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LOUISIANA FIFTH CIRCUIT DENIES CLASS CERTIFICATION IN ASBESTOS MEDICAL MONITORING CASE

Bourgeois v. A.P. Green Industries, Inc., 2006-0087 (La.App. 5 Cir. 7/28/06)

On Friday, the Louisiana Fifth Circuit Court of Appeals ruled that trial judge Robert Burns was correct in refusing to certify a class of all Avondale Shipyard employees, significantly exposed to asbestos during pre-1976 employment at Avondale, seeking medical monitoring.

The *Bourgeois* case was filed in 1996 and has been the subject of various appellate rulings, including most importantly the Louisiana Supreme Court's decision in *Bourgeois v. A.P. Green Indus., Inc.*, 1997-3188 (La. 7/8/98), 716 So.2d 355 (*Bourgeois I*). In *Bourgeois I* the Louisiana Supreme Court recognized the existence under Louisiana law of a cause of action for regular medical monitoring for persons who had been exposed to hazardous substances but had no current manifest physical injury. The Louisiana Legislature attempted to legislatively overrule *Bourgeois I* by amending article 2315 of the Civil Code to include the following language: "Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease." However, in a subsequent opinion, the Louisiana Supreme Court held that this amendment could not be applied retroactively to cases that had arisen prior to the amendment's effective date of July 9, 1999. *Bourgeois v. A.P. Green Indus., Inc.*, 2000-1528 (La. 4/3/01), 783 So.2d 1251 (*Bourgeois II*).

After several more appellate ventures, the plaintiffs tried their assertion that their medical monitoring case should proceed as a class action at a certification hearing held in July 2004. After considering extensive briefs and hearing oral argument, trial judge Robert Burns denied class certification. In the current opinion, the Fifth Circuit agreed with Judge Burns and affirmed his denial of class certification.

In a class action, class representatives with typical claims are allowed to sue on behalf of a class of similarly situated people. Because the procedure departs radically from traditional trial procedure in which each plaintiff must present his claim individually, only when certain requirements are satisfied may the case proceed as a class action. Here, the Fifth Circuit agreed with Judge Burns that several important class action prerequisites were not met.

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First, the Fifth Circuit found that plaintiffs had not proved that common issues predominated over individual ones. According to the doctors who testified at the class certification hearing, in order to determine whether any particular individual had been significantly exposed to asbestos and/or satisfied the *Bourgeois I* criteria to be entitled to medical monitoring, the circumstances of each employee's working environment would have to be examined. Because of the multiplicity of individual issues that would have to be determined, a trial involving only class representatives would not properly reflect the other class members claims.

Next, the Fifth Circuit found that the proposed class representatives were neither typical nor adequate. None of the representatives worked at Avondale before 1952, the critical date for assertion of tort claims against Avondale, one of the primary defendants. Further, the Fifth Circuit noted that one of the class representatives, the first named plaintiff Robert Bourgeois, did not appear at the class certification hearing; there was no competent evidence as to why he did not appear; and the trial judge found that this indicated a lack of interest in the case by Mr. Bourgeois.

Finally, the Fifth Circuit held that the class definition proposed by plaintiffs was too vague – it would be difficult for ex-workers to determine whether they were even members of the class due to the inclusion in the proposed definition of the nebulous term "significant exposure," and it would be difficult to determine who would be bound by the judgment if the case were tried as a class. The Fifth Circuit found that an adequate class definition, a requirement recently codified in an amendment to the class action code articles, was always an implied requirement for class certification and had been jurisprudentially developed and in existence prior to the formal amendment.

We will keep our readers advised should this important case be reviewed by the Louisiana Supreme Court.

—*Madeleine Fischer*

LOUISIANA HIGH COURT SAYS LOSS OF ENJOYMENT OF LIFE AND MENTAL ANGUISH AREN'T THE SAME

McGee v. A C and S, Inc., 2005-1036 (La. 7/10/06), ___ So.2d ____

In a ruling destined to affect all personal injury and death cases, the Louisiana Supreme Court has held that loss of enjoyment of life is recoverable as a separate element of general damages that may be included as a separate item on the jury verdict form. The ruling only applies to the direct victim of the tort, however. Family members of the victim who sue for their own loss of consortium or wrongful death damages, are not entitled to a separate recovery for "loss of enjoyment of life."

Conventional wisdom among plaintiff and defense attorneys is that the more slots on a jury verdict form a jury is asked to fill in dollar amounts, the higher the award is likely to be. For this reason, defense counsel normally ask for as few lines as possible and plaintiff counsel usually ask for as many lines as possible.

