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Products Liability
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4th Cir. Says Expert Testimony a Must to Controvert Manufacturer's Summary Judgment Motion

Leo J. Bourgeois v. Garrard Chevrolet, Inc.,
2002-0288 (La. App. 4 Cir. 2/21/02),___ So. 2d ___

Plaintiff, a New Orleans police officer, was injured when he was struck by a police cruiser driven by a fellow officer. Plaintiff sued General Motors Corporation and contended that its anti-lock braking system was unreasonably dangerous because of the construction or composition of the brake system.

The deposition testimony of another police officer, who had been qualified in other cases the Civil District Court for the Parish of Orleans as an expert witness in the field of automobile and brake repairs, indicated that he inspected the vehicle two weeks after the accident and that the vehicle remained in service after the accident with no reports of problems. He found that the electrical components of the ABS braking system were in normal working condition but that two rear wheel tires of the police cruiser were worn and under-inflated. He testified that the brake pads and rotors were worn and was of the opinion that the worn tires and low air pressure combined with a sticking brake caliper caused the ABS system not to function properly. He further testified that he was not in a position to comment on whether there was any deviation from the brake manufacturer's specifications or whether the braking system deviated in some material way from GMC's performance standards.

Judge Lloyd Medley of the Civil District Court for the Parish of Orleans denied GMC's Motion for Summary Judgment. On supervisory writs, a panel of the Fourth Circuit Court of Appeals comprised of Chief Judges Byrnes, and Judges Jones and Tobias, reversed and granted GMC's Motion for Summary Judgment. Chief Judge Byrnes, writing for the Panel, noted that the police repair technician's testimony and the affidavit of GMC's expert showed that the brake system in the police cruiser had not deviated in a material way from GMC's manufacturing or design specifications or that the design of the braking system caused or contributed to the accident. The Court also noted the uncontested testimony that brake pads in the police department's cars had an extremely short life. Police cars were generally in use 24 hours a day and the brake pads in these cars had a history of wearing out between eight hours to three weeks.

The plaintiff offered no contrary expert testimony or affidavit. The Court rejected the plaintiff's argument and affidavit that the car should have stopped within 57 feet at 30 miles per hour based on measurements plaintiff made:

> The plaintiff's affidavit stated that he measured the distance between where [the fellow officer testified she] started to stop and where [plaintiff] was hit. The plaintiff declared that the distance was a little more than 60 feet,

> whereas at 30 miles per hour the GMC brake system specification or standard is that the car must stop within 57 feet. Without expert testimony concerning GMC's specifications and standards, the plaintiff's testimony is inadequate. The plaintiff is required to present expert testimony to show a genuine issue of material fact. Without expert testimony, the plaintiff cannot carry his burden of proof that the ABS braking system was defective in design or that an alternative design would have prevented the plaintiff's injuries.

The Court also rejected the plaintiff's contention that the doctrine of *res ipsa loquitur* was applicable to show a defect in the design of the braking system. The failure of the vehicle's brakes was not proof of a design defect and uncontradicted testimony established that the brakes in police cruisers had an extremely short life.

- Richard D. Bertram

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La. Fourth Circuit Distinguishes Product Claims From Contract Claims

LaPlace Concrete, Inc. v. Stallings Construction Company, Inc.,
2001-0131 (La. App. 4 Cir. 12/05/01), 803 So.2d 1015

In connection with a project to construct an office building, Stallings Construction Company contracted with LaPlace Concrete, Inc., to supply the concrete for the job. Though LaPlace delivered the concrete, Stallings refused to pay the $19,635.90 balance. Stallings claimed that the concrete provided by LaPlace was defective as it did not meet the specifications of concrete supplied to it by LaPlace for an earlier job. LaPlace filed an action in the First City Court of New Orleans on "open account" against Stallings for the balance. Stallings reconvened, seeking damages against LaPlace for supplying defective concrete.

LaPlace filed an Exception of Prescription on Stallings' reconventional demand. LaPlace asserted that Stallings' claim was for defective concrete and therefore the applicable prescriptive period was the one-year period under the Louisiana Products Liability Act. The city court granted LaPlace's exception. Stallings appealed.

On appeal, Stallings argued that the concrete was not defective, as it may have been suitable for a different job, but that it did not meet the specific needs of the current job. Stallings contended that its claim was for breach of contract, not one arising under the LPLA.

The Fourth Circuit reversed the city court, holding that Stallings' reconventional demand did not arise under the LPLA. The court held that Stallings did not assert that the concrete was unreasonably dangerous; it acknowledged the product could have been used in another type of construction project. Nor did Stallings assert that the concrete deviated from LaPlace's or another concrete company's specifications of good concrete. Instead, Stallings claimed that the concrete failed to meet its particular specifications. Therefore, Stallings' claim was for supplying a product that was not the product contracted for, as opposed to a claim for supplying a defective product. The court concluded that the applicable prescriptive period was the ten-year period for breach of contract claims. Stallings' claim therefore had not prescribed.

- Stacie M. Hollis

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Asbestos Defendant's Bankruptcy Case Yields Info on Settlement Policies & Future Exposure

In re Babcock & Wilcox Company,
___ B.R. ___ (Bankr. E.D. La. 2/8/02)

Babcock & Wilcox designed, constructed and installed asbestos-insulated boilers at over 12,000 different sites for many decades through the mid-1970's. In February, 2000 B & W along with three affiliated companies filed for Chapter 11 relief. In this adversary proceeding the sole issue before the bankruptcy court was whether B & W was insolvent as of July 1, 1998. This determination entailed a review of B & W's long-standing settlement practices in asbestos actions as well as a projection of B & W's liability for future asbestos-related claims.

