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Supreme Court Delineates Limited Admissibility of Non-use of Seat Belts in Design Defect Case

Rougeau v. Hyundai Motor Am.,
01-1182 (La. 1/15/02), ___ So.2d ___

In an opinion written by Justice Victory the Louisiana Supreme Court has held that La. R.S. 32:295.1(E) which prohibits evidence of plaintiff's failure to wear a seat belt on the issue of comparative negligence or mitigation of damages does have limits. The court holds that such evidence may be admissible in a product liability action if (1) it has probative value for some purpose other than as evidence of negligence; (2) its probative value is not outweighed by its prejudicial effect or some other rule of evidence; and (3) appropriate limiting instructions are given to the jury. Unfortunately for the car manufacturer in this case, these three factors were not met and the evidence was excluded.

The plaintiff Jessica Rougeau was injured when she drove through an intersection and struck a steel utility pole. She claimed that her vehicle had unexpectedly veered to the right causing the accident. She sued Hyundai, the vehicle manufacturer, and Dickie's Master Craft who had repaired the car the week before the accident. She claimed that both defects in original design as well as improper repairs led to the accident.

In a pretrial motion, Rougeau moved to strike Hyundai's affirmatively asserted defense that Rougeau was not wearing a seat belt at the time of the accident. The district judge denied the plaintiff's motion, but the Fourth Circuit reversed holding that allowing the jury to hear that plaintiff was not wearing a seat belt would violate La. R.S. 32:295.1(E).

The Supreme Court noted that the Louisiana courts of appeal are split on whether seat belt evidence is admissible in product liability cases. Reviewing the legislative history of La. R.S. 32:295.1 (E) the court found no indication that the drafters intended to limit its application to exclude product liability cases. Despite many debates over the issue the Legislature has always come down in favor of leaving in place the choice that failure to wear a seat belt may not be used to determine comparative fault, to apportion fault or to mitigate damages. The court remarked that any different rule for products claims could result in an inconsistent result in cases where the plaintiff sued several different defendants, such as the one at bar where the plaintiff sued both the automobile manufacturer and the vehicle repair shop.

The court next considered Hyundai's argument that the prohibition of La. R.S. 32:295.1(E) should not apply when non-use of a seat belt is introduced to prove injury causation and/or lack of

design defect. The court agreed that La. R.S. 32:295.1(E) specifically only applied to evidence of comparative negligence and mitigation of damages; thus, evidence of seat belt non-use is admissible for any other relevant purpose. However, the court found that "injury causation" is necessarily interwoven with the question of whether the plaintiff caused her own injuries, and thus the evidence on non-use of seat belt could not be admitted under that guise.

On the question of whether such evidence was admissible to show that the car was not defective, the court found that the evidence was not relevant to that question under the facts of this case. The plaintiff had removed the crashworthiness claims from her petition and alleged only that the brakes, tires, and front-end vibration system of the car were defectively designed. The fact that the plaintiff was not wearing her seatbelt was irrelevant to disprove the plaintiff's specific design defect allegations. Accordingly, the court found no independent basis to allow the evidence in.

The court left the door wide open for use of the seat belt defense in cases involving claims of crashworthiness or a defective safety restraint system. In closing it listed three factors which must be met in order to introduce evidence that the plaintiff was not wearing a seat belt: 1) the evidence must have probative value for some purpose other than as evidence of negligence, such as to show that the overall design, or a particular component of the vehicle, was not defective; 2) its probative value must not be outweighed by its prejudicial effect nor barred by some other rule of evidence; and 3) the jury must be properly instructed that consideration of seat belt non-usage cannot be used to show negligence of the plaintiff or that the plaintiff failed to mitigate damages.

