retailer or supplier of the article, the plaintiff must prove the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.
>
> Plaintiff must prove that the defect made the article unreasonably dangerous to him or his property as the term "unreasonably dangerous is … defined."36

Early post Kirkland cases have, in reviewing the elements that the plaintiff must establish to prevail in a product liability case, either restated or rephrased the above quoted passage from the Kirkland decision.37 However, more recent decisions have essentially added a "fourth element" requiring the plaintiff to establish personal injury or damage to property other than the allegedly defective product.38

Causation. The causation requirement, the same requirement that has existed in traditional negligence actions, has frequently been cited as a necessary element in the product liability plaintiff's case.39 At least one court has refused to apply the doctrine of res ipsa loquitur in an Oklahoma product liability case, but the plaintiff need not exclude all other possible conclusions.40 Additionally, at least one court has held that the "but for" theory of causation is illustrative of negligent conduct, but is inapplicable in proving products liability actions.41

The abnormal use or misuse of a product may serve as a complete defense to the product liability action to the extent

that the abnormal use or misuse defeats the causation requirement.42 Where it is established that a subsequent modification of the product, rather than a manufacturing or design defect in the product, is the intervening and superseding cause of the injury (as opposed to the concurrent cause), no cause of action exists against the manufacturer.43 Similarly, the plaintiff's recovery may be barred by a finding that the injuries and damages were caused solely by someone other than the named defendant.44

Under the current Oklahoma product liability causation standard, "[a] manufacturer's products liability plaintiff need not exclude all other possible conclusions. However, the mere possibility that a defect caused the injury is not sufficient."45 Additionally, Oklahoma courts have rejected the theories of "alternative liability,"46 "market share liability"47 and other "nonidentification theories."48

The causation requirement does, however, become somewhat distorted in a situation where a distributor of a defective product is named as a defendant in a product liability action. In such a case, as the court noted in Braden v. Hendricks,49 "it is immaterial to the plaintiff's case that the defect in the product was not caused by the distributor."50 As noted previously, the liability of the manufacturer and distributor is coextensive even though the distributor was in no way responsible for the presence of the defect.51

Existence of a Defect. Central to the plaintiff's case in a product liability action is proof that a defect existed in the product either at the time the product left the manufacturer's control52 (where the defendant is the manufacturer) or at the time the product was sold for use to the general public.53 As the court noted in Mayberry v. Akron Rubber Mach. Co., 54 a product may be defective because of: 1) manufacturing defects;55 2) supplier flaws;56 3) design defects;57 or 4) a failure to supply proper warnings to the product's dangers.58

It is generally recognized that in most product liability cases the existence of a defect must be proved by expert testimony.59 In 2004, the Oklahoma Supreme Court adopted the standards set forth in Daubert v. Merrell Dow Pharm. Inc. 60 and Kumho Tire Co. v. Carmichael61 for civil cases.62 Hence, when faced with a proffer of expert scientific or engineering testimony, an Oklahoma trial court, acting as the gatekeeper, will determine at the outset whether the reasoning or methodology underlying the testimony rests upon a reliable foundation.63 Moreover, the trial court must also determine whether an expert's testimony is "relevant to the task at hand." That is, the testimony must not only be relevant, but it must "fit" the facts of the case.64 It should be noted that the 10th Circuit held that a district court may reject as untimely a Daubert motion raised late in the trial process, stating: "counsel should not 'sandbag' Daubert concerns until the close of an opponent's case, thereby placing opposing counsel and the trial court at a severe disadvantage."65 Appellate review of a trial court's decision, with respect to the admission of expert scientific testimony, is made under the abuse of discretion standard.66

Unreasonably Dangerous Defect. The mere proof of a defect does not, per se, when coupled with the causation element, establish a product liability cause of action. Rather, as the court noted in Kirkland, the defect alleged and proven must render the product "unreasonably dangerous." The Kirkland court, adopting the standard set forth in Section 402A (comment G) of Restatement (Second) of Torts, defined "unreasonably dangerous" as follows: "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."67 This definition of the term has been adopted in subsequent decisions.68 The analysis of whether a product is unreasonably dangerous focuses on the time of manufacture, not on the present day standards.69

The importance of properly stating the “unreasonably dangerous” element was emphasized in Lamke v. Futorian Corp. 70 In that case, the Oklahoma Supreme Court affirmed the trial court’s dismissal of the plaintiff’s product liability cause of action be-cause the plaintiff had not sufficiently alleged that the products involved were more likely than would be expected by the ordinary consumer to cause the damages alleged. The court emphasized that a manufacturer may not be held responsible merely because its product is not as safe as other similar products. Rather, it must be shown that the product is less safe than expected by the ordinary consumer.71

Harm to Something Other Than The Product. In Waggoner v. Town & Country Mobile Homes Inc.,72 the Oklahoma Supreme Court addressed the issue of whether a plaintiff can pursue a product liability cause of action when there is only economic loss. The court reasoned that there is no need to extend the product liability theory into an area occupied by the Uniform Commercial Code and held that “no action lies in product liability for injury only to the product itself resulting in purely economic loss.”73 If, however, there is personal injury or damage to other property that resulted from the product defect, the plaintiff may recover damages for the personal injury and/or the other property loss, as well as for the damage to the product.74

Limitation on Implied Warranty Claims. Oklahoma Courts uniformly recognize that Kirkland “renders it unnecessary in a products liability action to consider a recovery based on implied warranty.”75 After Kirkland, the only possible recovery based upon “implied warranty” is under a Uniform Commercial Code violation when the same has been properly pleaded.76

WHAT IS THE APPLICABLE STATUTE OF LIMITATIONS?

The Kirkland court noted that an action based on product liability is an action for injury to personal property or for

injury to the rights of another, and thus concluded the two-year statute of limitations generally applicable in Oklahoma for tortious conduct would also apply in product liability cases.77 The plaintiff may “extend” the limitations period by one year by filing, then dismissing, the action without prejudice.78 In Ross v. Kelsey Hayes Inc.,79 the court held that this applies so long as the initial action is filed before the limitation period expires. The defendant need not be served in order to activate the one year “extension.”80

Oklahoma courts have applied the discovery rule in those product liability actions in which particular hardships, or other circumstances, justify different accrual rules.81 In Daugherty v. Farmers Cooperative Ass’n, 82 the Oklahoma Supreme Court held that acquisition of sufficient information, which if pursued, would lead to the true condition of things, would start the running of the statute of limitations.83

In Huff v. Fiberboard Corp.,84 the 10th Circuit held that the statute allowing a personal representative two years from the date of the death of the injured party85 to bring an action does not serve to extend the time to sue if the deceased, on the date of his death, had no cause of action against the manufacturer for the injuries which caused his death. Thus, where the decedent knew, or reasonably should have known, more than two years prior to his death that he had the condition for which the action is ultimately brought, and the defendant caused it, the action is time barred.86

Recognition of the discovery rule in product liability actions has raised the question of whether Oklahoma’s statute of repose87 applies in product liability actions. Early indications from the Oklahoma Supreme Court were that it did apply to manufacturers.88 In Ball v. Harnischfeger Corp., 89 the Oklahoma Supreme Court held that the statute of repose might bar a product liability claim if the manufacturer was acting as a designer, planner, construction supervisor or observer, or constructor of an improvement to real property.

