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Ladder Manufacturer Achieves Summary Judgment on Two Out of Three Products Claims

Condiff v. R.D. Werner Co., Inc.,
2003 WL 21977167 (E.D.La. 8/15/03)

Louisiana Eastern District's Judge Engelhardt granted a manufacturer's motion for summary judgment with respect to plaintiffs' claims that defendant manufacturer's ladder was unreasonably dangerous in design and unreasonably dangerous due to inadequate warning, but denied the manufacturer's motion with respect to plaintiffs' claim that the ladder was unreasonably dangerous in construction.

Plaintiffs sued Werner Co., manufacturer of an extension ladder, alleging that their son's head injury and subsequent death were caused by defects in the ladder he was using on the day of the injury. Plaintiffs filed the action under the Louisiana Products Liability Act, which holds the manufacturer of a product liable for damage caused by a characteristic of its product that renders the product unreasonably dangerous. A product may be unreasonably dangerous in only four ways: (1) its construction or composition; (2) its design, (3) because an adequate warning was not provided, or (4) because the product does not conform to an express warranty. Plaintiffs alleged all but the fourth ground. Werner moved for summary judgment.

The court found that Werner was entitled to summary judgment on the design and warning claims, but denied the summary judgment as to the construction claim resorting to the doctrine of *res ipsa loquitur*.

To qualify as unreasonably dangerous in construction or composition under the LPLA, a product, at the time it leaves the manufacturer's control, must have "deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer." Werner was able to show that the plaintiffs had no direct evidence that the ladder deviated from specifications or from otherwise identical products. The plaintiffs, however, relied on circumstantial evidence and the doctrine of *res ipsa loquitur* as evidence of a construction defect.

Res ipsa loquitur may be applied when: (1) the circumstances surrounding the accident are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence or other fault on the part of the defendant; (2) the defendant had exclusive control over the thing causing the injury; and (3) the circumstances are such that the only reasonable and fair conclusion is that the accident was due to fault on the defendant's part.

In this case, plaintiffs urged, and the court agreed, that absent a construction defect, the ladder would not have bent during normal use. Plaintiffs presented the affidavit of Floyd Foley, the deceased's

co-employee, in which he stated that he saw a bend in the ladder step just prior to the deceased's fall, and had worked on that very same ladder earlier that day without any damage present on the ladder. In making its ruling the court noted that it was compelled to make all reasonable inferences in favor of the moving party, but was forbidden from making credibility determinations regarding the affidavit. Thus, the court concluded that a reasonable jury could find that the ladder was leaning securely against a wall when it bent, and that the evidence established with a certain amount of certainty, the unusual circumstances required for the application of *res ipsa loquitur*.

The court cautioned the plaintiffs that their case still rested on very thin ground, raising questions as to the competency of the testimony of Mr. Foley. The court reminded the plaintiffs that Mr. Foley's testimony would be subject to rigorous cross examination at trial and that the plaintiffs should not construe the court's ruling on summary judgment as an indication that the same conclusion would be reached at trial regarding *res ipsa loquitur*.

- *Mary Mitchell Felton*

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Welding Machine Manufacturer Can't Draw Adverse Inference from Destruction of Key Evidence

Nowlin v. Miller Elec. Mfg. Co.,
2003 WL 21664707 (E.D.La. 7/11/03)

Plaintiff Howard Nowlin and his wife brought suit against Miller Electric Mfg. Co., the manufacturer of a welding machine that allegedly shocked Nowlin while he was working for Bollinger Marine Fabricators, Inc. Nowlin alleged that the welding machine contained an open switch – an Arrow Hart 80771 model – as opposed to an enclosed switch, which could have prevented arcing from leaving the switch; thus, the machine was unreasonably dangerous under the LPLA. During discovery the parties learned that the employer, Bollinger, had removed and discarded the switch from the machine after Nowlin's accident. Further, the Bollinger employee who removed the switch from the machine initially was confused as to whether the discarded switch was similar to the Arrow Hart 80771 switch shown him during his deposition. At first the employee testified it was not similar, but, during a break from the deposition, the employee retrieved a spare Arrow Hart 80771 switch from Bollinger's office and then testified that the switch he discarded was in fact similar.

Defendants filed a motion in limine to 1) present evidence that Bollinger discarded the switch; 2) to allow the defendants to argue that Bollinger discarded the switch to strengthen its position so that it could discontinue workers' compensation payments to Nowlin; and 3) to give the jury an adverse inference instruction because of spoliation of the evidence, which would allow the jury to infer that, if the switch was not produced, it was not an open switch as plaintiffs claimed.

The court refused to allow the requisite inference of bad faith for a spoliation charge based on the facts, finding that Bollinger was not aware that Nowlin was contemplating filing suit at the time the switch was discarded. The court also held that an adverse inference instruction would be unfairly prejudicial to the Nowlin's case because there was no evidence that Nowlin himself played any part in the discarding of the switch. However, the court would allow defendants to present evidence that the switch at issue no longer existed.

