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LACK OF EXPERT TESTIMONY SKIDS DEFECTIVE GOODYEAR TIRE CLAIM OUT OF COURT

***Haskins Trucking, Inc. v. Goodyear Tire & Rubber Co.*, 2008 WL 1775272 (W.D. La. Apr. 17, 2008)**

On March 9, 2007, Haskins Trucking, Inc. filed suit against Goodyear Tire & Rubber Co. under the Louisiana Products Liability Act ("LPLA"), alleging that certain Goodyear tires it had recapped and retreaded were unreasonably dangerous in composition and design. Haskins is a trucking company that operates numerous 18-wheeler tractor-trailers. It purchased tires, many of which were Goodyear, for its tractor-trailers and often had those tires recapped and retreaded. Haskins alleged that the tires which were recapped and retreaded experienced multiple failures, all within the warranty period.

This suit was originally filed in state court but removed to the United States District Court for the Western District of Louisiana before Judge S. Maurice Hicks, Jr. Goodyear moved for summary judgment, arguing that Haskins' claims under the LPLA failed due to the lack of expert and/or technical evidence to support the allegations against Goodyear.

In support of its motion for summary judgment, Goodyear specifically contended that Haskins failed to meet its burden in establishing the essential elements of its claim, namely that an unreasonably dangerous characteristic of the tires caused its damages. Haskins did not provide any expert testimony and in fact, argued that expert testimony was not necessary. In Haskins' view, this was simply a case where caps put on tires came off before being worn down to a width that would no longer allow them to be utilized.

Judge Hicks disagreed with Haskins and granted summary judgment for Goodyear. In reaching his decision, Judge Hicks noted that Louisiana courts generally demand, or at a minimum favor, expert testimony to prove an unreasonably dangerous defect in composition or design of a product. Haskins failed to do this and in turn failed to meet its burden of proof. Specifically, Judge Hicks found that Haskins did not come forward with sufficient evidence from which a reasonable juror could conclude that more probably than not the damages were caused by a defective condition of the tires or the retreading process. In addition, Haskins did not sufficiently account for other possible causes of the tire failure.

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Judge Hicks' decision, while not surprising, emphasizes the importance of building a case around solid expert testimony, particularly for suits brought under the LPLA. Haskins was alleging a specific defect in the tires and tried to rely solely on lay testimony to meet its burden. Haskins' contention that no expert testimony was necessary was not only presumptuous, but also fatal to its claims against Goodyear.

– Michael B. DePetrillo

BROKEN REFRIGERATION CONTROL CAUSING SHRIMP SPOILAGE NOT PROVED DEFECTIVE

Muller v. Carrier Corp., 07-770 (La. App. 5 Cir. Apr. 15, 2008), 2008 WL 1735467

Owners of a seafood business bought a truck and a refrigeration unit. The refrigeration unit was operated through a "cab command" manufactured by Carrier Corporation. The seafood business owners claimed that about six weeks after the purchase the cab command fell apart when their driver attempted to turn on the refrigeration by poking his finger at the faceplate of the cab command's keypad. 3,000 pounds of shrimp spoiled because the refrigeration was inoperable.

The seafood business sued Carrier, claiming the cab command was defective in composition or construction. Although it presented no expert testimony, the seafood business asserted that the fact that the cab command broke well before its usual life span of five to seven years was itself proof of a defect.

Carrier filed a motion for summary judgment asserting that the seafood business had no evidence that the cab command deviated in any material way from the manufacturer's specifications or industry performance standards at the time it left Carrier's control. In support of its motion, it supplied the affidavit of Zimpfer, a refrigeration technician who personally serviced the truck and cab command for repairs after it broke. Zimpfer stated that he had never before seen a cab command controller broken into pieces and with the electrical plug cracked. The cab command looked like it had been kicked or forcefully hit by someone or something. The co-driver told Zimpfer that the driver had kicked the cab command unit with his leg while getting into the truck and broke the cab command. Zimpfer opined that the cab command was not defective. Additionally, a field service engineering manager with Carrier submitted an affidavit stating that the company had never had any other complaints of the cab command falling apart when the keypad was touched.

