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APPELLATE COURT RULES ON LOUISIANA TOBACCO CLASS ACTION SMOKING CESSATION PROGRAM

Scott v. American Tobacco Co., Inc., 2004-2095 (La.App. 4 Cir. 2/7/07), ___ So.2d ___

In an extensive opinion the Louisiana Fourth Circuit has ruled on the appeal by the tobacco manufacturers from a judgment in the amount of \$591,342,476.55 for the funding of a smoking cessation program in Louisiana. The Fourth Circuit affirmed in part, reversed in part, and significantly limited the class and reduced the award.

This case was filed in 1996. In 1997 a class was certified of all Louisiana smokers who desired to participate in a medical monitoring and/or smoking cessation program. The case was tried in two phases.

In Phase I of the trial the jury found that cigarettes as a product were not defectively designed. The jury made general findings in favor of plaintiffs on the claims of fraud and breach of an assumed duty. The jury rejected the medical monitoring claim but found for a smoking cessation program.

In Phase II of the trial the jury returned a special verdict form agreeing to the establishment of a smoking cessation program for 10 years and awarding \$591,342,476.55. The trial judge issued a judgment and a separate document entitled "Findings of Fact and Reasons for Judgment." There was no reference to the jury's Phase I finding that cigarettes were not defectively designed or that plaintiffs were not entitled to medical monitoring.

As a detailed dissection of this lengthy opinion is beyond the scope of this E*Zine, the major highlights of the Fourth Circuit's opinion are listed below:

1. The trial judge erred in considering the jury's verdict merely "advisory" and in issuing his own written reasons for judgment. The appellate court rejected those findings and stated it would consider only the judgment insofar as it tracked the jury's special verdict form. Additionally, the Fourth Circuit amended the judgment to include the jury's findings from Phase I that ciga-

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rettes are not defective in design and that medical monitoring was not reasonably necessary.

2. Because the jury found that cigarettes are not defectively designed, all plaintiffs who began smoking after September 1, 1988, the effective date of the Louisiana Product Liability Act, had no claim. This is because the LPLA is the sole remedy available for damage caused by a product (LPLA sets out four exclusive theories of recovery, including defect in design). The Fourth Circuit rejected plaintiffs' argument that in light of the fraud and conspiracy findings, it would be "inequitable" to deny a remedy to post-1988 smokers: [E]quitable relief in this case has no foundation in Louisiana law, violates due process, and uproots the very concept of adjudication. Therefore, the only available remedies to plaintiffs are express law.
3. The Fourth Circuit found that there was no need for individual trials on whether class members were addicted because, "The only people who will seek to participate in this program will be ... those who desire to participate."
4. The Fourth Circuit found that the plaintiffs had proved by circumstantial evidence that the class as a whole relied upon the defendants' "indirect communications" which created the impression that there was a legitimate controversy about the health effects of smoking.
5. The trial court erred by refusing to allow the defendants to cross-examine the class representatives as to why they began smoking. However, the Fourth Circuit held that the error was harmless.
6. The jury's findings that the defendants intentionally withheld information as to the addictive nature of cigarettes was a continuing tort. Thus, the case was not barred by prescription (statute of limitations).
7. Because the defendants' conduct was found by the jury to be intentional, and the fault of the plaintiffs in continuing to smoke was not (once they were addicted), the trial court did not err in prohibiting the defendants from reducing their liability by proving fault on the part of the plaintiffs.
8. The Fourth Circuit found that the establishment of a smoking cessation program would be allowed as a remedy by Louisiana law, and that the need for a smoking cessation program would be judged by the same factors as the need for medical monitoring (the latter was rejected by the jury in Phase I).
9. The Fourth Circuit refused to decertify the class, but did state that the class had been substantially reduced in size by the elimination of all post-1988 smokers.
10. The result in the case did not violate defendants' First Amendment right of free speech.

