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PLAINTIFF CAN MAINTAIN A CLAIM FOR INJURY WITHOUT AN EXPERT REPORT

Dreyfus v. Advanced Medical Optics, Inc., 2007 WL 148437 (E.D. La. 1/12/07)

This case involves an eye injury allegedly caused by a defective lens that was implanted into Clifton Dreyfus' eye. The defendant, Advanced Medical Optics, Inc., (AMO) was the manufacturer/distributor of the optical device. Dreyfus alleged he was harmed during eye surgery when his doctor attempted to implant a broken lens. During the implant surgery, the doctor noticed the lens was broken and attempted to remove the implant, which caused a tear in Dreyfus' eye. Dreyfus sued AMO under the Louisiana Products Liability Act (LPLA). AMO filed a motion for summary judgment asking to be dismissed from the lawsuit on the ground that federal legislation preempted Dreyfus' state law claims under the LPLA. Additionally, AMO asserted that Dreyfus had failed to produce evidence of a defect and evidence of medical causation. Judge Barbier of the Eastern District of Louisiana found that federal legislation did preempt a majority of Dreyfus' claims under the LPLA, except an action for manufacturing defect. As to Dreyfus' remaining claim, Judge Barbier found that no expert report was necessary to support Dreyfus' claims of a manufacturing defect or medical causation and thus allowed the case to proceed to trial.

Judge Barbier dismissed many of Dreyfus' claims under the LPLA. The court found that the Medical Devices Amendment to the Food, Drug, and Cosmetics Act preempted many of Dreyfus' claims under the LPLA, except the claim of manufacturing defect.

To prove that a product is unreasonably dangerous due to a manufacturing defect under the LPLA, a plaintiff must prove that when the product left the manufacturer's control, the product deviated in a material way from the manufacturer's specifications. AMO argued that Dreyfus did not produce an expert report or any documents to support Dreyfus' claim that the lens materially deviated from its specifications. Judge Barbier noted that the doctor who performed the implant surgery gave testimony that the device was broken when he released it into Dreyfus' eye. While noting that evidence that the lens left AMO in a defective condition was circumstantial and inferential, Judge Barbier found that it was sufficient to raise a material issue of fact as to whether the lens was broken when it left AMO.

AMO next contended that the case should be dismissed because Dreyfus failed to produce an expert report or any evidence that the defective lens caused damage to Dreyfus' eye. Noting that the doctor who performed the surgery testified that he actually observed the defective device cut into Dreyfus' eye during surgery when he

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attempted to retrieve it, Judge Barbier rejected AMO's argument on medical causation as being "incredible."

This case demonstrates that a plaintiff's failure to produce an expert report may not be fatal to his claims if he has other evidence sufficient to support his claims. Additionally, the court's holding illustrates the principle that federal law will preempt state law when the field is dominated by federal rules and federal oversight, as in the area of medical devices.

-Bernard H. Booth

LEAKING FLEXIBLE PIPE CASE APPEARS HEADED FOR TRIAL

***Brookshire Bros. Holding, Inc. v. Total Containment, Inc.*, 2007 WL 119843 (W.D.La. 1/10/07) and *Brookshire Bros. Holding, Inc. v. Total Containment, Inc.*, 2007 WL 184600 (W.D.La. 1/18/07)**

This case will be familiar to our e-zine readers as we have reported on it frequently in the past. FLEXPipe PART MANUFACTURER PARTIALLY LIMITS CLAIMS THAT ITS PIPE LEAKED (September 2006); POLYMER MANUFACTURER TO REMAIN A DEFENDANT IN LEAKING PIPE CASE (October 2006); and LEAKING PIPE PLAINTIFF MAY PROCEED WITH PUNITIVE DAMAGE CLAIM FOR TEXAS DAMAGES (November 2006).

The case involves a claim by Brookshire Brothers, a retail grocery chain that also sells gas, for damages caused by leaking flexible pipes used to attach the underground gas tanks to the surface pumps from which gas is sold to consumers. In these two opinions a week apart, Judge Trimble of Louisiana's Western District considered 1) a motion by the plaintiff, Brookshire Brothers, for summary judgment in its favor on several legal points necessary to its case; and 2) a motion by one of the defendants, Cleveland Tubing, Inc., who manufactured the corrugated inner tube that was incorporated into the flexible pipe, for summary judgment dismissing it from the case.

Brookshire's motion for summary judgment. Brookshire sought to shortcut its evidence at trial by asking Judge Trimble to rule that its use of the flexpipe system was a "reasonably anticipated use". However, the parties disputed whether Brookshire may have abused the system by allowing the continuous presence of a large volume of water contaminated with gasoline in the flexpipe. Thus, Judge Trimble held that the question of "reasonably anticipated use" would have to be tried and proven by Brookshire.

Brookshire also argued that the defendants should be deemed as a matter of law to have known that water was present in Brookshire's system, because of similar litigation that had taken place in Ohio some years earlier. Judge Trimble refused to im-

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pute such knowledge to the defendants solely because of the other case. He also held that the facts of the case were such that not only the fault of the defendants, but the possible contributing fault of Brookshire itself would be issues that would have to be tried.

In short, Judge Trimble denied Brookshire's motion for summary judgment in all respects, requiring that Brookshire prove all elements of its claim through a full trial.

Cleveland Tubing's motion for summary judgment. The flexpipe at issue is composed of several layers of various materials. Cleveland Tubing extrudes the inner layer of the flexpipe using a material called Carilon pursuant to other defendants' designs, specifications and selection of raw materials. Cleveland Tubing argued that Brookshire Brothers had not produced any evidence that any of the primary hose leaks were the result of alleged manufacturing defects attributable to Cleveland Tubing. However, Judge Trimble found that Brookshire Brothers had indeed produced evidence showing that Cleveland Tubing's extrusion process of Carilon had encountered problems over an extended period of time. Therefore, he refused Cleveland Tubing's bid for summary judgment on the manufacturing defect issue.

Judge Trimble did grant summary judgment to Cleveland Tubing on Brookshire Brothers' implied warranty and redhibition claims. Judge Trimble held that Brookshire Brothers' claims on these points were valid only against the overall manufacturer of the flexpipe – not against Cleveland Tubing which merely manufactured a component part (the inner layer) of the flexpipe.

The issues in this case have continued to be addressed in pretrial motions for summary judgment. The outcome of additional motions will be reported in this e-zine as they occur.

– *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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