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LEARNED INTERMEDIARY DOCTRINE INAPPLICABLE TO BREACH OF EXPRESS WARRANTY CLAIM

***Bencomo v. Guidant Corp.*, No. 06-2473, 2008 WL 3364960 (E.D. La. Aug. 8, 2008)**

In 2005, Raul Bencomo underwent a medical procedure involving a carotid stent. The operating physician, Dr. Stephen Ramee, used a stent system manufactured by Abbott Laboratories, Inc. ("Abbott") that was designed to prevent the migration of dislodged emboli to other parts of the body where they might cause a stroke. During the course of the procedure, emboli migrated, causing Bencomo to suffer a stroke and loss of sight in one eye. Accordingly, Bencomo filed suit. In 2008, Judge Carl Barbier of the United States District Court for the Eastern District of Louisiana heard a Motion for Partial Summary Judgment filed by Abbott. Abbott argued that the "learned intermediary doctrine" precluded any liability for Bencomo's claims of failure to warn and breach of express warranty under the Louisiana Products Liability Act. Judge Barbier granted summary judgment in Abbott's favor on the failure to warn claim but denied summary judgment on the breach of express warranty claim.

The learned intermediary doctrine eliminates a manufacturer's duty to warn a patient if the manufacturer adequately warns the physician using the product of the dangers attendant to its use. Here, Ramee possessed significant knowledge of the dangers associated with use of this particular stent system; indeed, Ramee had previously participated in clinical trials of the system and had used the system in over 50 procedures. Bencomo offered no counterargument to Abbott's defense, and Judge Barbier ruled in Abbott's favor on the failure to warn claim.

Bencomo's claim for breach of the express warranty rested upon Abbott's Patient Guide, which included the statement that the stent system would capture "any plaque or particles" that might be dislodged during the medical procedure. Abbott again relied upon the learned intermediary doctrine. Judge Barbier disagreed with Abbott about the applicability of this doctrine to a breach of express warranty claim under the LPLA and noted that Abbott had cited no authority showing otherwise. As such, Judge Barbier denied Abbott's summary judgment motion on this point.

Importantly, while Judge Barbier denied Abbott's summary judgment on Bencomo's claim for breach of express warranty, he did so because certain material factual issues remained in dispute. Whether Judge Barbier was affirmatively announcing that

the learned intermediary doctrine did not apply to claims of breach of express warranty or whether he was simply noting that Abbott failed to supply sufficient authority to support its defense is unclear from this decision.

– *Eric Michael Liddick*

CHICKEN SHACKLE MAKER OFF THE HOOK FOR PLAINTIFF WHO LOST HER THUMB

***Ramey v. Cantrell Machine Co., Inc.*, 2008 WL 4155335 (W.D. La. Sept. 8, 2008)**

Lillie Fay Ramey worked in a Pilgrim's Pride chicken processing plant. While reaching for a chicken suspended by a shackle on a conveyor line, her right thumb was caught in the shackle and she was lifted and carried until the upper part of her thumb tore from her hand and she fell to the floor. The line that Ramey was working on was a temporary reprocessing line used after a fire. When the new line was ready, Pilgrim's Pride removed the old line and the injury-causing shackle was not preserved.

Pilgrim's Pride eventually produced a sample shackle, which it said was of the same design, construction, and material that was used on the temporary reprocessing line. However, Pilgrim's Pride could not verify that the sample was an exact duplicate of the shackle that tore Ramey's thumb off. Further, Pilgrim's Pride could not identify the manufacturer or the seller of either the sample shackle or the injury-causing shackle.

Ramey filed suit against five different potential manufacturers and/or sellers of the injury-causing shackle. Three of the manufacturers moved for summary judgment and provided affidavits stating that their shackles were different from the exemplar shackle and that they had not provided shackles to Pilgrim's Pride.

Judge James of Louisiana's Western District noted that, under the LPLA, a plaintiff must initially prove that the defendant was a manufacturer of the product that caused the injury. Louisiana does not recognize a cause of action based on a market share liability theory. Further, the plaintiff must prove that the product was unreasonably dangerous and cannot simply rely on the fact that an accident occurred.

