

# Is There a Products Liability Case *Without* the Product?

by Leslie M. Kroeger & Diana L. Martin

A relatively unique aspect of products liability cases is that the event giving rise to a claim for product defects often also destroys the central evidence in the case—the defective product. Even if the product is not destroyed, the event may so damage the product that it is discarded as garbage by someone who fails to recognize its significance as evidence in a potential lawsuit. While turning down a potential products case may often be the first inclination of an attorney evaluating a claim based on a destroyed or discarded product, the recent decision in *Murray v. Traxxas Corp.*, 78 So. 3d 691 (Fla. 2d DCA 2012), warrants giving such cases a second hard-look.

In *Traxxas*, a child was severely burned when vapors from a can of fuel meant for use in a remote controlled model vehicle ignited. The child,

who was attempting to light a fire in order to roast marshmallows, found the can of fuel in his grandfather's tool shed. As he began to tip the fuel can to pour fuel onto a pile of leaves, his brother flicked a lighter, causing an explosion in which ignited fuel blew out of the can onto the child. The child suffered severe burns and had to be airlifted to the hospital.

The child's family threw the fuel can away, believing it to be dangerous. Before they did so, however, a city fire inspector inspected the can, photographed the scene, and took one close-up picture of the can.

The child's parents eventually sued the manufacturer and seller of the fuel can on a design defect theory. They claimed the fuel can was

defectively designed in that it lacked a flame arrestor that would have prevented the flashback explosion that caused the child's injuries. In opposition to defendants' motion for summary judgment, the parents presented the affidavit of a fire chemistry expert that opined, based on the photograph taken by the fire inspector, an exemplar of the can, and deposition testimony, that the child's injuries were caused by a flashback explosion that occurred once the contents of the can became over pressurized. According to the expert, the explosion could have been avoided by the incorporation of an inexpensive flame arrestor in the design of the can.

The defendants supported their motion for summary judgment with the opinions of the city fire inspector and city fire marshal, who both determined that no flashback explosion had occurred. Defendants also presented expert testimony from an engineer who opined that the fuel can could not have produced a flashback explosion.

The trial court entered summary judgment on the ground that the fuel can was not available for examination by the defendants because it had been discarded. The court determined that without the can there was no proof to support plaintiffs' theory of liability that the can had created a flashback explosion, and there was no way for plaintiffs to prove that the fuel contained in the can was even the same fuel that had been present at the time of sale.

The trial court's decision was based on *Torres v. Matsushita Electric Corp.*, 762 So. 2d 1014 (Fla. 5th DCA 2000). In that case, the plaintiff brought claims for design and manufacturing defects after a vacuum cleaner she owned and operated for six years caught fire. The vacuum was not available for inspection by the defendants because it was thrown out with the garbage after being stored in the garage of plaintiff's attorney. The plaintiff did have pictures of the vacuum cleaner, but they failed to show the make or model of the vacuum or allow for a reasonable identification of the vacuum. The only evidence that the vacuum was manufactured by the defendant was the testimony of the plaintiff. And the only evidence of a defect was the opinion of a safety specialist who had examined the vacuum after the accident and determined the most likely cause of the fire was heat internally generated in the vacuum causing combustion of the material in the dirt bag or construction material from the vacuum. The trial court dismissed the action with prejudice because the defendant was unable to examine the vacuum to determine whether it manufactured the product and was unable to test the vacuum to determine whether it had been modified, broken, or misused or to determine the cause of the fire. The appellate court affirmed, recognizing that the only way the plaintiff could prove her case would be with the benefit of an inference that the malfunction was caused by a product defect,<sup>1</sup> which the court declined to apply because the product was unavailable due to the negligence of the plaintiff or her lawyer.

In *Traxxas*, the Second District disagreed with the trial court's reliance on *Torres* and its holding that the plaintiffs' discarding of the defective product prevented them from proceeding with their design defect claim. It based its decision on evidence presented by plaintiffs that after the fuel can was initially purchased and a portion of the fuel was used, the can was put in the family's tool shed where it sat for two years without being used. This was enough circumstantial evidence

to support a finding that the fuel in the can at the time of the accident was the same fuel that was in the can at the time of purchase.

Additionally, the appellate court decided that the fact that the fuel can could not be examined and tested was not an impediment to the lawsuit because the can had been observed by eyewitnesses to the accident, it had been inspected and photographed by the fire inspector after the accident, and the shopkeeper who sold the fuel can identified the can in the photograph as a Traxxas Top Fuel can. Furthermore, experts for both sides were able to review the available evidence and an exemplar of the can in order to reach opinions regarding the nature of the explosion, how the explosion occurred, and whether the incorporation of a flame arrestor in the design of the can would have prevented the accident.

Ultimately, the *Traxxas* court distinguished its case from the decision in *Torres* because the plaintiffs in *Traxxas* based their design defect claim on the undisputed fact that the design of the Traxxas Top Fuel cans did not incorporate fuel arrestors. No testing of the specific can involved in the accident was needed to demonstrate this fact. The experts for each side could conduct experiments on exemplar cans to formulate their opinions and develop evidence to prove or disprove the fuel can was defectively designed by failing to incorporate a fuel arrestor. To the contrary, in *Torres* the defendants were deprived of the ability to determine whether there were other explanations for the vacuum fire, like the possibility of plaintiff's failure to maintain the vacuum or improper repair or mistreatment of the vacuum. As the Fifth District later explained, *Torres* is a case in which, "without the spoliated product, the defendant was left *completely unable to defend*."<sup>2</sup> If, on the other hand, there is enough evidence supporting a products liability claim that the defendant is able to mount a defense, although it is *unable to defend completely* because it cannot inspect or test the actual product, a products liability case can still proceed even without the product. ❏

<sup>1</sup> When a product malfunctions during normal operation, a legal inference arises that the product was defective at the time of the accident and at the time it was within the control of the supplier. *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1148 (Fla. 1st DCA 1981).

<sup>2</sup> *Reed v. Alpha Prof'l Tools*, 975 So. 2d 1202, 1204 (Fla. 5th DCA 2008) (emphasis in original).



**Leslie M. Kroeger**

a partner at Leopold-Kuvin, P.A. is a successful civil trial attorney who handles a variety of complex litigation matters in the areas of product liability, automotive crashworthiness, catastrophic injury and wrongful death. She has achieved an AV rating from Martindale-Hubbell and was recognized on the Florida Rising Stars Super Lawyers list in 2009.



**Diana L. Martin**

is an associate at Leopold-Kuvin, P.A., in Palm Beach Gardens, where she handles civil appeals in state and federal courts and provides litigation support. Ms. Martin is a 2002 high-honors graduate of the University of Florida Levin College of Law. Before entering private practice, she was a law clerk to the Honorable Martha Warner at the Fourth District Court of Appeal.