Jones Walker E*Zine

Products Liability
March 2001 Vol. 3

IN THIS ISSUE:

Louisiana's Third Circuit Says Law Banning Medical Monitoring Suits Cannot Be Applied Retroactively

Crooks v. Metropolitan Life Ins. Co.,
00-0947 (La. App. 3 Cir. 1/18/01), ___ So.2d ___, 2001 WL 40567.

The Louisiana Third Circuit Court of Appeal has squelched the Louisiana Legislature's attempt to retrospectively ban suits for medical monitoring for plaintiffs who have no manifest physical or mental injury or disease. In an opinion written by Judge Thibodeaux the court held that application of Louisiana Act 989 of 1999 to a suit brought by plaintiffs who wanted to be regularly monitored for the possible development of asbestos-related diseases would be unconstitutional in light of the fact that their exposure to asbestos-containing products allegedly occurred prior to the enactment of Act 989.

A cause of action for medical monitoring absent a manifest injury was not formally recognized in Louisiana until the 1998 Louisiana Supreme Court decision in *Bourgeois v. A.P. Green Indus., Inc.,* 97-3188 (La. 7/8/98), 716 So.2d 355. In *Bourgeois* the Louisiana Supreme Court ruled that plaintiffs who had been exposed to potentially harmful substances but suffered from no current manifest injury or disease could, under certain circumstances, sue to be medically monitored.

The Louisiana Legislature's response to *Bourgeois* was immediate. In less than a year's time the Legislature passed Act 989 which amended Louisiana's base tort article 2315 to provide that tort damages "do not include costs for future medical treatment, services, surveillance, or procedure of any kind unless such treatment, services, surveillance or procedures are directly related to a manifest physical or mental injury or disease." The Legislature also unequivocally expressed its intent in published notes to the Act stating that the Act was an interpretive law and was to be applied to all claims in existence on its effective date as well as future claims.

In *Crooks* a group of employees of the Pinecrest State School and Central State Hospital in Pineville, Louisiana claimed that they had been exposed to asbestos-containing products at these institutions from 1962 to the present. The defendants filed for summary judgment on the ground that the plaintiffs had produced no medical evidence of a current diagnosis related to asbestos exposure. Plaintiffs responded arguing that Act 989 could not be constitutionally applied to them because it would deprive them of their already vested right to medical monitoring under the *Bourgeois* decision.

The trial court granted defendants' motion for summary judgment finding that absent present damages there was no genuine issue of material fact. The plaintiffs appealed urging that Act 989 was unconstitutional in its application to them.

The Third Circuit discussed the two part analysis which is necessary to determine whether a law is retroactive. First the court must ascertain whether there is an expressed legislative intent. If there is no expressed intent, the court must determine whether the law is substantive, procedural or

interpretive. However, the court noted, "even where the legislature has expressed its intent to give a law retroactive effect, the law may not be applied retroactively if doing so would impair contractual obligations or disturb vested rights." *Id.* at *3.

The defendants argued that no right to medical monitoring existed in Louisiana law until the Louisiana Supreme Court created it in the *Bourgeois* decision. The Third Circuit disagreed.

> Article 2315 [Louisiana's basis for tort law] as enacted over 100 years ago, has always been of sufficient breadth to contain within it the cause of action of medical monitoring. The supreme court's recognition of medication monitoring as a cause of action is more a result of the advancements in diagnostic technology than the court's articulation of a new basis for recovery in tort.

Id. at *5. Therefore, the Third Circuit held that despite the Legislature's statement that the law was interpretive and should be applied retroactively, Act 989 in fact effected a substantive change in the law and could not be applied retroactively to causes of action in existence prior to its effective date.

In addition to writing the main opinion for the unanimous three member court, Judge Thibodeaux wrote a special concurrence assigning additional reasons for the decision. In the concurrence Judge Thibodeaux excoriated the Louisiana Legislature accusing it of an attempted power play.

> The legislature clearly sought to overrule the Louisiana Supreme Court. By passing 1999 La. Acts 989 in order to abrogate the supreme court's interpretation and application of a long-standing codal provision, the legislature has clearly and blatantly transgressed the doctrine of the separation of powers. This doctrine is violated when one branch assumes a function that more properly is entrusted to another.... Micromanagement of the decisions of the courts by the legislative and executive branches violates the Louisiana Constitution. The legislature and the governor's office are not the judicial branch and it is the duty of the courts to make certain that they keep to their proper functions.

Id. at *9.