The Louisiana Fifth Circuit Court of Appeal agreed with the trial court that Carrier deserved summary judgment. The Fifth Circuit held that the mere fact that the cab command broke before its expected lifespan was not proof that it was defective in composition or construction. Further, the court remarked upon the lack of any expert testimony offered by the seafood business. The seafood business argued that expert testimony is not required to prove a defect in a product. The Fifth Circuit declined to confirm a hard and fast rule on the necessity of expert testimony in products cases. "A review of the jurisprudence shows that, in product liability cases, both plaintiffs and defendants may

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choose to use expert witnesses or not, depending on the characteristics of the allegedly defective product and their burdens of proof."

The implication of the Fifth Circuit's ruling is that expert testimony may be required to prove a defect when the product is complex and when the circumstances of product failure do not unequivocally rule out all causes other than a defect.

– *Madeleine Fischer*

CATARACT-REMOVING MACHINE NOT PROVED DEFECTIVE DESPITE FAILURE MID-SURGERY

***Brunet v. Alcon Laboratories, Inc.*, 2008 WL 1771911 (E.D. La. Apr. 17, 2008)**

Ethel Brunet underwent cataract removal surgery on her left eye. The surgery involved a process called phacoemulsification, which is a method of cataract extraction where the lens is fragmented by ultrasonic vibrations and simultaneously irrigated and aspirated. To perform the surgery, Brunet's doctor used an Alcon Infiniti Vision System ("Alcon Infiniti") manufactured by Alcon Laboratories, Inc. and Alcon Manufacturing, Inc (collectively "Alcon").

During Brunet's surgery, the doctor used the Alcon Infiniti to remove three of the four sections of the cataract. After removing the third section, the Alcon Infiniti began "spitting" fluid and lens fragments and would not aspirate. Because of this, the doctor was required to remove the remaining fragment manually. Following the surgery, Brunet suffered vision loss in her left eye due to corneal clouding caused by damage to the endothelial cells lining the cornea.

Brunet and her husband filed suit against Alcon asserting claims under the Louisiana Products Liability Act ("LPLA"). Alcon filed for summary judgment requesting dismissal of all of the Brunets' claims. The Brunets argued that because the Alcon Infiniti Vision System "failed in normal use," Alcon's motion should be denied.

In order to maintain a products liability action under the LPLA, the plaintiff must establish that the product was "unreasonably dangerous." Under LPLA, a product may be deemed unreasonably dangerous "if and only if" the product is: (1) unreasonably dangerous in construction or composition; (2) unreasonably dangerous in design; (3) unreasonably dangerous for failure to warn; or (4) unreasonably dangerous for failure to conform with an express warranty.

Judge Lance Africk reviewed all four theories, even though the Brunets only responded to Alcon's first argument regarding the construction and composition of the Alcon Infiniti. With regards to the theory that a product is unreasonably dangerous due to construction or composition, Judge Africk noted that the plaintiff must show that when the product left the manufacturer's control, it deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer. Alcon argued that

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there was no evidence of any deviation and presented evidence that six days after Brunet's surgery, a field service technician completed a field service report and did not find any aspect of the machine's operations to be outside of the specifications. Moreover, Alcon showed that the machine was returned to service after Brunet's surgery and had been in use ever since without further incident. The Brunets argued that because the product "failed in normal use, causing the damage" the motion should be denied. However, Judge Africk noted that the Brunets failed to produce any evidence to support their argument that the product deviated in any way from other Alcon Infiniti Vision Systems, which was an essential element to this claim. As a result, Judge Africk dismissed this claim and all other claims under the LPLA.