Because Ramey could not prove that *any* of the defendants manufactured the injury-causing shackle and, further, could not prove that the exemplar shackle was identical to the injury-causing shackle, Judge James not only granted summary judgment to the three defendants who moved for summary judgment, but also stated his intent to enter judgment in favor of the remaining two defendants who had filed no motion.

This case illustrates the importance to the plaintiff of preserving evidence, particularly where the product at issue is a simple one not easily identified with a particular manufacturer.

– *Madeleine Fischer*

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DISCOVERY OF CRACKS IN WALL SUFFICIENT TO PUT HOME BUYERS ON NOTICE TO FILE SUIT

***Gadpaille v. Thomas*, No. 43,412, __ So. 2d ___, 2008 WL 3403342 (La. App. 2nd Cir. Aug. 13, 08)**

Robert and Marie Gadpaille purchased a home in Shreveport, Louisiana, from Keith and Anna Thomas on August 31, 1999. On the standard-form "Seller's Property Condition Statement," the Thomases represented that the premises were in good condition and free from any defects, including in the foundation, and the Gadpailles saw nothing to the contrary.

In December 2003, Mr. Gadpaille, after stripping some wallpaper, began to notice large cracks which had been filled previously. Shortly thereafter, Mr. Gadpaille noticed some cracks in the floor, and in the early spring of 2004, he discovered the front door would not open. In May 2004, the Gadpailles hired Interstate Foundation Company to inspect the house. Interstate disclosed that they had previously inspected the house in September 1998 and had identified 12 areas of separation varying from 1/4" to 3/4", and proposed stabilization work to the sellers, who declined.

On February 17, 2005, the Gadpailles filed suit *in quanti minoris* against the sellers as bad faith sellers. The Thomases each separately filed an exception of prescription, both urging that they were in fact good faith sellers and alternatively arguing that the Gadpailles' discovery of the cracks in December 2003 was over one year before filing suit, thus making the action untimely. The trial court granted the exceptions of prescription and dismissed the Gadpailles' case. The trial court held that the discovery of the cracks in December 2004 put the Gadpailles on sufficient notice to inquire into the possible problems with the foundation.

On appeal, the Gadpailles argued that the trial court erred in holding that the December 2003 event sufficiently put them on notice to inquire about the claim. The Gadpailles argued that they were not on notice of a problem until the Interstate Foundation Company informed them of their previous inspection. The Gadpailles argued that the discovery of minor cracking in the walls in December 2003 was not sufficient to convey knowledge that the foundation was faulty.

The Second Circuit Court of Appeal, however, disagreed. The Court held that the trial court was not plainly wrong in concluding that Mr. Gadpaille's December 2003 discovery triggered the prescriptive period (statute of limitations). The Court noted that Mr. Gadpaille candidly admitted that, in December 2003, he discovered "large cracks" in the walls. The Court concluded that, even though Mr. Gadpaille did not disclose the actual size of the cracks, they had to be larger than the hairline cracks that the inspector had previously noted. Thus, upon the discovery of these cracks, the one-year prescriptive period began to run in December 2003. As such, the Court affirmed the trial court's dismissal of the Gadpailles' claims.

– *Sara C. Valentine*

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BOATING ACCIDENT VICTIM'S FAMILY SUCCEEDS IN KEEPING ENGINE MAKER IN STATE COURT

***Madere v. Brunswick Corp.*, 2008 WL 3915009 (E.D. La. Aug. 30, 2008)**

In 2007, Brian Madere was killed in a boating accident. He was ejected from the boat when it took a sudden and sharp turn. His wife and children, Louisiana residents, asserted a products liability action against Brunswick Corporation ("Brunswick"), a Delaware company that manufactured the boat's Mercury outboard engine. They claimed that the bolt that connected the steering rod link to the boat's engine was defective. The Madere family also sued Brian Schexnayder, a Louisiana resident, alleging that he negligently installed the engine on the boat. Brunswick removed the lawsuit to federal court, citing diversity jurisdiction. According to Brunswick, Schexnayder was improperly joined for the purpose of destroying diversity and keeping the case in state court. Plaintiffs filed a motion to remand to state court, asserting that Schexnayder was improperly joined and that there was a lack of diversity jurisdiction in federal court.

