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LA. APPEAL COURT SAYS BRING A *DAUBERT* CHALLENGE TO DUBIOUS EXPERT OR RISK WAIVER

***Wilczewski v. Brookshire Grocery Store*, 2008-0718 (La. App. 3 Cir. Jan. 28, 2009), 2009 WL 187838**

In 1993, the United States Supreme Court ruled that federal district courts must act as gatekeepers to prevent witnesses practicing "junk science" from testifying as experts before juries. The Supreme Court established several non-exclusive criteria for courts to use to determine whether a witness' testimony is sufficiently reliable and relevant before the testimony is admitted. This landmark case, *Daubert v. Merrell Dow Pharmaceuticals* ("*Daubert*"), has since been adopted in its full or modified form by a number of states to be used in cases tried to state court juries.

The Louisiana Supreme Court adopted *Daubert* in 1993. Since then, Louisiana state courts have interpreted and developed the *Daubert* case in various settings, parallel to *Daubert*'s development in federal courts. One area of some dispute is *Daubert*'s applicability to non-jury trials.

In the *Wilczewski* case, Louisiana's Third Circuit Court of Appeal held that unless a party specifically requests a *Daubert* hearing at the trial level, that party cannot claim on appeal that the witness' testimony should not have been admitted. In support of its holding, the Third Circuit cited a case from Louisiana's Fourth Circuit Court of Appeal, *Brown v. Schwegman*n, 05-830 (La. App. 4 Cir. Apr. 25, 2007), 958 So. 2d 721, *writ denied*, 07-1094 (La. Sept. 21, 2007), 964 So. 2d 333.

Neither the Third Circuit in *Wilczewski* nor the Fourth Circuit in Brown confronted the applicability of *Daubert* in a non-jury case, although both were bench-tried cases. *Daubert* established the trial court as a gatekeeper to protect juries from hearing unreliable testimony. Yet in a bench trial, is it necessary for the trial court to act as a gatekeeper for itself?

A *Daubert* hearing normally consists of an evidentiary hearing before actual trial. The trial judge considers the proffered testimony of the expert in light of several criteria, such as whether the expert's opinion has been peer-reviewed, and whether his methodology is generally accepted by other experts in the area. Armed with testimony and evidence from the hearing, the trial judge then rules on whether the expert will be allowed to testify before the jury when the trial occurs.

When a case is tried directly to a judge, with no jury involved, why should a party be required to hold a separate *Daubert* hearing before trial? After all, the trial judge has to hear the testimony one way or the other in order to rule on its

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admissibility. The holdings of *Wilczewski* and *Brown* may lead to a needless duplication of effort. If a trial judge holds a pretrial *Daubert* hearing and decides that the testimony is admissible, must he then hear the same testimony again at trial? Why not allow a party to incorporate the challenge into the trial testimony?

This point seems particularly apt in *Wilczewski*. *Wilczewski* was a workers' compensation case tried to a workers' compensation judge. The expert testimony at issue was offered by way of a deposition submitted to the judge. The defense attorney challenging the testimony made objections to the expert's testimony during the deposition and reiterated those objections when the plaintiff introduced the deposition at trial. The Third Circuit held that, despite the objections in the deposition, the defense attorney had waived the issue of admissibility of the testimony on appeal because the attorney did not request a *Daubert* hearing at the trial level.

The ruling appears needlessly formalistic. Assuming that the objections conveyed the essence of the *Daubert* criteria for reliability, the mere omission of the magic words requesting a *Daubert* hearing should not have constituted a waiver in a non-jury trial.

Unfortunately, as a result of rulings such as these, it will be necessary for parties handling non-jury trials in Louisiana trial courts to specifically request *Daubert* hearings in advance of trial in every case.

– *Madeleine Fischer*

BUNK BED WITHOUT RAILINGS MAY BE A DEFECTIVE PRODUCT

***Hughes v. Pogo Producing Co.*, No. 06-1894, 2009 WL 367513 (W.D. La. Feb. 12, 2009)**

On January 2, 2006, Daniel Hughes, a field superintendent assigned to work on a fixed platform rig off the coast of Louisiana, was severely injured in a fall from the top bunk bed in the living quarters of the platform. As Hughes attempted to climb down from the top bunk, he missed a step and fell backward onto a bench located in the middle of the bunkroom. Hughes filed suit against Discovery Producing Services, LLC, the owner of the rig; Pogo Producing Company, the operator of the platform; Atlantia Corporation, one of the companies that allegedly manufactured the platform, including the living quarters; and ENI, the company that allegedly "ordered" the platform and, according to Hughes, exercised a degree of control over the design and construction of the platform and living quarters.