- *Madeleine Fischer*

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La. High Court Overrules Previous Holding on Prescription of Blood Product Claims

Williams v. Jackson Parish Hospital,
2000-3170 (La. 10/16/01), 798 So.2d 921

In a 4-3 decision, the Louisiana Supreme Court reversed its earlier ruling in *Boutte v. Jefferson Parish Hospital Service District No. 1,* 99-2402 (La. 4/11/00), 759 So.2d 45, and held that all pre-1982 (pre-blood shield statutes) strict products liability claims against hospitals arising out of defective blood transfusions are not traditional medical malpractice claims. *See Williams v. Jackson Parish Hospital,* 2000-3170 (La. 10/16/01), 798 So.2d 921, 932. As such, they are not governed by La. R.S. 9:5628, and the general tort prescriptive period set out in La. C.C. art. 3492 applies, requiring only that plaintiffs file suit within one year from the date of discovery of the alleged tainted transfusion. *Id.*

On May 29, 1980, the plaintiff, Nelson Nadine Williams, received a blood transfusion during childbirth at a private hospital designated as a qualified health care provider under the Medical Malpractice Act, La. R.S. 40:1299.41, *et seq.* ("MMA"). *Id.* at 923. Over 15 years later, Ms. Williams was diagnosed with hepatitis C, which she most likely contracted as a result of the 1980 blood transfusion. *Id.* She filed suit on April 17, 1997 alleging, *inter alia,* that the hospital was strictly liable for the damages she sustained due to its "sale and administration of defective blood or blood products." *Id.* at 924.

The district court, applying La. R.S. 9:5628, ruled that the plaintiff's strict products liability claim, although filed within one year of the date she was diagnosed with hepatitis C, was prescribed because it was filed more than three years after the transfusion at issue. *Id.* On appeal, the plaintiff argued that the general tort prescriptive period applied to her strict products liability cause of action against the hospital. *Id.* The Louisiana Court of Appeal for the Second Circuit affirmed the district court's holding finding that, in accordance with its earlier decisions, blood product claims were medical malpractice causes of action subject to La. R.S. 9:5628. *Id.* However, the court of appeal remanded the case to the district court for consideration of plaintiff's arguments that La. R.S. 9:5628, as applied, violated her constitutional rights of due process and access to the courts, and discriminated against her based on physical condition. *Id.* at fn. 8. The district court denied plaintiff's constitutional claims, the Second Circuit affirmed and the Louisiana Supreme Court granted certiorari. *Id.* at 925.

In 1994, the Supreme Court found that a "plaintiff's strict products liability action against a hospital arising out of a defective blood transfusion was governed by the general tort prescriptive period (Article 3492)," despite the close relationship between patient care and the provision of blood or blood products. *Id.* at 926 (*citing Branch v. Willis-Knighton Medical Center,* 92-3086 (La. 4/28/94), 636 So.2d 211). However, the Court reversed itself with the *Boutte* decision in 2000, finding that a "plaintiff's claim for damages arising out of a defective blood transfusion is in the nature of a medical malpractice claim, regardless of the underlying legal theory (strict liability) used to support the claim." *Id. (quoting Boutte,* 99-2402 at p. 4, 759 So.2d at 48).

Justice Pro Tempore Lobrano, writing for the majority in *Williams,* stated that:

> The application of § 5628 does not depend on whether the defendant is a qualified health care provider under the MMA, or on whether the claim alleged in the plaintiff's complaint is "malpractice" as defined under the Act. What the application of § 5628 depends on is whether the two restrictions the Legislature set forth in that special prescription statute are met; namely (i) the defendant must fall within one of the categories of enumerated providers; and (ii) the claim asserted must meet the statutory, conduct based standard, *i.e.,* the action, whether in tort, in breach of contract, or otherwise, must arise out of patient care.

Id. at 930. The opinion goes on to hold that the *Boutte* Court was incorrect when it found that a strict products liability claim based on a blood transfusion is statutorily defined as malpractice under the MMA, thus arises out of "patient care;" and, such a cause of action does not satisfy the second prong of the above analysis. Therefore, all pre-blood shield statute claims for strict products liability are governed by La. C.C. art 3492, not La. R.S. 9:5628.