Litigation based on asbestos exposure is by far the largest area of products liability litigation in the United States today. Beginning in the early 1980's B & W began to face thousands of personal injury claims from plaintiffs who contended they had developed various asbestos diseases as a result of exposure to the asbestos insulation on B & W's boilers. B & W decided that the best approach to minimize the effect of these claims on B & W was to adopt an approach of early settlement based on agreed schedules of payments categorized according to alleged disease. B & W negotiated agreements with various plaintiffs' law firms to the effect that if they would accept this settlement schedule, B & W would "pony up" the agreed upon settlement figure and would never be named as a defendant in cases filed by that firm. The two criteria B & W required minimal proof of in each case were: 1) plaintiff worked around an asbestos insulated B & W boiler (satisfied by as little as an affidavit from the plaintiff); and 2) plaintiff had a medical diagnosis of asbestosis or a pleural condition.

Estimates of future liabilities by plaintiffs' and defendants' experts varied wildly with each side critiquing the other's methodology. The court noted that estimating future asbestos liabilities was problematical given the variables in estimating exposure, latency periods, product identification and other factors. For example, one expert averred that the incidence of asbestos-related cancers would gradually peak and begin to go down slowly until ending in the year 2040, concluding that B & W's future liabilities as of July 1, 1998 consisted of 871,777 claims at a total undiscounted cost of $10.7 billion. Another expert who had prepared a forecast for B & W in 1993 contended that B & W would receive only 64,627 new claims from 1998 to 2011 falling to zero in 2012. This expert estimated the cost of these claims at approximately $800,000,000.

Ultimately the court concluded that B & W's own contemporary estimates were reasonable in the sole context of whether B & W was insolvent on July 1, 1998. Given that the court deemed B & W's future estimation of its liabilities was reasonable, the court held that B & W was not insolvent on July 1, 1998.

- Madeleine Fischer

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Fourth Circuit Focuses on Methodology Component of Daubert Overruling Exclusion of Experts

Dinett v. Lakeside Hosp.,
2000-2682 (La.App. 4 Cir. 02/20/02), ___ So.2d ___

Plaintiff (along with her husband and three adult children) filed a personal injury action against the defendant hospital for damages sustained from her alleged contraction of Hepatitis C from a blood transfusion performed at the hospital. Plaintiff's experts testified that based upon the medical history provided by the plaintiff, plaintiff more probably than not contracted the Hepatitis C virus from the blood

transfusion. The trial court excluded the testimony, holding that it failed to comport with admissibility standards articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *State v. Foret,* 628 So. 2d 1116 (La. 1993). The Fourth Circuit reversed the trial court's exclusion of plaintiff's experts' testimony and overturned the trial court's grant of defendant's summary judgment motion.

In reversing the trial court's decision, the Fourth Circuit found *Daubert* and *Foret* inapplicable, holding: "*Daubert* is inapplicable to the instant situation because it is not the experts' methodology that is being questioned; rather, it is the conclusions they reached in applying that methodology to the instant facts." The court also noted that routine and well-established practice allows physicians to give opinion testimony regarding a patient's condition based upon the history provided by the patient. Thus, it found the trial court erred by improperly applying *Daubert/Foret* to exclude Plaintiffs' experts' opinions on this basis. Since plaintiffs' experts' opinions contradicted those of defendant's expert, a genuine issue of material fact existed precluding summary judgment.

- *Bonita Jones*

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Procedure: La 3 Cir. - Wife's Wrongful Death Suit Stops Prescription for Child

Phillips v. Francis,
2001-1105 (La. App. 3 Cir. 2/6/02), ___ So. 2d ___

In a somewhat questionable opinion the Third Circuit holds that a timely filed suit by a widow for the wrongful death of her husband interrupts prescription for a late filed suit by her minor daughter. The court argued that mother and child shared a single cause of action, defining "cause of action" as the act by the defendant giving rise to plaintiff's complaint.

- *Madeleine Fischer*

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Procedure: La 4 Cir. Says Nonresident May Be Forced to Come to La for Deposition

In re Medical Review Panel of Hughes,
2001-2313 (La.App. 4 Cir. 1/23/02), ___ So. 2d ___

In a case involving discovery from a potential medical malpractice defendant, Louisiana's Fourth Circuit per Judge Plotkin holds that a nonresident defendant may under some circumstances be forced to travel to Louisiana to submit to a deposition. The factors to consider are the same as those applicable to a nonresident plaintiff: cost of travel, complexity of case, potential recovery, and whether other discovery methods have been tried.

- *Madeleine Fischer*

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Procedure: La 4 Cir. Clarifies Abandonment Rules

Naccari v. Namer,
2001-2410 (La. App. 4 Cir. 2/6/02), ___ So. 2d ___

The Fourth Circuit recently elaborated on the circumstances in which a case may be dismissed as abandoned. Louisiana Code of Civil Procedure article 561 states that if the parties fail to take a step in the prosecution or defense of the case in the trial court the case shall be dismissed as abandoned. The court held that an informal letter from the defendant to the plaintiff requesting supplementation of discovery responses was insufficient to interrupt the running of the three-year period. However, in a somewhat confusing opinion, the court ruled that the filing of a writ application and opposition in the Louisiana Supreme Court (not the trial court) did interrupt the three-year time period. The court relied upon the principle that the law favors maintaining an action and that article 561 should be liberally construed.

- *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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