JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

IN THIS ISSUE:

JUDGE FINDS DUMP TRUCK DESIGN DEFECTIVE DESPITE JURY VERDICT OF NO LIABILITY

***Domingue v. Excalibar Minerals of Louisiana, LLC*, 2005-1018 (La.App. 3 Cir. 7/26/06), ___ So.2d ____**

On June 14, 2000, Russell Domingue was killed while stockpiling barite ore at a mine site operated by Excalibar Minerals of Louisiana, L.L.C., located at the Port of Iberia. Domingue, Charles Judice, and Brent Gonsoulin, were all employees of M. Matt Durand, Inc. (MMD), a contractor hired to off-load the ore from a barge and transport it to a stockpile. Judice and Gonsoulin were operating Cameco Industries, Inc. dump trucks (ADTs) to transport the ore, and Domingue built up the ore pile with a bulldozer. Judice and Gonsoulin's ADTs would make several trips, passing each other on the way to and from the barge and the stockpile. Gonsoulin, who was new to the job, had trouble dumping a large load of ore. Domingue, an experienced ADT operator, got off the bulldozer and walked over to Gonsoulin's ADT to advise him how to dump the heavy load. While Domingue and Gonsoulin were talking, Judice continued to dump another load onto the stockpile. As he finished dumping his load, he turned his truck away from the pile and started to pull forward, when he accidentally ran over and killed Domingue. Domingue's widow and children brought suit, and the jury found MMD, the employer, 60% at fault; Domingue, the decedent, 35% at fault, and Judice, the co-employee, 5% at fault. The jury absolved Cameco, manufacturer of the ADT, of any liability. Upon plaintiffs' motion for a judgment notwithstanding the verdict, however, the trial judge reallocated fault and, among other things, found Cameco to be 30% at fault. Cameco appealed the judgment, and the appellate court affirmed.

To take a verdict away from a jury, the trial judge must find the evidence to be so strong and overwhelming that reasonable persons could not have found otherwise. Here, the trial judge found that plaintiffs' expert testimony overwhelmingly demonstrated that a blind spot on the Cameco ADT was the proximate cause of Domingue's death. This design defect rendered a driver unable to see, at all, a person of Domingue's height in the accident location. The trial judge also determined that the blind spot was unnecessary to the ADT's function and could

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

have been easily modified at minimal cost. Although Cameco's expert testimony and evidence implicated both the decedent and his co-employee, Gonsoulin, the trial judge found that their testimony did not exonerate Cameco. Though the appellate court affirmed, two members of the panel dissented and found the evidence offered by both parties to be highly controverted and subject to more than one conclusion. Importantly, this case demonstrates that even where a defendant manufacturer proves to the jury that no design defect existed, that verdict is still vulnerable, and a trial judge may enter a judgment notwithstanding the verdict where he disagrees and finds the verdict contrary to the great weight of the evidence.

—*Sarah B. Belter*

FLEXPIPE PART MANUFACTURER PARTIALLY LIMITS CLAIMS THAT ITS PIPE LEAKED

Brookshire Brothers Holding, Inc. v. Total Containment, Inc., 2006 WL 2037383 (W.D. La. 7/13/06)

Brookshire Brothers, an owner of retail grocery stores that also sell gas, filed suit against the vendors and manufacturers of flexible underground pipe it purchased to convey the gas from its underground storage tanks to the pumps. Brookshire Brothers' claims were based upon alleged defects in the pipe, which resulted in underground gas leaks. Defendant Dayco, who characterized itself as a component part manufacturer, moved for summary judgment on two issues: 1) that Brookshire Brothers' claims were time barred, and 2) that Brookshire Brothers had no legal basis for recovery against Dayco in redhibition or for breach of implied warranty because the necessary vendor-vendee relationship did not exist.

After determining that Louisiana law applied, the court made quick work of the statute of limitations issue. Louisiana law provides that a cause of action which sounds in tort is subject to a one year prescriptive period, or statute of limitations. The undisputed evidence showed that Brookshire Brothers was aware of leaks in the pipe as far back as 1994, and, certainly, as of 2000. Brookshire Brothers filed its suit in 2003. Brookshire Brothers argued that it relied upon statements made by certain other defendants that may have somehow "tolled" the statute of limitations, but the court found that it was "not legally entitled" to rely upon any representations by other parties to affect the liability of Dayco. Given the undisputed facts, the court found that all claims made prior to one year from filing of suit were time-barred.