Fraudulent or improper joinder arises in two ways: actual fraud in pleading or the inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Judge Lance Africk of Louisiana's Eastern District applied the test for improper joinder set forth by the Fifth Circuit in *Smallwood v. Illinois Central Railroad*, 385 F. 3d 568, 573 (5th Cir. 2004). Under *Smallwood*, to prove improper joinder, Brunswick had to establish that there was no possibility of recovery by the Madere family against Schexnayder, or, stated differently, that there was no reasonable basis for the court to predict that the Madere family might be able to recover against Schexnayder. In conducting this analysis, Judge Africk focused initially on the pleadings which, Brunswick admitted, clearly stated a cause of action against Schexnayder for negligence.

Brunswick urged Judge Africk to look beyond the pleadings, claiming that, despite the plain allegations of the pleadings, Schexnayder had sworn in an affidavit that he did not perform any work on the steering system of the boat or engine. The only evidence actually presented to Judge Africk was provided by the Madere family in the form of an affidavit by Madere's wife, confirming that Schexnayder admitted to her that he assisted Madere in the installation of the engine on the boat. Brunswick failed to present any affidavit to the contrary. Accordingly, Judge Africk found that without the Schexnayder affidavit, Brunswick failed to carry its heavy burden of proving improper joinder. Considering the citizenship of Schexnayder, complete diversity did not exist, and the case was sent back to state court.

– *Amy W. Truett*

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HELICOPTER ENGINE MAKER NOT LIABLE FOR OPERATOR'S ECONOMIC LOSS AFTER CRASH

***Turbomeca, S.A. v. Era Helicopters, LLC*, 2008 WL 2747465, ___ F.3d ____ (5th Cir. Jul. 16, 2008)**

This case involved claims by the helicopter operator, Era, against Turbomeca, the manufacturer of the engine, arising out of a crash landing in the Gulf of Mexico. As a result of the crash landing, the helicopter was damaged by saltwater, rendering it a total loss. Era sought damages consisting of the economic loss of the helicopter and alleged that this loss was due to a defective engine provided by Turbomeca. In the lower court, Turbomeca instituted a declaratory judgment action seeking, *inter alia*, a ruling that Era could not recover against it because of the maritime economic loss doctrine as set forth in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), which stands for the proposition that a maritime plaintiff may not maintain a tort cause of action against a product manufacturer "when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss." *East River*, 476 U.S. at 859.

The lower court agreed with Turbomeca and dismissed the tort claims brought by Era. The court declined to chart an exception to the *East River* doctrine advanced by Era. Era had argued that alleged post-sale negligence of Turbomeca excepted the claim from the *East River* doctrine. The sole issue on appeal was whether the Fifth Circuit should recognize a post-sale negligence exception to *East River*. In refusing to adopt such an exception, the Fifth Circuit noted that the only federal circuit to address the precise issue, the Third Circuit, had declined to create such an exception in *Sea-Land Serv., Inc. v. General Elec. Co.*, 134 F.3d 149 (3rd Cir. 1998). The Fifth Circuit found persuasive the Third Circuit's reasoning that *East River*'s focus was the nature of the injury, *i.e.* economic loss, rather than the timing of the defendant's conduct. The court also emphasized the Supreme Court's pronouncement of a broad economic loss rule as leaving little room for exceptions. Accordingly, the district court's dismissal was upheld, and Era's claims against the manufacturer were limited to a warranty or contract cause of action.

For more about this case see NO TORT CLAIM AGAINST MANUFACTURER FOR LOSS OF HELICOPTER IN MARITIME CRASH (September 2007).

– *L. Etienne Balart*

DRIVER'S CLAIM FOR NON-DEPLOYMENT OF AIRBAGS DEFLATES

***Jacobs v. Daimler Chrysler Corp.*, 2008 WL 4155345 (W.D. La. Sept. 05, 2008)**

Michael Jacobs was injured in an automobile accident. The driver's side frontal airbags of his 2003 Dodge Ram Pickup Truck failed to go off in a 45 mph collision. Federal regulations require that frontal air bags in frontal collisions be deployed at 15

mph. Jacobs sued Chrysler alleging that Chrysler, breached an express warranty that its airbags complied with federal regulations.