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11. The Fourth Circuit agreed with the defendants that numerous items of damages were unjustly awarded and struck awards for the following:

- Developing cessation capacity (funds for programs in unspecified localities);
- Community cessation programs (awards to churches and other community groups)
- Marketing and education to recruit participants (rejected as speculative) (this item alone was \$130 million)
- Evaluation of program effectiveness through research projects (over \$62 million)
- Local centers of cessation excellence (\$40 million)
- Development of program standards
- Monitoring and auditing (to ensure that funds were spent optimally)
- Training and technical assistance (\$30 million)

The Fourth Circuit found that all of these items were speculative, unsubstantiated, unrelated to the actual treatment of nicotine addition and therefore not legally recoverable. The Fourth Circuit also agreed with the defendants that because no money was being awarded individually (the money all went to the establishment of a smoking cessation fund), it could not be argued that plaintiffs were deprived of the use of the money while this litigation was pending. Therefore, the court found that the award did not qualify for pre-judgment interest.

The Fourth Circuit remanded the case to the trial court to recalculate the damage awards considering the reduction of class size (by the elimination of post-1988 smokers) and the reversal of certain damage elements as noted above.

—*Madeleine Fischer*

PREEMPTION RULES THE DAY IN TOBACCO CLASS ACTION OVER LIGHT CIGARETTES

Brown v. Brown & Williamson Tobacco Corp., ___ F.3d ___ (5th Cir 2/14/07)

Plaintiffs, purchasers of light cigarettes, filed a class action lawsuit against the major tobacco manufacturers, alleging violation of Louisiana's Unfair Trade Practices Act, Consumer Protection Act, fraud, redhibition and breach of warranty. Plaintiffs claimed that, contrary to advertising, light cigarettes were no safer than regular cigarettes.

The manufacturers moved for summary judgment, arguing that the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act. The plaintiffs argued that, even though there was federal regulation in this area, it could not trump the manufacturers' state law duties in this case. The district court judge

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agreed, and while he granted summary judgment on the Unfair Trade Practices Act claim, he otherwise rejected the manufacturers' preemption arguments.

The manufacturers immediately appealed this decision to the Fifth Circuit. They again argued that the plaintiffs' claims were entirely preempted by federal law. Again, plaintiffs argued that, in this case, state law duty survived preemption. The Fifth Circuit disagreed, and reversed the district court. The Fifth Circuit reasoned that because the federal government dictates the method by which tar and nicotine levels in cigarettes are detected, the maximum amount of tar and nicotine in a "light" cigarette, and the description that can be used in manufacturer advertising of "light" cigarettes, the manufacturers could not be held liable as long as their practices complied with the regulations. In short, the Cigarette Labeling and Advertising Act prohibits the asserted state law claims against the manufacturers as long as they followed standards set by the federal government.

—Emily E. Eagan

NAIL SALON OFFERS ENOUGH EVIDENCE TO AVOID LIABILITY ON PATRON'S STAPH INFECTION

Detraz v. Lee, ___ So.2d ___ (La. 1/17/07)

In the Fall of 2002, Michelle Detraz received a pedicure at Virgin Nails in Lafayette, Louisiana. Several days after receiving the pedicure, Detraz noticed red bumps on her lower legs and calves. Eventually, Detraz visited the emergency room where her treating physician diagnosed the bumps as a fungus and prescribed a topical cream for treatment. This cream was ineffective in treating the bumps on Detraz's lower legs. Detraz then visited Dr. Ronald Daigle, a dermatologist who suspected that Detraz's ailment was a staph infection and prescribed an antibiotic, which apparently was effective in treating Detraz's bumps. Despite Dr. Daigle's success in treating Detraz's bumps, scars remained on Detraz's legs for which she sought treatment by a second dermatologist, Dr. Adrian Stewart. Dr. Stewart recommended that Detraz stop tanning and quit smoking, advice that Detraz ignored. Several months later, Detraz consulted plastic surgeon, Dr. Darrell Henderson, about cosmetically removing the scarring from her legs.

Detraz filed suit against Virgin Nails and its owners, Mr. and Mrs. Huynh, alleging that they were negligent in performing the pedicure and that their negligence caused her damages. The evidence at trial showed that the Huynhs failed to clean the pedicure equipment in accordance with the instructions provided on the bottle of the chemical used to disinfect the equipment. The evidence also showed that, just prior to receiving the pedicure at Virgin Nails, Detraz used a dirty outdoor Jacuzzi, a public swimming pool, was employed cleaning tanning beds, and also was employed at a different nail salon. Both Dr. Daigle, the only physician to treat the infection while it was still active, and Dr. Stewart testified that it was impossible to determine the cause of the staph infection in Detraz's case, identifying numerous events as poten-

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tial causes. Dr. Henderson, on the other hand, testified that Detraz told him that she had cut her leg shaving just prior to the pedicure and that the filters on the pedicure equipment had not been cleaned prior to receiving her pedicure. Dr. Henderson testified that based on this reported history, the infection could have been caused by the pedicure.