Similarly, in O'Dell v. Lamb – Grays Harbor Co.,90 the court held that a product liability claim involving an allegedly defective conveyor was barred because the conveyor was an "improvement to real property" and the case was filed more than ten years after the conveyor was installed.91

WHAT DEFENSES ARE AVAILABLE?

The Kirkland court noted three defenses available to the product liability defendant: lack of causation, abnormal use and assumption of risk.92 Subsequent courts have continually reviewed the availability of these, as well as other defenses.93

Lack of Causation. If some act of the plaintiff caused the injury, rather than the product itself, the plaintiff may not recover. Thus, abnormal use,94 subsequent modification,95 or events, acts or omissions over which the defendant had no control may serve to defeat the causation requirement.

Abnormal Use or Misuse. The leading case on the issue of what constitutes an abnormal use or misuse of a product is Fields v. Volkswagen of America Inc. 96 In Fields, the Oklahoma Supreme Court significantly restricted the applicability of the abnormal use defense. The court noted that the defense of misuse or abnormal use of a product refers to cases where the method of using a product is not that which the maker intended or is a use that could not reasonably be anticipated by a manufacturer. As the court noted, a distinction must be made between use for an abnormal purpose and use for a proper purpose but in a careless manner (contributory negligence).97 The court, however, emphasized the latter element of foreseeability, stating that "to determine wheth er the use of a product is abnormal, we must ask whether it was reasonably foreseeable by the manufacturer. A manufacturer is not liable for injuries resulting from such use if it is not foreseeable."98 Thus, the Fields court characterized the plaintiff's alleged drinking and speeding as a "use for a

proper purpose, but in a careless manner" and noted that such "contributory negligence" was not a defense unless it caused the accident.98

Subsequent cases have acknowledged the existence of the abnormal use or misuse defense in product liability cases under the proper factual circumstances.100 Oklahoma has expanded the scope of admissible evidence for product liability actions concerning motor vehicles and seat belts by requiring submission of evidence of the nonuse of a seat belt, unless the individual is under the age of 16.101

Comparative Negligence or Fault. In Kirkland, the court held that the Oklahoma comparative negligence statute102 did not apply in product liability actions, and therefore, the plaintiff's contributory negligence or fault is a defense only where it reaches the point where it was the cause of the injury alleged.103 Despite a growing trend in other jurisdictions, subsequent Oklahoma decisions have consistently held that the plaintiff's negligence is not used to reduce the plaintiff's recovery in a product liability action.104

Assumption of Risk. Voluntary assumption of a risk is a complete defense to strict product liability under Oklahoma law.105 But, general knowledge of a risk is insufficient to bar recovery.106 Rather, the defendant must establish a "voluntary assumption of a known risk created by a defect which existed in a product at the time it left the manufacturer."107 In Smith v. FMC Corp.,108 the 10th Circuit stated the parameters of this defense, finding error in giving an assumption of risk instruction "in the absence of direct or credible and sufficient circumstantial evidence that the [defendant was] aware of the danger and voluntarily assumed the risk."109 It is not, however, necessary that the plaintiff have "specific, technical knowledge of the cause of the product's dangerous, defective condition."110 Rather, the plaintiff's general knowledge of the defective condition is sufficient to create a jury question on assumption of risk.111

Lapse of Time/Extended Use. Although the existence of a significant lapse of time between the manufacture of the product and injury is not a defense that can conclusively refute contentions that a product was defective, Oklahoma courts have found such evidence to be persuasive. In Hawkins v. Larrance Tank Corp.,112 the court noted that while the existence of a significant lapse of time between the sale of the product and the accident was a "damaging fact – one which frequently prevents any inference that the product was defective when sold … it does not preclude a finding of defectiveness at the time of sale."113 Similarly, the extensive use of the allegedly defective product between its manufacture and the date of the injury, though not an absolute defense, has been held to be persuasive evidence as to the existence or nonexistence of a defect at the time the product left the manufacturer's control.114 Thus, the fact that an aircraft engine operated satisfactorily for 538 flying hours after its sale,115 that bolts were in use three years prior to the date of an injury,116 or that a vehicle was driven 19,500 miles before an accident,117 has been held admissible to refute allegations that the product was defective at the time it left the possession and control of the defendant.

State of the Art. "State of the art," as used in product liability actions, is construed by Oklahoma courts to mean simply the custom and practice in an industry. Compliance with such standards does not constitute an absolute defense to product liability actions,118 nor does compliance with a federal safety standard, in and of itself, establish a product is not defectively designed.118 However, as the court noted in Bruce v. Martin-Marietta Corp.,120 state of the art evidence is helpful in determining the expectation of the ordinary consumer, and thus, is relevant in determining whether a particular product is defective.121 Furthermore, state of the art evidence may be considered relevant to whether the manufacturer is, or should be, aware of various dangers associated with the product.122

Substantial Change in the Product.123 Oklahoma cases have adopted the Restatement (Second) of Torts §402A(1)(b), which imposes liability only when the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."124 Most decisions have stated that the plaintiff must establish a defect existed in the product at the time it left the control of the manufacturer.125 In Saupitty v. Yazoo Mfg.,126 however, the court noted that while the general rule is that a manufacturer is not liable when an unforeseeable subsequent modification alone causes the plaintiff's injury, the manufacturer may be held liable where the subsequent modification was foreseeable.127

Learned Intermediary. Oklahoma courts have recognized that the duty to warn may be abated or lessened in cases where the user is not an "ordinary consumer" but is someone who does, or reasonably should, possess special skills or knowledge regarding the safe use of the product.128 The Oklahoma Supreme Court held in Duane v. Oklahoma Gas & Electric Co.,129 where a product is used in an industrial setting by one supposedly skilled at his job, a manufacturer has "no duty to warn of dangers inherent in the task or which are created by the oversight or negligence of the contractor or fellow employees."130 In Hutchins v. Silicone Specialties Inc.,131 the court distinguished between products marketed toward the ordinary consumer and those distributed to professionals and reasoned that a product that might be unreasonably dangerous in the hands of a home handyman may not be defective when used at a commercial work site by professionals.132

Similarly, a drug or medical device manufacturer may, in most cases, warn the physician, rather than the patient/consumer, of dangers associated with the product.133 This creates the ability, in the proper factual scenario, to argue that the duty to warn is abrogated, or at least delegated, to the knowledgeable purchaser.134 In a failure to warn case with a

learned intermediary, the plaintiff is entitled to a rebuttable presumption that the learned intermediary will heed any warnings given.135 However, the assumption is that the intermediary will heed the warnings, not that the warnings will ultimately be passed on to the patient. The defendant can rebut this presumption by "establishing that although the prescribing physician would have read and heeded the warning . . . this would not have changed the prescribing physician's course of treatment."136 The learned intermediary standard is a subjective standard that looks at what that particular physician would determine, not what an objective physician would determine.137

Obvious Defect. In the context of a duty to warn case, whether in negligence or product liability, the duty to warn exists only when those to whom the warning is to be communicated can reasonably be perceived to be ignorant of the dangers disclosed in a warning. That is, if the dangers or potential dangers are known, or should reasonably be known to the user, no duty to warn exists.138

Unavoidably Unsafe Product.139 In Tansy v. Dacomed Corp.,140 the court recognized the principles of comment K of the Restatement (Second) of Torts, Section 402A. Under these principles, some products that otherwise create a significant risk, but have great utility, may be deemed "unavoidably unsafe." Comment K serves as an affirmative defense where the product is incapable of being made safe under present technology, but the social need for the product warrants its production.141 The defense is available only when the product is properly manufactured and contains adequate warnings.142 With Oklahoma Tort Reform discussed below, this defense has since been codified into Oklahoma law.143

