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POSITIVE DRUG TEST TO BE ADMITTED IN LEG AMPUTEE'S CASE AGAINST TILLER MANUFACTURER

Harris v. Kubota Tractor Corp., 2006 WL 2734460 (W.D.La. 9/22/06)

While attempting to remove a rotary tiller from a tractor manufactured by Kubota Tractor Corporation, Wesley Harris' leg became entangled in the tiller. As a result of the injuries sustained, Harris' leg had to be amputated. Harris brought an action against Kubota under the Louisiana Products Liability Act. A urinalysis performed after the accident indicated that Harris tested positive for cocaine metabolites and cannabinoids, byproducts of the body's use of cocaine and marijuana. In the course of his deposition, Harris admitted using cocaine during the first part of the week before the accident (which occurred on a Friday). Both sides retained experts, who drafted reports concerning the test. Harris' expert opined that the presence of metabolites did not prove that Harris was impaired at the time of the accident, as metabolites can remain in a person's system for days or weeks after drug use. Kubota's expert did not necessarily disagree, but opined that the amount of metabolites in Harris' system suggested that he had ingested the cocaine closer to the time of the accident.

As the trial date drew near, Harris filed a motion in limine to exclude the positive drug test, arguing that the results of the test did not prove that he was under the influence at the time of the accident, and, as such, any probative value was substantially outweighed by the danger of undue prejudice. Kubota did not dispute that the results could not prove Harris was impaired at the time of the accident, but instead argued that the results demonstrated that Harris used drugs closer to the time of the accident than he admitted. Kubota argued that, while Harris may not have been under the influence of the drugs, there may have residual effects, such as fatigue or loss of concentration, which he was still feeling as of the time of the accident.

Judge Stagg's analysis focused first on whether or not the test was relevant. He found that it was, in fact, relevant to Harris' state of mind at the time of the accident. Next, the judge weighed the probative value of the evidence against any unfair prejudice it might cause, and found that the prejudi-

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cial effect did not substantially outweigh the probative value. This was particularly true as Harris' impairment provided a basis for a finding of contributory negligence. Accordingly, Judge Stagg denied the motion.

– *Emily E. Eagan*

LEAKING PIPE PLAINTIFF MAY PROCEED WITH PUNITIVE DAMAGE CLAIM FOR TEXAS DAMAGES

Brookshire Bros. Holding, Inc. v. Total Containment, Inc., 2006 WL 2921975 (W.D.La. 10/12/06)

Brookshire Brothers owns grocery stores in Texas and Louisiana. Many of the stores also have gasoline pumps. According to Brookshire Brothers, the underground pipes that deliver the gasoline from the tanks to the retail pumps are defective and prone to leaks which cause extensive and costly damage. Brookshire Brothers brought this products liability action against the company that sold them the pipes and against the manufacturers and suppliers of the pipe and its various component parts. Several of the defendants filed summary judgment motions with varying success. (See our previous stories, [POLYMER MANUFACTURER TO REMAIN A DEFENDANT IN LEAKING PIPE CASE, October 2006](#), and [FLEXPIPE PART MANUFACTURER PARTIALLY LIMITS CLAIMS THAT ITS PIPE LEAKED, September 2006](#).) In this motion, defendants Dayco and Mark IV filed for summary judgment seeking to dismiss Brookshire Brothers' claims for exemplary damages. Judge Trimble denied the motion.

Because Brookshire Brothers' damage spans two states (Texas and Louisiana), the Court was faced with choice of law issues. In a previous ruling, Judge Trimble held that Texas law would apply to injuries that occurred in Texas, and Louisiana law would apply to those that occurred in Louisiana. Louisiana law does not allow punitive damages in products liability cases. Accordingly, Brookshire Brothers could not recover punitive damages for its injuries in Louisiana. Texas law does allow punitive damages, provided the plaintiff can prove, among other things, that the harm resulted from fraud or malice. In this case, there were no allegations of fraud, so in order to make its case for exemplary damages, Brookshire Brothers would have to prove malice. In Texas, malice is defined (in pertinent part) as an act or omission which involves an extreme risk of which the actor has actual, subjective awareness but nevertheless proceeds with conscious indifference. Dayco argued that the factual allegations made against it could not support a finding of malice. Brookshire Brothers maintained that it had put forth evidence that Dayco knew the pipe was subject to degradation and that it continued to produce and

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sell the pipe. This, Brookshire Brothers argued, at least created an issue of fact with respect to whether or not Dayco knowingly engaged in risky behavior with a conscious disregard for its customers.

Judge Trimble agreed, finding that there was sufficient evidence to overcome summary judgment. The ultimate question as to whether or not Dayco's conduct amounts to "malice" was left for the jury to decide.

– *Emily E. Eagan*

NURSE ANESTHETIST'S LATEX GLOVE ALLERGY CASE TO REMAIN IN FEDERAL COURT

Larroquette v. Cardinal Health 200, Inc., ___ F.3d ___, 2006 WL 2807024 (5th Cir. 10/3/06)

This diversity jurisdiction case queries whether the plaintiff, Brenda Larroquette, a Louisiana nurse anesthetist who developed an allergy to latex gloves after using them on the job for 24 years, improperly joined her battery action against her former in-state hospital employer, Touro Infirmary, with her products liability actions against non-resident latex glove manufacturers to defeat federal jurisdiction and removal. Judge Lemmon of Louisiana's Eastern District decided that the joinder was improper, denied plaintiff's remand motion, and dismissed her action against Touro. In an opinion written by Judge Dennis (a former Louisiana Supreme Court Justice) the Fifth Circuit Court affirmed.

Larroquette avered that the defendant latex glove manufacturers made and distributed the latex gloves she used from 1979 to 2003; that these gloves proximately caused her latex allergy and other damages; that the latex gloves were unreasonably dangerous in design and because of inadequate warning; and that the latex glove manufacturers were liable to her under the Louisiana Products Liability Act.

Cardinal Health 200, Inc., removed the case to the federal court, where it and the other defendants asserted that Touro was improperly joined in an effort to defeat diversity jurisdiction. Larroquette moved to remand the case to state court, arguing that Touro was properly joined, thus foreclosing diversity jurisdiction. Judge Lemmon at the trial court level accepted the defendants' argument, dismissed Touro from the case, and denied Larroquette's motion to remand.

Joinder of a non-diverse party is improper if there is no reasonable basis to predict that the plaintiff might be able to recover against that party.

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Louisiana statutes make workers' compensation recovery an employee's exclusive remedy for a work-related injury caused by the employer's conduct, except when suit is based on an intentional tort. Under this exception, "intent" means that the employer either (1) consciously desired the physical result of its act; or (2) knew, to a substantial certainty, that the result would follow from its conduct. Here, both the trial court and the Fifth Circuit found that there was no reasonable basis to predict that Larroquette could ever recover against Touro for intentionally causing her sensitization and allergy to latex.

Larroquette alleged that Touro caused her to develop latex allergy by requiring her to work with latex gloves for approximately four years and stocking only latex gloves at its facilities. But she did not contend that Touro desired to harm her. Nor did she allege facts that would support a finding that Touro knew to a substantial certainty that the use of latex gloves would harm her. The Fifth Circuit suggested that her allegations might support a claim of negligence or recklessness, but they did not support a finding of battery or any other unlawful intentional act. Thus, the Fifth Circuit affirmed the denial of Larroquette's motion to remand and the dismissal of her claim against Touro.

— *Don A. Rouzan*

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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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