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MANUFACTURERS NOW EXPOSED TO NONPECUNIARY DAMAGES UNDER REDHIBITION

***Aucoin v. Southern Quality Homes, LLC*, 07-1014 (La. 2/26/08); __So. 2d ____, 2008 WL 498668**

In 2001, Kelly Aucoin and his wife purchased a mobile home and land "to satisfy their desire to achieve the American dream." What resulted was an "American nightmare," and after experiencing numerous problems with their new home without successful repair, Aucoin sued Southern Quality Homes, the seller, and Dynasty Homes, the manufacturer, in Louisiana state court on various theories, including redhibition. The trial court held Southern Quality and Dynasty Homes solidarily liable for the entire purchase price of the home plus other damages. The Fourth Circuit Court of Appeals affirmed the trial court's ruling and Dynasty Homes filed a writ application with the Louisiana Supreme Court. While the Louisiana Supreme Court granted certiorari and held that the manufacturer, Dynasty Homes, was independently liable to Aucoin for the redhibitory defects existing at the time the mobile home was delivered, it was the Court's holding with respect to damages for "mental pain and suffering" that causes concern for manufacturers of a defective product.

"Redhibition" is a warranty against "redhibitory defects," which are defects or vices that render the thing sold "useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect." Here, the mobile home contained significant defects relating to the control of internal moisture, which, in the trial court's opinion, rendered the home useless. Significantly, where a redhibitory defect exists, the buyer may seek rescission of the sale and reimbursement of the purchase price.

Aucoin originally brought suit against Dynasty Homes under redhibition and the Louisiana Products Liability Act. However, at the beginning of trial, Aucoin voluntarily dismissed his claims under the latter. The distinction between recovery under the LPLA and redhibition, in this case, hinged upon recovery of damages for "mental pain and suffering," or nonpecuniary damages. The LPLA permits recovery of nonpecuniary damages for injuries caused by a product. Conversely, redhibition only permits recovery of these damages if the buyer can establish that (1) the buyer bought the product to gratify

a significant nonpecuniary interest, and (2) the seller or manufacturer either knew or should have known that failure to perform would cause nonpecuniary loss to the buyer.

The lower courts here awarded mental pain and suffering damages to Aucoin in the redhibition action, and Dynasty Homes argued that the lower courts erred in doing so. Dynasty Homes claimed that Aucoin had not provided sufficient evidence to satisfy the requirements for recovery of nonpecuniary damages. Dynasty Homes also argued that nonpecuniary damages were only available under the LPLA. While the Court held that the lower courts erred in awarding nonpecuniary damages, it did so on the basis that Aucoin failed to present evidence that Dynasty Homes "knew or should have known" that failure to provide a defect-free mobile home would cause significant mental pain and suffering.

The Court's holding presents a potential "nightmare" to manufacturers. Previously, courts drew a clear line of demarcation between recovery against a manufacturer under the LPLA, on the one hand, and under redhibition, on the other. *Aucoin* represents a significant departure from the guidelines set forth in the LPLA, which, by its definition of the word "damage," appears to reserve to redhibition the remedy of damage to the product itself and economic loss from loss of use of the product, while all other types of damages are assigned exclusively to the LPLA. This decision blurs that line. Indeed, this decision establishes the principle that a buyer may recover nonpecuniary damages from a manufacturer under redhibition, as well as the LPLA.

This decision has important practical implications. Under what circumstances would a manufacturer know, or when should it know, that an end-user intends to "gratify a significant nonpecuniary interest?" For instance, let us assume that Jane loves "fright movies" and purchases a DVD of a new scary movie. Jane is unaware of the fact that a defect occurred in the manufacturing process, and as her anticipation builds for the gory climax, a cute cartoon bunny appears on the screen. Jane is, of course, emotionally scarred. Is the manufacturer liable for nonpecuniary damages if Jane simply files a redhibition action? While this example is ridiculous, at best, it illustrates the seriousness of the problem presented by this decision. The Court provides no guidelines and blends two distinct legal theories of recovery into one.