Government Contractor Defense. This defense, originally articulated by the United States Supreme Court in Boyle v. United Technologies Corp.,144 provides product manufacturers with insulation from tort liability under state law for

injuries allegedly caused by equipment manufactured according to specifications dictated by the military. The elements of the government contractor defense are as follows: 1) the United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers and the use of the equipment that were known to the supplier but not to the United States. In Andrew v. Unisys Corp.,145 Judge Russell, noting a split of authority concerning whether the government contractor defense applied to nonmilitary contracts, found that a manufacturer of a nonmilitary product is entitled to assert the government contractor defense so long as it meets the threshold test established in Boyle. 146

Preemption. Oklahoma product liability claims against products that are subject to federal regulations may be barred by preemption. In Riegel v. Medtronic, 147 the United States Supreme Court held that "state requirements are preempted under the MDA only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law."148 Each product will be subject to a case-by-case analysis that will consider whether the federal regulations applicable to the product simply set a minimum standard or are meant to govern the field of the product at issue.149 Where federal law is intended to govern the entire field of the product at issue, the claim will be preempted. However, where the federal statutes and regulations merely set a minimum standard for products (such as automobile standards), compliance with those statutes is not an absolute defense to liability.150 While claims against medical devices approved under the Medical Devices Act may be preempted, the Supreme Court has not taken the same stance for warnings on prescription pill containers.151 In reviewing the preemption arguments of the parties related to the adequacy of a warning placed on a pharmaceutical drug, the Supreme Court opined, "it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its

label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market."152 The court held, "[w]e conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that [the] common law claims do not stand as an obstacle to the accomplishment of Congress' purposes."153 Ultimately, as demonstrated by the cited case law, preemption will be both on a product-by-product basis as well as a case-by-case basis.

On May 2, 2014, the Oklahoma Legislature enacted a law that creates a "rebuttable presumption that [a] product manufacturer or seller is not liable for any injury to a claimant" caused by a product that is subject to federal or agency safety standards or regulations so long as the product manufacturer can show that it "complied with or exceeded" those standards.154 This same rebuttable presumption applies where a manufacturer can show by a preponderance of the evidence that the product was subject to "premarket licensing or approval by the federal government, or an agency of the federal government."155 The statute explicitly states that the protection does not extend to manufacturing defects regardless of compliance with federal standards or premarket approval.156 This statute essentially codifies the preemption rulings addressed above.

WHAT DAMAGES ARE RECOVERABLE?

The Kirkland decision was considered by the court as an appeal from a defendant's verdict and it did not address the issue of what damages are recoverable in a product liability action.

Compensatory Damages. Oklahoma courts have generally, without discussion, followed the general tort principle that one injured by the wrongful act or omission of another is entitled to fair and just compensation commensurate with the loss or damage sustained.157 Damages may be recovered for personal injuries arising out of a product liability action by an

adult,158 a minor child,159 the parent or guardian of a minor child,160 and a spouse of an injured plaintiff.161 Damages caused by a product failure are also recoverable in a wrongful death action.162 The proper plaintiffs to a wrongful death action are determined by Oklahoma wrongful death and probate statutes.163 A survival action may be brought by the personal representative of the decedent.164

Punitive Damages.165 In Thiry v. Armstrong World Industries, 166 the Oklahoma Supreme Court held that plaintiffs may allege and prove exemplary or punitive damages as an element of damage in a product liability action. The court, reasoning that such awards were authorized by Oklahoma statute,167 stated that "punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a reckless disregard for the public safety."168 "Reckless disregard" for public safety is shown when the evidence indicates: 1) the defendant was aware of the defect and the likelihood that the injury would result from it; 2) the defendant could either remedy the defect or prevent the injury caused by it; and 3) notwithstanding the above, the defendant deliberately failed to take action to remedy the defect or prevent the injury.169 Under the applicable Oklahoma statute,170 a jury in an action for the breach of an obligation not arising from contract may award punitive damages for the sake of example and by way of punishing the defendant. Under Oklahoma law, awarding punitive damages is a two-stage process.171 In order to award punitive damages, the jury must first make a determination that there is clear and convincing evidence that the defendant is guilty of conduct evincing reckless disregard for the rights of others or the defendant acted intentionally and with malice.172 In Moore v. Subaru of America, 173 the 10th Circuit held that absent presentation of such evidence, the court may properly refuse to instruct on the issue of punitive damages.

TORT REFORM, NEW OKLAHOMA PRODUCT LIABILITY LAWS AND THE

EFFECT ON PRODUCT LIABILITY ACTIONS

In 2009, the Oklahoma Legislature passed “tort reform” legislation by enacting a number of laws vastly changing the landscape of tort law in Oklahoma. The original Oklahoma “Tort Reform Act” was passed in 2009, but was subsequently followed by a 2011 statute amending many parts of the 2009 act. Several of these provisions have a direct impact on Oklahoma product liability actions. These provisions include capping noneconomic damages in cases of bodily injury to $350,000 (this does not apply to wrongful death actions or Governmental Tort Claims and there are other limitations),174 doing away with joint and several liability,175 no longer allowing a separate tort action for breaching the UCC duty of good faith,176 providing immunity against product liability actions for manufacturers and distributors for products that are inherently unsafe and known to be unsafe by an ordinary consumer (creates an affirmative defense that must be pled like any other affirmative defense),177 and requiring plaintiffs claiming physical or mental injuries to provide the defendants with releases for medical records, employment records and scholastic records.178 These statutes were enforceable law until the Oklahoma Supreme Court addressed them in two separate opinions.

In 2013, the Oklahoma Supreme Court struck down the 2009 Oklahoma Tort Reform Bill, H.B. 2818, as being unconstitutional. See generally Douglas v. Cox Retirement Props., 2013 OK 37, 302 P.3d 789 (striking down H.B. 2818 for violating the “single subject” rule); see also Wall v. Marouk, 2013 OK 36, ¶27, 302 P.3d 775, 787 (finding that requiring an “affidavit of merit” for professional negligence cases “creates a monetary barrier to access the court system, and then applies that barrier only to a specific subclass of potential tort victims”). In response to Douglas v. Cox and Wall v. Marouk, the Oklahoma Legislature, through a September 2013 special session, revived essentially all of the laws

struck down by the Oklahoma Supreme Court, including the notorious “affidavit of merit” in cases where “plaintiffs shall be required to present the testimony of an expert witness to establish breach of the relevant standard of care . . . .”179 The special session laws, coupled with the Oklahoma Supreme Court rulings, leave Oklahoma attorneys attempting to look at the tea leaves to determine the future of Oklahoma tort law.

In addition to Oklahoma’s tort reform statutes, the Oklahoma Legislature enacted legislation on May 2, 2014, providing greater protection to product sellers. The legislation expressly states that “[n]o product liability action may be asserted against a product seller other than a manufacturer unless . . .” the statute then sets forth six separate bases upon which a plaintiff can establish to bring a claim against a product seller.180 These include showing that the seller had “substantial control” over the product design, testing or manufacturing,181 demonstrating that the seller altered or modified the product and that alteration or modification was a “substantial factor” in causing harm to the plaintiff,182 bringing a claim against the seller where after a good faith exercise of due diligence, the plaintiff is unable to locate the manufacturer,183 asserting a claim against a seller is limited in its discovery to information related to these bases,184 and a seller is only liable to a plaintiff for negligence if the plaintiff can establish the following: the seller actually sold the product involved, the seller did not exercise reasonable care in assembling, maintaining, inspecting, and passing on the warnings and instructions, and the seller’s failure to exercise reasonable care was the proximate cause of the plaintiff’s injuries.185 Because this statute did not become effective until Nov. 1, 2014,186 Oklahoma courts have not yet applied it to product liability actions. Although this statute has not yet been applied, it is clear the statute will have a substantial impact on plaintiffs’ product liability claims against product sellers

by affording sellers stronger defenses against product liability actions.