– Sara C. Valentine

STORE'S SOAKED INVENTORY CASE SURVIVES SPRINKLER SYSTEM MAKER'S IDENTITY CRISIS

***United Fire Group v. Simplex Grinnell, L.P.*, No. 06-3501, 2008 WL 1730097 (E.D. La. Apr. 10, 2008)**

On June 6, 2005, Rapp's Luggage and Gifts "sustained property damage when a sprinkler head allegedly malfunctioned, causing water to spray for several hours throughout the store, soaking the walls and ruining most of the store's inventory." United Fire Group, Rapp's insurer, paid for the property damage covered by Rapp's policy. One year later, United Fire, as subrogee, filed a timely suit against Simplex Grinnell, LP and its liability insurer in Louisiana State Court claiming that Simplex Grinnell manufactured, sold, assembled, and serviced a defective sprinkler system. The lawsuit was removed to federal court. Then, on October 4, 2007, over two years after the incident, United Fire filed an amended complaint adding a new defendant, Tyco, claiming that Tyco may have been the actual manufacturer and alleging a claim under the Louisiana Products Liability Act.

Tyco filed a motion to dismiss. Tyco argued that because over two years had passed since the alleged malfunction, United Fire's claim was too late under Louisiana law, which has a one year prescriptive period (statute of limitations). Judge Feldman disagreed and denied Tyco's motion to dismiss. Under Louisiana law, a suit against one joint tortfeasor (wrongdoer) will interrupt the deadline for filing suit as to all other joint tortfeasors. Judge Feldman, citing Civil Code Article 2324, held that Tyco and Simplex were joint tortfeasors because "unless the tort liability is solidary under [Article 2324], then it is joint." Accordingly, Judge Feldman denied the motion to dismiss because United Fire's timely filing of suit in state court against Simplex Grinnell interrupted prescription for all tortfeasors, including Tyco.

In the course of his opinion, Judge Feldman discussed a case cited by Tyco in support of its argument that United Fire's claim had prescribed. In *Renfroe v. State of Louisiana through DOTD*, the Louisiana Supreme Court held that "a suit timely filed against one defendant does not interrupt prescription as against other defendants not timely sued,

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where the timely sued defendant is ultimately found not liable to plaintiffs, since no joint or solidary obligation would exist." Judge Feldman left open the possibility that "[s]hould a finding be made that [Simplex] is not ultimately liable to [United Fire]," then Tyco's claim of prescription would have merit.

– Eric Michael Liddick

PRO SE PLAINTIFF CANNOT DEFEAT SUMMARY JUDGMENT IN ONE CAR ACCIDENT CASE

***Green-Johnson v. Enterprise Rent-A-Car*, 2008 WL 941708 (E.D. La. Apr. 7, 2008)**

Gayle Green-Johnson was injured in a single-car accident where her 2004 Chevrolet Trailblazer hit a hard object and left the highway, sliding into a cotton field and coming to an abrupt stop. Representing herself, Green-Johnson sued General Motors ("GM") under the Louisiana Products Liability Act, redhibition, and breach of warranty claiming defects in the air bags (which did not deploy) and the rear-wheel drive.

General Motors brought a motion for summary judgment on all claims. In support of its motion, GM submitted a statement of uncontested facts, establishing that Green-Johnson's vehicle struck a puddle, hydroplaned, crossed the median, slid through a ditch, and came to rest in a cotton field; that after the accident, the vehicle was driven out of the cotton field; that the air bag data was downloaded from the vehicle; that Green-Johnson brought the vehicle to the dealership for repairs but did not ask that the air bag system or the rear wheel drive be repaired; and that Green-Johnson no longer had the vehicle. GM supported its motion with affidavits of two experts, opining that the impact was below the deployment threshold for the air bags, therefore the air bags functioned properly by *not* deploying, and that, if they had deployed, the air bags would not have mitigated Green-Johnson's injuries.

In response, Green-Johnson did not submit counter affidavits or evidence of any kind. Instead, Green-Johnson's opposition was cursory and primarily a reiteration of the allegations found in her complaint.

Recognizing that a *pro se* plaintiff's pleadings must be construed liberally, Judge Mary Ann Vial Lemmon found that Green-Johnson had not met her burden to refute GM's evidence and to demonstrate the existence of a genuine issue for trial. The Louisiana Products Liability Act imposes liability when a product is found to be unreasonably dangerous in (1) construction or composition; (2) design; (3) inadequate warning; or (4) nonconformity with an express warranty. Judge Lemmon found that Green-Johnson offered no proof of any defective design or construction, warning or evidence any nonconformity with an express warranty. Accordingly, Judge Lemmon held that she failed to meet her burden, and GM's motion for summary judgment was granted. This case provides an illustration of the necessity to rebut summary judgment evidence with actual evidence – not mere allegations – sufficient to demonstrate an issue of material fact.