Importantly, the majority's opinion exercises some restraint. The Court merely holds that a manufacturer may be liable for nonpecuniary damages under redhibition *if* the plaintiff can satisfy the requirements for such a recovery, *i.e.* that the manufacturer actually knew that the plaintiff sought to gratify a nonpecuniary interest by his purchase of the product. Where the Court blurs the line between redhibition and the LPLA, Justice Knoll, in dissent, does away with that line altogether. Justice Knoll felt that the lower courts were correct in awarding nonpecuniary damages. As manufacturers are presumed to act in bad faith, Justice Knoll asserted that this bad faith "is sufficient to prove the manufacturer intended, through his failure, to aggrieve the feelings of the purchaser." Thus, Justice Knoll's position might be viewed as establishing a presumption that manufacturers are liable for nonpecuniary damages in redhibition claims, thereby shifting the burden to manufacturers to prove that they did not and could not have known that the plaintiff intended "to gratify a significant nonpecuniary interest."

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The Louisiana Supreme Court's decision in *Aucoin* represents a significant deviation from the Civil Code provisions and jurisprudence concerning the relationship between redhibition and the LPLA. By blurring the previously-clear line between these two theories and by failing to establish particular guidelines, the Court made clear that Aucoin was not the only one to suffer a "nightmare." Significantly, this decision represents a potential "nightmare" for manufacturers, and one that is equally less guided.

– *Eric Michael Liddick*

HIGH COURT RULES DEVICE SPECIFIC PRE-MARKET APPROVAL PREEMPTS STATE LAW CLAIMS

***Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2/20/08)**

Medtronic, Inc. manufactures and markets a medical device called the Evergreen Balloon Catheter. Medical devices such as Medtronic's catheter are regulated by Congress through the Medical Device Amendments of 1976 (the "MDA"). The MDA created a complete regulatory scheme that "swept back some state obligations and imposed a regime of detailed federal oversight." The MDA includes an express preemption provision that preempts state claims that differ from or add to any requirements relating to the safety or effectiveness of the medical device.

The MDA regulatory regime establishes various levels of oversight for medical devices with the highest, most regulated level being devices placed in the Class III category. A Class III device may be grandfathered in if the device was sold before the MDA's effective date or if the device is "substantially equivalent" to another device exempt from the pre-market approval process.

Class III devices that are not grandfathered in must undergo a rigorous pre-market approval process. This process requires a manufacturer to submit, among other items, full reports of all studies and investigations of the device's safety and effectiveness that have been published or should reasonably be known to the applicant; a "full statement" of the device's "components, ingredients, and properties and of the principle or principles of operation;" "a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and, when relevant, packing and installation of, such device;" samples or device components required by the U.S. Food and Drug Administration; and a specimen of the proposed labeling. The FDA spends an average of 1200 hours per application and only grants pre-market approval if it finds there is a "reasonable assurance" of the device's "safety and effectiveness" after weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use. Once a device has received pre-market approval, the MDA forbids the manufacturer from making any changes in design specifications, manufacturing processes, labeling, or any other change that would affect safety or effectiveness without FDA permission.

Medtronic received Class III pre-market approval for the Evergreen Balloon Catheter in 1994. Subsequently, Medtronic made FDA-approved changes to its label in 1995

and 1996. The catheter's labeling stated that use was contraindicated for patients with diffuse or calcified stenoses, and warned that the catheter should not be inflated beyond its rated burst pressure of eight atmospheres.

In 1996, Charles Riegel suffered a heart attack and shortly thereafter underwent a coronary angioplasty. During the surgery, Riegel's doctor inserted the Evergreen Balloon Catheter into Riegel's artery in an attempt to dilate the artery. The doctor inflated the catheter five times to a pressure of ten atmospheres, two atmospheres greater than the warning provided. On the fifth inflation, the catheter ruptured, causing Riegel to develop a heart block. Because of this blockage, Riegel was placed on life support and underwent emergency coronary bypass surgery. Riegel and his wife brought this lawsuit against Medtronic alleging that the catheter was designed, labeled, and manufactured in a manner that violated New York common law, and the defects caused Riegel to suffer severe and permanent injuries. The district court held that the MDA preempted all of Riegel's state law claims. The Court of Appeals affirmed this decision and the plaintiffs appealed to the United States Supreme Court.

