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Marching On: Wisconsin's Peculiar Products Liability Law After *Murphy*

Plaintiffs in Wisconsin courts suing manufacturers for injuries caused by alleged product design defects must now meet both the reasonable-alternative-design requirements and the consumer-contemplation test.

Historically, Wisconsin has taken a unique approach to products liability law. Some have described it as "marching to its own, sometimes quite peculiar, drummer."[1]

Adding a new chapter to its "unique" approach,[2] the Wisconsin Supreme Court closed out 2022 with a question of first impression – how to interpret Wisconsin's "new" products liability statute (enacted in 2011), Wis. Stat. section 895.047. In *Murphy v. Columbus McKinnon Corp.*, the court concluded that the Wisconsin Legislature's enactment of the statute created a "unique, hybrid products liability claim"[3] for design defects.

Specifically, the court held that section 895.047 did not entirely discard the consumer-contemplation test from Wisconsin's common-law precedents, which were based in section 402A of the Restatement (Second) of Torts, nor did it entirely adopt section 2 of the Restatement (Third) of Torts: Products Liability.[4] Instead, the court held that section 895.047 incorporates elements of both Restatements for design defect cases. In doing so, *Murphy* breathes new life into the consumer-contemplation test in Wisconsin, which many had left for dead years ago.

The History

Strict liability claims arose out of the problems plaintiffs faced in pursuing products liability claims based in negligence and warranty.[5] While several court decisions and law review articles led to the development of strict products liability,[6] Justice Roger J. Traynor's 1963 opinion for the Supreme Court of California in *Greenman v. Yuba Power Products Inc*. truly kicked off the revolution because it was the first decision to establish a cause of action for strict liability in tort.[7]

Just two years later, in 1965, the American Law Institute embraced *Greenman*'s principles when it published section 402A of the Restatement (Second) of Torts [hereinafter Restatement (Second)].[8] Section 402A requires a plaintiff to show that the subject product was "defective" and "unreasonably dangerous" when sold.[9] Comment g states that a product is "defective" when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to [the consumer]."[10] Further, comment i states that a product is "unreasonably dangerous" only if it is "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."[11] This became known as the "consumer-contemplation" test.[12]

Between the mid-1960s and the mid-1980s, section 402A and its consumer-contemplation test "spread like wildfire from state to state," with courts and legislatures throughout the U.S. adopting the new doctrine.[13] Wisconsin was no exception. In 1967 – four years after *Greenman* and two years after creation of section 402A – the Wisconsin Supreme Court adopted section 402A in *Dippel v. Sciano*, establishing for the first time a claim for strict products liability in Wisconsin.[14] Although the court in *Dippel* did not specifically adopt or reject any of the comments to section 402A, the court adopted comments g and i eight years later in *Vincer*.[15] Thus, for several decades after the adoption of section 402A, Wisconsin followed the consumer-contemplation test in determining whether a product was defective and unreasonably dangerous.

By the 1990s, support for the consumer-contemplation test began to erode, particularly in cases alleging defective design and failure to warn.[16] Among its detractors were professors Aaron Twerski and James Henderson, the reporters for the Restatement (Third) of Torts: Products Liability [hereinafter Restatement (Third)] published in 1998.[17] Twerski and Henderson called the use of the consumer-contemplation test for design defect claims an "abject failure" that had been "thoroughly discredited."[18] Among other things, they argued that the consumer-contemplation test embodied in comment i of § 402A was "clearly intended … to apply only to manufacturing defects" and was therefore inappropriate as applied to design defect claims.[19]

The Restatement (Third) stated that "[t]he major thrust of § 402A was to eliminate privity" so that a consumer could bring a strict products liability claim concerning "a product containing a manufacturing defect" without having to establish negligence.[20] However,

SUMMARY

Since the development of the concept of strict liability claims, the test for whether a product is "defective" has evolved. For several decades, Wisconsin courts followed the consumer-contemplation test (from the Restatement (Second) of Torts) in determining whether a product was defective and unreasonably dangerous. More recently, the Wisconsin Supreme Court repeatedly declined invitations to adopt a replacement formulation in design defect claims: the risk-utility test in the Restatement (Third) of Torts: Product Liability. Then, in 2011, the Wisconsin Legislature created Wis. Stat. section 895.047 (titled "Product liability"), which mirrored the Restatement (Third).

