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Products Liability
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Auto Makers May Place Adequate Service Warnings In Manual

Williams v. Super Trucks, Inc.,
36,993 (La.App. 2 Cir. 4/9/2003), ___ So. 2d ___.

Applying the law to the specific facts of this case, the jury found and the Louisiana Second Circuit agreed that Ford Motor Company provided adequate warning not to apply heat to its semi-float axles even though it placed the warning in its service or shop manuals and not on the axle itself.

A Ford Bronco collided with another vehicle when the Bronco's semi-float axle snapped, causing a wheel and part of the axle to break free from the vehicle. The trial judge found that negligent repair work performed on the Bronco by Super Trucks, Inc. caused the axle failure. A mechanic at Super Truck had applied heat to the axle to replace bearings. The injured accident victims sued Super Trucks and Ford. As regards Ford, they raised a product liability claim, alleging inadequate warning. Specifically, they alleged that the warning not to apply heat to the axle that Ford provided in its service manual should have been placed on the axle itself. The plaintiffs and Ford's expert witnesses testified concerning the adequacy of the warning. The jury returned a verdict against the repair shop, but attributed no fault to Ford, which it found to have provided adequate warning. The plaintiffs appealed.

On appeal, the Second Circuit affirmed. The Louisiana Product Liability Act, La. R.S. 9:2800.51, et seq., required the plaintiffs to establish that (1) at the time the Bronco left Ford's plant, the axle possessed a characteristic that might cause damage, (2) the characteristic proximately caused their damages, (3) Ford failed to use reasonable care to provide a warning or instruction that would have led the repair shop to contemplate the danger in applying heat to the axle, and (4) the plaintiffs' damages arose from a reasonably anticipated handling of the axle. The plaintiffs did not carry their burden by simply arguing that Ford's warning not to apply heat to the axle should have been placed on the axle itself. Although one of the balancing factors for determining the adequacy of a warning is its eye-catching attributes, Ford's and other service manuals containing the warning in this case were commonly used by auto repair shops. In addition, even plaintiffs' expert conceded that a visible and durable warning on the axle itself would have to be inscribed and could in itself induce axle failure. Furthermore, the Plaintiffs produced no evidence that Ford's more than 200 million semi-float axles were frequently failing because of improper repair. Thus, the court concluded that the jury reasonably found, by a preponderance of the evidence, that the warning was adequate.

For contrary findings in other factual scenarios in which juries have found the need to place a warning on a product itself, see some of the cases cited by the *Williams'* plaintiffs and distinguished by the court: *Simon v. American Crescent Elevator Co.,* 99-2058 (La. App. 4 Cir. 4/26/00), 767 So. 2d 64, *writ denied,* 00-1974 (La. 11/13/00), 773 So. 2d 726; *Moore v. Chrysler Corp.,* 596 So. 2d 225 (La. App. 2d Cir. 1992), *writs denied,* 599 So. 2d 316, 317 (La. 1992); *Lacrouts v. Future Abrasives, Inc.,* 99-583 (La. App. 5 Cir. 11/10/99), 750 So. 2d 1063, *writ denied,* 99-3484 (La. 2/11/00), 754 So. 2d 941; *Moore v. Safeway, Inc.,* 95-1552 (La. App. 1 Cir. 11/22/96), 700 So. 2d 831, *writs denied,* 97-2921, 97-3000 (La. 2/6/98),709 So. 2d 735, 744.

- Andrew M. Obi back to top

U.S. Fifth Circuit Allows Equitable Exception To One Year Limit On Removal

Tedford v. Warner-Lambert Co.,
___ F.3d ___ (5th Cir. 4/7/03)

In this drug product case the Fifth Circuit addressed, in an issue of first impression, whether to apply an equitable exception to the federal rule of procedure contained in 28 U.S.C. § 1446(b) requiring removal to federal court within a year of commencement of an action where the matter was not initially removable to federal court. Tedford, the plaintiff, sued Warner-Lambert Company in Texas state court, alleging that the pharmaceutical drug Rezulin caused her liver to fail. One year and ten days after the initial filing of suit, Warner-Lambert removed the case to federal court. The procedural saga pre-dating this second removal served as the basis for the Fifth Circuit's application of an equitable exception to the one-year requirement of 28 U.S.C. § 1446(b).

Tedford – a resident of Eastland County, Texas – filed suit along with another plaintiff, a resident of Johnson County, Texas, against Warner-Lambert. The original Petition named only one non-diverse defendant, a local doctor and resident of Johnson County. Warner-Lambert eventually discovered that this local doctor had not treated Tedford and, in fact, Tedford's claims had no connection to Johnson County. Tedford's state court action was subsequently severed and transferred to Eastland County. Tedford then amended her petition to name her treating physician – who ironically resided in Eastland County – thus destroying diversity. Nevertheless, Warner-Lambert removed the action, asserting that the local doctor had been fraudulently joined. The federal district court granted Tedford's motion to remand to state court.