Chrysler moved for summary judgment, arguing that Jacobs could not prove his breach of express warranty claim. To succeed on an express warranty claim under the LPLA, a plaintiff must prove: 1) the manufacturer made an express warranty; 2) the plaintiff was induced to use the product because of the warranty; 3) the product didn't conform to the warranty; 4) the injury was caused because the warranty was untrue. Chrysler contended that Jacobs couldn't prove he was induced to use the pickup truck because of any warranty about the airbags, and Jacobs couldn't prove that his injuries were caused by the airbags' failure to live up to the warranty.

Judge Minaldi of Louisiana's Western District agreed with Chrysler's arguments. First, Jacobs could not meet the "inducement" requirement because, according to Jacobs' own deposition testimony, before the accident Jacobs had no knowledge of the contents of the owner's manual or how the pickup truck's airbags should function. Thus, Jacobs couldn't have been induced to use the pickup truck due to the mere existence of any warranty about airbags in the owner's manual.

Second, Jacobs could not prove that the breach of any express warranty about the airbags caused his injuries. In an airbag case, in order to prove causation, the plaintiff must be able to establish that his injuries would have been less severe if the airbag had deployed. This question requires expert testimony because it is not a part of the everyday experience of the consuming public. Jacobs had disclosed no expert witness on this subject, and the deadline for listing expert witnesses had passed. Chrysler had an expert in biomechanics who stated that, in her opinion, Jacobs would have sustained the same or very similar types of injuries regardless of whether the airbags had deployed.

Because Jacobs could present no evidence that he was induced to use the pickup truck due to warranties about the airbags and could present no expert testimony that his injuries would have been different had the airbags deployed, Judge Minaldi granted Chrysler's summary judgment motion and dismissed Jacobs' case.

– *Madeleine Fischer*

MALFUNCTION IN BOOM'S JOYSTICK NOT DUE TO PRODUCT DEFECT

***Thomas v. Genie Industries, Inc.*, No. 07-1447, 2008 WL 4366067 (W.D. La. Sept. 22, 2008)**

James Ray Thomas was injured while operating a hydraulic manlift manufactured by Genie Industries, Inc. ("Genie"). The manlift continued to "boom out" after he released the boom control joystick, causing him to pinch his left index finger between the gasket of the manlift and a section of steel plate he was attempting to weld. Following the accident, it was discovered that there was a tear in the rubber boot which pro-

tected the joystick's control surfaces and debris had lodged in the control surfaces of the joystick preventing it from returning to the neutral position.

Thomas sued Genie claiming various defects in the joystick. Genie moved for summary judgment.

Judge Trimble of Louisiana's Western District issued the opinion, addressing each of Thomas' defect theories in turn:

1) Judge Trimble found no evidence that the manlift deviated from Genie's specifications or performance standards and therefore rejected Thomas' contention that the manlift was defective in construction or composition.

2) Thomas next contended that the joystick used on the Genie manlift (the JS100) was defective in design because it did not provide adequate environmental protection in an industrial setting. Thomas further argued that a more recent model of joystick (the JS1000) would have provided greater protection against the invasion of the debris that caused the joystick to malfunction. Judge Trimble rejected these arguments for two reasons. First, he found that the JS1000 did not exist when the Genie manlift was sold—thus no alternative design was available at the pertinent time. Second, he found that the JS100 and the JS1000 were identical insofar as the rubber boot was concerned. Thus, there was no proof that the JS1000 would have prevented the accident.

3) Judge Trimble also rejected Thomas' argument that the manlift had an inadequate warning. The operator's manual for the manlift cautioned users not to use a damaged or malfunctioning machine and to inspect the manlift for damage before using. The rubber boot clearly had a tear, and Thomas admitted he had not read the operator's manual. Thus, Thomas could not prove that the warning was inadequate or that but for the "inadequate" warning he would not have been injured.

4) Last, Judge Trimble found that Thomas could not prove a breach of express warranty. Thomas contended that Genie warranted that the manlift met all American National Standards Institute ("ANSI") requirements, yet Genie did not address the expected environment that the manlift would be suited for. Judge Trimble looked at the ANSI standards and was unable to find any provision that required the manufacturer to address the expected environment for the manlift.

Accordingly, Judge Trimble dismissed all of Thomas' defective product claims.

– *Madeleine Fischer*

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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