FOOTNOTES

1. 1974 OK 52, 521 P.2d 1353.
2. Kirkland, 521 P.2d at 1356.
3. Id.
4. Id.
5. Id. at 1357.
6. Id.
7. 1974 OK 53, 522 P.2d 622.
8. Id. at 624.
9. Id. at 626.
10. Id.
11. Kraszewski v. Baptist Medical Ctr. of Okla. Inc., 1996 OK 141, 916 P.2d 241.
12. See Okla. Stat. Title 12, §§1051-55.
13. See McKee v. Moore, 1982 OK 71, 648 P.2d 21, 23.
14. Woods v. Fruehauf Trailer Corp., 1988 OK 105, 765 P.2d 770, 774.
15. 965 F.2d 844 (10th Cir. 1992), aff'd following remand, 53 F.3d 1181 (10th Cir. 1995).
16. Id. at 846.
17. Kirkland, 521 P.2d at 1361. The same test was later restated by the court in Fields v. Volkswagen of America Inc., 1976 OK 106, 555 P.2d 48, 53.
18. Robinson v. Volkswagen of America Inc., 803 F.2d 572, 574-75 (10th Cir. 1986); Braden v. Hendricks, 1985 OK 14, 695 P.2d 1343, 1350; Moss v. Polyco Inc., 1974 OK 53, 522 P.2d 622, 626. The liability of the manufacturer and distributor/retailer is coextensive, even though the latter is not responsible for the presence of the defect. Braden, 695 P.2d at 1350. Where the defect is attributable solely to the manufacturing process, the distributor/retailer may seek indemnification from the manufacturer. Shuman v. Lavern Farmers Cooperative, 1991

OK CIV APP 2, 809 P.2d 76, 77-78; Friend v. Eaton Corp., 1989 OK CIV APP 74, 787 P.2d 474, 476-77; Braden, 695 P.2d at 1349. Conversely, a verdict for the manufacturer in such a case absolves the distributor/retailer from liability on a product liability theory.

19. Dewberry v. La Follette, 1979 OK 113, 598 P.2d 241, 242 (action available against commercial lessors of a mobile home that supplied allegedly defective steps); Coleman v. Hertz Corp., 1975 OK CIV APP 5, 534 P.2d 940, 945 (action available against company that leased truck to plaintiff).
20. This is implicit in the decision of Mayberry v. Akron Rubber Mach. Corp., 483 F.Supp. 407 (N.D. Okla. 1979); c.f., Scott v. Thunderbird Indus. Inc., 1982 OK CIV APP 31, 651 P.2d 1346, 1349.
21. Kating v. ONEOK Inc., 1997 OK CIV APP 88, 953 P.2d 66, 68; Dewberry v. La Follette, 1979 OK 113, 598 P.2d 241, 242. A hospital has been held to be primarily in the business of rendering health care, not selling implants, and thus was not a member of the manufacturer's marketing chain. Van Downum v. Synthes, 908 F. Supp. 2d 1179 (N.D. Okla. 2012). For additional information, see infra "Tort Reform" discussion in Section 7 and accompanying endnotes.
22. Edwards v. Pepsico Inc., 268 Fed. App'x 756 (10th Cir. 2008) ("There is no legal support, however, for Mr. Edwards' attempt to extend this principle and make all defendants within the chain of distribution automatically liable for a defective product. Rather, responsibility for the defect must still be traced to the proper defendant. Thus, which defendant is responsible for an alleged defect [is] determined in the trial court.") (quotations and citations omitted).
23. Gosner v. Decker, 1991 OK CIV APP 64, 814 P.2d 1056, 1057-58. In Gosner, the defendant was neither a seller nor lessor, but merely used and allowed the use of its own equipment in providing a service.

24. 1987 OK 79, 743 P.2d 1062.
25. Case, 1987 OK 79, 743 P.2d at 1067; see also, Blair v. Eagle-Picher Industries Inc., 962 F2d 1492, 1496 (10th Cir. 1992); Dillon v. Fiberboard Corp., 919 F.2d 1488, 1491 (10th Cir. 1990).
26. Case, 743 P.2d at 1067. The court's opinion was in response to certified questions regarding an "asbestos related injury" case where the plaintiff is unable to identify specific tortfeasors. Id. A similar conclusion was reached by the court in Wood v. Eli Lilly & Co., 38 F.3d 510 (10th Cir. 1994), a case involving diethylslilbestrobol (DES). But see infra note 45.
27. 519 F. Supp. 487 (W.D. Okla. 1981).
28. Id. at 488. "The defendant neither manufactured the battery, nor did it process the battery…. Rather, [the defendant] stands in the shoes of an ultimate consumer…." Id. at 489.
29. 2001 OK 22, 22 P.3d 223.
30. Id. at 224-25.
31. Spence v. Brown-Minneapolis Tank Co., 2008 OK CIV APP 90, 198 P.3d 395.
32. Allenburg, 22 P.3d at 224.
33. 1977 OK 36, 561 P.2d 68.
34. Id. at 69.
35. Green v. Oilwell, 1989 OK 7, 767 P.2d 1348. This is known as the "equitable trust fund doctrine."
36. Kirkland, 521 P.2d at 1363.
37. See e.g., Wheeler v. HO Sports Inc., 232 F.3d 754, 756 (10th Cir. 2000); Gaines-Tabb v. ICI Explosives, USA Inc., 160 F.3d 613, 624 (10th Cir. 1998); Holt v. Deere & Co., 24 F.3d 1289, 1292 (10th Cir. 1994); McMurray v. Deere & Co., 858 F.2d 1436, 1439 (10th Cir. 1988); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984); Sterner Aero AB v. Page Airmotive Inc., 449 F.2d 709, 713 (10th Cir. 1974); Woulfe v. Eli Lilly & Co., 965 F. Supp. 178, 1482 (E.D. Okla. 1997); Dutsch v. Sea Ray Boats Inc., 1992 OK 155, 845 P.2d 187, 190;

Lamke v. Futorian Corp., 1985 OK 47, 709 P.2d 684, 688 (Doolin, J. dissenting); Lee v. Volkswagen of America Inc., 1984 OK 48, 688 P.2d 1283, 1285; Stuckey v. Young Exploration Co., 1978 OK 128, 586 P.2d 726, 730; Bohnstedt v. Robscon Leasing L.L.C., 1999 OK CIV APP 115, 993 P.2d 135, 136; Attocknie v. Carpenter Mfg., 1995 OK CIV APP 54, 901 P.2d 221, 227; Tigert v. Admiral Corp., 1979 OK CIV APP 41, 612 P.2d 1381, 1383.

