# Court Deals Blow to Product Manufacturers

## Statute of Repose provides no respite to makers of products used as improvements to real property

By Alan R. Levy

On Aug. 3, a unanimous New Jersey Supreme Court delivered a stinging blow to proponents of tort reform and product manufacturers who manufacture or design products that are used as improvements to real property. In *Dziewiecki v. Bakula*, 180 N.J. 528 (2004), the state's highest court held that a swimming pool manufacturer was not entitled to the defense of repose when faced with a personal injury claim.

New Jersey's Statute of Repose (SOR) states no cause of action for any injury or property damage may be claimed arising from the "deficiency in the design, planning, surveying, supervision or construction of an improvement to real property ... more than 10 years after the performance or furnishing of such services and construction." See N.J.S.A. 2A:14-1.1

The effect of the SOR places time limitations upon the potential liability of persons performing design or construction of an improvement to real property. See *Newark Beth Israel v. Gruzen*, 124 N.J. 357, 362 (1991). Contractors, architects, designers, engineers and surveyors are immune from suits arising from negligence in the design or construction of an improvement to real property 10 years has after the completion of construction.

The SOR does not act in the same way as a standard statute of limitations. In fact, the SOR is technically NOT a Statute of Limitations. A statute of limitations bars a plaintiff from bringing a cause of action if he does not invoke his rights within a certain period of time from the date of injury; the SOR states that a plaintiff has no cause of action once ten years has passed from the completion of the improvement, regardless of when the injury occurred. In other words, a suit may be barred before the injury even occurs. "Injury occurring more than ten years after the performance of the negligent act simply forms no basis for recovery. The injured party literally has no cause of action." *E. A. Williams, Inc. v. Russo Development Corp.*, 82 N.J. 160, 167 (1980).

In recent years tort reform proponents and product manufacturers have attempted to use state SOR provisions to prevent suits brought many years after the product was manufactured. The question of whether the SOR applied to manufacturers of the products that encompassed the improvements was a matter of first impression for New Jersey's highest court. Prior to *Dziewiecki*, there were two Appellate Division decisions that dealt with the questions of repose and product manufacturers.

In *Brown v. Jersey Central Power and Light Co.*, 163 N.J. Super. 179 (App. Div. 1978), in dictum, the Appellate Division stated:

> The [SOR] was not to limit the exposure of manufacturers and purveyors of products which are used in the factory, shop or home, or those who service these products. As best we can perceive, the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate.

While this early decision delivered a serious blow to product manufacturers, the *Brown* court did affirm summary judgment for the product manufacturers for other reasons, and left open alternative interpretations of the statute.

The later decision of *Wayne Twp. Bd. of Ed. v. Strand Century, Inc.*, 172 N.J. Super. 296 (App. Div. 1980), concentrated on the SOR's interplay with product liability law, and gave manufacturers another avenue of defense. In that case a dimmer panel installed in a school auditorium's lighting system caught fire resulting in property damage. The dimmer panel's manufacturer was one of many defendants. First, the court held that the dimmer panel was an integral part of the auditorium's electrical system, and an improvement to real property. In addition, there was a question of fact whether the manufacturer of the dimmer panel also assisted in the design and installation of the product. The court stated:

> If [defendant] ... participated to any extent in the design and planning stages of the lighting system and dimmer panel, as fabricated and installed in plaintiff's auditorium, it is entitled to the repose of N.J.S.A. 2A:14-1.1. If, however, [defendant] merely sold a stock or shelf item out of its regular inventory or fabricated a product as designed and specified by the electrical engineer ... for this project it was not within the repose of N.J.S.A. 2A:14-1.1. *Wayne Twp.*,

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the plaintiff's proofs eliminated causes for which the manufacturer would not have been responsible, and the court found that such proofs permitted "an inference that the accident was caused by some defect, whether identifiable or not;" a jury issue as to liability was legally presented. 66 N.J. at 460. In both *Scanlon* and *Moraca*, therefore, expert proofs were unnecessary, as the cases turned on lay testimony that eliminated causes for which the manufacturers would not be responsible.

### Beyond Common Experience

There are many cases where, without expert proof, a jury cannot determine whether such additional causes have been eliminated because possible causes for the malfunction would be beyond the common experience of the jury. The prototypical case, albeit in a medical malpractice setting, is *Bucklew v. Grossbard*, 87 N.J. 512 (1981), involving a plaintiff whose bladder had been mistakenly cut during an operation. Her medical expert could state no more about such an event than it would not have happened in the absence of the surgeon's negligence. The expert had not examined the plaintiff, nor had the expert opined on the nature of the surgeon's negligence in the particular case. He merely aided the jury in understanding the nature of the operation. Once the jury had this understanding, it was able to treat the case as one of res ipsa loquitur.

The Court noted that although a jury could rely on its own knowledge of medical care to determine that it was negligence to leave a sponge in a plaintiff after an operation, jurors needed expert proof to understand whether the incision of a bladder in the course of an exploratory laparotomy ordinarily bespeaks negligence. 87 N.J. at 526. The expert witness is still subject to the net opinion rule and must have experiential or similar support for a conclusion that the mishap in question would not have occurred but for the negligence of the defendant. Id. at 529. But, the expert can provide the jury with such a foundation and standards to understand the factual situation of the parties. The jury can then proceed from that point on a res ipsa loquitur basis.