Judge Victory dissented on the grounds that the plaintiff applied for, and was granted, certiorari solely on the issue of the constitutionality of La. R.S. 9:5628. In his opinion, it was inappropriate for the Court to address the validity of the *Boutte* decision, especially in light of the fact that the majority was composed of two *pro tempore* Justices. In addition, both Judge Victory and Judge Knoll dissented based on their view that blood transfusions are, undoubtedly, given as part of patient care and should fall under the prescriptive period provided for medical malpractice actions in La. R.S. 9:5628. Judge Traylor dissented for the reasons assigned by Justices Victory and Knoll.

- Meredith Young

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3rd Cir. Holds Petroleum May Be Hazardous Substance & Ups Attorney Fee to 4 Mil.

Corbello v. Iowa Production,
01-0567 (La.App. 3 Cir. 12/26/01), ___ So.2d ___

Plaintiff landowners sued Shell Oil Company over the condition of property leased to Shell after the termination of the lease. The Third Circuit, with a few relatively minor deviations, affirmed a $50,000,000 verdict in favor of plaintiffs. However, the Third Circuit reversed the trial court's finding that as a matter of law Shell could not be liable for punitive damages under now-repealed article 2315.3 and remanded the case on that issue to allow the trial court to take additional evidence and make a factual determination on the issue.

Plaintiffs' predecessor granted Shell an oil and gas mineral lease and later a surface lease upon which Shell built an oil terminal. Shell's lease expired in 1991, however Shell remained on the premises for 22 months after the lease expired. Plaintiffs brought this suit claiming damages for trespass on the premises after the expiration of the lease, for unauthorized disposal of saltwater on the leased premises and for the poor condition of the leased premises. The jury awarded $927,000 for trespass, $33,000,000 to restore the premises to their pre-lease condition, and $16,679,100 for illegal

disposal of salt water on the leased premises. The trial court reduced the trespass award to $32,500 and awarded $689,510 in attorney fees to plaintiffs.

The significance of this case for product liability mavens lies in its treatment of punitive damages. The trial court determined that Shell's activities on the leased premises did not subject it to exemplary damages under Civil Code article 2315.3 (which was repealed in 1996), apparently accepting Shell's argument that because "petroleum" is exempted from the definition of hazardous substance in La. R.S. 30:2272(4)(c) (the definitions portion of the statutes on liability for hazardous substance remedial action) it is not a hazardous substance for purposes of article 2315.3. The Third Circuit reversed on this issue and remanded the case to the trial court "for further proceedings".

The Third Circuit adopted the reasoning of two cases from other circuits in which the courts concluded that the exclusion of natural gas from the definition of "hazardous substance" in La. R.S. 30:2772 did not exclude it from the definition of hazardous or toxic substances within the meaning of article 2315.3. *Rivera v. United Gas Pipeline Co.,* 96-502, 96-503, 97-161 (La.App. 5 Cir. 6/30/97), 697 So.2d 327, *writs denied,* 97-2030 (La. 12/12/97), 704 So.2d 1196 and 97-2031, 2032, 2034 (La. 12/12/97), 704 So.2d 1197; *State Farm Fire and Casualty Co. v. Sewerage & Water Board of New Orleans,* 97-1862 (La.App. 4 Cir. 2/25/98), 710 So.2d 290. The court found that the definitions of La. R.S. 30:2772 were limited in application to the Chapter in which they appeared, and did not extend to article 2315.3.

The Third Circuit also distinguished the case of *Chustz v. J.B. Hunt Transport, Inc.,* 95-356 (La. 11/6/95), 662 So.2d 450 in which the Supreme Court held that petroleum lubricating oil was not a toxic or hazardous substance under article 2315.3. The Third Circuit noted that the *Chustz* opinion "did not address the issue presented here" and was decided before *Rivera* and *State Farm* (in which last the Supreme Court denied writs). The Third Circuit did accept the definitions of hazardous and toxic substances set forth in *Chustz,* specifically:

> Hazardous substances are those that present substantial danger to public health or the environment. A toxic substance is a substance poisonous to living organisms. Thus, the terms "hazardous" and "toxic" refer to substances which cause injury or death to human beings and/or create an environmental hazard.

