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5th Cir. Holds Expert Testimony Not Always Needed To Prove LPLA Design Defect

Malbrough v. Crown Equipment Corp.,
___ F.3d ___ (5th Cir. 11/23/04)

The United States Fifth Circuit Court of Appeals in a recently published opinion has held that expert testimony is not a *per se* requirement of proving a design defect under the Louisiana Products Liability Act.

Trudy Malbrough was injured while operating a forklift manufactured by the defendant Crown Equipment Corporation. Malbrough filed suit in the Western District of Louisiana alleging that the forklift was defectively designed because it lacked a door to the operator compartment. Malbrough planned to use expert testimony in support of her case, but Crown succeeded in striking the expert on a motion *in limine* when Malbrough failed to meet certain pretrial deadlines set by the district court. Crown then filed for summary judgment arguing that Malbrough could not win her design case under the LPLA without expert testimony. The district judge denied the summary judgment motion holding that expert testimony was not necessary to determine whether a door should have been incorporated into the forklift. Crown took an interlocutory appeal to the Fifth Circuit.

The Fifth Circuit emphasized that on an interlocutory appeal (one taken in the midst of a case) it could only consider questions of law. The question of law that it agreed to consider was whether "as a matter of statutory interpretation, the LPLA requires expert testimony in every instance in which a design defect is alleged." The Fifth Circuit concluded that the LPLA *does not* always require expert testimony to prove a design defect.

The Fifth Circuit first noted that the language of the LPLA itself does not contain any explicit requirement of expert testimony in support of a design defect claim. The Fifth Circuit also observed that there was no case law directly on point. The Fifth Circuit conceded that there exist many cases in which expert testimony was found to be essential to the final disposition of a design claim, but stated, "One cannot infer from the widespread use of expert testimony that the LPLA mandates such testimony in every design defect case." The Fifth Circuit hypothesized that there could be cases in which the judge or jury could rely upon simple "common sense" to "fill in the gaps" in finding a design defect.

This case is significant because defendant manufacturers frequently employ the strategy of attempting to knock out the plaintiff's expert before trial to set the stage for summary judgment. (*See* AIR BAG CASE DISMISSED FOR LACK OF EXPERT TESTIMONY CONNECTING DAMAGES TO ALLEGED DEFECT, July 2004, Vol. 42.) The Fifth Circuit's ruling here raises the bar on the summary judgment hurdle, but does not by any means eliminate the summary judgment remedy in design defect

cases. The Fifth Circuit took great care to state that because it was reviewing the case on interlocutory appeal, it could only review the narrow question of law presented; it could not review the district court's "weighing of the evidence." The Fifth Circuit also cautioned that, "given the record thus far made, it may be difficult or impossible for this case to be successfully tried without plaintiff's expert testimony…." Thus, the case stands solely for the proposition that the lack of expert testimony is not a *per se* requirement for proving a design defect. The particular facts and circumstances of an individual case may yet entitle a defendant to summary judgment in a case where more than "common sense" is needed to evaluate a design defect.

- Madeleine Fischer

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5th Cir. Affirms Seaman's Family Can't Get Non-Pecuniary Damages From Manufacturers

Scarborough v. Clemco Industries, ___ F.3d ___, 2004 WL 2615742 (5th Cir. 11/18/04)

In a decision involving a maritime products liability claim, a panel of the United States Fifth Circuit Court of Appeal held that a spouse and adult children pursuing a wrongful death action could not recover non-pecuniary damages.

The decedent, Scarborough, worked aboard sandblasting vessels between 1959 and 1967. These vessels maintained protective coatings of offshore oil platforms and drilling vessels through the use of abrasive sandblasting. Scarborough ultimately developed silicosis, allegedly as a result of years of exposure. In 1977, Scarborough filed suit against his employer, the manufacturer defendants and their insurers. This case proceeded to trial with the jury finding that Scarborough was a Jones Act seaman and awarding him damages in the amount of $650,000.

After Scarborough's death in March of 2002, his surviving spouse and adult children brought a wrongful death suit against a majority of the same defendants named in the previous lawsuit. Both sides filed various dispositive motions, which the district court denied due to the existence of material issues of fact in connection with plaintiffs' claim for pecuniary damage. (*See* SILICOSIS DEATH CASE PLAINTIFFS HOLD EARLIER LIABILITY VICTORY BUT LOSE SHOT AT BIG DAMAGES, July 2003, Vol. 30.) The parties then settled the pecuniary damages claims and the district court granted the defendants' motion to dismiss the remainder of plaintiffs' claims.

Plaintiffs appealed two legal conclusions contained in the district court's final judgment: that plaintiffs' claims against the manufacturer defendants were subject to admiralty jurisdiction and that the survivors of a Jones Act seaman may not recover non-pecuniary damages against a non-employer third party. The court of appeal had little trouble affirming the conclusion that admiralty jurisdiction existed under *Sisson v. Ruby,* 497 U.S. 358 (1995). The court concluded that the tort occurred on navigable water as Scarborough was exposed while working on vessels, and that one of the tort-feasors – Scarborough's employer – was involved in a traditional maritime activity.