On appeal, Justice Scalia, writing for the majority of the Supreme Court, first determined whether the federal government had established requirements applicable to Medtronic's catheter. The Court began by reviewing its prior decision of *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996). The *Lohr* Court reviewed the applicability of the MDA's preemption statute, and concluded that the federal manufacturing and labeling requirements applicable across the board to almost all medical devices did not preempt state based common law claims because they were not requirement specific but merely created generic concerns about device regulation generally. *Id*. at 501. The majority distinguished this case from *Lohr* and found that the pre-market approval process imposed "requirements" applicable to Medtronic's catheter. Justice Scalia noted that this pre-market approval focused on safety of the device and that the FDA grants pre-market approval only after it determines that a device offers a reasonable assurance of safety and effectiveness. The Court held that because of this individual pre-market approval process, the federal government had established requirements applicable to this catheter.

Next, the majority determined whether the Riegels' claims based upon the New York laws created requirements, and whether those requirements were "different from, or in addition to" the federal requirements related to safety and effectiveness. The Court noted that safety and effectiveness are the very subjects of the plaintiffs' common law claims and reframed this issue as to whether New York's tort duties constitute "requirements" under the MDA. The Court, following the *Lohr* decision, held that common law causes of action for negligence and strict liability did impose "requirements" and would be preempted by federal requirements specific to a medical device.

The majority explained that, in the context of this legislation, excluding common law duties from the scope of preemption would make little sense. The Court highlighted that "[s]tate tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model that the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect." Allowing the tort claims to remain, the

Court noted, would mean that Congress intended to grant greater power to a single state jury than to state officials acting through state administrative or legislative law making processes, which was implausible. Although the dissent raised questions of Congressional intent and the applicability of this decision to other federally regulated items such as drugs, food, and color additives, the majority dismissed those concerns by stating that it was not the Court's duty to second-guess Congress's intent. However, the majority limited the holding to state claims that differ from or add to the federal requirements. The Court held that a claim premised on a violation of the FDA regulations or state duties that parallel FDA requirements would not be preempted. Although the Court created this limitation, the plaintiffs failed to raise this argument prior to the Supreme Court, and as such, the Court affirmed the dismissal of their claims.

With this decision, the Supreme Court further defines the preemption effects of the MDA on state tort claims for defects in medical devices. As distinguished from the *Lohr* case, which did not involve a device-specific process, when a medical device undergoes the rigorous pre-market approval process and receives approval, the state tort claims that add to or differ from the MDA will be preempted. Further, the Court left a small zone of doubt by seemingly allowing a state claim to survive preemption if it parallels the FDA regulations, rather than adds to or differs from the regulations.

– *Sara C. Valentine*

CANCER PATIENT'S SUICIDE NOT CAUSED BY WARNINGS ON ANTIDEPRESSANT DRUG

***Allgood v. GlaxosmithKline PLC*, 2008 WL 331682 (E.D.La. 2/20/08).**

Jake Palermo was diagnosed with prostate cancer in 2000 and lung cancer in 2002. In January 2003, Palermo filed a civil action against his former employers, certain asbestos manufacturers, ship repair companies, and the Port of New Orleans, alleging that his cancers were the result of exposure to asbestos during his employment as a longshoreman. In early April 2003, Palermo was diagnosed with depression and resolving pneumonia. On April 10, 2003, his treating physician, Dr. Robert Kessler, prescribed an antidepressant, Paxil 10 mg. daily. Paxil is manufactured and marketed by GlaxoSmithKline ("GSK"). Paxil is an antidepressant in the group of SSRIs (Selective Serotonin Reuptake Inhibitors), which adjusts the level of serotonin, a chemical substance in the brain that is believed to influence mood. On April 14, 2003, Palermo committed suicide.