This article discusses *Murphy v. Columbus McKinnon Corp.*, the first case to deal in depth with section 895.047. The most important takeaway from *Murphy* is that the consumer-contemplation test lives on in Wisconsin strict products liability design defect cases.

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"Section 402A had little to say about liability for design defects… [because]… [i]n the early 1960s these areas of litigation were in their infancy."[21]

The Restatement (Third) represented an "almost total overhaul" of the Restatement (Second) based on "thousands of judicial decisions that had fine-tuned the law of products liability in a manner hardly imaginable when the Restatement Second was written."[22] Section 2 of the Restatement (Third) contains separate definitions for each of the three types of product defect: manufacturing, design, and inadequate instructions or warnings.[23] As it relates to design defects, section 2 replaced the consumer-contemplation test with a risk-utility test as the standard for determining whether a product was defective.[24]

The Wisconsin Supreme Court, however, was not convinced by the Restatement (Third). Despite quickly adopting section 402A and its consumer-contemplation test in *Dippel*, a divided court twice resisted adopting section 2 of the Restatement (Third) in the three years following its publication – first in *Sharp* in 1999 and later in *Green* in 2001.[25]

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In *Green*, Justice Sykes filed a dissent stating that the majority was "seriously out of step with product liability law as it has evolved since" adopting section 402A in *Dippel* and that the majority's ruling "blurs the distinctions between design, manufacturing, and failure-to-warn product defects."[26] Justice Sykes wrote that the court should adopt section 2 rather than keep "Wisconsin in the much-criticized and rapidly dwindling minority of jurisdictions that rely exclusively on a consumer contemplation test to determine liability in design defect cases."[27]

The disagreement within the supreme court on this issue was highlighted again in two cases decided on the same day in 2009, *Godoy* and *Horst*.[28] Adherents to section 402A's consumer-contemplation test saw abandoning it for section 2 of the Restatement (Third) as a "sea change" that "would discard over forty years of precedent."[29] At the same time, the proponents of section 2 echoed Justice Sykes' dissent in *Green* and argued that the adherents to section 402A "restate[] Wisconsin's peculiar position on alleged design defects without mustering the intellectual firepower to defend it."[30] But once again, the proponents of the Restatement (Third) were unable to muster enough votes to change Wisconsin's law.[31]

It was against this backdrop that, in 2011, the legislature adopted Wis. Stat. section 894.047.[32] Subsection (1)(a) contains different tests for manufacturing, design, and inadequate-instruction defect claims that mirror section 2 of the Restatement (Third).[33] Section 894.047(1) states that in design defect claims, a manufacturer is liable if the plaintiff can establish that:

a) the product is defective because "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe;"

b) "the defective condition rendered the product unreasonably dangerous to persons or property;"

c) "the defective condition existed at the time the product left the control of the manufacturer;"

d) "the product reached the user or consumer without substantial change in the condition in which it was sold;" and

e) "the defective condition was a cause of the claimant's damages."[34]

Many saw the adoption of section 894.047(1) as the legislature moving in to resolve the disagreement among the supreme court justices and establish section 2 of the Restatement (Third) as a full replacement for section 402A of the Restatement (Second) and the consumer-contemplation test adopted and developed by Wisconsin common law: "Whether one agrees or not, the new standard means that consumer expectations (as such) no longer are relevant to findings about whether a product's design is defective or unreasonably dangerous."[35] The Wisconsin Civil Jury Instructions were revised not only to reflect the new standards in section 894.047(1) but also to include a comment suggesting that the statute "apparently discard[ed]" the consumer-contemplation test for design defect cases.[36]

Only a few Wisconsin decisions addressed section 895.047 in the ensuing years, providing little guidance to litigants and lawyers.[37] One federal jurist in Wisconsin concluded that section 895.047 "essentially changed the elements" of a strict products liability claim and effected a "substantive" change to Wisconsin law.[38]

Murphy: A New Unique Hybrid Approach to Strict Product Liability

The Wisconsin Supreme Court's recent decision in *Murphy* arose out of an accident involving the transportation of old electrical-line poles. Murphy, a utility company technician, used a truck-mounted boom equipped with specialty "Dixie" tongs to hoist downed poles onto a truck bed. As Murphy moved a

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pole using the tongs, the tongs lost their grip and the pole fell onto him, causing severe injuries. He brought a strict-product-liability design defect claim and a common-law negligent design claim against the manufacturer of the Dixie tongs. The circuit court granted the defendant summary judgment on both claims; the court of appeals reversed in a published opinion.