38. Dutsch v. Sea Ray Boats Inc., 1992 OK 155, 845 P.2d 187; Waggoner v. Town & Country Mobile Homes Inc., 1990 OK 139, 808 P.2d 649.
39. See e.g., Blair v. Eagle-Picher Industries Inc., 962 F.2d 1492, 1495 (10th Cir. 1992), cert denied, 506 U.S. 974, 113 S. Ct. 464 (1992) ("The mere possibility that the product caused the injury is not enough."); Dillon v. Fiberboard Corp., 919 F.2d 1488, 1491 (10th Cir. 1990); McMurray v. Deere & Co., 858 F.2d 1436, 1439 (10th Cir. 1988); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984); Cunningham v. Charles Pfizer & Co., 1974 OK 146, 532 P.2d 1377, 1379; Messler v. Simmons Gun Specialities Inc., 1984 OK 35, 687 P.2d 121, 125; Kaye v. Ronson Consumer Products Corp., 1996 OK CIV APP 57, 921 P.2d 1300, 1302.
40. Freeman Family Ranch, Ltd. v. Maupin Truck Sales Inc., 2010 WL 908665 (W.D. Okla. 2010); Dutsch v. Sea Ray Boats Inc., 1992 OK 155, 845 P.2d 187, 191.
41. Minter v. Prime Equip. Co., 356 F. App'x 154, 159-61 (10th Cir. 2009).
42. Kirkland, 521 P.2d at 1367 (plaintiff's intoxication as misuse if the intoxication caused the injury); see also Black v. M&W Gear Co., 269 F.3d 1220, 1236 (10th Cir. 2001) ("in a product liability case in which contributory negligence is not a defense and misuse is not an issue, the only relevant causation issue is whether a defect in the defendant's product was the cause of the injury."); Saupitty v. Yazoo Mfg., 726 F.2d 657, 659 (10th Cir. 1984); Stuckey v. Young Exploration

Inc., 1978 OK 128, 586 P.2d 726, 730; Fields v. Volkswagen of America Inc., 1976 OK 106, 555 P.2d 48, 56; Stewart v. Scott-Kitz Miller Co., 1981 OK CIV APP 3, 626 P.2d 329, 331.

43. Messler v. Simmons Gun Specialties Inc., 1984 OK 35, 687 P.2d 121, 125; Prince v. B. F. Ascher Co., 2004 OK CIV APP 39, 90 P. 3d 1020 (Okla. Civ. App. 2004).
44. See Hinds v. General Motors Corp., 988 F.2d 1039, 1049 (10th Cir. 1993).
45. Dutsch v. Sea Ray Boats Inc.,1992 OK 155, 845 P.2d 187, 191 (Okla. 1992); see also Abercrombie & Fitch Stores Inc. v. Broan-Nutone LLC, 2012 U.S. Dist. LEXIS 166947, 3-4, 2012 WL 5906552 (W.D. Okla. Nov. 26, 2012). In asbestos related cases, however, the causation standard is heightened and Oklahoma courts require "[t]his causative link [] be established through 'circumstances which would insure that there was a significant probability that [the defendant's] acts were related to the [plaintiff's] injury.'" Dillon v. Fibreboard Corp., 919 F.2d 1488, 1491 (10th Cir. 1990) (quoting Case v. Fibreboard Corp., 1987 OK 79, 743 P.2d 1062, 1067).
46. 46.Wood v. Eli Lilly & Co., 38 F.3d 510, 512-13 (10th Cir. 1994).
47. Id. at 513-14.
48. Id. at 512-13; Case v. Fiberboard Corp., 1987 OK 79, 743 P.2d 1062, 1067.
49. 1985 OK 14, 695 P.2d 1343.
50. Id. at 1350.
51. Id.; see Robinson v. Volkswagen of America Inc., 803 F.2d 572, 574-75 (10th Cir. 1986) (verdict in favor of manufacturer absolves distributor where alleged defect is attributable solely to manufacturing process). See supra note 18. For additional information, see infra "Tort Reform" discussion in Section 7 and accompanying endnotes.
52. Holt v. Deere & Co., 24 F.3d 1289, 1292 (10th Cir. 1994); McMurray v. Deere & Co., 858 F.2d 1436, 1439

(10th Cir. 1988); Lamke v. Futorian Corp., 1985 OK 47, 709 P.2d 684, 688 (Doolin, J., dissenting); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984); Barber v. General Electric Co., 648 F.2d 1272, 1276 (10th Cir. 1981); Scott v. Thunderbird Indus., 1982 OK CIV APP 31, 651 P.2d 1346, 1348; Kirkland, 521 P.2d at 1363; Bohnstedt v. Robsco Leasing, L.L.C., 1999 OK CIV APP 115, 993 P.2d 135.

53. Mayberry v. Akron Rubber Mach. Corp., 483 F. Supp. 407, 412 (N.D. Okla. 1979); Kirkland, 521 P.2d at 1363; Hawkins v. Larrance Tank Corp., 555 P.2d 91, 94 (Okla. Ct. App. 1976).
54. 483 F. Supp. 407 (N.D. Okla. 1979).
55. Id. at 412; see e.g., Wheeler v. HO Sports Inc., 232 F.3d 754, 757 (10th Cir. 2000); Messler v. Simmons Gun Specialties Inc., 1984 OK 35, 687 P.2d 121.
56. Mayberry v. Akron Rubber Mach. Corp., 483 F. Supp. 407 (N.D. Okla. 1979).
57. Id. at 412. See e.g., Wheeler v. HO Sports Inc., 232 F.3d 754, 757 (10th Cir. 2000); Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844 (10th Cir. 1992); McMurray v. Deere & Co., 858 F.2d 1436 (10th Cir. 1988); Saupitty v. Yazoo Mfg., 726 F.2d 657 (10th Cir. 1984); Blood v. R&R Engineering Inc., 1989 OK 10, 769 P.2d 144; Messler v. Simmons Gun Specialties Inc., 1984 OK 35, 687 P.2d 121. In the automotive context, design defects may be alleged in the context of crashworthiness. See e.g., Hinds v. General Motors Corp., 988 F.2d 1039, 1049 (10th Cir. 1993); Lee v. Volkswagen of America Inc., 1984 OK 48, 688 P.2d 1283.
58. See e.g., McPhail v. Deere & Co., 529 F. 3d 947 (10th Cir. 2008); Wheeler v. HO Sports Inc., 232 F.3d at 757 (10th Cir. 2000); Daniel v. Ben E. Keith Co., 97 F.3d 1329, 1332 (10th Cir. 1996); McMurray v. Deere & Co., 858 F.2d 1436 (10th Cir. 1988); Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844 (10th Cir. 1992); Smith v. FMC Corp., 754 F.2d 873 (10th Cir. 1985);

Woulfe v. Eli Lilly & Co., 965 F. Supp. 1478, 1482 (E.D. Okla. 1997); Mayberry v. Akron Rubber Mach. Corp., 483 F.Supp. 407 (N.D. Okla. 1979); Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981); Smith v. United States Gypsum Co., 1980 OK 33, 612 P.2d 251; Bohnstedt v. Robscon Leasing, L.L.C., 1999 OK CIV APP 115, 993 P.2d 135; Shuman v Lavern Farmers Cooperative, 1991 OK CIV APP 2, 809 P.2d 76; Spencer v. Nelson Sales Co. Inc., 1980 OK CIV APP 58, 620 P.2d 477. The court noted in Smith v. FMC Corp., 754 F.2d 873, 877 (10th Cir. 1985), "a manufacturer has a responsibility to warn of a defective product at any time after it is manufactured and sold if the manufacturer becomes aware of the defect." The duty to warn arises only when the manufacturer "knows or should know that the use of the product is hazardous …." Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844, 847 (10th Cir. 1992). However, plaintiff has the burden of proving that the lack of adequate warnings caused his or her injuries. Black v. M&W Gear Co., 269 F.3d 1220, 1231 (10th Cir. 23001). A rebuttable presumption exists that an adequate warning would have been heeded. For a discussion of the inference and its rebuttal, see Eck v. Parke, Davis & Co., 256 F.3d 1013 (10th Cir. 2001); Daniel v. Ben E. Keith Co., 97 F.3d 1329, 1332-33 (10th Cir. 1996); Woulfe v. Eli Lilly & Co., 965 F. Supp. 1478, 1483-86 (E.D. Okla. 1997).