Next, the court considered Dayco's assertion that because there was no vendor/vendee relationship between it and Brookshire Brothers, there could be no redhibition claim against it. Preliminarily, the court noted that Texas law would apply to those injuries that occurred in Texas, and Louisiana law would apply to those injuries that occurred in Louisiana. For the purposes of the pending summary judgment motion, the court applied its ruling only to the injuries governed by

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

Louisiana law. Having made that determination, the court looked to Louisiana's law. In Louisiana, redhibition refers to an implied warranty from a seller to a buyer against defects which render a thing sold unfit for its purpose. The warranty is owed by each of the multiple sellers in a chain of sales, as well as by manufacturers of a product. Thus, a vendor/vendee relationship is not necessary. Rather, Brookshire Brothers needed only to prove that Dayco was either the seller or manufacturer of the pipe. After reviewing the contentions of the parties, the court concluded that there was sufficient evidence presented to create a genuine issue of material fact as to whether or not Dayco was a "manufacturer" who could be held liable in redhibition. Accordingly, it denied Dayco's motion on that issue.

At the end of the day Dayco won one and lost one. All claims for injuries occurring prior to one year before Dayco filed suit were dismissed, but Dayco remained potentially liable to Brookshire with respect to its redhibition/breach of implied warranty claims.

—*Emily E. Eagan*

PARAPLEGIC'S CASE AGAINST COTTON PICKER MAKER WILL REMAIN IN FEDERAL COURT

***Carter v. CNH America, L.L.C.*, 2006 WL 2274436 (W.D. La. 8/7/06)**

Plaintiff, Bruce Carter, was rendered a paraplegic when he was crushed beneath the wheels of a cotton picker designed and manufactured by CNH America, L.L.C. ("CNH"). The accident occurred when Carter went underneath the cotton picker to clean the electronic monitoring lenses in the interior of an air conveyor chute. The operator of the cotton picker climbed down from the machine, but left the engine running and went to check on another piece of equipment. When the operator returned about fifteen minutes later, he climbed back onto the cotton picker and engaged it without first checking to be sure that Carter was no longer underneath. As a result, Carter was crushed under the front wheels.

Carter filed the suit in state court, but CNH removed the matter to federal court on the basis of diversity jurisdiction. Carter then amended to joined Scott Tractor Company ("Scott") as an additional defendant and filed a motion to remand the case to state court arguing that the addition of Scott, a Louisiana entity, destroyed complete diversity of the parties, depriving the Court of subject matter jurisdiction.

CNH opposed the motion arguing that Carter fraudulently joined Scott in an attempt to defeat diversity jurisdiction. To defeat the plaintiff's motion to remand, CNH had to show the court facts that established that plaintiffs could not maintain a cause of action against Scott as a matter of Louisiana state law.

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

Plaintiff's sole theory of recovery against Scott rested on an alleged directive made by Scott to the operator of the cotton picker regarding the operation of the equipment. Plaintiff alleged that Scott directed the operator to refrain from shutting down or otherwise stopping the engine during use and that this directive contributed to the injuries suffered by Carter.

In opposition, CNH provided deposition testimony in which the operator stated that his usual practice was to leave the cotton picker running while cleaning the lenses or whenever he got off of the cotton picker for brief periods of time. CNH argued that, in light of this testimony, plaintiff had no evidence to support the element of causation in the negligence claim against Scott.

Magistrate Karen Hayes agreed with CNH. Finding no evidence that would support recovery against Scott, she denied plaintiff's motion to remand, and the case remained in federal court.

—*Michelle D. Craig*

EXPERT TESTIMONY IN SOCKET ADAPTOR CASE LIMITED TO METALLURGY & FAILURE ANALYSIS

***Watson v. Snap-On Tools, Inc.*, 2006 WL 2114558 (W.D.La. 7/26/06)**

James Watson suffered personal injuries during a fall, which he alleged was precipitated by the failure of a ¾ inch to ½ inch socket adaptor that Watson was using while repairing an engine. He sued the manufacturer of the socket adaptor, Snap-On Tools ("Snap-On"). (See our previous article on this case *SOCKET ADAPTOR MAKER MAY BE LIABLE FOR "CONSTRUCTION DEFECT" REGARDLESS OF SPECS* appearing in our July 2006 issue.)

Watson alleged that the socket adaptor was unreasonably dangerous due to its construction or composition. Watson claimed that at the time the socket adaptor left Snap-On's control, it deviated in a material way from Snap-On's specifications or performance standards for Snap-On's socket adaptors or from otherwise identical products manufactured by Snap-On. Snap-On responded by alleging that the socket adaptor was initially cracked when it was improperly used by the buyer. Both parties proffered expert testimony supporting their version of events. As reported in our July issue, the court previously denied Snap-On's motion for summary judgment.

