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Parents Of Child Injured By Vaccine Can Sue In Fed. Court For Their Own Claims

Moss v. Merck & Co., ___ F.3d ___,
2004 WL 1814082 (5th Cir. 8/16/2004)

Plaintiffs, Scott and Janice Moss, the parents of a young child who allegedly developed autism as a result of receiving vaccines containing mercury, pursued state law tort claims for injuries they suffered as a result of their child's condition.

The defendants argued that plaintiffs' claims should be barred by the National Childhood Vaccine Injury Act of 1986. The Vaccine Act provides compensation to persons injured by vaccines, while ensuring that the nation's supply of vaccines is not unduly threatened by the costs and risks of tort litigation. The Vaccine Act does not apply to all vaccine-related lawsuits, however. It only applies to those brought against a "vaccine administrator or manufacturer."

In this case the district court granted a dismissal to defendants Merck & Company, Aventis Pasteur Inc., and Wyeth, Inc. (the "Vaccine Defendants") on the grounds that the Vaccine Act precluded the Mosses' pursuit of a tort remedy for a vaccine-related injury. Defendant, Eli Lilly & Company, the manufacturer of Thimerosal, the mercury-containing preservative used in several childhood vaccines, obtained a dismissal on the grounds that it too was a vaccine manufacturer entitled to the protection of the Vaccine Act. The plaintiffs appealed.

The Fifth Circuit reversed the district court's dismissal of Eli Lilly and the Vaccine Defendants. The appeals court found that because Thimerosal was a component of a vaccine and not a vaccine itself, Eli Lilly was not a manufacturer as defined by the Vaccine Act, and thus, was not protected by the act.

Additionally, the Vaccine Defendants argued that the Mosses' claims were preempted by the act because the suit evolved from the administration of a vaccine. However, the court determined that just as the Vaccine Act does not protect all defendants, it also does not apply to all tort suits having some connection to the administration of a vaccine. Rather, the restriction on filing tort claims applies only to those who have "sustained a vaccine-related injury or death."

Because the Mosses did not personally sustain a vaccine-related injury or death, the court held that the Vaccine Act's restrictions did not apply to them. Moreover, the court held that the Vaccine Act neither provided a mechanism for the Mosses' recovery on the state law claims, nor barred their right to pursue these remedies. Accordingly, the Vaccine Act did not preempt them from filing suit for their own damages against the Vaccine Defendants.

For an account of earlier conflicts in this case see our article in the September, 2002 E*Zine,

[SUIT AGAINST HOSPITAL FOR INJECTION OF ALLEGEDLY DEFECTIVE VACCINE HELD PRESCRIBED](#), our article in the January, 2003 E*Zine, [PARENT'S INDIVIDUAL REQUEST FOR DAMAGES BEYOND THE SCOPE OF THE VACCINE ACT](#) and our article in the July, 2003 E*Zine, [E.D. LA. HOLDS PLAINTIFFS NOT PREEMPTED BY VACCINE ACT FROM ASSERTING LPLA CLAIM AGAINST VACCINE PRESERVATIVE MANUFACTURER](#).

- [Michelle D. Craig](#)

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Eastern District Strikes Part Of Smoker's Family's Claim

Carter v. R.J. Reynolds Tobacco Co.,
2004 WL 1497770 (E.D. La. 7/1/04)

Judge Berrigan of Louisiana's Eastern District holds that the family of a deceased smoker was not entitled to pursue a claim for her pain and suffering during her lifetime, when the smoker knew for at least ten years before her death that her illness was caused by smoking, and knew even earlier than that that she was addicted to cigarettes.

Maurine Carter died on January 2, 2002, and one year later her spouse and children filed suit against two tobacco companies. The plaintiffs alleged that the defendants' cigarettes caused Ms. Carter to suffer from debilitating health conditions for over ten years before her death. The plaintiffs sued both for Ms. Carter's pain and suffering in the ten years preceding her death (the "survival" action) and for the damages they personally suffered as a result of Ms. Carter's death (the "wrongful death" action).

Louisiana allows the spouse and children of an injured person a time period of one year after the person's death to bring both a survival action and a wrongful death action. However, the deceased must have had a viable cause of action on the date of death for a survival action to pass to family members.