Following his death, Palermo's daughters were substituted as plaintiffs in his asbestos case. The case was amended to allege that Palermo's suicide was caused by his exposure to asbestos. In March 2004, the asbestos case proceeded to a bench trial, resulting in an award in favor of Palermo's daughters in the amount of $2,500,000, finding that the "depression induced suicide was the result of his exposure to asbestos." This judgment was reversed by the Louisiana Fourth Circuit Court of Appeal on the basis of liability. The Louisiana Supreme Court denied writs.

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In February 2006, Palermo's daughters filed a new suit against GSK, alleging that Palermo's use of Paxil contributed to his suicide. They sued under the Louisiana Products Liability Act ("LPLA"). Following discovery, including the deposition of Dr. Robert Kessler, the prescribing physician, GSK filed six motions for summary judgment on the following issues: the learned intermediary doctrine and the plaintiffs' warning claim; the plaintiffs' remaining claims under the LPLA; the doctrine of judicial estoppel; plaintiffs' claims for survival damages; lack of evidence of product usage; and federal preemption. Plaintiffs also moved for partial summary judgment challenging several of GSK's affirmative defenses, including the learned intermediary defense.

The court granted GSK's motions for summary judgment under the provisions of the LPLA and judicial estoppel. As to plaintiffs' inadequate warning claim, GSK asserted the doctrine of learned intermediary, by which a "drug manufacturer discharges its duty to consumers by reasonably informing prescribing physicians of the dangers of harm from a drug." Plaintiffs argued that the learned intermediary doctrine did not apply because the warning was inadequate as a matter of law and because GSK had engaged in direct to consumer advertising. The court rejected plaintiffs' arguments and "faithfully applied" the Fifth Circuit's test articulated in *Stahl v. Norvatis Pharm. Corp.*, 283 F. 3d 254 (5th Cir. 2002). According to *Stahl*, to avoid the application of the learned intermediary defense, plaintiff must establish that the manufacturer failed to warn, or inadequately warned, the physician of a risk of the product that was not otherwise known to the physician, and that the failure to warn was both a cause in fact and the proximate cause of plaintiff's injury. In other words, plaintiffs must establish that the physician had no knowledge of the risk of harm complained of and that, if the prescribing physician knew of the specific risk, he would not have prescribed the drug. The court held that plaintiff could not sustain this burden.

The court's decision was based upon the deposition testimony of Dr. Robert Kessler. For purposes of the motion, the court assumed there was a genuine factual dispute relating to the adequacy of the warnings and focused on the second test, causation. The court extensively cited Dr. Kessler's deposition testimony, concluding that "there are no factual disputes regarding whether or not a stronger warning would have changed Dr. Kessler's decision to prescribe Paxil to Mr. Palermo. Indeed, Dr. Kessler's testimony reveals that stronger warnings concerning the risk of suicide would not have changed his decision to prescribe Paxil in this case." Dr. Kessler testified that the drug is effective and that he has treated thousands of patients with this drug and has had only one patient who committed suicide, specifically, Palermo. The court held that based upon Dr. Kessler's testimony, causation was lacking and granted GSK's motion for summary judgment.

The court also granted summary judgment to GSK under plaintiff's remaining three theories under the LPLA and the doctrine of judicial estoppel. The plaintiffs conceded that the case was "primarily a warnings case." Without more, the court dismissed the design and warranty claims. The court also dismissed plaintiffs' construction or composition claim, finding that plaintiffs did not allege a manufacturing defect in the Paxil pills that Palermo allegedly ingested. Finally, the court found that the position taken by

plaintiffs in the asbestos case that their father's suicide was caused solely by exposure to asbestos was irreconcilable with their claim in the product liability action that the suicide was the result of several factors, including Paxil. Therefore, plaintiffs were estopped from asserting this same claim against GSK in this litigation.