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Before this decision was rendered, Louisiana's intermediate courts of appeal were split on this issue. The Fourth Circuit had held that having one line for an award of loss of enjoyment of life and another for mental anguish resulted in a double award because loss of enjoyment of life is part and parcel of mental anguish. The other circuits held that the two items were different, and that including two separate lines in a jury verdict form did not risk an unduly enhanced award.

Here, the Supreme Court sided with the majority of the circuit courts. Justice Kimball, writing for the majority, reasoned that alterations to a person's life style—loss of enjoyment of life—are different from mental anguish, and that two people with different life styles who suffer the same injury will have different losses. The majority did rule, however, that family members of the injured person cannot recover for "loss of enjoyment of life" because claims of family members for loss of consortium and loss of the relationship through the death of the tort victim already encompass loss of enjoyment of life.

Justice Weimer, joined by Justice Victory, dissented in the belief that two separate lines on the jury verdict form lead to duplicative damages. He said, "I find that a damage award for mental pain and suffering can adequately compensate for hedonic damages. The award for pain compensates an individual for no longer having a physical or mental condition that formerly was free of pain. The award for loss of enjoyment of life compensates an individual for the absence of a physical or mental activity that formerly was a part of his or her lifestyle. Thus, 'pain' and 'pleasure' are merely two sides of the same coin, making an award for pain the equivalent of an award for loss of pleasure. In the terms of a jury verdict that makes specific awards for pain and suffering and loss of enjoyment of life, the injured party is potentially compensated for the same deprivation twice." Justice Weimer proposed the practical solution of allowing one line on the verdict form for *either* mental anguish *or* loss of enjoyment of life, or alternatively a single line for "mental anguish *and* loss of enjoyment of life." This ruling by the Louisiana Supreme Court is likely to lead to higher damage awards in personal injury and death cases.

—*Madeleine Fischer*

LOUISIANA SUPREME COURT: WHEN CASE TRIED WITHOUT ALL DEFENDANTS, JUDGMENT IS NOT FINAL

Strother v. Continental Cas. Co., 2006-0302 (La. 6/2/06), ___ So.2d ____

Complex lawsuits often involve the claims of one or more plaintiffs against multiple unrelated defendants. In such cases, it is common for the court to issue judgments specific to a certain defendant or group of defendants. This situation often raises serious questions concerning whether the ruling is immediately appealable.

Louisiana Code of Civil Procedure article 1915 recognizes two types of judgments: the final judgment which is immediately appealable and the partial final judgment which is appealable only if the trial court certifies it as immediately appealable. Once a final judgment is rendered, the trial court cannot make substantive changes to the

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judgment unless a timely motion for a new trial, additur or remittur is filed. However, a partial final judgment that is not certified as immediately appealable is subject to substantive modification by the trial court until a subsequent final judgment is rendered.

In *Strother v. Continental Casualty Company*, 2006-0302 (La. 6/2/06), the Louisiana Supreme Court was required to determine the proper classification of a judgment affecting less than all of the defendants in the case. Plaintiff initially sued five defendants. Prior to trial, the claims against one defendant were severed. After a jury trial, a judgment was signed regarding plaintiff's claims against the remaining four defendants. Subsequently, the judgment was amended and designated as immediately appealable. Plaintiff timely appealed the amended judgment.
The Fourth Circuit Court of Appeal held that the initial judgment was a final judgment, that the amendments were substantive and, therefore, the amended judgment was null. The court dismissed plaintiff's appeal because it was not timely filed with regard to the first judgment.

The Louisiana Supreme Court disagreed with the appellate court's characterization of the initial judgment. The court concluded that because the claims against the severed defendant were not addressed in the initial judgment, the decision adjudicated fewer than all claims or the rights and liabilities of all the parties and was, therefore, a partial final judgment, La. Code Civ. Pro. art. 1915(B)(2). As a partial final judgment not designated as immediately appealable, it was subject to modification by the trial court; thus, the amended judgment was not null. The Court concluded that the plaintiff had timely appealed from the amended judgment and reversed the appellate decision.

In toxic tort cases and other similar litigation involving numerous defendants, plaintiffs seldom if ever proceed to trial against all of the defendants. Generally, this is due to settlements; however, increasingly plaintiffs are strategically severing defendants for various reasons. They may be unprepared to proceed to trial against a particular defendant, may have agreed to settle a case but have not finalized the settlement, may want to avoid having a trial continued on the motion of a late added defendant or may be negotiating a settlement of several cases with a particular defendant. In all of these situations, any judgment rendered at the end of trial would be a partial final judgment and not appealable unless designated as such by the trial court.