59. Harrington v. Biomet Inc., 2008 WL 2329132 (W.D. Okla. 2008) ("[T] he Court will assume that the plaintiff herein can prove the existence of a defect without identifying what the defect is and exclusively by circumstantial evidence, even though the product – the prosthetic hip – was not destroyed and/or there are numerous prosthetic hips of the same type and size available. However, the court observes that there is obvious tension between the principle that a plaintiff may prove the existence of a defect, without identifying

it, by circumstantial evidence and the principle recognized by the Oklahoma Supreme Court in Kirkland and its progeny, adhered to by the 10th Circuit, that ‘we do not infer that the injury is itself proof of the defect, or that proof of injury shifts the burden to the defendant.’”).

60. 509 U.S. 579 (1993).
61. 526 U.S. 137, 147 (1999).
62. See generally 2003 OK 10, 65 P.3d 591.
63. The following factors are among those to be considered to determine the reliability of scientific or engineering evidence: 1) whether the expert’s theory or technique has been subject to peer review; 2) whether there is a known or potential rate of error; 3) whether the scientific methodology has been generally accepted in its field; and 4) whether it can be tested. Christian, 2003 OK 10, ¶8, 65 P.3d at 597-98; Daubert, 509 U.S. at 592-593; Hollander v. Sandoz Pharm. Corp., 95 F. Supp. 1230, 1234 (W.D. Okla. 2000); see also, Tyler v. Sterling Drug Inc., 19 F. Supp.1239 (N.D. Okla. 1998).
64. Christian, 2003 OK 10, ¶9, 65 P.3d at 598; Daubert, 509 U.S. at 592- 593.
65. Alfred v. Caterpillar Inc., 262 F. 3d 1983 (10th Cir. 2001).
66. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Black v. M&W Gear Co., 269 F.3d 1220, 1227 (10th Cir. 2001).
67. Kirkland, 521 P.2d at 1363.
68. See e.g., Smith v. Cent. Mine Equip. Co., 876 F. Supp. 2d 1261 (W.D. Okla. 2012); McMurray v. Deere & Co., 858 F.2d 1436, 1439 (10th Cir. 1988); Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 500 (10th Cir. 1984); Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976); Lamke v. Futorian Corp., 1985 OK 47, 709 P.2d 684, 686; Smith v. United States Gypsum Co., 1980 OK 33, 612 P.2d 251, 253; Attocknie v.

Carpenter Mfg., 1995 OK CIV APP 54, 901 P.2d 221.

69. Estate of Wicker v. Ford Motor Co., 393 F. Supp. 2d 1229 (W.D. Okla. 2005).
70. 1985 OK 47, 709 P.2d 684.
71. Id. at 686; see also Gaines-Tabb v. ICI Explosives, USA Inc., 160 F.3d 613, 624 (10th Cir. 1998).
72. 1990 OK 139, 808 P.2d 649.
73. Id. at 653; see also Okla. Gas & Electric Co. v. McGraw-Edison Co., 1992 OK 108, 834 P.2d 980, 982. See also United Golf LLC v. Westlake Chem. Corp., 05-CV-0495-CVE-PJC, 2006 WL 2807342 (N. D. Okla. August 15, 2006).
74. Waggoner, 1990 OK 139, 808 P.2d at 652; Dutsch v. Sea Ray Boats Inc., 1992 OK 155, 845 P.2d 187, 193-94. See also Agape Flights Inc. v. Covington Aircraft Engines Inc., No. CIV-09-492-FHS, 2012 WL 2792452 (E.D. Okla. 2012).
75. O'Neal v. Black & Decker Mgf. Co., 1974 OK 55, 523 P.2d 614, 615; Mittapalli v. Ford Motor Co., Inc., No. 06-CV-61-GKF-SAJ, 2007 WI. 2292697, at *2 (N.D. Okka, Aug. 7, 2007.
76. Black & Decker Mfg. Co., 1974 OK 55, 523 P.2d at 615.
77. Kirkland, 521 P.2d at 1361; see Okla. Stat. Title 12, §95.
78. Okla. Stat. Title 12, §100.
79. 1991 OK 83, 825 P.2d 1273.
80. Id. at 1276-79.
81. See e.g., Huff v. Fiberboard Corp., 836 F.2d 473 (10th Cir. 1987); Williams v. Borden Inc., 637 F.2d 731 (10th Cir. 1980); Daugherty v. Farmers Cooperative Ass'n., 1984 OK 72, 689 P.2d 947.
82. 1984 OK 72, 689 P.2d 947.
83. Id. at 951; see also Huff v. Fiberboard Corp., 836 F.2d 473, 479 (10th Cir. 1987).
84. 836 F.2d 473 (10th Cir. 1987).
85. Okla. Stat. Title 12, §1053.
86. Huff, 836 F.2d at 475-480.
87. Okla. Stat. Title 12, §109-113.

88. Loyal Order Of Moose, Lodge 1785 v. Cavaness, 1978 OK 70, 563 P.2d 143, 147.
89. 1994 OK 65, 877 P.2d 45, 50.
90. 911 F. Supp. 490 (W.D. Okla. 1995).
91. Id. at 493-94; but see Durham v. Herbert Olbrich GMBH & Co., 404 F.3d 1249 (10th Cir. 2005) (holding manufacturing machinery was not an "improvement of real property" and therefore the defendant could not escape a claim for product liability by claiming the action was barred by Okla. Stat. Title 12, §109).
92. Kirkland, 521 P.2d at 1366.
93. "Defense" here is used in the broad sense of the word, indicating matters of proof that either serve as affirmative defenses or serve to rebut the plaintiff's prima facie case.
94. See supra note 42 (cases cited therein).
95. See supra note 43 (cases cited therein).
96. 1976 OK 106, 555 P.2d 48.
97. Id. at 56.
98. Id. The court, perhaps realizing the inconsistency with Kirkland, noted that while drunkenness could be misuse of a product, the facts in the present case did not establish such misuse. See also, Black v. M&W Gear Co., 269 F.3d 1220, 1235 (10th Cir. 2001) (holding that evidence that plaintiff's alcohol consumption might have caused the accident is irrelevant because it did not rebut plaintiff's evidence that a defective product caused plaintiff's injuries); Prince v. B.F. Asher Co. Inc., 2004 OK CIV APP 39, 90 P.3d 1020 (summary judgment for defendant on wrongful death claim where medical inhaler only became dangerous after extracting and ingesting an ingredient therefrom).
99. Id.; see also, McMurray v. Deere & Co., 858 F.2d 1436 (10th Cir. 1988) (party injured when bypassing a neutral start switch was carelessly using product for a proper purpose).
100. See e.g., Farrell v. Klein Tools Inc., 866 F.2d 1294,

1296 (10th Cir. 1989); Stuckey v. Young Exploration Co., 586 P.2d 726, 730 (Okla. 1978); Stewart v. Scott-Kitz Miller Co., 1981 OK CIV APP 3, 626 P.2d 329; Basford v. Gray Manufacturing Co., 2000 OK CIV APP 106, 11 P.3d 1281, 1293.

