A Post-'Sullivan' World Requires a Strong Expert Report

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When passing words of wisdom down to a younger attorney, any seasoned attorney will advise that an expert will either make or break a case. In the wake of *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023), this wisdom is especially true.

To establish a strict products liability claim, a plaintiff must prove that the product was defective and contained a design defect, a manufacturing defect, or a failure to warn defect. A design defect is established by using either (or both) the consumer expectations test or risk-utility test. The consumer expectations test examines whether the product's danger is unknowable and unacceptable to the average or ordinary consumer.

In contrast, the risk-utility test analyzes factors to determine whether a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden/cost of taking precautions. Pennsylvania courts have used the Wade factors, which include:

> The usefulness and desirability of the product—its utility to the user and to the public as a whole; The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury; The availability of a substitute product which would meet the same need and not be as unsafe; The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; The user's ability to avoid danger by the exercise of care in the use of the product; The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

See *Tincher v. Omega Flex*, 104 A.3d 328, 389-90 (Pa. 2014) (quoting J. Wade, "On the Nature of Strict Tort Liability for Products,"

44 MISS. L.J. 837-38 (1973)). Courts have also used the *Barker* factors, which include:

> The gravity of danger posed by the challenged design; The likelihood that such danger would occur; The mechanical feasibility of a safer alternative design; The financial cost of an improved design; The adverse consequences to the product and to the consumer that would have resulted from an alternative design.

See *Barker v. Lull Engineering*, 573 P.2d 443 (Cal. 1978).

In *Sullivan*, a nonprecedential opinion, the majority opinion of the Supreme Court of Pennsylvania held that evidence of compliance with industry standards is inadmissible under the risk-utility test, as the focus of a design defect case is limited to the characteristics of the product, not the conduct of the manufacturer or seller. While the concurring opinion of the Supreme Court agreed in precluding evidence of industry standards at trial, its finding was premised upon the "undeveloped evidentiary record" in the trial court. The concurring opinion held that, accepting the defendants' argument that "producing a product that is designed pursuant to the industry or government standard makes evidence of the standard relevant to the question of whether the product is defective" as "workable," there were evidentiary deficits in the record that supported the conclusion that the standards were inadmissible. The concurring opinion explained that the defendants did not establish the relevance of the standards to any of the factors used in the risk-utility test. The concurring opinion reasoned that the record was "devoid of any information about what the standards are, how they are developed, or what their purpose, application or interpretation is." The concurring opinion held that "any decision on the admissibility of industry or governmental standards in a design defect products liability case requires a developed record containing evidence establishing the relevance of the standard to a factor or factors that a jury must consider in reaching its liability verdict."

In handling a products liability case post-*Sullivan*, it is imperative to have a strong expert report to support any liability defense, especially if that defense includes industry/government standards and regulations. As *Sullivan* only addressed an evidentiary issue related to a design defect claim using the risk-utility test, there is a compelling argument that compliance evidence is admissible as to other defect claims, such as design defects using the consumer-expectations test, manufacturing defects, and failure to warn defects. Additionally, compliance evidence is also relevant as to negligence products liability claims and, thus, is potentially admissible. However, considering the concurring opinion in *Sullivan*, the evidentiary record must clearly support the relevancy of standard/regulation evidence. One such way to create the necessary supporting record is with an expert report.

In selecting an expert, qualifications are key. The expert must not only be familiar with the at-issue standard/regulation, but the expert should also have been involved in the development of the standard. In the report, the expert needs to highlight this background. The expert should include in the report the history and development of the standard, the committee or members involved in the developmental process of

the standard, and approval and implantation of the standard. The expert should explain the unbiased developmental process used to create the standard. The expert should further include explanations as to the purpose of the standard and the interpretation and application of the standard.

The expert must clearly identify in the report the applicable standard and include text of the standard. The expert needs to take the additional step of showing and establishing that the standard is relevant to the factors a jury considers in determining whether the at-issue product was unreasonably dangerous. For example, the expert should include an explanation of the standard's application to the Wade and Barker factors. The expert should also directly tie the standard to the applicable jury instructions. In the report, the expert should not only identify the factors/instructions but also clearly explain how the applicable standard relates to the factors/instructions.

The expert must further include in the report the reason(s) as to exactly why the standard is being used. The expert will need to explain that the purpose of the standard as it relates to safety. The expert should use the standard when analyzing the condition and safety of the at-issue product. The expert could also use the standard in support of a feasibility of design argument relative to an alternative design claim. Standards could also be used to support a causation argument. These expert explanations and opinions can then be used to argue that the standard/regulation evidence does not relate to conduct or due care of the defendant (i.e., the issue in *Sullivan*) and, thus, is admissible evidence. Such an argument provides an additional basis of relevancy and can be used in motions in limine, opposition responses, objections, offers of proof, and proposed jury instructions.

Taking the time to select the proper expert who will produce a strong expert report will help build the supporting relevancy record for key evidence necessary to support a products liability defense. Not having this expert report could very well break the case.

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