The court correctly applied the learned intermediary doctrine in this case. In a footnote, the court noted that plaintiffs could have presented a "reasonable physician" standard to controvert the testimony of the prescribing physician. However, the only testimony before the court was that of the prescribing physician, who firmly established that his decisions were driven by the best interest of his patients with consideration of his personal practice experience along the warnings provided by the manufacturer. Summary judgment in favor of GSK was appropriate in the absence of testimony to controvert the testimony of the prescribing physician.

– *Amy W. Truett*

PRE-LPLA CRANE BOOM DEATH CASE NOT CRANE MANUFACTURER'S FAULT

***Benjamin v. First Horizon Ins. Co.*, 07-1321 (La.App. 3 Cir. 3/5/08), 2008 WL 586482**

In 1986, Leroy Benjamin was killed on the job at a construction site when the boom of a Bucyrus-Erie crane fell on him as he walked under it. Before the accident, the boom had frozen up and would not move up or down. Two crane operators were in the process of troubleshooting the problem with the frozen boom. Workers in the yard had been told that the boom was frozen and the men should not walk under it while the operators were attempting to diagnose the problem. While experimenting with ways to release the boom, the operators disengaged two safety devices which would have kept the boom suspended. The boom fell to the ground, killing Benjamin and injuring a co-worker.

The case is unusual due to its age. At the time of the accident, the Louisiana Products Liability Act was not yet in effect. Instead, the law of product liability in Louisiana had been developed in case law and was most fully explicated in a Louisiana Supreme Court case called *Halphen v. Johns-Manville*. In the *Halphen* case, the Louisiana Supreme Court set forth the various theories under which a product liability plaintiff might recover from the manufacturer of a product. One of the theories – that a product was "unreasonably dangerous per se" – was later abolished with the advent of the Louisiana Products Liability Act. The "unreasonably dangerous per se" theory was one of the theories asserted by Benjamin's family when they filed this suit against Bucyrus-Erie in 1987, along with more traditional design and warning theories.

For reasons that are not apparent in this opinion, the case was only recently decided when the two opposing sides, Benjamin's family and the crane manufacturer, Bucyrus-Erie, both filed motions for summary judgment. The trial court ruled in favor of Bucyrus-Erie dismissing plaintiffs' case, and plaintiffs appealed.

On appeal, the Third Circuit examined the case under old product liability law and found that the plaintiff could not make out a case, even under the "unreasonably dangerous per se" theory. Under that theory, a product was unreasonably dangerous if its utility was outweighed by its danger. The Third Circuit noted that the crane had been in operation for 25 years before the accident without incident. Furthermore, following the accident, the crane was put back into operation and is still in use today. Additionally, the accident did not occur while the crane was "in normal use" but rather when the crane was not being used at all, but was being repaired.

The Third Circuit also rejected plaintiffs' design defect theories. According to testimony of Dr. Gerald Whitehouse, expert mechanical engineer for the defendant, the crane had a state-of-the-art design at the time of its manufacture, and the boom would not have fallen had the two safety devices not been intentionally disabled by the operators.

Last, the Third Circuit rejected plaintiff's failure to warn theory. The court found that Bucyrus-Erie had no duty to warn against the danger of walking under an elevated boom, which was not only an open and obvious danger, but was also a danger of which the men in the yard had been specifically warned at the time of the accident.

In conclusion, the Third Circuit stated, "In this tragic accident, the boom did not fall as a result of a defect in the boom during normal use. It fell during troubleshooting efforts by operators who disengaged both safety features on the crane." Thus, the court affirmed the dismissal of plaintiffs' case against Bucyrus-Erie.

– *Madeleine Fischer*

BOILER MANUFACTURER WINS SUMMARY JUDGMENT IN ASBESTOS CASE

***Danos v. Avondale Industries, Inc.*, 07-1094 (La.App. 4 Cir. 2/13/08), ___ So.2d ____, 2008 WL 484057**

Golzie Danos worked for Avondale Shipyards for 13 years in various capacities, including electrician's helper, electrician, terminator, and foreman. He later contracted mesothelioma and died. A lawsuit ensued against Avondale and various contractors and manufacturers, including Foster Wheeler.

