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FIRST FEMA FORMALDEHYDE TRAILER BELLWETHER TRIAL ENDS IN VICTORY FOR TRAILER MANUFACTURER

FEMA Trailer Formaldehyde Product Liability Litigation, MDL-1873 (E.D. La. Sept. 24, 2009)

This multi-district litigation consolidates thousands of cases in which plaintiffs claim they were harmed by the presence of formaldehyde in government-supplied trailers they lived in following Hurricanes Katrina and Rita. In December 2008, Judge Kurt D. Engelhardt of Louisiana's Eastern District ruled that the cases could not proceed as a class action. Instead, selected representative cases, called "bellwethers," are being tried individually in a series.

On September 24, 2009, a jury rendered a verdict in the first bellwether trial: that of plaintiffs Alana Alexander and her son Christopher Cooper against trailer manufacturer Gulf Stream. The jury found in favor of Gulf Stream and determined that the trailer they lived in was not unreasonably dangerous under Louisiana law.

More bellwethers are scheduled for later this year and into 2010.

—[*Madeleine Fischer*](#)

TIRE TREAD SEPARATION CASE SENT BACK TO STATE COURT

Dowdall v. Cooper Tire & Rubber Co., No. 09-0217, 2009 WL 2982914 (M.D. La. Sept. 11, 2009)

On April 27, 2007, Catherine Dowdall, her daughter Tiffany Dowdall, and Guy Nardini, Jr. were involved in a single-car accident on Interstate 12 in Walker, Louisiana. The 2000 Ford Explorer XLT in which they were traveling was owned and operated by Catherine Dowdall, with Tiffany Dowdall and Nardini riding as passengers. The Dowdalls were ejected from the vehicle, resulting in fatal injuries to both women. Though he survived, Nardini was severely injured in the accident.



James and Joann Dowdall filed suit as the parents and grandparents of the Dowdalls, and Nardini filed a separate suit on his own behalf. The suits, filed in state court in Livingston Parish, were later consolidated.

Both petitions alleged that tire tread separation was the cause of the single-car accident and resulted in the vehicle overturning several times. The plaintiffs named Cooper Tire Company and Ford Motor Company as defendants under the Louisiana Products Liability Act, alleging that the tire and vehicle were defective in design, manufacture, and warning. The plaintiffs also sued Natchitoches Tire, a Louisiana corporation, alleging that Natchitoches Tire failed to properly select a replacement tire, failed to properly mount or install the tire, and/or failed to properly inflate the tire. Plaintiffs alleged that Catherine Dowdall either bought the tire from Natchitoches or she received it in exchange for her performance of plumbing services.

After several months of discovery by the parties, Cooper Tire deposed Randy Despino, one of the owners of Natchitoches Tire. In his deposition, Despino testified that the company had no record of selling or installing a Cooper Discoverer HT Series tire on Catherine Dowdall's vehicle. Despino further testified that it is the company's policy not to perform exchange work. However, Despino did not ask all of the employees of Natchitoches Tire whether they had ever performed exchange work, despite the company's policy to the contrary.

Immediately after the deposition, Cooper Tire and Ford removed the action to federal court in Louisiana's Middle District, where the case fell to Judge Frank J. Polozola. Judge Polozola in turn referred the case to Magistrate Judge Docia L. Dalby for a ruling on preliminary motions.

Cooper Tire and Ford, both out-of-state corporations, contended that removal was appropriate because the plaintiffs could not prevail on a claim against the only Louisiana defendant, Natchitoches Tire; therefore, Natchitoches Tire was an improperly joined party meant to destroy diversity jurisdiction. The plaintiffs responded with motions to remand to state court, arguing that the information on which the defendants based their removal was known for months before Despino's deposition, making the defendants' removal untimely. The plaintiffs further argued that the defendants failed to demonstrate that there was no possibility of recovery against Natchitoches Tire, especially in light of weaknesses in Despino's deposition testimony on the issue of liability.

Finding that the defendants failed to meet their burden of proving that Natchitoches Tire was improperly joined for the purpose of destroying diversity jurisdiction, Magistrate Dalby pointed out that the issue of whether Natchitoches Tire could be liable was "hotly disputed," and would require the court to weigh the evidence, which was not appropriate on a motion for remand. The fact that the Despino deposition was not the corporate deposition of Natchitoches Tire, coupled with the fact that Despino admitted that a tire could be sold without being entered into the record-keeping system, was sufficient to convince Magistrate Dalby that the plaintiffs might ultimately be able to produce sufficient evidence that Natchitoches Tire was at fault. Because the matter before the court was a motion to remand to state court, and not a motion for summary judgment or a trial on the merits, Magistrate Dalby declined to shift the burden to the plaintiffs to prove the merits of their case, and instead required the defendants to put forth evidence that negated the possibility of recovery against Natchitoches Tire.



Because Magistrate Dalby found that the defendants failed to meet the heavy burden of proving that there was no possibility of recovery against Natchitoches Tire, it was not necessary to address the issue of whether the defendants' notice of removal was timely. Judge Polozola adopted Magistrate Dalby's report and recommendation and ruled in favor of the plaintiffs on their motion to remand, transferring the case back to state court in Livingston Parish.