ENI moved for summary judgment regarding the following issues: (1) ENI was not a "manufacturer" of the bunk bed from which Hughes allegedly fell or of the living quarters of the platform under the Louisiana Products Liability Act ("LPLA") at the time of the accident; (2) ENI did not own or control the platform at issue, therefore, Hughes's claim against ENI for premises liability must fail; (3) ENI did not owe a duty to Hughes to equip the bunk bed with handrails or a guardrail; (4) a fixed platform is not a "product" under the LPLA; and (5) neither the bunk bed in question nor the living quarters were "unreasonably dangerous."

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With respect to Hughes's claims under the LPLA, ENI argued that it could not be liable under the LPLA because it was not a "manufacturer" of either the bunk bed or the living quarters in question. The LPLA defines a "manufacturer" as "a person or entity who is in the business of manufacturing a product for placement into trade or commerce." "Manufacturing a product" is defined under the LPLA as "producing, making, fabricating, constructing, designing, remanufacturing, reconditioning, or refurbishing a product."

Finding that summary judgment was not appropriate where Hughes offered evidence to support the contention that ENI participated in the design and construction process of the bunk bed and the living quarters, the court rejected ENI's argument that Hughes's claims should be dismissed because ENI was not a "manufacturer" under the LPLA. The court further found that it could not conclude as a matter of law that ENI owed no duty to Hughes to provide a bunk bed with no handrails or guardrail.

Though the court rejected ENI's argument that the platform was not a "product" under the LPLA, it did find merit in ENI's argument that it could not be liable to Hughes for the premises liability claim. Because ENI did not own the platform on the date of Hughes's injury, the court dismissed Hughes' premises liability claims against ENI.

Finally, the court rejected ENI's argument that it was entitled to summary judgment on the issue of whether the bunk bed in question was unreasonably dangerous at the time of Hughes's accident. Because Hughes presented an expert report stating that there was an alternative design that was capable of preventing his injuries, the court could not grant summary judgment in favor of ENI on this point.

It is important to note that the court's denial of summary judgment did not amount to findings on the merits of Hughes's claims. Rather, it simply means that Hughes will "have his day in court," where he will be required to prove to the judge or jury all of the essential elements of their claims. At that time, ENI will be given the opportunity to present evidence to oppose Hughes' claims.

– *Carla T. Ashley*

ROTARY STRAIGHTENER MACHINE REPAIRER NOT A MANUFACTURER UNDER LPLA

***Carr v. Spherion*, No. 08-0326, 2009 WL 260932 (W.D. La. Jan. 14, 2009)**

Marian Carr severely injured her left hand on a rotary straightener machine while working at Plymouth Tube Company ("Plymouth"). Carr sued numerous defendants, including Plymouth, its insurer, and several purported manufacturers of the machine. Carr alleged that the manufacturers violated the Louisiana Products Liability Act ("LPLA") and that her injuries resulted from a defect in the machine.

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One of the alleged manufacturers, Turner Machine Co., Inc. ("Turner"), filed a motion for summary judgment contending it was not a manufacturer (or a successor in interest of the manufacturer) and asked the court to dismiss Carr's LPLA claim. Turner submitted affidavits stating it did not design, formulate, produce, create, construct, assemble, or rebuild the rotary straightener machine. The original Turner company subcontracted the machine's manufacturing in the 1980s and was bought out in 2003. The acquiring company changed its name and the firm was incorporated as Turmacco, Inc. ("Turmacco"). Turmacco purchased some assets of the company that bought out Turner, including the right to use the "Turner" name. The purchase did not include the assumption of any liabilities. The legal entity originally known as Turner, which subcontracted the machine manufacturing, was not the same Turner sued by Carr.

Carr did not introduce any evidence to contradict Turner's motion for summary judgment. The trial court therefore dismissed Carr's LPLA claim because Turner did not qualify as a manufacturer under the LPLA.

The trial court next considered whether Turner could be liable under ordinary negligence principles even though Carr had not asserted a separate negligence claim. Turner provided evidence that its only connection to the machine was maintenance performed in April 2003 on a component part unrelated to any of the machine's safety features or lack of safety features. The court found that although a repairer owes a duty of reasonable care in the performance of a maintenance contract, Carr did not allege that the repairs were deficient or substandard. Even if the repair work had been substandard, it was not a cause-in-fact of Carr's injury.

Accordingly, the court granted Turner's motion for summary judgment in its entirety and dismissed Turner from the case.

– *Sarah S. Brehm*

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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