101. Okla. Stat. Title 47, §12-420 ("[T]he use or nonuse of seat belts shall be submitted into evidence in any civil suit in Oklahoma unless the plaintiff in such suit is a child under sixteen (16) years of age.").
102. Okla. Stat. Title 23, §§12, 13, 14. Okla. Stat. Title 23, §11 has since been repealed and now Okla. Stat. Title 23, §§12, 13, 14 govern contributory negligence and comparative negligence.
103. Kirkland, 521 P.2d at 1367. The court noted that the referenced statute applies to "negligent actions" and not product liability actions.
104. Black v. M&W Gear Co., 269 F.3d 1220, 1234 (10th Cir. 2001) ("In Oklahoma, use of a product `for a proper purpose, but in a careless manner' is merely contributory negligence, which is not a defense to a products liability suit."); McMurray, 858 F.2d at 1439; Saupitty v. Yazoo Mfg., 726 F.2d 657, 660 (10th Cir. 1984); Bingham v. Hollingsworth Mfg., 695 F.2d 445, 454 (10th Cir. 1982); Hogue v. A.B. Chance Co., 1979 OK 2, 592 P.2d 973, 975; Fields v. Volkswagen of America Inc., 1976 OK 106, 555 P.2d 48, 55.
105. Holt v. Deere & Co., 24 F.3d 1289, 1295 (10th Cir. 1994).
106. Hogue, 592 P.2d at 975.
107. Smith v. FMC Corp., 754 F.2d 873, 876 (10th Cir. 1985). See also, Holt v. Deere & Co., 24 F.3d 1289, 1292 (10th Cir. 1994); Bingham v. Hollingsworth Mfg., 695 F.2d 445, 452 (10th Cir. 1972); Barber v. General Electric Co., 648 F.2d 1272, 1277 (10th Cir. 1981).
108. 754 F.2d 873 (10th Cir. 1985).
109. Id. at 877; McMurray v. Deere & Co., 858 F.2d 1436, 1440 (10th Cir. 1988).

110. Holt, 24 F.3d at 1293.
111. Id.
112. 555 P.2d 91 (Okla. Ct. App. 1976).
113. Id. at 94. In Hawkins, there was a three year lapse from the time of sale to the date of injury. See also Hurd v. American Hoist & Derrick Co., 734 F.2d 495 (10th Cir. 1984) (30 year lapse of time does not preclude finding of defectiveness at time of sale).
114. See e.g., Sterner Aero AB v. Page Airmotive Inc., 449 F.2d 709, 714 (10th Cir. 1974); Hawkins v. Larrance Tank Corp., 555 P.2d 91, 94-95 (Okla. Ct. App. 1976).
115. Sterner Aero AB v. Page Airmotive Inc., 449 F.2d 709, 714 (10th Cir. 1974).
116. Hawkins, 555 P.2d at 94-95.
117. Braden v. Hendricks, 1985 OK 14, 695 P.2d 1343, 1350.
118. O'Banion v. Owens-Corning Fiberglass Corp., 968 F.2d 1011, 1016 (10th Cir. 1992). See also, Smith v. FMC Corp., 754 F.2d 873, 877 (10th Cir. 1985); Robinson v. Audi NSU Auto Union Aktiengesellschaft, 739 F.2d 1481, 1485 (10th Cir. 1984); Smith v. Minster Mach. Co., 669 F.2d 628, 633 (10th Cir. 1982).
119. Attocknie v. Carpenter Mfg., 1995 OK CIV APP 54, 901 P.2d 221, 228; Edwards v. Basel Pharm., 933 P.2d 298, 301 (Okla. 1997). Issues concerning federal preemption as affecting a state common law product liability claim are discussed in Johnson v. G.M. Corp., 889 F.Supp. 451 (W.D. Okla. 1995) and Bokis v. American Medical Systems Inc., 875 F.Supp. 748 (W.D. Okla. 1995).
120. 544 F.2d 442 (10th Cir. 1976).
121. Id. at 447.
122. Obanion at 968 F.2d 1011, 1016 (10th Cir. 1992); Smith, 669 F.2d at 634.
123. See infra "Tort Reform" discussion in Section 7 and accompanying endnotes.
124. Saupitty v. Yazoo Mfg., 726 F.2d 657, 659 (10th Cir. 1984).
125. McClaran v. Union Carbide Corp, 26 Fed. App'x 869 (10th

Cir. 2002); Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984); Mayberry v. Akron Rubber Mach. Corp., 483 F.Supp. 407, 412 (N.D. Okla. 1979); Dutsch v. Sea Ray Boats Inc., 1992 OK 155, 845 P.2d 187, 191- 92; Manora v. Watts Regulator Co., 1989 OK 152, 784 P.2d 1056, 1059; Messler v. Simmons Gun Specialities Inc., 1984 OK 35, 687 P.2d 121, 125; Stuckey v. Young Exploration Co., 1978 OK 128, 586 P.2d 726, 730; Cunningham v. Charles Pfizer & Co., 1974 OK 146, 532 P.2d 1377, 1379; Hawkins v. Larrance Tank Corp., 555 P.2d 91, 94 (Okla. Ct. App. 1976).

126. 726 F.2d 657, 659 (10th Cir. 1984).
127. Id. at 659.
128. Akin v. Ashland Chemical Co., 156 F.3d 1030, 1037 (10th Cir. 1998); see also Ingram v. Novartis Pharms. Corp., 888 F. Supp. 2d. 1241 (W.D. Okla. 2012).
129. 1992 OK 97, 833 P.2d 284.
130. Id. at 287.
131. 1993 OK 70, 881 P.2d 64, 67.
132. Id.
133. Woulfe v. Eli Lilly Co., 965 F. Supp. 1478, 1482 (E.D. Okla 1997). Exceptions to the rule are discussed in Edwards v. Basel Pharmaceuticals, 933 P.2d 298, 300-03 (Okla. 1997); Tansy v. Dacomed Corp., 1994 OK 146, 890 P.2d 881, 886.
134. Duane, 1992 OK 97, 833 P.2d at 287.
135. Stafford v. Wyeth, 411 F. Supp. 2d 1318, 1320-21 (W.D. Okla. 2006).
136. Id.
137. Id.
138. Mayberry v. Akron Rubber Machinery Corp., 483 F. Supp. 407,413 (N.D. Okla. 1979); Graves v. Superior Welding Inc., 1995 OK 14, 893 P.2d 500, 503-04; Travelers Indemnity Co. v. Hans Lingl Anlagenbau Und Verfahrenstechnik GMBH & Co. KG, 189 Fed. App’x 782 (10th Cir. 2006).
139. See infra “Tort Reform” discussion in Section 7 and

accompanying endnotes.