—*William L. Schuette*

PARENT COMPANY DOES NOT QUALIFY AS A MANUFACTURER UNDER THE LPLA

Andry v. Murphy Oil, U.S.A., Inc., 2005-0126 (La.App. 4 Cir. 6/14/06), __ So.2d ___

On July 27, 1995, after a lightning strike and resulting power outage, a ROSE heater located at the Murphy Oil Corporation ("Murphy") refinery in Meraux, Louisiana, exploded and burned during a re-ignition attempt after power was restored. A subsequent investigation determined that a defective swing check valve malfunctioned and improperly allowed flammable pentane gas to backflow into a steam line that Murphy used to purge the ROSE heater during the relighting process. Several class action lawsuits, consisting of persons claiming to have suffered damages from the explosion

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and the resulting fire, were filed against Murphy. Shortly before the class action trial, Murphy settled the class claims for $8.8 million. Murphy funded $7.3 million of the settlement, while the insurers of the bankrupt TWC, manufacturer of the swing check valve, paid the balance. As part of the settlement, Murphy received an assignment of the plaintiffs' claims.

After the class action lawsuit was filed, Murphy filed a cross-claim against Entergy Louisiana Inc. ("Entergy") for improperly restoring power to the refinery after the lightning strike. Murphy also filed third-party petitions against: 1) The Walworth Company ("TWC"), as manufacturer of the swing check valve, alleging a design change and mislabeling of the swing check valve; 2) Arilan S.A. de C.V. ("Arilan"), the parent company of TWC; 3) Empresas Lanzagorta, Arilan's majority shareholder; and 4) Atlantic Richfield Company ("ARCO"), the former indirect minority shareholder of Arilan. All third-party petitions asserted claims under Louisiana's Products Liability Act ("LPLA"). The trial court found Entergy 40% at fault, TWC 40% at fault, and Murphy 20% at fault. TWC was not cast in judgment because it had received a release from liability as a result of the settlement with regard to the class action plaintiffs. The court also found that Murphy did not meet its burden of proof required to prevail against ARCO.

Murphy appealed the dismissal of its claim against ARCO, arguing, among other things, that ARCO was liable because of a design change in the valve and its subsequent labeling. Murphy maintained that the swing check valve was manufactured in Italy by an alien manufacturer and distributed for sale in the United States by TWC. The swing check valve was originally designed so that, without modification, it could be used in both horizontal and vertical lines. Murphy claimed that in 1977, the alien manufacturer changed the design of the swing check valve so that it was suitable for use only in a horizontal line. Notice of the design change was allegedly given to an executive of Anaconda, another subsidiary of ARCO. Despite the design change, Murphy claims that catalogs published by TWC continued to warrant that the valve in question could be used either vertically or horizontally. Louisiana's Fourth Circuit Court of Appeal rejected Murphy's argument that ARCO was liable for publishing the catalogs that allegedly misrepresented the swing check valve design change. This argument was rejected because the catalogs that Murphy submitted into evidence were published in 1972, five years prior to the design change, and in 1989, three years after ARCO's entire indirect interest in TWC was terminated. Thus, the Fourth Circuit held, it was impossible for ARCO to have had any hand in publishing the allegedly incorrect catalogs.

The Fourth Circuit also rejected Murphy's argument that Anaconda and TWC intentionally mislabeled the valves it received from the alien manufacturer in order to mislead customers. After the explosion, remnants of a "Made in Italy" label was found on the swing check valve underneath a newer label, which offered vague language suggesting the swing check valve was made in the United States. The Fourth Circuit held that Murphy failed to introduce evidence that established Anaconda participated in, had knowledge of, or approved of the use of the new label.

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Murphy also argued that under the LPLA, ARCO was liable as a manufacturer. The trial court ruled, and the Fourth Circuit affirmed, that only TWC could be defined as a manufacturer under the LPLA because TWC was the importer of a product made by an alien manufacturer and sold the valves as its own, as evidenced by the label placed on them. Murphy further argued that ARCO could also be considered a manufacturer of the valve under La. R.S. 9:2800.53(1)(b) and/or (d) because the alien manufacturer gave notice of the valve's design change to an ARCO executive in 1977. However, in distinguishing *Cook v. United Container Machinery, Co.*, 1998-0120 (La.App. 5 Cir. 5/27/98), 712 So.2d 307, the case Murphy cited in support of its argument, the Fourth Circuit pointed out that the executive made aware of the design in *Cook* actually participated in designing the printing press that was the subject of that litigation. The executive's participation in the design of the printing press created a genuine issue of material fact, which the Fourth Circuit relied upon in reversing the trial court's granting of summary judgment. The Fourth Circuit distinguished the *Cook* case from *Murphy Oil* by stressing that ARCO had no hand in the design of the swing check valve, and thus ARCO could not be held liable under the statute.