662 So.2d at 451. The Third Circuit felt that a jury could find some of the substances at issue in this case satisfied the *Chustz* definition.

The Third Circuit also increased the trial court's award of attorney fees from $689,510 to $4,000,000. The attorney fee award stemmed from language in the lease allowing attorney fees to the prevailing party in any lease dispute. (With the Third Circuit's suggestion that punitive damages might be in order, this would provide a second basis for an attorney fee award.) The plaintiffs argued the award was too low because their contracts with their attorneys provided a contingency fee component. The Third Circuit rejected the notion which the trial court favored that Shell's liability for fees should not have been affected by the arrangements between plaintiffs and their attorneys. Finding the award abusively low, the court stated that "The type of contract the prevailing party has with its attorney is a factor we must consider, but it is not the determining factor." The Court's award of $4,000,000 adopted a middle ground between the hourly rate appraisal made by the district court and plaintiffs' proposal of an enormous contingent fee.

- *Madeleine Fischer*

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3rd Circuit Says Co-conspirators May Be Liable for Punitive Damages

Ross v. Conoco, Inc.,
00-1757 (La.App. 3 Cir. 12/26/01), ___ So.2d ___

The Third Circuit has recently held in a divided 3 - 2 opinion that product manufacturers and

others who conspire with employers who are liable for punitive damages under article 2315.3, may themselves be liable for punitive damages, even though they do not directly handle, store, or transport hazardous or toxic substances.

Plaintiffs in this case were the heirs of two Conoco Chemical employees who died, allegedly due to work place exposure to vinyl chloride. Plaintiffs sued the employer defendants claiming the two decedents were the victims of an intentional tort culminating in a battery on their persons. Plaintiffs also sued various manufacturers and users of the chemical alleging that the employers conspired with these members of the vinyl chloride industry to keep secret the hazardous health effects of vinyl chloride. Last plaintiffs sued Minnesota Mining and Manufacturing (3M), a manufacturer of badges which plaintiffs claimed inaccurately registered the level of exposure to the chemical; plaintiffs also claimed 3M was a member of a trade association "through which the conspiratorial conduct took place."

Plaintiffs sought punitive damages against all defendants under article 2315.3, Louisiana's punitive damage law which was repealed in 1996. The non-employer defendants filed motions for partial summary judgment arguing that they could not be liable for punitive damages because they themselves were not physically involved in the "storing, handling, or transportation" of the chemical (required before 2315.3 liability can attach) which allegedly caused the death of the two men. 3M further pointed out that it did not even manufacture vinyl chloride. The trial court granted the motion and an appeal was taken to the Third Circuit.

The Third Circuit in a split opinion reversed the trial court, reinstating the claims for punitive damages and holding that "exemplary damages may be assessed against the non-employer defendants for their individual involvement in events integrally related to the storage, handling, or transportation of hazardous or toxic substances in violation of La. Civ. Code art. 2315.3...." The court relied in part on the law of conspiracy, noting that one who is injured through a conspiracy has a right of action against all of the conspirators.

The non-employer defendants contended that even if the conspiracy allegations of the plaintiffs were proven, the most they could be found liable for was failure to warn which does not equate to "storage, handling, or transportation" of a hazardous substance. The Third Circuit rejected this reasoning, relying upon the Fourth Circuit opinion in *In re New Orleans Train Car Fire Litigation,* 95-2710 (La.App. 4Cir. 3/20/96), 671 So.2d 540 , *writ denied,* 675 So.2d 1120 and 1121 (La. 1996), *cert. denied,* 519 U.S. 1009, 117 S.Ct. 512, 136 L.Ed.2d 402 (1996). In that case the Fourth Circuit stated that "nothing in the express language of the statute requires a finding that a person or entity be physically involved with the hazardous substance at the time the incident occurs as a prerequisite to liability."