The tobacco company defendants sought partial summary judgment on the survival action. They argued that because more than one year had passed both since Ms. Carter had knowledge of her tobacco-related illness, and since Ms. Carter knew she was addicted to cigarettes, Ms. Carter's cause of action for her own pain and suffering expired long before her death. Because Ms. Carter herself brought no lawsuit during her lifetime, and her claim was time-barred when she died, there was no survival action in existence to pass to her family on the date of her death.

The plaintiffs, Ms. Carter's family, agreed that Ms. Carter knew that she suffered from tobacco-related illnesses for many years before her death. They also agreed that Ms. Carter knew she was addicted to cigarettes even earlier. However, they argued that because Ms. Carter continued to smoke up until the time of her death, the defendants had committed a "continuing tort" which did not abate until Ms. Carter smoked her last cigarette.

Judge Berrigan reviewed the requirements to prove a continuing tort under Louisiana law. Among other requirements, there must be continuous conduct by the defendant. No Louisiana court has applied the continuing tort doctrine in a tobacco-related product liability case. Neither has any other jurisdiction found the doctrine applicable. Courts from other states faced with similar arguments have held that the prescriptive period starts to run either from the time the plaintiff knew that he was addicted to cigarettes or from the time he was diagnosed with a tobacco-related illness.

Judge Berrigan concluded that plaintiffs' survival action had prescribed and the continuing tort doctrine was not applicable. "A plaintiff cannot eschew the prescriptive period by continuing to use a product that is harmful, knowing it to cause her injury. The decedent could have filed her own product liability claim much more than one year before her death – whether the period began to run earlier (at

the time of addiction) or later (at the time she was diagnosed with tobacco-related medical illnesses)... [T]he one year prescriptive period for torts had run and ... there is no survival claim for decedent's relatives to inherit."

- [*Madeleine Fischer*](#)

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Eastern District Grants Summary Judgment To Lawn Tractor Manufacturer

Gray v. Industrial Plant Maintenance, **2004 WL 1661209 (E.D.La. Jul. 23, 2004)**

LaMorrises Gray, a maintenance worker, was injured when, while cutting grass using a tractor with an accompanying belt mower, Gray dismounted the tractor to retrieve a trash bag. His right pant leg became caught in the tractor's spinning shaft and Gray sustained burns and a broken right leg.

Gray sued the tractor manufacturers alleging that the tractor was unreasonably dangerous in construction, composition, and design, and that it failed to carry an adequate warning. The Court ultimately granted defendants' motion for summary judgment.

Gray produced no evidence sufficient to show that the tractor's construction materially deviated from the manufacturer's specifications or performance standards. Gray entered no evidence into the record demonstrating the condition of the tractor when it first left the manufacturer's control; the manufacturer's specifications or performance standards; or, how and why the tractor deviated materially from the manufacturer's specifications or standards, or from identical products made by the same manufacturer. In fact, Gray had not been able to locate the tractor since the accident. Because of his lack of evidence, Gray failed to meet his burden of proof concerning the claim of dangerous construction or composition.

To demonstrate that a product is unreasonably dangerous in design, Plaintiff must make a threshold showing that a design deficiency existed at the time the tractor left the manufacturer's control. Thereafter, Plaintiff must (1) identify a specific alternative design that existed and was capable of preventing his injury; and (2) perform the requisite risk-utility analysis. An alternative design must be reasonably specific and not based on mere speculation.

There was no evidence in the record regarding the original design of the tractor or its component parts. Gray's alternative design, moreover, was not specific enough to be valid. Gray offered no drawing, specification, model, sample, calculation, photograph, or expert opinion on his alternative design. Further, Gray provided no evidence pursuant to the risk-utility analysis, such as the frequency and cost of similar-type accidents. Because Gray failed to propose a valid alternative design or to offer evidence concerning risk-utility, he failed to meet his burden of proof on the defective design claim.

The LPLA also requires that a manufacturer provide an adequate warning of the characteristic of a product that may cause damage. Again, Gray failed to produce any evidence supporting his inadequate warning claim. He admitted he did not know that an operating manual for the tractor existed. Gray, therefore, neither addressed the operating manual warnings nor offered any alternatives. Consequently, Gray's inadequate warning claim also failed.

Because Gray failed to meet his burden of proof to demonstrate the facts underlying his LPLA claims, no issue of material fact existed. Thus, defendants were entitled to summary judgment.

- [*Sarah B. Belter*](#)

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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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