Here, Snap-On moved the court to exclude the testimony of Watson's expert, Dr. Thomas C. Shelton. Snap-On argued that Dr. Shelton conceded that he had no expertise in the manufacture of adaptors and he was unfamiliar with the manufacturing process of the product. While acknowledging Dr. Shelton's expertise in the field of metallurgical engineering, Snap-On argued that the product characteristic Dr. Shelton had identified as a manufacturing defect was actually a natural and expected result of the manufacturing process. Snap-On further argued

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

that Dr. Shelton's opinion was subjective, unreliable, and neither relevant nor helpful to the jury because it was not based on any deviation from the manufacturer's specifications or performance standards as required by La. R.S. § 9:2800.55. The court observed that the party offering expert testimony need not prove the testimony is correct, but must establish by a preponderance of the evidence that the testimony is reliable. The trial court must assess whether the reasoning or the methodology supporting the expert's testimony is valid. Expert testimony based solely on subjective belief or unsupported speculation should be excluded. Federal Rule of Evidence 702 expressly contemplates that an expert may be qualified on the basis of experience.

The court noted that Dr. Shelton had an extensive resume in the field of metallurgy and failure analysis. Dr. Shelton used widely recognized and accepted methods of analyzing the socket adaptor and its failure and performed many tests to determine why the socket adaptor failed. Considering all those factors, the court found that within these fields, Dr. Shelton's testimony was based on specialized knowledge, training, experience, and firsthand observation, and was supported by solid evidence in the scientific community. The court also found that Dr. Shelton's testimony would assist the trier of fact to understand the evidence or to determine facts relating to metallurgy and failure analysis.

The court ruled, however, that because Dr. Shelton was not an expert in the manufacturing process for the adaptor at issue, he would be barred from testifying as to any problems in that process. Accordingly, Dr. Shelton's testimony was limited to the fields of metallurgy and failure analysis.

—*Don A. Rouzan*

SPECULATIVE SCENARIO INSUFFICIENT AS EXPERT OPINION UNDER *DAUBERT*

Johnston v. General Electric Co., 2005 WL 2037384 (E.D. La. 7/18/06)

Plaintiff sued General Electric under the Louisiana Products Liability Act alleging that he sustained an electrical burn from a stove manufactured by General Electric, which he claimed was defective. In support of his claim, Plaintiff intended to introduce the opinions of an electrical engineering expert, Frederick M. Brooks. General Electric filed a *Daubert* motion in limine to exclude the opinions of Brooks as irrelevant, unreliable and otherwise inadmissible. According to General Electric, Brooks did little more than speculate as to the possible cause of the alleged accident. Unable to find any anomaly in the stove's electrical system, Brooks attempted to reconstruct the accident, and set forth several scenarios that could have resulted in injury to the plaintiff. According to General Electric, Brooks' opinion was based upon a fictitious, imagined set of facts, and, therefore, was not the product of the application of facts to any scientific theory, as required under *Daubert*. In other

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

words, Brooks' opinion that the stove was defective did not rest upon what *did* happen, but rather what *could* have happened.

In response, the plaintiff asked for more time for Brooks to complete testing and supplement his report, which the trial judge, Judge Carl Barbier, granted. However, the Plaintiff ultimately added nothing new to his opposition, and, not surprisingly, General Electric re-urged its earlier motion.

Judge Barbier found that oral argument was not necessary, and granted General Electric's motion. There were two bases for his ruling. First, because the plaintiff's original opposition was, for the most part, premised on the proposition that more time was needed for additional testing, and no supplemental information was ever provided to the court, there was little, if any, actual opposition to General Electric's motion. Second, and more substantively, Judge Barbier concluded that Brooks' opinions were not based on any application of fact to scientific or engineering principles, and, accordingly, did not meet the *Daubert* test. Although the opinion does not express the thought, Judge Barbier's description of the scenario set forth by plaintiff's expert Brooks, suggests that it was simply too full of "may haves" to be considered reliable. That is, it was much more of an imagined scenario than a scenario that appeared likely based upon the available evidence. In this case, such speculation did not meet the *Daubert* test for reliability, and the Plaintiff found himself without an expert opinion.

—*Emily E. Eagan*

JONES WALKER

E*ZINES
September 2006 Vol. 68

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

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

Products Liability Practice Group

Allgood, Davis B.
Anseman, III, Norman E.
Balart, L. Etienne
Belter, Sarah B.
Casey, Jr., Thomas Alcade
Collins, Donald O.
Duvieilh, John L.
Eagan, Emily Elizabeth
Eitel, Nan Roberts
Fischer, Madeleine
Gary, Jr., Leon
Geary, Covert J.
Gomila, John G.
Hurley, Grady S.
Jenkins, R. Scott
Joyce, William J.
Lowenthal, Jr., Joseph J.
Meyer, Conrad
Nosewicz, Thomas M.
Ourso, III, A. Justin
Quirk, Aimee M.
Radlauer, David G.
Schuette, William L.
Tillery, Jefferson R.
Tyler, Richard J.
Veters, Patrick J.
Walsh, Robert Louis
Windhorst, Judith V.
Winters, Amy M.