The Third Circuit found that the allegations against the non-employer defendants were not distantly related to the activities of storage, handling, or transportation characterizing the allegations as that "these defendants deliberately and with forethought took definitive steps to conceal the danger posed by vinyl chloride and acted in concert with [the employer] and others to deliberately and consciously influence the manner in which vinyl chloride was ‘handled, stored, and transported'...." The court thus ruled that "It is the ‘series of events related' to the handling, storage, and transportation of the vinyl chloride plaintiffs alleged occurred in this case that we find potentially subjects the non-employer defendants to liability under La. Civ. Code art. 2315.3, if plaintiffs can show their conspiratorial conduct was in wanton and reckless disregard for public safety and caused the injuries suffered by Landon and Ross."

Throwing a small bone to the defendants, the Third Circuit conceded that the solidary liability for compensatory damages imposed upon conspirators by article 2324 would not flow over to punitive damages. Rather, punitives would have to be individually assessed against each conspirator based on their individual culpability.

Judge Amy wrote the dissenting opinion, joined in by Judge Decuir. He narrowed the issue to "whether, even assuming the allegations of conspiracy are proven, can conspiracy, alone, be a sufficient route for recovery of punitive damages under Article 2315.3." Judge Amy found nothing in the petition's allegations to suggest that any of the non-employer defendants directly handled, stored, or transported any hazardous product in connection with the deaths of the plaintiffs. He expressed his view that punitive damages cannot be extended to those who are subject to liability for compensatory damages under conspiracy alone. He noted that the conspiracy article (2324(A)) states that all conspirators are liable for damages "caused by such act", but pointed out that punitive damages "are not caused at all" but are rather a punishment. He also invoked the legal maxim that penalty statutes are to be strictly construed.

This case stridently illustrates that the punitive damage statute continues to plague product manufacturers six years after its repeal. Allegations of conspiracy are routinely made by plaintiffs in toxic tort lawsuits (most notably in asbestos cases). If this case stands, these allegations are destined to become even more common. Astute plaintiff attorneys are well aware of the difficulty of proving intentional tort claims against employers (which is done to avoid the worker's compensation bar). Now, by alleging a conspiracy, plaintiffs may be able to tie product manufacturers, heretofore protected from punitive damage liability, into punitive damages, at least in theory. Even the threat of punitive damages is likely to affect settlement. We expect defendants will seek review by the Supreme Court of this significant case and will follow the issue in this E*Zine.

- *Madeleine Fischer*

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Manufacturers' Second Removal of Tobacco Claim Upheld

Green v. R. J. Reynolds Tobacco Company,
274 F.3d 263 (5th Cir. 12/06/01)

The survivors of a cigarette smoker brought a wrongful death action in Texas state court against several tobacco manufacturers and a grocer, which was a forum defendant. The defendants removed the case on the basis of diversity jurisdiction. The district court remanded based on the presence of the forum defendant and rejected the defendants' argument that grocer had been fraudulently joined. The defendants contended that the Texas Products Liability Act precluded all claims against the grocer and alternatively that the Federal Cigarette Labeling and Advertising Act preempted application of state law.

Shortly after the remand, the Fifth Circuit decided *Sanchez v. Liggett & Myers, Inc.,* 187 F.3d 486 (5th Cir. 1999), in which Reynolds and others were defendants. *Sanchez* held that the Texas Products Liability Act abrogated an earlier decision of the Texas Supreme Court which allowed state law claims of the type asserted against the grocer. *Sanchez* also held that the federal Labeling Act preempted almost all claims against tobacco manufacturers. In addition to *Sanchez,* the defendants developed evidence that the deceased lived in Houston until his death in 1997 and proffered an affidavit from an employee of the grocery confirming that the store had no locations in Houston until 1998. Defendants also contended that at most the grocery could be liable for the last nine years' of the deceased smoking and, standing alone, this nine year period was not sufficient to cause his death.

