# WINTER 2014 NEWSLETTER

## PRODUCTS LIABILITY UPDATE

## By Rocky Little

***Garza v. Ford Motor Co.*, No. 04-12-00734-CV (Tex. App. – [4th Dist.] San Antonio, November 6, 2013).**

This case deals with a manufacturer's duty to indemnify and hold harmless an innocent seller in a products liability action, pursuant to TEXAS CIVIL PRACTICE & REMEDIES CODE §82.002. Under that section, a manufacturer shall indemnify and hold harmless a seller against loss arising out of a product liability action, except for a loss caused by the seller's negligence, intentional misconduct, or other act or omissions, such as negligently modifying or altering the product, for which the seller is independently liable. Loss includes court costs and other reasonable expenses, reasonable attorney's fees, and any reasonable damages. The manufacturer's duty to indemnify and hold harmless begins with the notice that a seller has been sued, and the plaintiff's pleadings are sufficient to invoke the manufacturer's duty.

In this case, Luis Aguilar died as a result of an accident involving a vehicle, and Aguilar's estate sued Ford Motor Co. and Garza, a used car dealer. Garza, the car dealer, sent a letter to Ford on September 15, 2010, making a demand for defense and indemnity. Ford responded that it would conditionally indemnify and assume the defense of Garza. The written agreement prepared by Ford provided that Garza would pay his own costs of defense up to and including the date that Ford assumed Garza's defense. About a year later, Garza signed the agreement, and thereafter Ford also signed the agreement. The court found that the agreement proposed by Ford, and thereafter signed by both parties, was an enforceable contract, and that Garza was not entitled to recovery from Ford for costs of defense prior to the date the contract was signed. In effect, by signing the agreement that Garza would pay his defense costs until Ford assumed his defense, Garza waived his statutory right to recover defense costs prior to the agreement.

***Schronk v. Laerdal Med. Corp.*, No. 10-12-00118-CV (Tex. App. – [10th Dist.] Waco, December 12, 2013).**

The estate of Schronk sued Laerdal based on an allegedly defective Automatic External Defibrillator ("AED"). Schronk designated Dr. Desser as a causation expert. Dr. Desser's opinion was that Schronk's death was preventable and caused by the failure of the AED to function appropriately. The court noted that an expert's simple *ipse dixit* (Latin for "he himself said it"), meaning the only proof we have of the fact is that this person said it, is insufficient to establish a matter. Rather, the expert must explain the basis of the statements to link his conclusions to the facts. In assessing the admissibility of expert testimony, the court does not focus on the correctness of the expert's opinion, but on the reliability of the analysis the expert used in reaching his conclusions. Moreover, a causation finding cannot be supported by mere conjecture, guess, or speculation. It is the basis of the witness' opinion, not the witness'

qualifications or his bare opinions alone, that can settle an issue as a matter of law. A claim will not stand or fall on the mere *ipse dixit* of a credentialed witness. If an expert brings little more than his credentials and a subjective opinion, his testimony will not support judgment. Therefore, Dr. Desser's testimony and accompanying report do not constitute admissible evidence.

Plaintiff also designated Dr. Reese as an expert pertaining to marketing defects in the AED. Dr. Reese has Bachelor's and Master's degrees in management, along with a Doctorate in the field of medical technology studies. However, Dr. Reese is not an engineer or a medical doctor, and is not an expert in cardiopulmonary resuscitation or defibrillation. Moreover, Dr. Reese did not examine or test the AED at issue. Therefore, the court held that Dr. Reese was not qualified to serve as an expert concerning marketing defects of the AED.