Following discovery, Foster Wheeler filed a motion for summary judgment alleging that it was never a manufacturer of asbestos products, but instead that it was an engineering company that designed power generation equipment such as boilers. The Orleans Parish trial court granted Foster Wheeler's motion. The trial court found that there was insufficient evidence to overcome the plaintiff's burden of proof at trial that Danos was exposed to asbestos from products manufactured by Foster Wheeler. Plaintiff appealed the ruling to the Louisiana Fourth Circuit Court of Appeal.

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On appeal, the Fourth Circuit considered all of the evidence *de novo* (*i.e.*, under the same criteria that governed the trial court's consideration of whether summary judgment was appropriate). Specifically, the court considered whether the plaintiff could meet its burden at trial. In an asbestos case, a plaintiff must show by a preponderance of the evidence: (1) he was exposed to asbestos from a defendant's product, and (2) he received an injury that was substantially caused by that exposure.

Prior to his death, Danos testified that he performed new construction and repair work on various vessels, including destroyer escorts. Danos' job duties did not require him to work on boilers, but on occasion, he worked around other men who were laying and insulating pipe on and to the boilers. Danos testified that the only vessels on which he worked around boilers were the destroyer escorts.

In a classic move by the plaintiff, a plethora of testimony was offered from various co-workers about the working conditions at Avondale. The co-workers testified generally about the work on or around boilers and how various crafts worked in close proximity to one another, contributing to the exposure to asbestos containing products. One co-worker, an electrician like Danos, provided extensive testimony that he worked around boilermakers who cut insulation to be installed on the boilers and that he connected electrical components to the boilers while the insulation work was being done. Detrimental to the plaintiff's position, however, was each co-worker's inability to link the exposure to Foster Wheeler. In fact, none of the co-worker witnesses testified that they ever worked with or around Danos or that they ever worked on the destroyer escorts (the only vessels on which Danos stated he worked around boilers).

Foster Wheeler's defense was twofold. First, Foster Wheeler argued that as an engineering company, its focus was on the inside of the boiler and not the external connections (*i.e.*, the insulated pipes). Interestingly, Danos' co-worker witnesses confirmed Foster Wheeler's first defense. The witnesses testified that the Foster Wheeler brand appeared only on metal, tubes, and headers, and not on any of the insulation products installed on the boiler.

Second, Foster Wheeler offered evidence that it did not manufacture the boilers on the destroyer escorts, which were the only vessels on which Danos testified he worked around boilers. Plaintiff's witnesses were not as helpful with this defense. In fact, one of the plaintiff's witnesses contradicted Foster Wheeler's evidence by testifying that Foster Wheeler manufactured the boilers on the destroyer escorts. Fortunately for Foster Wheeler, this contradiction was of no consequence to the court.

The Fourth Circuit affirmed the judgment of the trial court finding that the plaintiff failed to produce factual support for his claim. Specifically, the court concluded that because Foster Wheeler proved that it did not manufacture asbestos-containing products and that it did not manufacture the boilers around which Danos worked, the plaintiff failed to prove that Foster Wheeler caused or contributed to Danos' disease or death sufficient to satisfy the plaintiff's evidentiary burden of proof at trial.

– *Olivia S. Regard*

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PLAINTIFFS DIDN'T PROVE TRUCK FIRE WAS CAUSED BY MANUFACTURING DEFECT

***Desoto v. Ford Motor Co.*, 07-1097 (La.App. 3 Cir. 1/30/08), ___ So. 2d ____, 2008 WL 239754**

On a spring evening, Jayleen Desoto parked her family's 2000 Ford F150 pickup truck near the front of their mobile home. Early the next morning, the Desotos awoke to a loud noise and felt their mobile home shaking. They ran outside and saw the truck against the mobile home, its rear wheel spinning. About the same time, flames burst through the hood of the truck, and the fire spread to the mobile home. The fire department arrived and extinguished the fire. The Desoto's insurance company paid them for the full value of the truck, took possession of the truck, and then had it destroyed.