- *Stacie M. Hollis*

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LPLA Applies to Smoker Who Failed to Prove

Significant Exposure Before LPLA Effective Date

Chustz v. R.J. Reynolds Tobacco Co.,
2003 WL 21919426 (5th Cir. 8/11/03)

The only significant issue before the court was the applicability of the Louisiana Products Liability Act (LPLA), La. R.S. § 9:2800.51 *et seq.*, to this case. The court agreed with the district court that the plaintiff failed to present sufficient summary judgment evidence from which a fact finder could conclude that Mr. Chustz's exposure to the cigarettes was so significant before the effective date of the LPLA that the disease would have progressed independently after that date, even without repeated exposure.

The court also agreed that the district court did not err by taking judicial notice of the fact that there was widespread knowledge among consumers of the dangers of cigarette smoking before the effective date of the 1969 Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-1340. Accordingly, the Fifth Circuit upheld summary judgment granted in favor of defendant.

- [Diana A. Cross](#)

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Federal or State Court – Why Is it Important for a Product Manufacturer?

This e-zine attempts to cover all cases involving Louisiana products liability law whether filed in state or federal court. You may have noticed that often the majority of cases reported here are federal cases, and many deal with the topic of "removal". Why is this?

While there are exceptions to every rule, as a matter of general perception plaintiffs like to be in state court in Louisiana, while product defendants like to be in federal court. Conventional wisdom is that federal court judges apply procedural rules more strictly and federal court juries, when guided by federal judges, are more conservative, and more likely to hold a plaintiff to his burden of proof. Many feel that this is because state court judges are elected, and therefore may be naturally inclined to favor their constituents, while federal judges are appointed for life and not so easily affected by the opinions of the populace.

The plaintiff is the one who decides where to file his suit. Usually plaintiffs file in state court. When confronted with a products suit filed by a plaintiff in state court, the lawyer for the product manufacturer must carefully investigate whether there are any grounds to move – or in legal terms "remove" – the case to federal court.

Federal courts have limited jurisdiction. There are many types of cases they will not handle. With a few exceptions, however, if a case could have been filed in federal court to begin with, a case that is filed in state court may be removed by the defendant manufacturer to federal court.

The primary basis for removing a case to federal court is diversity jurisdiction. Federal courts have jurisdiction over suits in which the plaintiff is a citizen of a different state than the defendant. If there are multiple parties, each and every party must be diverse – that is no plaintiff and no defendant can be citizens of the same state. In addition, to qualify for diversity of citizenship, the case must involve a dispute involving at least \$75,000.

Plaintiff attorneys, well aware of this rule, and preferring to remain in state court, sometimes add defendants they would not otherwise have sued, simply to destroy diversity of citizenship. A defendant may still remove the case by arguing that those non-diverse defendants were "fraudulently joined". The doctrine of fraudulent joinder does not involve traditional fraud as the public commonly understands it. Rather it requires only that the defendant prove that the plaintiff have no possibility of winning the case

against the non-diverse defendant.

The area of fraudulent joinder is currently a hot topic in the Fifth Circuit and the federal district courts of Louisiana. Issues involving fraudulent joinder have been decided differently by different judges sitting in the same court. While the controversy sorts itself out, we will continue to report on the on-going battles over removal of products cases from state to federal court.

- [Madeleine Fischer](#)

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Spinal Screw Patient Loses Bid to Send Case Back to State Court

Donaldson v. Spinal Concepts, Inc.,
2003 WL 21913704 (E.D.La. 8/6/03)

In this case involving the fracture of screws used during spinal surgery, Judge Fallon of the federal court for Louisiana's Eastern District denied the plaintiff's motion to remand her case to the Civil District Court for the Parish of Orleans. The court rebuffed the plaintiff's attempt to return her case to state court on a theory that her petition alleged a cause of action against a non-diverse individual who had not yet been made an actual defendant. A lawsuit against the non-diverse defendant, a physician, would have been premature because the medical review panel had not rendered its ruling, a prerequisite to filing suit against a physician.

Dr. Bradley Bartholomew performed surgery on Sharron Donaldson to correct a disc herniation. During the course of the surgery, Dr. Bartholomew implanted a cervical plate and screws manufactured by Spinal Concepts, Inc. into her spine. In April of 2002, the plaintiff discovered that certain of the screws had fractured, leading to a worsening of her condition. In April of 2003, Ms. Donaldson filed suit in Civil District Court for Orleans Parish against Spinal Concepts, Inc. alone. On that same day, she instituted a complaint against Dr. Bartholomew with a medical review panel in compliance with Louisiana law. Spinal Concepts removed the case to federal court on the basis of diversity jurisdiction. Plaintiff then moved to remand the case to state court for lack of subject matter jurisdiction, arguing that because the original petition included facts sufficient to allege a cause of action against Dr. Bartholomew, a citizen of Louisiana, diversity of citizenship did not exist and federal subject matter jurisdiction was lacking.

