Products Liability Series: Does Arkansas Law Require an Expert Witness?

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Does Arkansas products liability law require an expert witness? Technically, the answer is "it depends." But for a plaintiff to make a claim in a products case, the answer is almost always "yes."

Rule. The general rule of when an expert witness is required is that for plaintiff to meet their burden of proof expert testimony is required when the asserted negligence is outside the jury's comprehension as a matter of common knowledge. § 75:10 Need for expert testimony on applicable standard of care, 3 Trial Handbook for Arkansas Lawyers § 75:10 (2019-2020 ed.); *Bedell v. Williams*, 2012 Ark. 75, 386 S.W.3d 493 (2012). Case law is left to determine what is inside or outside of the jury's comprehension as a matter of common knowledge.

Case Law. Arkansas case law usually encounters this question in medical and legal malpractice cases, where experts are almost always required, although there is no per se expert requirement. The expert requirement is overlooked if the plaintiff's theory is obvious to a jury, as in the case of a sponge retained after a doctor performs surgery. Cases litigating this issue outside of the medical and legal context are less prevalent. In one products liability action against a manufacturer and distributor of a loader for injuries resulting when the machine tipped, the Arkansas Supreme Court stated that "[o]bviously this case required expert testimony. There is no suggestion that the dynamics of this accident were explainable in lay terms." *Dildine v. Clark Equip. Co*., 282 Ark. 130, 666 S.W.2d 692 (1984). Because most products actions involve issues of design, warning, or other matters plainly outside of the jury's comprehension as a matter of common knowledge, the necessity of expert testimony is all but ubiquitous.

Application. Most plaintiffs are savvy enough to know that they need an expert witness but this issue can still arise after plaintiff's purported expert falls short. Long before depositions, skilled defense counsel will be laying the groundwork for a *Daubert* challenge to disqualify a products expert and keep them from testifying. *See e.g., In re Prempro Prod. Liab. Litig.,* 514 F.3d 825, 832 (8th Cir. 2008) (excluding expert testimony relying on a study in a products case because one expert had previously testified that such study could not be used to prove causation, and another expert had failed to disclose study data in report). Alternatively, defense counsel strives to secure strategic admissions during an expert's deposition or during trial testimony, thus showing as a matter of law that plaintiff cannot meet their burden. *See e.g., Boatmen's Tr. Co. v. St. Paul Fire & Marine Ins. Co.,* 995 F. Supp. 956, 961 (E.D. Ark. 1998) (holding that under Arkansas law, machine was not defective or unreasonably dangerous at time of sale, and thus manufacturer would not be held liable in products liability action asserting that machine was a defective and unreasonably dangerous product, where experts agreed that machine was state-of-the-art piece of equipment at time it was sold). And even where this strategy does not work in totem, certain claims can

be picked off at the summary judgment stage where plaintiff has employed the all too frequently seen "kitchen sink pleading" approach, but then plaintiff's experts do not support all possible theories.

This article is part of the Mitchell Williams Products Liability Series explaining the nuances of how Arkansas Products Liability law is interpreted and practiced.