At the end of the trial, the trial judge instructed the jury on a legal doctrine known as the *Housley* presumption. In a personal injury lawsuit, the test for determining the causal relationship between the incident in question and the subsequent injury is whether the plaintiff proved through medical testimony that it was more probable than not that the subsequent injuries were caused by the accident, in this case, the pedicure. With the *Housley* presumption, the law presumes that the accident in question caused the plaintiff's injuries if: 1) the plaintiff can establish that before the accident she was in good health; 2) shortly after the accident, the disabling condition manifested itself; and 3) the medical evidence shows there to be a reasonable possibility of a causal connection between the accident and the disabling condition. In order to defeat this presumption, the defendant must show that some other particular incident caused the injury.

The jury decided that Virgin Nails was negligent in providing the pedicure, but that negligence was not the cause of Detraz's injuries. Detraz appealed the jury verdict and Louisiana's Third Circuit Court of Appeals reversed on grounds that the jury verdict form was confusing. The Third Circuit further ruled that Dr. Henderson's unequivocal testimony that the pedicure was the cause of Detraz's injuries was sufficient to satisfy the third element of the *Housley* presumption and that the defendants did not provide satisfactory evidence of an intervening cause that would destroy the causal link between the pedicure and the infection.

In reversing the Third Circuit, Louisiana's Supreme Court clarified the definition of negligence as "conduct which falls below the standard of care established by law for the protection of others against an unreasonable risk of harm." Thus, a finding of negligence in performing the pedicure did not include a finding of causation of Detraz's injuries. The Supreme Court noted that after being given the *Housley* instruction, the jury made the factual determination that the defendants' negligent conduct did not cause Detraz's injuries. The jury either found that Detraz had not established the three elements necessary for the application of the *Housley* presumption, or found that the presumption did apply but that defendants proved some other factor caused her injuries. The Supreme Court noted that the record was replete with evidence that would allow the jury to make a reasonable determination that it was impossible to establish where Detraz's infection came from.

The Louisiana Supreme Court, in reversing the judgment of the Third Circuit, has shown that a jury is free to reject the *Housley* presumption by accepting the testimony of defense experts that show that the accident did not cause the injury. This ruling may prove beneficial to manufacturers in products liability cases because it seems to have set limits on the plaintiff-friendly *Housley* presumption.

—Don A. Rouzan

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HAIR PRODUCT MANUFACTURER NOT LIABLE FOR SCALP BURNS AND INFECTION

Jack v. Alberto-Culver USA, Inc., 2006-1883 (La. 2/22/07), ___ So.2d ___

In this case the Louisiana Supreme Court reversed and vacated an award to a woman who suffered scalp burns and an ensuing staph infection after using a hair texturizer manufactured by Alberto-Culver.

The trial court found in favor of the plaintiff, holding that the warnings accompanying the texturizer were inadequate because they did not instruct the user to perform a scalp test with the product before fully applying it. The Third Circuit Court of Appeal affirmed this holding.

The Louisiana Supreme Court reversed finding that the lower courts had erred. Plaintiff introduced the warning label into evidence and adequately proved that her damages were caused by the texturizer. However, the Supreme Court found that she needed more evidence of some kind to show that the warning on the product was inadequate.

The existing warning included language to the effect that the product was toxic and should be kept away from eyes and mouth. It went on to say that if skin or scalp irritation resulted, the user should wash the product out immediately with a special shampoo supplied with the texturizer. The Supreme Court held that it was up to the plaintiff to introduce some kind of evidence to prove that the existing warning was inadequate. The mere argument that a different type of warning should have been provided was not enough. "Because plaintiff presented no *factual* evidence to satisfy her burden of proof, the trial court's judgment in her favor was manifestly erroneous."