More importantly, the court of appeal affirmed the district court's decision dismissing plaintiffs' claim for non-pecuniary damages in accordance with *Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990). In *Miles,* the Supreme Court recognized a general maritime law cause of action for wrongful death of a seaman, but held that there could be no recovery for loss of society in such a claim. In so holding, the Supreme Court sought to restore "a uniform rule applicable to all actions for the wrongful death of a seaman whether under DOHSA [Death On The High Seas Act], the Jones Act, or general maritime law." *Miles,* 498 U.S. at 32. District courts within the Eastern District and elsewhere had split on the issue of whether a Jones Act seaman could recover non-pecuniary damages in suits brought against non-employers, as *Miles* involved only claims against the Jones Act employer and vessel owners. *See, e.g., Stogner v. Central Boat Rentals, Inc.,* 326 F.Supp.2d 724 (E.D.La. 2004). After noting that products liability law had been incorporated into general maritime law, the court of appeal held that the plain language of *Miles,* limiting a Jones Act seaman for his survivor's recovery for non-pecuniary damages, mandated dismissal of all claims for non-pecuniary damages, whether against the Jones Act employer or third parties. Plaintiffs argued that because claims were made against non-employer defendants, the *Miles* uniformity principle and the limits contained in the Jones Act on recovery of non-pecuniary damages did not apply. The court of appeal disagreed stating that *Miles* governs any case

concerning the wrongful death of a seaman and that the uniformity principle applies to any damages recoverable by a Jones Act seaman or his survivors regardless of whom these claims are asserted against.

Interestingly, although confronted with a death apparently caused by negligent acts on the "high seas," neither the parties nor the court raised the issue of the Death on the High Seas Act, 46 App. U.S.C. § 761 *et seq.* ("DOHSA"). In rejecting the plaintiffs' argument that *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199 (1996) allowed for the recovery of non-pecuniary losses, the court stated that the "case deals with neither a non-seafarer nor territorial waters." DOHSA provides a cause of action for the death of any person "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State …." 46 App. U.S.C. § 761. DOHSA applies even if a party's negligence is entirely land-based or the decedent does not perish on the high seas, so long as the wrongful act occurs on the high seas. *Motts v. M/V GREEN WAVE,* 210 F.3d 565 (5th Cir. 2000). Thus, it would appear that Scarborough's death caused by exposure to sandblasting on the high seas – and his survivors' wrongful death action – would be governed by DOHSA. The measure of damages in a claim brought under DOHSA is statutorily limited to pecuniary losses. 46 App. U.S.C. § 762.

- L. Etienne Balart

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5 Class Actions Over High Sulfur Content Gasoline Consolidated In East'n District

In re High Sulfur Content Gasoline Products Liability Litigation,
--- F.Supp.2d ----, 2004 WL 2550268 (Jud.Pan.Mult.Lit. 11/5/04)

Last May patrons of New Orleans area Shell gas stations encountered a problem. A number of the stations received a batch of tainted gasoline. The gasoline contained high sulfur levels which allegedly could damage vehicle fuel gauges. When the problem was discovered, the affected stations were forced to shut down until they could be resupplied with untainted gasoline.

Five competing class actions were filed, four in the Eastern District of Louisiana and one in the Southern District of Florida. The Judicial Panel on Multi-District Litigation found that the five actions "share[d] claims of negligence and products liability arising from the affected fuel, which led to the suspension of gas sales at certain service stations and allegedly caused damage to the fuel gauges of purchasers' vehicles." Thus, the court consolidated all five actions for pretrial proceedings in the Eastern District of Louisiana. In a footnote, the court mentioned that it had been notified of a total of 13 related actions, and that those actions would be treated as "potential tag-along actions."

- Madeleine Fischer

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La. 2nd Cir. Discusses Action For Pure Economic Loss Under LPLA And Redhibition

Bearly v. Brunswick Mercury Marine Div.,
39,069 (La. App. 2 Cir. 10/27/04); 2004 WL 2390124

Plaintiff purchased a Ranger boat and Mercury motor from boat retailer, Reeves Marine. Plaintiff alleged he returned the boat to Reeves for repairs on numerous occasions because of problems with the motor. Plaintiff brought suit against the manufacturer of the motor, Brunswick Mercury Marine Divisions ("Mercury"), and the manufacturer of the boat, Wood Manufacturing Company d/b/a Ranger Boats ("Ranger"). Alleging that the Mercury motor was not a suitable design for that particular Ranger boat, plaintiff sought return of the purchase price, damages, and attorney fees. Plaintiff also alleged that Ranger was aware of the design problem with the Mercury motor and that type of Ranger boat, but marketed them together anyway. Ranger moved for summary judgment arguing plaintiff could not establish that Ranger had knowledge of the alleged design problem. Finding that plaintiff could not meet this burden because his opposing affidavits were based on hearsay, the trial court granted the motion and dismissed plaintiff's claims against Ranger. Plaintiff appealed, asserting that the personal knowledge of the affiants established genuine issues of material fact.