The Desotos initially thought someone had been trying to steal the truck when the fire occurred. However, when they learned that Ford had issued a safety recall on certain vehicles including their truck, because the speed control deactivation switch could catch on fire, the Desotos brought suit against Ford claiming the fire was caused by this defect. At trial, the Desotos did not present expert testimony, but instead relied on the evidentiary doctrine of *res ipsa loquitur* ("the thing speaks for itself") to prove their case. *Res ipsa loquitur* is used to infer fault on the part of the defendant when there is no direct evidence of fault, but the circumstances surrounding an accident are so unusual that the only reasonable and fair conclusion is that the accident resulted from a breach of duty or an omission on the part of the defendant. The trial court agreed and awarded the Desotos damages.

Ford appealed this decision to the Third Circuit Court of Appeal. The Third Circuit carefully examined the record to determine whether the trial court had correctly applied *res ipsa loquitur*, with particular emphasis on the trial testimony of Ford's expert in fire and explosion investigation, Larry Helton. Helton testified that for several reasons, he did not believe that the speed control deactivation switch caused the fire. First, the truck had been parked for a good length of time before it caught on fire. Second, although the truck itself was not available for inspection, photographs taken by the Desotos showed that the speed control deactivation switch was intact after fire, as well as another plastic cap in the rear of the engine compartment near the speed control deactivation switch. Third, the burn pattern depicted in the Desotos' photographs was inconsistent with burn patterns Helton had seen in known speed control deactivation switch fires. Last, Helton had never seen or heard of any reports of wheels spinning or the engine starting in other fires where fire was determined to be caused by the speed control deactivation switch.

The Third Circuit concluded that the trial court erred in concluding that *res ipsa loquitur* was applicable. The trial court determined there was no evidence of vandalism as initially suspected by the Desotos, implying that it was Ford's burden to prove that the fire *was caused* by vandalism. The Third Circuit held that this was error, because it was the Desotos' burden to *exclude* all other reasonable explanations for the fire. The Desotos

did not carry their burden, so the Third Circuit reversed and entered judgment in favor of Ford.

This case sheds light on the application of the *res ipsa loquitur* doctrine in product liability cases. The Louisiana Supreme Court held recently that *res ipsa loquitur* can be used to prove a product defect without expert testimony, but that it must be used sparingly. *See* COURT CLEARS CAR MAKER IN AIR BAG CASE, BUT SAYS PRODUCT DEFECT MAY BE INFERRED (October 2006). In order to utilize *res ipsa loquitur*, the plaintiff must exclude all other reasonable explanations for his injuries.

– *Madeleine Fischer*

COURT AFFIRMS DEFENDANTS' SUMMARY JUDGMENT FOR LACK OF ASBESTOS CAUSATION EVIDENCE

Thibodeaux v. Asbestos Corp., Ltd., 07-0617 (La.App. 4 Cir. 2/20/08), ___ So. 2d ___, 2008 WL 484054.

This decision from the Louisiana Fourth Circuit Court of Appeal confirms the availability of summary judgment for a defendant in a mesothelioma case. Marie Thibodeaux and her husband filed suit against multiple defendants seeking damages allegedly arising from exposures to asbestos products. Mrs. Thibodeaux later died from mesothelioma, and her husband (plaintiff) pursued the claim. Her asbestos exposures were alleged to be from her husband's and father's work clothing, while living at the Windmill Mobile Home Park, while a student and nurse at Charity Hospital in New Orleans, and while a nurse at Lallie Kemp Hospital. Two of the defendants, Eagle Asbestos & Packing Company ("Eagle") and its insurer, OneBeacon America Insurance, filed a motion for summary judgment. The district court granted the motion, and the appellate court affirmed.