In *Murphy*, although the court issued a splintered decision with majority, concurring, and dissenting opinions, there was cohesion on several key points. Most significantly, despite the widespread belief that Wis. Stat. section 895.047(1) adopted section 2 of the Restatement (Third) and discarded section 402A's consumer-contemplation test, all the justices agreed that the statute did not entirely abolish the consumer-contemplation test.

The majority opinion explained that previously, courts used the consumer-contemplation test under section 402A and Wisconsin common law to assess whether a product was defective and unreasonably dangerous.[39] The court unanimously held that the language in Wis. Stat. section 895.047(1)(a) concerning defectiveness clearly mirrors the language from the Restatement (Third) section 2.[40] Therefore, the statute requires that to prove a design defect, plaintiffs must demonstrate a reasonable alternative design, the omission of which renders the product at issue "not reasonably safe."[41]

However, as to the second element of the statute in Wis. Stat. section 895.047(1)(b) – that the defective condition must render the product "unreasonably dangerous" – the court also unanimously held that the term "unreasonably dangerous" is part of the common-law consumer-contemplation test.[42] The majority opinion rejected the defendant's argument that section 895.047 constituted a complete adoption of the risk-utility test under the Restatement (Third) and a rejection of the consumer-contemplation test under the Restatement (Second). The court instead adopted a "plain language reading" of section 895.047 and found that the statute "remains loyal to Wisconsin's roots in the common law consumer-contemplation test."[43] In doing so, the court "recognize[d] the legislature's retention of the consumer-contemplation test in the statute."[44]

The majority based its conclusion on the structure of section 895.047(1). The majority said that the legislature copied much of the language in subsection (a) from the Restatement (Third) and that subsections (b)-(e) codified elements of the common-law test applied by Wisconsin courts for many decades.[45] The court rejected the defendant's argument that the adoption of the Restatement (Third) language in Wis. Stat. section 895.047(1)(a) affected the test for whether a product is "unreasonably dangerous." The "unreasonably dangerous" requirement is separately set forth in Wis. Stat. section 895.047(1)(b), in language that the court determined the legislature took from Wisconsin case law rather than from the Restatement (Third).[46]

The justices largely agreed that the legislature intended to create a "unique hybrid test," incorporating section 2 of the Restatement (Third) for determining whether a product is "defective" while retaining the consumer-contemplation test of section 402A of the Restatement (Second) for determining whether a product is "unreasonably dangerous."

Justice Roggensack was the only justice to suggest that Wisconsin's pre-statute common law would continue to provide persuasive authority as to the "defectiveness" element under section 895.047(1)(a).[47]

None of the justices chose to adopt any specific comments from the Restatement (Third) to interpret section 895.047(1)(a) concerning defectiveness,[48] although six of them noted that the comments might be persuasive and useful in applying the statute in future cases.[49]

All the justices agreed that the plaintiff's negligence claim should proceed to trial, noting that section 895.047(6) expressly disclaims altering the common-law analysis of negligence claims.

In *Murphy v. Columbus McKinnon Corp.*, the court concluded that the Wisconsin Legislature's enactment of the new statute created a "unique, hybrid products liability claim" for design defects.

Conclusion: Design Defect Cases After *Murphy*

The most important takeaway from *Murphy* is that the consumer-contemplation test lives on in Wisconsin strict-products-liability design defect cases. But unlike the common law before the enactment of Wis. Stat. section 895.047(1), plaintiffs must now meet both the reasonable-alternative-design requirements under section 895.047(1)(a) (derived from section 2 of the Restatement (Third)) and the consumer-contemplation test under section 895.047(1)(b) (derived from section 402A of the Restatement (Second)).