The district court was not persuaded by this argument. In denying the motion to remand, Judge Fallon discussed two contradictory rulings within the Eastern District of Louisiana on this issue. In *Kelly v. Danek Medical, Inc.*, 1994 WL 321074 (E.D.La. 6/28/94), the court granted a motion to remand on similar facts on the rationale that a cause of action had been stated against non-diverse defendants who could become parties at a future date. The court in *Kelly* concluded that diversity of citizenship did not exist as a "practical matter." In *Lillie v. Wyeth-Ayerst Laboratories*, 1994 WL 532091 (E.D.La. 9/26/94), the court refused to remand a case with similar facts, concluding that the "mere possibility" that an additional non-diverse defendant might be added in the future could not justify a remand to state court. Judge Fallon adopted the rationale of *Lillie*, noting that at the time the case was filed in state court complete diversity of citizenship existed. Judge Fallon did not believe that subject matter jurisdiction was lacking simply because a non-diverse party might be added at some unspecified time in the future. Judge Fallon cautioned that under the plain wording of 28 U.S.C. § 1446(b), if the plaintiff waited more than one year but did not pursue a cause of action against the non-diverse party, the diverse defendant – here the product manufacturer – would be time-barred from pursuing removal. In closing, Judge Fallon pointed out that the plaintiff could have named the non-diverse physician as a defendant in the state court action to defeat removal jurisdiction, despite the prematurity of such a claim.

- [L. Etienne Balart](#)

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Eastern Dist. Upholds Removal Based on Fraudulent Joinder of Tobacco Distributor Defendants

Walker v. Philip Morris, Inc.,
2003 WL 21914056 (E.D. La. 8/8/03)

Peter Walker smoked Marlboro and Marlboro Light cigarettes from 1962 until he quit smoking in 1996. Following his death from lung cancer on July 20, 2001, his wife and children filed wrongful death and survival action claims against the maker of Marlboro cigarettes, Philip Morris USA, Inc., as well as three local wholesale distributors of Philip Morris cigarettes, in Louisiana state court. Philip Morris removed the case to federal court asserting that the distributor defendants were fraudulently joined. Philip Morris argued that the court should not consider the Louisiana citizenship of the distributor defendants because: (1) the distributor defendants' affirmative defense of prescription (or statute of limitations) barred plaintiff from asserting a state redhibition claim against them; and (2) plaintiffs had no viable cause of action against the distributor defendants under any other theory, whether in tort, express warranty, or under the Louisiana Products Liability Act ("LPLA"). Plaintiffs moved to remand the case to state court.

Judge Engelhardt of Louisiana's Eastern District first addressed plaintiffs' assertion that the redhibition claim (based on the sale of the cigarettes) supported the joinder of the distributor defendants to the suit. The court first determined that the Fifth Circuit's holding in *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, Ltd.*, 99 F.3d 746 (5th Cir.1996) required it to examine both the viability of both the plaintiffs' cause of action and of any affirmative defenses that could bar recovery against the non-diverse defendants. In this case, the undisputed facts showed that Peter Walker purchased his last cigarette more than four years before the suit was filed and knew of the defects complained of more than one year before suit was filed. The court held that because there was no possibility that the plaintiff could survive the defense of prescription, the redhibition claims against the distributor defendants were fraudulent.

The court next addressed plaintiffs' claims of breach of express warranty, violation of the LPLA, and tort claims against the distributor defendants. The court quickly rejected plaintiffs' breach of express warranty claim and their LPLA claim – there was no evidence that the tobacco distributors had issued any express warranties for the cigarettes, and there was no evidence that the tobacco distributors were "manufacturers" (a prerequisite for recovery under the LPLA). Next, the court considered plaintiffs' tort claims. Plaintiffs made two arguments supporting these claims: (1) in distributing and promoting Marlboro cigarettes, the distributor defendants acted as agents of Philip Morris in carrying out Philip Morris's alleged scheme of fraudulent concealment of the health effects of cigarettes; and (2) the distributor defendants were liable as sellers of a defective product. The court rejected the first argument, finding that the plaintiffs' petition failed to allege an agency relationship between Philip Morris and the distributor defendants. Moreover, the plaintiffs failed to respond to the distributor defendants' affidavits refuting the existence of an agency relationship with Philip Morris. The court rejected plaintiff's second argument, holding that plaintiffs presented no evidence to rebut the distributor defendants' contentions that they had no information regarding the health risks of cigarettes not available to the general public. Accordingly, plaintiffs' motion to remand was denied.

- [Diana A. Cross](#)

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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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