Plaintiff claimed that Eagle was a seller, installer, and remover of asbestos-containing products at the Charity and Lallie Kemp hospitals. Eagle and its insurer moved for summary judgment, claiming that plaintiff could not produce evidence that (1) Eagle supplied or used asbestos-containing materials at the hospital exposure sites and (2) any exposure that Mrs. Thibodeaux had to such materials was a substantial factor in causing her mesothelioma. Plaintiff opposed the motion by asserting that Mrs. Thibodeaux was exposed to asbestos while a student and an employee at Charity and while working at Lallie Kemp and that Eagle was seller, installer, and remover of asbestos-containing materials at those sites. At the summary judgment hearing, the district court ordered plaintiff to supplement his opposition with evidence that Mrs. Thibodeaux was exposed to Eagle asbestos products. Plaintiff responded with a letter stating that no additional evidence would be filed. The district court subsequently granted Eagle's motion. In its reasons for judgment, the court held that "plaintiff failed to offer evidence demonstrating that Marie Thibodeaux was exposed to asbestos containing materials manufactured, supplied, or installed by Eagle, Inc."

On appeal, plaintiff argued that the evidence presented to the district court demonstrated issues of fact as to whether Mrs. Thibodeaux was exposed to Eagle asbestos products and that Eagle failed to produce evidence to debunk the universally-recognized causal relationship between asbestos exposure and mesothelioma found in *Torrejon v. Mobil Oil Co.*, 03-1426 (La. App. 4 Cir. 6/2/04), 876 So.2d 877. The appellate court, however, distinguished *Torrejon* and found Thibodeaux's reliance on that decision misplaced. The court held that *Torrejon* was a Jones Act case with a different causation standard from that in tort cases, which required plaintiff to offer evidence of Mrs. Thibodeaux's exposure to an Eagle asbestos product. At best, plaintiff's evidence suggested that Eagle may have supplied asbestos products that were used at Charity at some point between 1959 and 1984. Mrs. Thibodeaux was employed by Charity between 1963 and 1966. Defendants contended there was no evidence that Eagle supplied products to Charity during that those years and no evidence that Mrs. Thibodeaux was actually exposed to any such products. Following its decisions in *Vodanovich v. A.P. Green Industries, Inc.*, 03-1079 (La. App. 4 Cir. 3/3/04), 869 So.2d 930 and in *Quick v. Murphy Oil Co.*, 93-2267 (La.App. 4 Cir. 9/20/94), 643 So.2d 1291, the court reaffirmed that a plaintiff's burden of proof against multiple defendants in a long-latency case is not relaxed or reduced because of the degree of difficulty that might ensue in proving the contribution of each defendant's product to the plaintiff's injury. Thus, in an asbestos case, "the claimant must show that he had significant exposure to the product complained of to the extent that it was a substantial factor in bringing about his injury." (Quoting *Asbestos v. Bordelon, Inc.*, 96-0525 (La. App. 4 Cir. 10/21/98), 726 So.2d 926, at 948.)

Following this causation standard, the court found that the only exposure evidence that plaintiff supplied is that "at some point between 1959 and 1984, Eagle was one of several suppliers of asbestos-containing products at Charity Hospital." Finding that plaintiff failed to supply any evidence that (1) any Eagle asbestos was used at Charity while Mrs. Thibodeaux was there or (2) Mrs. Thibodeaux was actually exposed to any Eagle asbestos product while at Charity, the court applied *Abram v. EPEC Oil Co.*, 05-0626 (La. App. 4 Cir. 6/28/06), 936 So.2d 209, 213, and held that evidence of mere presence of Eagle asbestos-containing material at Charity was not enough to avoid summary judgment. The appellate court thus affirmed the summary judgment dismissal.

The *Thibodeaux* decision confirms the evidentiary requirements for maintaining an asbestos tort case on a motion for summary judgment. It is not enough to show that a defendant's asbestos products *might* have been present on the site with the plaintiff. Instead, there must be, at a minimum, evidence that the defendant's product was indeed present and that there was significant exposure to that product.

– *Judith V. Windhorst*

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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