It is also noteworthy that such a hybrid test might not have been needed to preserve consumer contemplation as a relevant factor in design defect cases. Comment f to the Restatement (Third) section 2(b) – which neither the legislature nor the court in *Murphy* chose to adopt – identifies "the nature and strength of consumer expectations regarding the product" as one of the factors to consider in the Restatement (Third)'s risk-utility balancing test.[50]

Reasonable people can differ as to whether the court got it right in *Murphy*

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– that is, whether the legislature truly intended to create this "hybrid" approach in adopting section 895.047. They also can differ as to whether such an approach is more advantageous to consumers or manufacturers, given that plaintiffs must satisfy the additional reasonable-alternative-design element under section 895.047(1)(a) and defendants must continue to litigate consumers' contemplations under section 895.047(1)(b). The supreme court also expressly left unanswered the question of whether a difference exists between products that are "unreasonably dangerous" under the Restatement (Second) and products that are "not reasonably safe" under the Restatement (Third).[51]

But *Murphy* makes two things clear: The consumer-contemplation test survives in Wisconsin, and the state's product liability law will continue to march to the tune of its own drummer, however peculiar it may be. **WL**

ENDNOTES

[1]James A. Henderson Jr. & Aaron D. Twerski, *A Fictional Tale of Unintended Consequences*, 70 Brook. L. Rev. 939, 940 (2005) (later, at 941, referring to Wisconsin as "a renegade jurisdiction.").

[2]*Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, ¶ 27, 405 Wis. 2d 157, 982 N.W.2d 898.

[3]*Id.*

[4]*Id.* ¶¶ 27-28, 37, 40.

[5]Among other things, negligence claims focus on the conduct of the manufacturer or seller rather than on the condition of the product. Warranty claims require privity of contract between the manufacturer and the user of the product. *See Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (discussing problems posed by strict-products-liability claims founded in negligence and warranty).

[6]*See, e.g., Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944)*; Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69 (N.J. 1960); William Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

[7]*Greenman v. Yuba Power Prods. Inc.,* 377 P.2d 897 (Cal. 1963); *see also Godoy v. E.I. du Pont de Nemours & Co.,* 2009 WI 78, ¶ 15, 319 Wis. 2d 91, 768 N.W.2d 674.

[8]Restatement (Second) of Torts § 402A (1965). Notably, although section 402A is in the Restatement (Second), it hardly embodied a "restatement" of the law in the typical sense – that is, reflecting the existing consensus of what the law is. When the Restatement (Second) was published in 1965, California was the only state that recognized strict tort liability for defective products. Section 402A represented what the ALI and Professor William Prosser ("the preeminent scholar in American tort law who served as sole Reporter" for the Restatement (Second)) thought the law should be. *Godoy*, 2009 WI 78, ¶¶ 83-84, 319 Wis. 2d 91 (Prosser, J., concurring).

[9]Restatement (Second) of Torts § 402A(1).

[10]Restatement (Second) of Torts § 402A, cmt. g.

[11]Restatement (Second) of Torts § 402A, cmt. i.

[12]Also frequently referred to as the "consumer expectations" test.

[13]David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 977 (2007).

[14]*Dippel*, 37 Wis. 2d at 459.

[15]*Vincer v. Esther Williams All-Aluminum Swimming Pool Co.,* 69 Wis. 2d 326 (1975); *see also Green v. Smith & Nephew AHP Inc.,* 2001 WI 109, ¶ 29, 245 Wis. 2d 772, 629 N.W.2d 727.

[16]See, e.g., James A. Henderson Jr. & Aaron D. Twerski, *What Europe, Japan and Other Countries Can Learn From the New American Restatement of Products Liability,* 34 Tex. Int'l L.J. 1, 4-5 (1999); *Godoy*, 2009 WI 78, ¶ 17, 319 Wis. 2d 91.

[17]Restatement (Third) of Torts: Products Liability at XVII.

[18]Henderson & Twerski, *supra* note 16, at 4-5, 13.

[19]*Id.* at 4.

[20]Restatement (Third) of Torts: Products Liability, Intro. (1998).

[21]*Id.*

[22]*Id.*

[23]*Id.* § 2.

[24]*Id.*; *see also Murphy*, 2022 WI 109, ¶ 23, 405 Wis. 2d 157.

[25]*Sharp ex rel. Gordon v. Case Corp.*, 227 Wis. 2d 1, 19, 595 N.W.2d 380 (1999); *Green v. Smith & Nephew AHP Inc.*, 2001 WI 109, ¶ 74, 245 Wis. 2d 772, 629 N.W.2d 727.

[26]*Green*, 2001 WI 109, ¶ 122, 245 Wis. 2d 772.

[27]*Id.* ¶¶ 122, 127.

[28]*Godoy*, 2009 WI 78, 319 Wis. 2d 91; *Horst v. Deere & Co.*, 2009 WI 75, 319 Wis. 2d 147, 769 N.W.2d 536.