– Emily E. Eagan

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MANUFACTURER OF HELICOPTER MAY HAVE HAD DUTY TO WARN OF DANGERS OF FUEL ADDITIVE

***Landry v. Apache Corp.*, 2008 WL 1733731 (W.D. La. Apr. 14, 2008)**

On February 18, 2005, John Landry suffered injuries when the helicopter in which he was a passenger crash landed in the Gulf of Mexico. The helicopter was manufactured by Bell Helicopter Textron, Inc., and maintained and operated by Landry's employer, Rotorcraft. The helicopter lost power due to the collapse of the engine's fuel nozzle inlet screen. An investigation of the crash revealed that the helicopter's fuel system was filled with a gel-like substance commonly called "apple jelly." This slimy substance was formed by the presence of water and an anti-icing additive in the helicopter's fuel.

John Landry and his wife Chantelle, individually and on behalf of their minor son Connor, filed suit under the Louisiana Products Liability Act ("LPLA"). They named the manufacturer of the helicopter, Bell Helicopter Textron, Inc., as defendant, alleging that Bell failed to adequately inform or warn Rotorcraft of the dangers of using anti-icing fuel additives in the fuel system of the helicopter, and that Bell's failure to warn Rotorcraft resulted in the helicopter's loss of power due to the "apple jelly" clog and ultimate crash.

Under the pertinent section of the LPLA, a manufacturer of a product is liable for damages "proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity." La. R.S. 9:2800.54(A). The LPLA defines a manufacturer not only as "a person or entity who is in the business of manufacturing a product into trade or commerce," but also as "a manufacturer of a product who incorporates into the product a component or part manufactured by another manufacturer." La. R.S. 9:2800.53. Under the LPLA, an adequate warning is defined as, "a warning or instruction that would lead an ordinarily reasonable user or handler of the product to contemplate the danger in using or handling the product." La. R.S. 9:2800.53(9).

Landry argued that Bell had actual knowledge that using anti-icing fuel additives in the fuel system of the engine incorporated in its helicopter rendered the helicopter unreasonably dangerous. Bell acquired this knowledge as a result of several National Transportation and Safety Board ("NTSB") reports regarding accidents caused by "apple jelly" formation. One NTSB report in particular indicated that Bell's Senior Accident Investigator participated in the NTSB's investigation. Under Louisiana law, a manufacturer's duty to warn is continuous, and any later acquired knowledge that a product it made could malfunction creates a duty to warn the product's user of the danger. According to Landry, Bell was liable for his injuries because it failed to adequately warn Rotorcraft, and that failure was the proximate cause of the helicopter crash and his injuries.

Bell, in turn, brought a motion for summary judgment arguing that it could not be liable for a failure to warn because it did not manufacture the fuel nozzle that was contaminated with anti-icing fuel additive and therefore had no duty to warn of a condition of

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another manufacturer's product. In addition, Bell argued that it had no duty to warn under the LPLA because Landry's injuries did not arise from a reasonably anticipated use of the helicopter. Bell further argued that any enhanced warnings to Rotorcraft by Bell would have been futile, as Rotorcraft had prohibited the use of anti-icing additives before the crash. Lastly, Bell asserted that any failure to warn on its part did not proximately cause Landry's damages and therefore it could not be liable for failure to warn under the LPLA.

The court flatly rejected Bell's argument that it could not be liable as a manufacturer under the language of the LPLA. Because Bell incorporated the engine containing the fuel nozzle which became contaminated into the helicopter, the court held it qualified as a manufacturer under the LPLA's definition.