The *Bourgeois* decision itself is now back before the Louisiana Supreme Court on the very issue decided in *Crooks*. *Bourgeois* was argued in November and a decision will likely issue within the next few months determining the retroactivity of Act 989 for once and all. Questions to ponder: 1) Given that medical monitoring is most commonly requested in cases of long-term exposure, if Act 989 is not applied retroactively how many suits will Act 989 affect? 2) Although Judge Thibodeaux criticized the Louisiana Legislature for invading the province of the judiciary in Act 989, could a similar criticism be leveled at the Louisiana Supreme Court for the original *Bourgeois* decision in which it authorized district courts to administer medical monitoring programs (rather than allow the traditional direct remedy of money damages) -- effectively reconstituting courts as administrative agencies?

- *Madeleine Fischer*

back to top

Seat Cover Manufacturer Awarded Summary Judgment;
Plaintiff's Controverting Evidence Lacked Sufficient Weight
to Create an Issue of Material Fact

Welch v. Technotrim, Inc., 34,355 (La.App. 2 Cir. 01/24/01), continues the evolution of the summary judgment into a favored mechanism to secure the just, speedy and inexpensive resolution of legal disputes. The opinion demonstrates that after the 1997 amendments to Louisiana Code of Civil Procedure article 966 that, 1) the mere possibility of a factual dispute is not fatal to a motion for

summary judgment, and 2) the trial judge is authorized to weigh the quantity and quality of the evidence submitted in support of and in opposition to the motion.

Facts

Plaintiff Ingemar Welch was worked for Johnson Controls, Inc. ("JCI") assembling General Motors car seats. Welch's job was to stretch the seat cover over the frame and to sew it closed. The seat covers were manufactured according to GM specifications and on GM dies by Tecnotrim, Inc.. Welch alleged that on November 8, 1995 he was attempting to close an unusually tight seat cover when his hand became trapped between the cover and the metal frame causing an injury that subsequently required surgery.

Procedural History

Welch filed suit against Technotrim contending that the seat cover it manufactured was unreasonably dangerous in composition because it did not meet specifications, and that Technotrim had failed to provide a warning of the dangers associated with small seat covers.

Technotrim moved for summary judgment and supported it with the deposition and affidavit testimony of JCI quality control and assembly personnel, the Technotrim general manager and a union representative. These affidavits established

- That GM provided the specifications and dies for the manufacture of the seat covers, and the same dies were used to produce all seat covers;
- That it was necessary for the seat covers to be tight, and this characteristic was apparent to the installers;
- That neither JCI nor Technotrim were aware of any seat covers being too tight or off specification.

However, the evidence also demonstrated that several witnesses (the other assembly personnel and the union representative) had testified that the seat covers had been unusually tight, that Technotrim personnel had acknowledged this problem and that seat closers were paid extra for handling the tight covers. Despite these apparent factual disputes, the trial judge granted Technotrim's motion for summary judgment. On appeal, the Second Circuit affirmed the dismissal.

Commentary

The Court's opinion lends support for the concept that the 1997 amendments to Louisiana Code of Civil Procedure article 966 allow the trial judge to evaluate the evidence submitted in connection with a motion for summary judgment. Prior to the amendments, it was axiomatic that the trial judge could not weigh evidence and any factual dispute was fatal to a summary judgment. The Court made numerous comments indicating that the "quality" of plaintiff's evidence was inadequate and, therefore, did not create a material issue of fact. Specifically, the Court ignored testimony from several assemblers that the covers were unusually tight because this position could not be reconciled with the fact that all seat covers came from the same dies.

This case should be used to encourage trial judges to look beyond the assertion of a factual dispute and to apply common sense and logic in weighing the quality of evidence submitted in opposition to a motion for summary judgment. Where the evidence submitted in opposition is illogical, unreasonable or otherwise unbelievable, it should be ignored.

- William L. Schuette

back to top

Finding That Plaintiff's Evidence Came Up Short, U.S. Fifth Circuit Reverses Jury Verdict Against A Ladder Manufacturer Under Texas'

Products Liability Law

Smith v. Louisville Ladder Co., 237 F.3d 515 (5th Cir. 2001)

In Smith, a panel of the U.S. Fifth Circuit, applying the Texas products liability law, reversed a jury verdict and rendered judgment in favor of a ladder manufacturer, concluding that (1) the plaintiff failed to establish a "safer alternative design" for the ladder; and (2) that the manufacturer's warning was adequate in light of the plaintiff's employer's knowledge of the danger of lateral cable slides and how to prevent them.