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This is also true in the product liability field. There are situations where a jury may not understand whether a particular incident would have occurred but for the presence of some defect. There are other instances where an expert may be required to state that a particular type of defect (such as in a closed system) must have existed at the time of manufacture, even though a particular defect could not be located and shown to the jury. In still other situations, an expert may be required to define the causes for which a manufacturer would not be responsible, so that these causes can be eliminated by lay or other expert proof. Any or all of these types of expert proof may be present, whether or not the instrumentality is complex. The need for such proof is not defined by the complexity of the instrumentality, but rather by the need to tie the defendant to the particular or general class of defects alleged by a plaintiff.

Returning to *Lauder*, we see that at the end of the opinion the court explained that the defect in proof involved a failure to show that the defect existed while the product was in control of the manufacturer and that there had been no negation of "other causes of the failure of the product for which the defendant would not be responsible," citing the Appellate Division's decision in *Myrlak*. This reading was correct; the earlier res ipsa loquitur and complex instrumentality analysis was not. There was a failure of proof, but not for the reasons previously stated by the court. The locking mechanism on the gurney was not overly complex. There simply were other elements which may have caused it to fail. A blanket may have caught in the lock. It may not have been fully closed by the operator. Someone may have pressed the opening mechanism unintentionally. Of course, some of these explanations may have been the subject of expert proof concerning an alternative design, but this was not plaintiff's theory. The decision should not have addressed the inapplicability in a product liability case of res ipsa loquitur, nor the need for expert testimony in a case involving a complex mechanism. As in *Scanlon* and numerous other cases, there merely was a failure of proof that any alleged defect caused this accident. Hopefully, the language of *Lauder* and the somewhat ambiguous language of the precedent cases will not foreclose the proper use of res ipsa loquitur as defined by the Supreme Court in *Myrlak*, *Sabloff*, *Moraca* and *Scanlon*.

Should a plaintiff in most product liability cases present an expert? The answer is usually "yes." There is typically some aspect of the case for which the jury can use the aid of an expert, even if it may be unnecessary as a prerequisite to a judge sending the case to the jury. Of course there must be a balancing of need and expense; but plaintiffs can be reasonably assured that the defense will present an expert. Unless the case is open and shut as falling within the common experience of the jury, plaintiffs would be well advised to confront the defense expert with their own expert. ■

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172 N.J. Super. at 303.

The holding in *Wayne Twp.* placed defendants who wore "two hats" (i.e. installer and product manufacturer) in an awkward and potentially paradoxical position; the more involved the defendant was in the installation of an improvement to real property, the more likely they were to benefit from repose. This is certainly counterintuitive to common product liability defense strategy where defendants often try to argue that: 1) the product had no defect; 2) they had no involvement in the installation phase of the product; and 3) plaintiff's loss was the result of the negligence of the installer. Under the analysis of *Wayne Twp.* there would potentially be scenarios where a defendant would be eager to prove his own negligent conduct in the installation or design of a product simply to show that he was involved in the installation completed 10 years prior to the suit, just so he can get out of the case on summary judgment using a repose argument.

While nothing in the text of the statute states that a product manufacturer who designs and constructs the improvement does not fit within the four corners of the statute, the *Dziewiecki* court quickly dismissed this argument.

> Although we acknowledge that Fox "designed" the pool kit, in the sense that "products" are "designed," we do not believe that those who design products for manufacturers and suppliers of standardized items were intended to be covered by the SOR. Id. at 532-33.

In addition, *Dziewiecki* went even farther and ended the "two hat" scenario created by the *Wayne Twp.*:

> We reject that approach and hold that when a person in effect wears "two hats" (undertakes activities covered by the SOR and comes under the product liability statute), and the cause of the injury is attributable to both, the responsibility should be allocated between the two.

The defendant could wear either hat, but not both hats. In other words, even if a defendant both manufactured the product and installed it, he could only benefit from the SOR insofar as his liability for negligent installation. However, he would still be exposed to liability arising from an allegation of product liability.

**Why should a contractor who negligently installed an improvement have immunity protection when the manufacturer of the improvement, who wasn't even present when it was installed, is not immune?**

*Dziewiecki* appears to be a course reversal for the Supreme Court, which previously interpreted the SOR in a broad and remedial manner to bring in as many defendants as possible. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 198 (1972) (The statute must be applied with a "broad sweep ... to all whom this condition may adhere whether they be planners and builders of structures, roads, playing fields, or aught else that by broad definition can be deemed 'an improvement to real property.'"); *E.A. Williams, Inc. v. Russo Development Corp.*, 82 N.J. 160, 169 (1980) ("the statute was intended to terminate the liability of all persons who might be responsible for the existence of "defective and unsafe" conditions through their negligent design, plan, or construction of an improvement to real property.")

Product manufacturers could argue that instead of broadly interpreting the statute, the Court interpreted the statute in a narrow manner to exclude an entire class of defendants. Furthermore, the current scenario creates some potentially illogical situations; a clearly negligent contractor may be immune from suit, while a blameless product manufacturer must expend costs in defending a case, where no defect exists. Why should a contractor who negligently installed an improvement have immunity protection when the manufacturer of the improvement, who wasn't even present when it was installed, is not immune? Logic would dictate that the less involved a party is in the negligence, the more protected they should be. Likewise, the more involved a party is in installing a product, the more open to liability they should be. However, that does not appear to be the case in New Jersey.

*Dziewiecki* reflects this illogical scenario -- the manufacturer of a pool older than 10 years, encloses proper "no diving" warning signs but is sued because the signs were never installed or installed improperly. Currently, the liability against the manufacturer could potentially last for all eternity, while at the same time, the installer, regardless of his sophistication or experience, would be immune from liability for installing the signs in incorrect places or, for that matter, neglecting to install or post the signs at all.

Understandably, this scenario offers little comfort to product manufacturers. ■