The appellate court observed that blatantly missing from the parties' briefs was any discussion of plaintiff's cause of action against Ranger, and thus the relevance of the issue contested in the summary judgment – Ranger's actual knowledge of the alleged defect. Noting that plaintiff did not allege personal injury, the court determined plaintiff could have a right to recover against Ranger for purely economic loss whether under the LPLA or in redhibition, notwithstanding the ambiguous provision of the LPLA that excludes recovery for damages to the product and economic loss that may be recovered under the redhibition articles. Analyzing whether plaintiff's allegations could state a cause of action under the LPLA, the court found that, although the phrase "unreasonably dangerous" in Section A of the LPLA concerning products unreasonably dangerous in composition implies danger to the user resulting in personal injury, the Act as a whole suggests that a product that does damage to itself because of its composition could be "unreasonably dangerous." The court thus held that Ranger's allegations could state a cause of action under this section of the Act, which does not require that the manufacturer have knowledge of the alleged defect in composition.

Turning to whether plaintiff's allegations could state a cause of action in redhibition against Ranger, the court acknowledged the ambiguity as to whether a redhibition claim still exists against a manufacturer, post-LPLA, arising from the LPLA's exclusivity provision as to manufacturers and the redhibition articles' reference to a *seller's* warranty against redhibitory defects. Relying on the 1993 Revision Comments to La. C.C. art. 2545, written post-LPLA, and jurisprudence cited therein, the court held that a manufacturer with no direct privity with the consumer still is subject to claims in redhibition. Accordingly, plaintiff's allegations could state a cause of action against Ranger in redhibition. Because a manufacturer's knowledge of the alleged defect is presumed under La. C.C. art. 2545, the court held that Ranger's actual knowledge of the alleged defect was irrelevant also to the redhibition claim. Holding therefore that Ranger's knowledge of the alleged incompatible motor and boat was not dispositive of the case, the court reversed the trial court's grant of summary judgment, leaving open the issue of whether plaintiff's claims arose under the LPLA, in redhibition, or both.

Although touching on the ambiguity of whether a plaintiff may bring a cause of action against a manufacturer for purely economic loss under both the LPLA and in redhibition, the Second Circuit declined to decide the issue. The court, however, suggested the possibility that a plaintiff could bring a claim against a manufacturer for purely economic loss under both, despite the LPLA's provision excluding recovery for damages recoverable under the redhibition articles and its exclusivity provision. Until further clarification is provided either by the legislature or the Louisiana Supreme Court, the confusion of how the two theories are to be reconciled remains.

- Stacie M. Hollis

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East'n Dist. Rejects Last Minute Attempt To Add Ball Valve Manufacturer To Case

Curol v. Energy Resource Technology, Inc.,
2004 WL 2609963 (E.D.La. 11/16/04)

Judge Lance Africk of Louisiana's Eastern District expounded upon the importance of complying with deadlines set out in the court's scheduling order in this case where he denied the plaintiff's request for leave to add a new defendant – a ball valve manufacturer – when the case was set for trial within the next few months.

The case originated as a maritime personal injury claim against the defendant Energy Resources Technology, Inc. In the ordinary course of events the court entered a scheduling order which provided a deadline for amendments to the pleadings of February 23, 2004. Trial was set to begin on February 22, 2005.

On September 7, 2004 the plaintiff filed an *ex parte* motion to amend his complaint to add AOP Industries, Inc. as a defendant, alleging that AOP's failure to manufacture a reasonably safe ball valve caused plaintiff's injury. Judge Africk signed the motion. Within weeks, AOP entered an appearance and moved the court to vacate its order allowing the amendment.

Judge Africk first took the plaintiff to task for failing to set forth the fact that the amendment deadline had passed when he filed his motion to amend. "It is not the obligation of this Court to police a litigant's compliance with this Court's orders. Absent any indication to the contrary, this Court ordinarily presumes that litigants are, in fact, complying with this Court's orders."

Next Judge Africk reviewed four components of proof of "good cause" for deviating from a court-ordered scheduling order:

- First, what is the explanation given for the deviation? Here the court found the explanation (that plaintiff was ignorant of the involvement of AOP until discovery was taken) implausible and insufficient, because plaintiff had made allegations about AOP in his original complaint.

- Second, what is the importance of the amendment? The court agreed that the amendment was critical to the case because AOP could be ultimately liable for plaintiff's injuries, but found that the importance of the amendment could not by itself override enforcement of the scheduling order.

- Third, what would be the prejudice in allowing the amendment? The court found that AOP would be greatly prejudiced since it would not have time to prepare for the trial.

- Fourth, to what extent could the prejudice be cured by a continuance? The court found that only a substantial continuance, together with the establishment of new deadlines would assist AOP. Even with that, witnesses would have to be redeposed and a continuance would result in additional delay and expense for the current defendant.

For all these reasons, Judge Africk vacated his prior order allowing the amendment and denied plaintiff's renewed motion to amend the complaint.

- Madeleine Fischer

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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