One might wonder what type of evidence the Court was looking for in this case. The answer may lie in the footnotes rather than in the text of the opinion. There the Court made several interesting observations. It stated that it would have liked to have known what types of chemicals were in the product and what kind of test the plaintiff felt should have been specified. The Court stated that the factual evidence would not necessarily have to consist of expert testimony, but that some sort of factual evidence was needed. And it also commented favorably on the existing warnings that accompanied the product, stating that the warning sufficed to alert the user to the danger of using the product.

—Madeleine Fischer

PRIOR TRIP ON TAVERN STAIRS NOT ADMISSIBLE TO PROVE DEFECT IN STAIRS

Luminais v. O.R.S.T. Inc., 2006-0749 (La.App. 5 Cir. 1/20/07), ___ So. 2d ___

Melissa Luminais sued defendants for injuries she allegedly sustained in an accident on the stairs at the Rivershack Tavern. After a three day trial, a jury ruled for the defen-

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dants finding that the steps upon which Luminais fell were not unreasonably dangerous. On appeal to the Court of Appeal of Louisiana, Fifth Circuit, Luminais raised several issues including her contention that the trial court committed reversible error in refusing to allow introduction of evidence of previous accidents on the same set of stairs. Luminais also alleged the trial judge's comments upon the evidence in front of the jury were improper. Luminais had questioned co-defendant, James Collings, about a prior lawsuit involving the stairs on cross-examination, and the trial judge sustained the defendant's objection to further discussion of this aspect of the prior lawsuit since the facts of the case were not sufficiently similar. The Court of Appeal found no error, and affirmed the jury's findings.

The court noted that, generally, evidence of prior accidents is admissible for the limited purpose of showing that a thing or a place was dangerous and the defendant knew of the dangerous condition. However, the prior accident must be closely related in circumstance to the injury or hazard at issue. The test is whether the other accident occurred at substantially the same place, and under substantially the same conditions and must be caused by the same or similar defect, danger, act or omission. Contrary to Luminais' contention, the court found that the trial court had allowed testimony regarding the prior lawsuit during Collings cross-examination. The defendant raised an objection, pointing out that the prior complainant alleged she tripped on the metal threads to the stairs, and this fact differed from the allegations in Luminais' suit. The trial judge properly sustained the defendant's objection to further discussion of this aspect of the prior lawsuit holding that the claims about the stairs in the two suits were not sufficiently similar.

Although not a product liability case, the case is significant for product manufacturers because product plaintiffs frequently try to introduce evidence of other accidents to prove a product defect. This case illustrates the general principle that evidence of prior accidents may be admissible for limited purposes, but the prior accident must be sufficiently similar to the circumstances of the injury or hazard at issue.

—Bernard H. Booth

VENTILATOR INSTALLER NOT A MANUFACTURER FOR PURPOSES OF PRODUCTS LIABILITY ACTION

Regan v. Respironics, Inc., 2007 WL 550064 (E.D.La. 2/16/07)

Due to advanced muscular dystrophy, Bryan Regan required a ventilator. In December 2004, Regan asphyxiated when the tube to his ventilator detached and the system's alarm failed to sound. Regan's parents sued, among others, the ventilator manufacturer and Apria, the supplier, on both products liability and negligence theories. Apria had delivered the ventilator to Regan's home, and an Apria technician installed the system. At that time, Regan's parents signed a release statement, releasing Apria from liability for the failure of the equipment, unless it was improperly installed.

Apria moved for summary judgment on plaintiffs' claims, arguing that there was no evidence of negligence and, moreover, it was not a "manufacturer" under the Louisiana

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Products Liability Act. The district court quickly determined that an issue of fact remained as to whether the ventilator was properly installed, and denied that portion of Apria's motion. However, the Court agreed that Apria was not a manufacturer as defined by the LPLA. 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."

Apria did none of those things, it simply supplied and installed the ventilator. Plaintiffs argued that additional discovery from Apria employees would demonstrate that it was a manufacturer, but the Court rejected this argument. The Court found that Apria had put forth evidence to demonstrate that it was *not* a manufacturer, and the plaintiffs had provided no evidence to the contrary. Accordingly, they could not defeat partial summary judgment on the product liability claim.

—Emily E. Eagan

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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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