The Texas two-step approach to product liability claims: Neither the existence of a defect nor causation can be presumed

By E. Stratton Horres Jr. and Christopher L. Ash

Introduction

A nighttime fire in February 2003 partially destroyed a home in a West Texas town, resulting in extensive property damage but no loss of life. Suit was filed against a stereo manufacturer, alleging that a defective stereo caused the fire. The homeowners testified that they observed flames coming from the back of the stereo when they awoke. A fire investigation expert for the claimants testified that the fire originated in the area of the stereo. Plaintiff’s engineering experts testified that the stereo appeared to exhibit signs of internal electrical arcing\(^1\) that they believed caused the fire.

The outcome of the suit: summary judgment for the stereo manufacturer.

The reason: we were able to demonstrate that neither the claimants nor their experts could (1) identify a defect in the stereo, or (2) point to anything that the stereo manufacturer did, or failed to do, that caused the fire.

The existence of a defect

The claimants in the above-referenced lawsuit asserted claims against the stereo manufacturer for strict product liability and negligence. Generally, strict liability and negligence are separate causes of action. However, when both causes of action are based on the allegation that a product is defective, the controlling issues are the same.\(^2\)

Under Texas law, the elements that a claimant must prove to succeed on any product liability claim are: (1) that the product at issue is defective; and (2) that the defect caused the claimant’s alleged damages.\(^3\) More specifically, a claimant must present more than a scintilla of evidence in support of each of the following essential elements to survive summary judgment:

1. That the product is defective;
2. That the product reached the claimant without a substantial change in its condition;
3. That the defect rendered the product unreasonably dangerous; and
4. That the defect caused the claimant’s alleged damages.\(^4\)

Further, Texas generally requires a claimant to specify whether the products liability claim is based on a design defect, a manufacturing defect, or a marketing defect. In addition to the foregoing elements, a claimant must prove: the existence of a safer alternative design to prevail on a design defect claim;\(^5\) that the product deviated from its planned specifications to prevail on a manufacturing defect claim;\(^6\) and that the product lacked an adequate warning to prevail on a marketing defect claim.\(^7\) Claimants in the case at hand asserted allegations consistent with both a design and manufacturing defect.

Proving the occurrence does not equal proving liability

In the case at hand, the claimants’ experts (fire investigation and engineering) collectively propounded the following: (1) the fire in question started near the stereo; (2) based on visual inspection, other electrical appliances in the room (a television, lamps, etc.) are ruled out as a source of the fire; and (3) electrical arcing occurred within the stereo. The experts could not say, however, what caused the electrical arcing (i.e., a defect, external heat, or some other cause). Nor could they identify any defect in the stereo.\(^8\) Highlighting the experts’ failure on these two points proved critical.

The ultimate conclusion reached by the experts, that the stereo manufacturer was responsible for the fire, is what Texas courts have characterized as a “negative conclusion.”\(^9\) In other words, the experts determined that certain potential sources did not...
cause the fire and concluded that the stereo must have therefore caused the fire. A “negative conclusion,” however, is “really not a conclusion at all,” and amounts to no evidence under Texas law.

In *Doyle Wilson Homebuilder, Inc. v. Pickens*, a case based on a house fire allegedly started by electrical wiring, the plaintiffs argued that “the fire appears to have started in an isolated area containing electrical wiring, therefore either the builder or the electrician must be at fault.” As the *Pickens* court noted, however, “[t]he problem” with this argument is that it “equate[s] proof that the fire started in the wiring with proof of [the defendant’s] liability.” The court in *Pickens* held that this type of argument “bears strong resemblance to res ipsa loquitur,” and that “[Texas] case law does not support this approach.” Causation “may not be presumed.” Instead, “[t]he plaintiff must offer some evidence of what the defendant actually did or failed to do to cause the fire.”

The experts in *Pickens* and the case at hand used a “process of elimination” to form their conclusions. The only established fact was that an electrical fire had occurred; there was no evidence of any defect or a negligent act by the defendant. The claimants’ experts instead argued that the evidence showed that “in all probability the fire resulted from alleged defects.” The *Pickens* court stated:

> In this case, [the claimants’ experts] … acknowledged that they could not state precisely what caused the fire; they arrived at their conclusion by theorizing various possible causes and using a process of elimination. Only minimal physical evidence supports their conclusion.

The court held that such conclusions are factually insufficient and that any opinion as to the cause of the fire was purely speculation, surmise, or an impermissible stacking of inferences.

Other Texas case law supports the conclusions in *Pickens*. In *Bass v. General Motors Corp.*, the claimant produced evidence that an electrical fire had occurred, but no evidence as to the cause. The *Bass* court granted a defense verdict based on the claimant’s complete failure to show: (1) the existence of a defect, (2) that the product at issue was defective, (3) that the product was defective when it left the manufacturer’s hands, (4) that a defect, if any, rendered the product unreasonably dangerous, (5) that any defect proximately caused the fire, or (6) a faulty design.

If the expert is kicked out, the claim should be kicked out

In the case at hand, the claimants’ experts ultimately concluded that the stereo had caused the fire despite the fact that: (1) they could not identify any defect in the stereo; and (2) they could not say what caused the alleged electrical arcing in the stereo (and they admitted that the signs of electrical arcing could also have been caused by external heat or arcing through char).

Thus, the claimants’ experts could not point to any act or omission by the stereo manufacturer that caused the fire, and could not identify any defect in the stereo that caused the alleged electrical arcing. Therefore, even if the theories of these experts were taken as true, the claimants could only establish that electrical arcing had occurred; but not why. As a result, the experts’ ultimate conclusion — that a defect in the stereo caused the fire — was based entirely on conjecture and speculation.