The defendants removed for a second time on the basis of the *Sanchez* decision and the newly discovered evidence. The district court refused to remand the case this time and instead dismissed the plaintiffs' lawsuit for failure to state a claim. The Fifth Circuit affirmed in a *per curiam* opinion by Judges Jolly, Smith and Wiener. The court addressed the novel issue of whether the *Sanchez* decision constituted a valid basis for the second removal under 28 U.S.C. § 1446(b).

Section 1446(b) allows removal within 30 days of receipt by the defendant "through service or otherwise, of a copy of an amending pleading, motion, order, or other paper" from which it appears the case is or has become removable. The Court determined that the *Sanchez* decision constituted an "order" within the meaning of § 1446(b). This decision properly served as a basis for the second removal petition because it involved some of the same defendants, a similar factual situation, and a similar legal conclusion. The Fifth Circuit followed the Third Circuit's decision in *Doe v. American Red Cross,* 14 F.3d 196 (3d Cir. 1993).

Following *Sanchez,* the Court went on to affirm the district court's dismissal of plaintiffs' petition for failure to state a claim. The Court noted that the Texas Products Liability Act precluded all state law claims against tobacco manufacturers, except claims for manufacturing defects and breach of express warranty. Since the petition did not allege any manufacturing defect or breach of express warranty claims, dismissal was appropriate because the plaintiffs failed to plead the essential elements of their case.

- *Richard D. Bertram*

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Manual's Description of Air Bags May Support Breach of Express Warranty Claim

Caboni v. General Motors Corp.,
___ F.3d ___ (5th Cir. 1/2/02)

In a suit brought under the Louisiana Products Liability Act (LPLA), the Fifth Circuit holds that a statement in a truck's owner's manual that, "The air bag is designed to inflate in moderate to severe frontal crashes or near frontal crashes," may serve as the basis for a suit for breach of express warranty.

The district judge granted summary judgment in favor of the manufacturer holding that as a matter of law, the statement in the owner's manual was not an express warranty. The Fifth Circuit disagreed, citing the definition of "express warranty" in the LPLA and stating that: "a reasonable jury could find that the passage is a ‘representation' or ‘statement of alleged fact' about the air bag system that ‘represents' or ‘affirms' that the air bag will meet a ‘specified level of performance' . . . ."

In addition to the issue of whether the statement might be an express warranty, the court held that the plaintiff had presented enough evidence to survive the manufacturer's motion for summary judgment on three remaining factors necessary to sustain an express warranty claim. These additional factors are: 1) the plaintiff was induced to use the product because of the warranty; 2) the product failed to conform to the warranty; and 3) the plaintiff's damage was proximately caused because the express warranty was untrue.

This case provides an explication of what is needed to prove the relatively rarely used action for breach of express warranty under the LPLA. The LPLA provides the sole theories of liability available against product manufacturer under Louisiana law: defect in composition, defect in design, failure to warn, and breach of express warranty.

- *Madeleine Fischer*

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U.S. Fifth Circuit Rebuffs Louisiana "Diminished Value" Class Action Claims

Manguno v. Prudential Property and Casualty Ins. Co.,
___ F.3d ___ (5th Cir. 1/8/02)

Plaintiff, on behalf of a putative class, sought to recover from Prudential, the defendant insurer, the diminished value of her car after the insurer had paid for repairs following an accident. The case is notable not only for the Fifth Circuit's ruling that such damages are not recoverable under the standard insurance language, but also for its treatment of removal of the action from state to federal court.