—[*Carla T. Ashley*](#)

DEFECT CLAIM AGAINST MANUFACTURER OF EXPLODING RIFLE MISSES THE TARGET

***Matthews v. Remington Arms Co., Inc.*, No. 07-1392, 2009 WL 2970441 (W.D. La. Sept. 16, 2009)**

On October 19, 2006, Jerry Matthews went to his neighbor's house for some target practice. When he fired the Remington Model 710 Bolt Action Rifle he borrowed from his mother-in-law, it exploded, causing serious head injuries and the loss of his right eye. The Model 710, manufactured by Remington Arms Co., Inc., was designed with a bolt assembly pin, which fixed the bolt head to the bolt body. Without the bolt assembly pin in place, the bolt assembly will not properly lock into position for firing, which could either cause the rifle to misfire or result in an uncontained explosion. Unbeknownst to Matthews, the rifle had been disassembled for cleaning at some time before the accident, and the bolt assembly pin was not reinstalled when the gun was reassembled. The missing pin caused the explosion.

Matthews and his wife sued Remington in federal court in the Western District of Louisiana for their damages under the Louisiana Products Liability Act. The Matthews alleged that the Model 710 was unreasonably dangerous in construction and design, lacked adequate warning, and that Matthews's injuries were caused by either a broken or missing bolt assembly pin. Under the LPLA, in addition to proving a defect in the product, a plaintiff must also prove her damages resulted from a reasonably anticipated use of the product. Matthews alleged that his use of the Model 710 without the bolt assembly pin in place was a reasonably anticipated use, because Remington should have reasonably foreseen that an ordinary user of the Model 710 could fail to reinstall the bolt assembly pin when reassembling the rifle after cleaning, and the Model 710 seemed to Matthews to be working properly just before the accident.

At the bench trial before Judge Robert G. James, Matthews and Remington put on conflicting evidence regarding whether Matthews knew the rifle would not lock, and was therefore unsafe to use. Judge James concluded that Matthews was able to rotate the bolt handle into what seemed to be the closed position before he fired the gun, so his use of the rifle at the time was not obviously dangerous. According to Judge James, both Matthews and an ordinary user of the gun would have assumed the rifle was safe to fire.

Nevertheless, Judge James ruled in favor of Remington, holding that Matthews' use of the Model 710 without the bolt assembly pin was not a reasonably anticipated use. "Reasonably anticipated use," as used in the LPLA, is a term of art,



and does not encompass any conceivable or foreseeable use of a product. Rather, it is determined from the point of view of the manufacturer at the time the product was manufactured. Remington's lay and expert witnesses testified that ordinary firearms users know that reassembly of a firearm with all of its parts is critical to the safe operation. The Matthews failed to put on persuasive evidence to rebut this testimony. Therefore, Judge James found it was reasonable for Remington to expect that the ordinary user of the Model 710 would reassemble the rifle with all its parts.

—[*Wade B. Hammett*](#)

AIR BAG DEPLOYMENT CASE NARROWED FOR TRIAL

***Murphy v. Ford Motor Co.*, No. 07-864, 2009 WL 2969905 (W.D. La. Sep. 14, 2009)**

***Murphy v. Ford Motor Co.*, No. 07-864, 2009 WL 2998960 (W.D. La. Sep. 14, 2009)**

Plaintiff Dana Murphy and her three minor children were involved in a car accident while traveling in a 1995 Ford Mustang. The accident caused the driver's side and passenger air bags to deploy. The two children riding in the backseat survived. However, Murphy's six year old daughter seated in the front passenger seat died in the accident. Murphy brought a products liability action against Ford Motor Company. The parties now sit before Judge Robert G. James in the Western District of Louisiana. On September 14, 2009, with trial approaching, Judge James entered a Ruling and a separate Memorandum and Order regarding several issues that could arise at trial.

First, the court ruled on several preliminary motions filed by the parties. Murphy sought to exclude any evidence of past traffic or seatbelt violations as irrelevant and prejudicial. Agreeing with Ford's analysis, Judge James decided to defer deciding admissibility of this evidence until trial. Ford filed its own motion seeking to exclude several general items. The court granted Ford's motion in part and denied it in part. Perhaps most importantly, the court agreed to exclude "Air Bag Static Deployment Tests" offered by Murphy to illustrate how air-bag deployment differed in the 2004 Mustang as compared to the 1995 Mustang. The court reasoned that these tests: (1) were unhelpful to the jury if not accompanied by expert testimony; (2) were not substantially similar to the circumstances of the accident; and (3) might unduly influence the jury.

In a separate ruling, Judge James ruled that plaintiff Murphy would not be allowed to proceed with a failure to warn claim. Precluding the claim as a matter of law, Judge James stated that Murphy could not meet her proximate cause burden where she admitted that she did not read the warnings located on the visor or in the owner's manual. In summary, the court's recent rulings appear to narrow important issues likely to be presented by both the plaintiff and the defendant in the upcoming trial.

—[*Christopher D. Cazenave*](#)



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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