Under Texas law a defendant may be entitled to judgment as a matter of law when critical evidence found only in expert testimony, such as evidence of a defect in a product liability claim, is excluded as unreliable. Similarly, at least one federal court has held that where the claimants’ experts offered “the only evidence of [a] defect,” and such evidence is excluded, “the [product] cannot be proven to have been defective,” and “the plaintiffs cannot prevail” on their claim.

In light of the foregoing, we moved to exclude the opinions of these experts because they were based on conjecture, speculation, and stacking inference upon inference. Our motion to exclude the claimants’ experts was filed shortly after our motion for summary judgment, and while the court was still considering our summary judgment arguments. Though the
court granted our motion for summary judgment prior to ruling on our motion to exclude claimants’ experts, our motion to exclude claimants’ experts may have been a factor in persuading the court to grant summary judgment.

**Law from other jurisdictions**

The Eighth Circuit Court of Appeals’ decision in *Weisgram v. Marley Co.* is an often cited case precisely on point for our discussion.27 *Weisgram* involves a wrongful death claim based on a fire and toxic fumes allegedly caused by a defective heater.28 The claimants in *Weisgram* retained multiple experts to support their arguments, including a fire investigation expert, and an electrical engineer.29 The district court admitted the testimony of these experts over the objections of the heater manufacturer and denied the heater manufacturer’s motion for judgment as a matter of law.30 The Eighth Circuit reversed and rendered judgment for the heater manufacturer, finding that: (1) portions of the experts’ opinions were unreliable, (2) that the experts should have been excluded, and (3) that absent reliable expert evidence, the heater manufacturer was entitled to judgment as a matter of law.31

The *Weisgram* court based its decision on several key facts. First, while the claimants’ experts targeted a supposedly faulty thermostat, they stated that they had “no idea what caused the thermostat to fail.”32 Second, while the experts thought “there was the possibility of a manufacturing defect … [they] had been unable to identify one” — or any other defect.33 These admissions mirror the experts’ admissions in connection with the West Texas fire.

In light of the experts’ statements and admissions in *Weisgram*, the court held that the experts could do nothing more than “speculate” and offer “conjecture,” and that their opinions and testimony were therefore “unreliable under Rule 702 and should have been excluded.”34 Moreover, the court held that the experts’ opinions should have been excluded under both “Daubert factors,” and under “the general principles of reliability and relevance.”35 Finally, the *Weisgram* court went a step further and rendered judgment for the heater manufacturer as a matter of law based on the exclusion of the claimants’ experts.36

**Conclusion**

The purpose of this article is to provide our clients with an analysis of the current state of product liability law in Texas. We recognize that this article only summarizes a small portion of the current case law in this field. Nevertheless, the article highlights key defense points that should be referenced in any product liability case in Texas, and possibly other jurisdictions: (1) the claimant’s burden to identify and prove the existence of a specific defect; (2) the claimant’s burden to prove a causal connection between the alleged defect and the incident in question; (3) that neither causation nor the existence of a defect is presumed — claimants cannot use a *res ipsa loquitur* argument to infer the existence of a defect; (4) the importance of carefully examining the conclusions of a claimant’s experts and challenging such experts where appropriate; and (5) because claimants can only meet their burden on a product liability claim by utilizing expert testimony, excluding such experts can result in judgment for the defendant.

---

1 “Arc. A high-temperature luminous electric discharge across a gap or through a medium such as charred insulation.” (NFPA 921, 3.3.7).
3 *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967) – adopting Restatement (Second) of Torts § 402A as law of Texas; see also *Houston Lighting & Power v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988).
4 *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967) – adopting Restatement (Second) of Torts § 402A as Texas law; see also *Houston Lighting & Power v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988).
5 Texas Civil Practice & Remedies Code § 82.005.
Further, though the experts claimed to have visually ruled out these items, they did not dispute that stereo speakers, a candle container, and a butane lighter were found in the room.

\[7\] *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986).


\[9\] Id.

\[10\] Id.

\[11\] Id.

\[12\] 996 S.W.2d 387, 396-97 (Tex.App. – Austin 1999, pet. dism’d).

\[13\] Id. at 396.

\[14\] Id. at 396-97.

\[15\] Id. at 396 (emphasis supplied).

\[16\] Id. (emphasis supplied).

\[17\] Id. at 397-98.

\[18\] Id. at 398.

\[19\] Id.

\[20\] Id. (emphasis supplied).

\[21\] Id.

\[22\] 447 S.W.2d 443, 447 (Tex.Civ.App. – Fort Worth 1968, writ ref’d n.r.e.)

\[23\] Id.

\[24\] “Arcing through Char. Arcing associated with a matrix of charred material (e.g., charred conductor insulation) that acts as a semiconductive medium.” (NFPA 921, 3.3.8).

\[25\] See *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997).

\[26\] *Weisgram v. Marley Co.*, 169 F.3d 514, 516-18 & 522 (8th Cir. 1999); *aff’d* 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 958 (2000).

\[27\] *Weisgram* is clearly not controlling for all jurisdictions (it is not controlling in Texas). Therefore, one should considering arguing that the decision is still strongly persuasive if the applicable jurisdiction’s evidentiary rules and standards governing the admissibility of expert opinions mirror federal rules and standards; as they do in Texas.

\[28\] *Weisgram*, 169 F.3d at 516-18.

\[29\] Id. at 517-18.

\[30\] Id. at 516-18.

\[31\] Id. at 514, 517-18.

\[32\] Id. at 520.

\[33\] Id.

\[34\] Id.

\[35\] Id. at 518, n. 3 (italics supplied).

\[36\] Id. at 522.

This article is for general guidance only and does not contain definitive legal advice. Contact us at productliability@wilsonelser.com.

© 2006 Wilson Elser Moskowitz Edelman & Dicker LLP. All Rights Reserved.