140. 1994 OK 146, 890 P.2d 881.
141. Id. at 885.
142. Id. at 886; Littlebear v. Advanced Bionics LLC, 896 F. Supp. 2d 1085 (N.D. Okla. 2012); Reed v. Smith & Nephew Inc., 527 F. Supp. 2d 1136 (W.D. Okla. 2007).
143. Okla. Stat. Title 76, §57.1 (this statute does not provide a defense for manufacturer's defect or breach of warranty suits).
144. 487 U.S. 500, 507-508 (1988).
145. 936 F. Supp. 821 (W.D. Okla. 1996).
146. Id. at 830.
147. 552 U.S. 312 (2008).
148. 552 U.S. at 330.
149. Compare Riegel v. Medtronic, 552 U.S. 312 (2008) (preemption of state common law claims for certain medical devices) with Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 830-31 (N.D. Okla. 2007) (finding compliance with a governmental standard for the minimum strength of a roof was insufficient to establish an absolute defense to a claim of products liability).
150. Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 830-31 (N.D. Okla. 2007) (finding compliance with a governmental standard for the minimum strength of a roof was insufficient to establish an absolute defense to a claim of products liability).
151. Wyeth v. Levine, 555 U.S. 555, 570-571 (2009).
152. Id. at 570-71.
153. Id. at 581.
154. 2013 OK H.B. 3365(1)(A) and (C).
155. Id.
156. Id. at (1)(D).
157. This principle is codified in Okla. Stat. Title 23, §61.
158. The elements that may be considered by the jury in fixing an amount to be awarded to an adult for personal injuries are enumerated in OUJI – Civ. No. 4.1.
159. The elements that may be considered by the jury in

fixing an amount to be awarded to a minor child for personal injuries are the same as set out in endnote 142 above, except for loss of earnings, which are not considered. OUJI – Civ. No. 4.2.

160. In a derivative action brought by the parent or guardian of a minor child who has suffered personal injuries, the jury is allowed to consider the elements set out in OUJI – Civ. 4.3.

161. In order for a plaintiff to recover on a claim of loss of spousal consortium, the jury must make findings as set out in OUJI – Civ. 4.5. The measure of damages for loss of spousal consortium is the amount of money which will reasonably and fairly compensate the plaintiff for the value of the loss of consortium he or she has sustained, and for the value of the loss of consortium he or she is reasonably certain to sustain in the future. Any award to the plaintiff will be reduced by the court in proportion to the percentage of negligence the jury attaches to the injured spouse. OUJI – Civ. 4.6. Children may also have a cause of action for loss of parental consortium, which is defined as the love, care, companionship and guidance given by a parent to a minor child. For a child to recover on a loss of parental consortium claim, the jury must make findings set out in OUJI – Civ. No. 4.7. The measure of damages for loss of parental consortium is based upon the amount of money which will reasonably and fairly compensate the child for the loss of the value of the parental consortium that he or she has lost, and for the value of the loss of parental consortium he or she is reasonably certain to sustain until he or she reaches the age of eighteen. Any award to the child will be reduced by the court in proportion to the percentage of negligence the jury attaches to the injured parent. OUJI – Civ. No. 4.8.

162. An action for wrongful death is derivative, brought in the name of the decedent. Elements that may be

considered by the jury in determining the amount of damages are described in OUJI – Civ. No. 8.1. Damage items which may be considered as a result of the wrongful death of a minor child are enumerated in OUJI –Civ. No. 8.2.

163. Okla. Stat. Title 12, §§1053-1055; Okla. Stat. Title 84, §213.
164. The personal representative may recover damages the decedent might have otherwise sustained had he or she lived. Okla. Stat. Title 12, §1053(a).
165. See infra "Tort Reform" discussion in Section 7 and accompanying endnotes.
166. 1983 OK 28, 661 P.2d 515.
167. Okla. Stat. Title 23, §9.1.
168. Thiry, 661 P.2d at 518.
169. Id. at 517-18; see also, Johnson v. General Motors Corp., 889 F. Supp. 451, 454 (W.D. Okla. 1995).
170. Okla. Stat. Title 23, §9.1.
171. Okla. Stat. Title 23, §9.1.
172. Id. For an absence of such a finding on the record, the court in Shuman v. Laverne Farmers Cooperative, 1991 OK CIV APP 2, 809 P.2d 76, 79 reduced the punitive damage award to equal the compensatory damages awarded.
173. 891 F.2d 1445 (10th Cir. 1989). The court rejected the argument that a defendant's resistance in producing material in discovery constitutes an implied admission of punitive guilt, and reasoned that such evidence, if admissible, is relevant to liability, not damages.
174. Okla. Stat. Title 23, §61.2 (there is no limit on economic loss and the "cap" is lifted if the judge and jury find by clear and convincing evidence that the defendant's acts or failures to act were in reckless disregard for the rights of others; grossly negligent; fraudulent; or intentional or with malice).
175. Okla. Stat. Title. 23, §15.
176. Okla. Stat. Title 12A, §1-304.
177. Okla. Stat. Title 76, §57.1 (does not provide a defense

for manufacturer's defect or breach of warranty suits).

178. 2013 OK H.B. 3375. This bill was enacted on April 28, 2014, and amends Okla. Stat. Title 12, §3226(A)(2)(a) by adding the following language: "Subject to subsection B of this section, in any action in which physical or mental injury is claimed, the party making the claim shall provide to the other parties a release or authorization allowing the parties to obtain relevant medical records and bills, and, when relevant, a release or authorization for employment and scholastic records."
179. The Legislature revived the "affidavit of merit" requirement that was struck down in Wall, but provided an exemption for indigent plaintiffs. See Okla. Stat. Title 12, §19.1. The future application of this statute remains uncertain.
180. Okla. Stat. Title 76, §57.2(E)(1-6).
181. Okla. Stat. Title 76, §57.2(E)(1).
182. Okla. Stat. Title 76, §57.2(E)(2).
183. Okla. Stat. Title 76, §57.2(E)(4).
184. Okla. Stat. Title 76, §57.2(F).
185. Okla. Stat. Title 76, §57.2(G).
186. 2013 OK H.B. 3365(2).

Chris Pearson *is a partner at the Law Firm of Germer, Beaman & Brown in Austin, Texas. He is licensed in Oklahoma and Texas and regularly defends automobile and heavy truck manufacturers in product liability litigation.*

Tom Wolfe *is a trial attorney at the firm of Phillips Murrah P.C. whose practice is focused on complex business cases, including product liability, oil and gas, mass tort and class action defense. He served on the board of directors and as chair of the Trial Practice Section of the Oklahoma Association of Defense Counsel. He is Master of the William J. Holloway, Jr. American Inn of Court. He co-authored the OBJ articles, "Kirkland v. General Motors Co. and Beyond: An Overview of Twenty Years of Oklahoma Product Liability Law"*

and "An Overview of Oklahoma Product Liability Law," the latter of which won the Oklahoma Bar Association Golden Quill Award.

***Lyndon Whitmire** is a trial attorney and Litigation Practice Group Leader at the firm of Phillips Murrah P.C. He represents clients in a wide range of complex litigation matters, including product liability, commercial litigation, class actions, various UCC and consumer protection related disputes, first and third party insurance disputes, general tort and personal injury claims, intellectual property and appellate advocacy. He co-authored the OBJ article, "An Overview of Oklahoma Product Liability Law," which won the Oklahoma Bar Association Golden Quill Award. Other distinctions include recipient of the International Academy of Trial Lawyers Award.*

***Cody J. Cooper** is a litigation associate at the firm of Phillips Murrah P.C. He represents clients in a wide range of civil complex litigation matters. His practice concentrates on intellectual property, product liability and commercial litigation. He graduated from OU College of Law with honors. While in law school, he served as the managing editor of the American Indian Law Review. He has published articles on both "E-Discovery" and "Bring Your Own Device Policies" in the workplace.*