The plaintiff was injured while working as a cable technician. A job assignment on the day of the accident required him to rest the ladder against a cable strand twenty feet off the ground. The plaintiff placed the strand inside U-shaped hooks which extended from the top of the ladder and rested the ladder against the strand. The base of the ladder was located approximately five feet from a utility pole. The plaintiff climbed the ladder without securing the ladder to the pole. After the plaintiff reached the top of the ladder, the ladder began to slide down the natural slope of the cable. When the ladder slid down to the low point of the cable between the two utility poles, a hook came off the cable, and the ladder twisted. Unable to maintain his grip on the ladder, the plaintiff fell.

The plaintiff asserted three theories against the ladder manufacturer: defective design, breach of an implied warranty of merchantability, and failure to warn. Following trial, the jury found in favor of the plaintiff on all three theories.

The plaintiff asserted that the ladder and hook assembly was defective because of the hook's capacity to come off the cable during a slide. The plaintiff's expert, Dr. Packman, testified that a "safer alternative" design using a simple latching device that would close the opening in the hook would have prevented the hook from disengaging from the cable. Under Dr. Packman's concept, after the hook is placed over the cable and the ladder is resting on the cable, the worker would then activate a latch by pulling a line running from the latch to the bottom of the ladder. Once the latch was engaged, the hook would no longer be open and the hook could not disengage from the cable.

The manufacturer argued that the plaintiff did not establish that Packman's proposed latch was a "safer alternative design" within the meaning of the Texas statute. To establish a design defect under Texas law, Section 82.005 of the Texas Civil Practice and Remedies Code requires a claimant prove by a preponderance of the evidence "that: (l) there was a safer alternative design; and (2) the defect was a producing cause of the personal injury property damage or death for which the claimant seeks recovery."

The plaintiff relied solely on Dr. Packman's evidence and testimony to establish a safer alternate design. But Dr. Packan's design would not have prevented a cable slide. Dr. Packman testified that his spring loaded latch, by preventing the hook from disengaging from the cable, would only reduce the twisting of the ladder at the end of the slide. Dr. Packman's alternative design would result in a less violent jerk on the ladder at the end of the slide. He could not quantify this reduction in force. He could not state whether his design would have allowed the plaintiff to stay on the ladder in case of a cable slide. The most plaintiff's expert could say was that his alternative design reduced the possibility of a worker falling off the ladder.

Importantly, Dr. Packman's "alternative design"concept was only a preliminary idea. He was not ready to recommend it to a manufacturer. He had not settled on any particular method to operate the latch mechanism. In addition, Packman conceded that a person climbing the ladder would find his latch mechanism awkward and that the mechanism could itself cause the ladder to get out of balance and slide.

When asked if the line to operate the latch mechanism running the length of the ladder could pose a hazard to the person climbing the ladder, Dr. Packman admitted that he never evaluated the risks associated with his alternate design, partly because the design was never completed. Dr. Packman also did not conduct a risk-benefit analysis of his proposed design.

The Court concluded that no reasonable jury could have found that the proposed latching device was a "safer alternative design" as defined by the Texas statute. First, the evidence failed to establish that the alternative design would have "significantly" reduced the risk of the plaintiff's injury. The alternate design would not prevent a cable slide. The only benefit from the alternate design was a reduced jerk at the end of the slide and the expert was unable to say that his alternate design would

have prevented plaintiff's fall. Second, no proof was presented regarding whether the alternate design would have substantially impaired the ladder's utility. Dr. Packman performed no risk-benefit analysis, including what additional hazards his proposed alternative design would create.

The Court also ruled that the breach of implied warranty claim required the plaintiff to prove a "safer alternative design." As he failed to do so, the jury's finding on that claim was also reversed.

The Court further reversed the jury's finding that the warning on the ladder was inadequate. The warning label directed users to "[s]ecure top and bottom of the ladder from movement where possible" and that "serious personal injuries" could result from failure to follow instructions. The Court found that the warning "was plainly adequate when considered in light of industry knowledge of this danger and how to avoid it."

The Court noted that under Texas law, "there is no duty to warn when the risks associated with a particular product are matters 'within the ordinary knowledge common to the community' and a supplier may rely on the professional expertise of the user in tailoring its warning." The plaintiff did not dispute that the telecommunications industry was well aware that cable slides were a common hazard. Additionally, the evidence presented clearly showed that the industry was aware of procedures to avoid a cable slide.

- Robert L. Walsh

back to top

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:

Leon Gary, Jr.
Jones Walker
Four United Plaza
8555 United Plaza Boulevard
Baton Rouge, LA 70809-7000
ph. 225.248.2024
fax 225.248.3324
email lgary@joneswalker.com

To subscribe to other E*Zines, visit our website at http://www.joneswalker.com/news/ezine.asp.