—*Don A. Rouzan*

NO PUNITIVE DAMAGES AVAILABLE TO EX-SMOKER, SAYS LOUISIANA 3RD CIRCUIT

Badon v. R.J. Reynolds Tobacco Co., 1005-1048 (La.App. 3 Cir. 7/12/06), __ So.2d __

A unanimous panel of the Louisiana Third Circuit Court of Appeals has ruled that a woman who claimed to have contracted throat, larynx and vocal cord cancer from smoking cigarettes is not entitled to seek punitive damages or to seek damages under an "unreasonably dangerous *per se*" theory of recovery.

Plaintiff Carrie Badon filed suit against several cigarette manufacturers seeking compensation for her cancer. The tobacco companies filed several motions for summary judgment in the trial court. While the trial court did not grant all of their motions, the trial court did strike plaintiff's claim for punitive damages and also ruled that plaintiff would not be permitted to pursue the defendants under an "unreasonably dangerous *per se*" theory of liability. In this opinion, the Third Circuit affirmed both of these rulings.

Louisiana's punitive damage statute, now repealed but in effect during part of the time period during which Carrie Badon smoked, allowed punitive damages to be awarded in very limited situations. Under the former Civil Code article 2315.3, punitive damages were available, "if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances." The Third Circuit agreed with the trial court that the defendants' activities of manufacturing, designing and labeling of cigarettes did not constitute the "storage, handling, or transportation" of hazardous substances.

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The "unreasonably dangerous per se" theory of products liability was also based on old law—products liability law as it existed in Louisiana before enactment of the Louisiana Product Liability Act ("LPLA"). The LPLA bans the use of this theory presently, but part of the time period during which plaintiff smoked cigarettes occurred before the effective date of the LPLA.

Under the old "unreasonably dangerous per se" theory, a manufacturer could be liable based on the inherent characteristics of a product. A product was "unreasonably dangerous per se" if a judge or jury determined that its danger outweighed its benefits, regardless of how carefully it was designed or manufactured, and regardless of whether it labeled with proper warnings.

The Third Circuit agreed again with the trial court that applying the "unreasonably dangerous per se" theory would "have the effect of imposing a ban on the manufacture/sale of cigarettes where Congress has not enacted a ban." The court further explained: "[I]f Ms. Badon succeeds in proving the unreasonably dangerous per se character of cigarettes, she will have established a precedent for liability that cigarette manufacturers can avoid only by taking the product off the market. Thus, Ms. Badon will have effectively utilized Louisiana law to ban the sale of cigarettes in this state, in contravention of congressional policy foreclosing the removal of tobacco products from the market." The Third Circuit concluded that due to this conflict between state and federal law, the "unreasonably dangerous per se" theory could not be applied in this case.

The Badon case remains alive on other legal theories of liability and will eventually be tried in Cameron Parish.

—*Madeleine Fischer*

BURDEN OF PROOF AND LACK OF EVIDENCE DOOM PLAINTIFFS' PUNITIVE DAMAGES CLAIM

LeBlanc, v. Severan Trent Services, Inc., 2006 WL 1968865 (E.D. La. 7/6/06)

Plaintiff, James LeBlanc, a Louisiana citizen, was allegedly injured while working inside a bottle washing machine manufactured by defendants Severan and Universal Aqua Technologies, Inc. Mr. LeBlanc and the other plaintiffs sued, alleging that the washing machine was unreasonably dangerous under the Louisiana Product Liability Act. The plaintiffs took the somewhat unique position that they were entitled to punitive damages under the California Civil Code because the washing machine was manufactured in California. The defendants filed a motion for partial summary judgment on the issue.

In a brief opinion, Judge Mary Ann Vial Lemmon granted the defendants' motion. Both sides acknowledged that in a diversity case such as this one, the court must follow the choice-of-law rules of the forum state. In this instance, the applicable choice-of-law rule was article 3545 of the Louisiana Civil Code, which provides the choice-of-law rule for products liability cases. Article 3545 provides generally that Louisiana law will apply if the injured party lives in Louisiana, the injury occurred in Louisiana, and/or the product was manufactured or acquired in Louisiana. It was undisputed that

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Mr. LeBlanc sustained his injury and was domiciled in Louisiana. The article does, however, provide an exception in cases where neither the product that caused the injury nor any of defendant's products of the same type were made available in Louisiana "through ordinary commercial channels."

The plaintiffs argued that, since the washing machine was not available in Louisiana through ordinary commercial channels, California law should apply. The defendants argued that the plaintiffs had not met their burden of proof. As the comments to Article 3545 make clear, if a plaintiff chooses to use Article 3545 to his advantage, then the burden of proof rests with him. Specifically, the plaintiff, choosing to rely upon the exception to Article 3545 must prove that the defendant's products are not available through ordinary commercial channels. Here, Judge Lemmon found that the plaintiffs failed to meet their burden because the record contained no evidence that the defendants' products were not available in Louisiana through ordinary commercial channels. Accordingly, she granted the motion.

—*Emily E. Eagan*

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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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