[29]*Horst*, 2009 WI 75, ¶ 110, 319 Wis. 2d 147 (A.W. Bradley, J., dissenting).

[30]*Godoy*, 2009 WI 78, ¶ 109, 319 Wis. 2d 91 (Prosser, J., concurring).

[31]Although four justices – Gabelman, Prosser, Roggensack, and Ziegler – endorsed adoption of section 2 of the Restatement (Third) in *Horst* and *Godoy*, they were not able to form a majority in either case because Justice Ziegler did not participate in *Horst* and Justice Roggensack did not participate in *Godoy.*

[32]2011 Wis. Act 2.

[33]*Compare* Wis. Stat. § 895.047(1)(a) *with* Restatement (Third) § 2; *Murphy*, 2022 WI 109, ¶ 31, 405 Wis. 2d 157.

[34]Wis. Stat. § 895.047(1)(a)-(e).

[35]Timothy D. Edwards & Jessica E. Ozalp, *A New Era: Products Liability Law in Wisconsin*, Wis. Law. (July 2011) (further explaining that the replacement of the consumer-contemplation test with the risk-benefit test in design defect cases "represents a move to the approach of the Restatement (Third) of Torts, a move that had been hotly debated in recent years and that split the Wisconsin Supreme Court in two 2009 cases.").

[36]Wis. JI-Civil 3260.1; *Murphy*, 2022 WI 109, ¶ 36 n.21, 405 Wis. 2d 157.

[37]*See, e.g., Forsythe v. Indian River Transp.*., No. 2012AP58, 2012 WL 4444862, ¶ 32 n.5 (Wis. Ct. App. Sept. 27, 2012) (unpublished) ("We note that the Forsythes filed their strict products liability claim before the effective date of the changes to Wisconsin's products liability law … . Thus, we are not faced with the question of whether our analysis would be different under current Wisconsin products liability law."); *see also Allen v. American Cyanamid*, 527 F. Supp. 3d 982, 995 n.3 (E.D. Wis. 2021) (similarly concluding that Wisconsin common law governed the plaintiffs' claims because they were filed before the effective date of Wis. Stat. section 895.047).

[38]*Nelson v. Johnson & Johnson*, 428 F. Supp. 3d 1, 5 (E.D. Wis. 2019).

[39]*Murphy*, 2022 WI 109, ¶ 21, 405 Wis. 2d 157.

[40]*Id.* ¶¶ 33 (majority opinion), 59 (Karofsky, J., concurring), 76 (Hagedorn, J., concurring & dissenting).

[41]*Id.* ¶¶ 33 (majority opinion), 59 (Karofsky, J., concurring), 76 (Hagedorn, J., concurring & dissenting).

[42]*Id.* ¶¶ 31, 37 (majority opinion), 61 (Karofsky, J., concurring), 77 (Hagedorn, J., concurring & dissenting).

[43]*Id.* ¶¶ 27-28 (majority opinion).

[44]*Id.* ¶ 37.

[45]*Id.* ¶ 31. These common-law elements include the requirements that the alleged defect render the product "unreasonably dangerous," that it exist at the time the product left the manufacturer's control, that the product reach the consumer without substantial change in condition, and that the defective condition cause the plaintiff's damages. *See* Wis. Stat. § 895.047(1).

[46] *Murphy*, 2022 WI 109, ¶ 37, 405 Wis. 2d 157. The defendant argued that it was impossible to read Wis. Stat. section 895.047(1)(a)'s "not reasonably safe" language as distinct from Wis. Stat. section 895.047(1)(b)'s "unreasonably dangerous" language, but the supreme court rejected that position, relying on the statutory interpretation canon of imputed common-law meaning. *Id.*

[47]*Id.* ¶¶ 38, 41.

[48]Restatement (Third) § 2, cmt. f.

[49]*Murphy*, 2022 WI 109, ¶¶ 64 n. 2, 405 Wis. 2d 157 (Karofsky, J., concurring); *id.* ¶ 76 n. 3 (Hagedorn, J., concurring & dissenting).

[50]*Id.* ¶ 34 n.20 (citing Restatement (Third), § 2, cmt. f.) (majority opinion).

[51]*Id.* ¶ 77 n.4 (Hagedorn, J., concurring & dissenting). **WL**

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