The case was originally filed in state court with the plaintiff stipulating in the petition that the amount in controversy did not exceed $75,000 and that the plaintiffs were not seeking attorney fees under La. R.S. 22:658 (an insurance penalty statute). The Fifth Circuit found that the defendant had properly removed the case under diversity jurisdiction despite these allegations. The Fifth Circuit stated

that under Louisiana Code of Civil Procedure article 595, the aggregate attorney's fees sought for the entire class may be allocated to the class representative to determine jurisdictional amount. It was undisputed that the aggregate attorney's fees for the putative class would likely exceed $75,000. The court also found plaintiff's purported waiver of attorney's fees to be ineffective, noting that a state court could grant the relief even if the plaintiff did not demand it. The court disparaged the possibility of abusive manipulation by plaintiffs who plead damages below the jurisdictional amount to avoid federal jurisdiction, when they know the claim is actually worth more.

On the merits of the claim, the Fifth Circuit affirmed dismissal of the case. The court followed two Louisiana appeal courts which recently held that "repair or replace" policy language does not require the insurer to pay for diminished losses in value to a repaired vehicle. The court predicted that if faced with the question the Louisiana supreme Court "would also find that the 'repair or replace' language in Manguno's policy limits Prudential's liability to the cost of the actual and appropriate restoration of her car only, and it is not required to compensate her for the car's diminished value."

This case is indicative of an emerging trend in the Fifth Circuit to take jurisdiction over removed class actions and squelch attempts of plaintiffs who manipulate pleadings so as to remain in state court.

- *Madeleine Fischer*

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Summary Judgment for Tire Maker on Failure to Warn Claim

Gray v. Cannon,
2002 La.App LEXIS 48 (La. App. 5 Cir. 1/15/02)

In *Gray,* plaintiffs were injured when a recently purchased tire blew out, causing the plaintiffs' van to flip over several times. It was undisputed that the tire blew out because it was under-inflated. The plaintiffs asserted that the tire manufacturer was liable under the Louisiana Products Liability Act because it failed to warn of the danger of driving on an under-inflated tire. The tire manufacturer successfully argued that the manufacturer was entitled to summary judgment because the plaintiffs could not prove the alleged failure to warn was a "cause in fact" of the accident. None of the plaintiffs knew that the tire was under-inflated. "Under these circumstances, therefore, any failure to warn can't have played any part in causing the Gray's damage: an absence of warnings, unless it is coupled with the knowledge that would have called the warnings into play, was not 'reasonably connected' to the accident caused by the tire's eventual rupture."

- *Robert L. Walsh*

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Medical Monitoring Asbestos Class Action Revived

Edwards v. State,
2000-2420 (La.App. 1 Cir. 12/28/01), ___ So.2d ___

Workers who were exposed to asbestos and asbestos-containing products while working at southeast Louisiana State Hospital in Mandeville brought a class action seeking damages for medical monitoring. The trial court dismissed the case on an exception of no cause of action based upon the legislature's 1999 amendment to Civil Code article 2315 eliminating medical monitoring damages.

While this case was on appeal the Louisiana Supreme Court decided *Bourgeois v. A.P. Green Indus., Inc.,* 00-1528 (La. 4/3/01), 783 So.2d 1251 (See April 2001, vol. 4). In that case, generally referred to as *Bourgeois II,* the Supreme Court held that the 1999 amendments to 2315 could not be applied retroactively. On the basis of *Bourgeois II,* not surprisingly, the First Circuit reversed the judgment of the trial court, reviving the case for further proceedings at the trial court level.

- *Madeleine Fischer* back to top

District Court Refuses to Stay Nintendo Suit for Class Action

Benoit v. Nintendo of America, Inc.,
2002 WL 59416 (E.D.La. 1/14/02)

Plaintiff sued Nintendo alleging that her son suffered epileptic seizures as a result of playing Nintendo games. A similar suit filed in the Western District of Louisiana at about the same time seeks certification of a Louisiana personal injury class and a national consumer class. *Martin v. Nintendo of America, Inc.* District Judge Sarah Vance denied plaintiff's motion to stay the instant case pending the outcome in *Martin,* holding that a stay at this time would be premature. We will continue to follow both this and the *Martin* case and will report any significant developments in this E*Zine.

- *Madeleine Fischer* back to top

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