Things then took an even more interesting turn when Tedford signed and post-dated a "Notice of Non-suit" – without taking any discovery from the local doctor – before the one-year anniversary of the commencement of her action. However, Tedford did not notify Warner-Lambert of the non-suit until after expiration of the one-year anniversary, obviously assuming that the case would be non-removable because of the one-year limitation in 28 U.S.C. § 1446(b). Not to be discouraged, Warner-Lambert again removed the case to federal court and Tedford filed a motion to remand, citing the one-year limit. The district judge applied an equitable exception to the one-year limit on removal based on Tedford's pattern of "forum manipulation." The district judge then certified the issue for interlocutory appeal.

The Fifth Circuit's opinion marks the first time that the Fifth Circuit – or any other circuit court of appeal – has published an opinion on the issue of whether the one-year limit of § 1446(b) is absolute or subject to equitable exception. Relying on Supreme Court jurisprudence, the panel began by noting that "time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" The court then went on to discuss prior Fifth Circuit jurisprudence holding that the one-year limit contained in § 1446(b) is subject to waiver where a timely motion to remand was not filed. Thus, the Fifth Circuit held that Tedford's "forum manipulation" justified application of an equitable exception in the form of estoppel, therefore making the removal proper even though it was done more than one year after the suit was commenced. The court recounted Tedford's numerous attempts to destroy diversity jurisdiction and noted that Warner-Lambert vigilantly sought to try the case in federal court at each possible time. In the end, the Fifth Circuit ruled that "[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction ... equity may require that the one-year limit in § 1446(b) be extended."

Although the court did not issue any "bright-line" test for application of the equitable exception, the Tedford decision marks an important statement regarding removal jurisdiction at a time when parties have become increasingly bold in attempts to manipulate the forum. The court recognized that a strict interpretation of § 1446(b) would allow a litigant to manipulate and eliminate removal jurisdiction. Although Congress intended the one-year limit to reduce the opportunity for removal after substantial progress in state court, the Fifth Circuit refused to allow a blatant manipulation by a litigant

desperate to remain in Texas state court.

- *L. Etienne Balart*

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Circumstantial Evidence Creates Issue re Defect in Power Device Blocking Summary Judgment

Hanover American Ins. Co. v. Trippe Mfg. Co.,
(La.App. 2 Cir. 4/9/03), ___ So. 2d ___

In this case involving a fire allegedly started by a defective power supply device, the Louisiana Second Circuit reversed the defendant's summary judgment finding that genuine issues of material fact were raised by expert testimony and holding that circumstantial evidence was sufficient to allow plaintiff's claims under the Louisiana Product Liability Act ("LPLA") to go forward.

In a claim for damages resulting from a fire, plaintiff, Hanover Insurance Company ("Hanover"), insurer and subrogee, sued Trippe, designer and manufacturer of an uninterrupted power supply device ("UPS") which provided electrical power to a computer file server in the event of a power interruption. Hanover claimed that the UPS was unreasonably dangerous in its construction and composition and in its design, and that Trippe failed to warn of the alleged defects of the UPS all of which led to the fire.

Trippe filed a motion for summary judgment arguing that Hanover lacked sufficient evidence to carry its burden of proof under the LPLA. After the trial court granted Trippe's motion, Hanover appealed, asserting that summary judgment was improper as there were genuine issues of material fact in dispute. Specifically, Hanover maintained that its expert opinions disagreed with Trippe's expert opinions as to the cause of the fire and the defective nature of the UPS. Thus, according to Hanover, the trial court erred in resolving conflicting expert opinions on those issues.

The Second Circuit found that the trial court's statement that all parties were in agreement that the problems with the UPS occurred post ignition (*i.e.,* the UPS did not cause the fire) was simply wrong. The record clearly reflected that Hanover's expert testimony disputed Trippe's position on this point. Additionally, Hanover offered the reports of two experts who opined that the fire originated in the UPS. Although Trippe's expert disagreed, there was no elaboration, no official report, nor any deposition testimony by Trippe's expert. Therefore, the trial court's finding that there was no disagreement was clearly erroneous.

The appellate court explained that a trial court is not to weigh the opinion testimony or evaluate the credibility of experts in determining whether to grant or deny a motion for summary judgment. If expert testimony conflicts, the motion for summary judgment should be denied. Further, when a party opposing the summary judgment submits expert opinion evidence that would be admissible and would allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the court should deny the summary judgment motion. This reasoning follows the rule set forth in the Louisiana Supreme Court decision in *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99-2181, 99-2257 (La. 02/29/00), 755 So.2d 226 (adopting the *Daubert* standards for admissibility of expert opinion evidence at the summary judgment stage).

Finally, the court held that circumstantial evidence may be used to establish a manufacturing defect. Trippe claimed that Hanover failed to present sufficient factual support for one or more elements essential of its claims under the LPLA. The court found however that circumstantial evidence presented by Hanover in the form of experts' opinions was sufficient to raise a real issue as to whether the UPS caused the fire. "As discussed, Snow opined that the fire originated with the UPS. Montgomery opined regarding what he considered defects in the construction or composition of the UPS. Although Hanover does not clearly state what the performance standard might be for the UPS, obviously that standard does not include igniting a fire in normal operation."

- Mary Mitchell Felton

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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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