Based on the record before it, the court held that there were several factual disputes that created genuine issues of material fact, therefore precluding disposal of the matter by means of a motion for summary judgment. First, the court determined that Bell did not satisfy its burden of proof on the issue of reasonably anticipated use. Reasonably anticipated use, as defined by the LPLA, means "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." La. R.S. 2800.53(7). This statutorily defined concept is meant to be narrow. It is an objective standard which does not include uses clearly contrary to manufacturers' warnings. Bell's only support for its argument that Rotorcraft's use of anti-icing additives was not an anticipated use of the product were the facts that the helicopter's flight manual states that "anti-icing fuel additives are not required for any ambient temperature," and the flight manual's lack of express approval of or authorization of the use of anti-icing additives. In the court's opinion, this was not sufficient evidence and genuine issues of material fact remained.

The court held the same for Bell's argument that any additional warnings provided to Rotorcraft would have been futile. Bell argued that Rotorcraft, Landry's employer, knew about the hazards of using anti-icing additives, and at the time of the crash had implemented a prohibition against using the additive. However, based on the testimony of Rotorcraft's vice-president, the court determined that Rotorcraft's decision to stop using the additive was not due to its knowledge of a danger associated with the additives, but rather because the additives were not bacterial or fungal preventatives, as it previously believed. The court determined that summary judgment was further precluded by factual issues in the record regarding Bell's knowledge of the hazards associated with the additives.

Lastly, Bell asserted that any failure to warn on its part did not proximately cause Landry's damages and therefore it could not be liable for failure to warn under the LPLA. However, the court did not find this factually unsupported position compelling, and held that factual disputes existed regarding whether or not Rotorcraft's current procedures would have prevented the crash.

The court held that the case could not be disposed of through summary judgment due to the existence of genuine issues of material fact regarding the adequacy of Bell's warn-

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ings to Rotorcraft. Under the court's reasoning, a manufacturer's duty to warn is not limited to the components of the product it manufactures, but extends to any component incorporated into the product. Furthermore, it is immaterial that the manufacturer had no knowledge of a defect in the component when the product was manufactured. The court makes clear that under Louisiana law, any subsequent awareness of a problem with the product, or its components, excites the manufacturer's duty to warn under the LPLA. In sum, under the LPLA, a manufacturer cannot avoid liability on the basis that (1) the hazardous condition resulted from an incorporated component manufactured by another manufacturer; (2) the manufacturer was aware of no hazardous conditions at the time the product was manufactured when it subsequently became aware of the condition; and (3) the user was engaging in misuse when the product contained information stating that a certain use is not required, but does not expressly warn against the dangers of such use.

For an earlier report on another decision in this case *see* MANUFACTURER OF HELICOPTER ENGINE MAY HAVE HAD DUTY TO WARN OF MISMATCHED PART (February 2008).

– *Wade B. Hammett*

FEMA TRAILER EXPLOSION SUFFICIENTLY DESCRIBED TO PRESENT PRODUCTS CLAIM

***Creighton v. Fleetwood Enterprises, Inc.*, 2008 WL 1746953 (E.D. La. Apr. 11, 2008)**

LeTonya Creighton and her son, Deshawn Creighton, sued for injuries sustained by Deshawn when their FEMA trailer exploded. They sued a number of defendants, including Fleetwood Enterprises, Inc., whom they alleged was the manufacturer of the trailer.

Fleetwood filed a motion to dismiss arguing that the allegations of the complaint against it were insufficient to sustain a case. The Creightons' complaint was not specific as to what had caused the accident, but merely stated that the trailer had exploded, the trailer was defective, and the explosion caused Deshawn's injuries.

Judge Sarah Vance found that these allegations, if true, would be sufficient to support a claim by the Creightons against Fleetwood and so refused to dismiss their complaint entirely. However, Judge Vance did dismiss one part of the complaint in which the Creightons sued Fleetwood for negligence. The Louisiana Products Liability Act provides the sole theories of liability against a manufacturer for damage caused by a product. As Judge Vance explained: "Although plaintiffs' factual allegations are germane to their products liability claim to the extent they allege that Fleetwood negligently manufactured the trailer, placed its defective product into the stream of commerce, and failed to provide adequate warnings to the trailer's occupants, they do not state independent claims for negligence. To the extent plaintiffs assert negligence as an independent ground for relief, their negligence claim is dismissed."

– *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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