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LESS THAN FULL DISCLOSURE LEAVES CAR MAKER FIGHTING NULLITY ACTION

***Wright v. Louisiana Power & Light, Mercedes-Benz of North America, Inc.*, 40,636 (La. App. 2 Cir. 4/19/06) ___ So.2d ____**

In 1988, Ned Wright was killed in a one vehicle accident when he drove his Mercedes off the road and up a guy-wire anchoring a light pole, flipping it. Wright's family sued Mercedes Benz claiming that Wright's death was caused by certain deficiencies in the design and construction of the vehicle. In particular, the plaintiffs claimed that the A-pillars surrounding the windshield were defective.

Shortly after the accident, Wright's widow, the eventual plaintiff, sold the vehicle. She did so with the approval of her attorney. Subsequently, the lawsuit was filed and more than 10 years of litigation followed. Plaintiffs propounded a request for production asking Mercedes Benz to produce any evidence it had "retrieved from the accident site" or "taken from the vehicle." Mercedes Benz responded that it had none. At the time, this response was correct. For its part, Mercedes Benz filed two motions alleging that the plaintiffs spoliated evidence by selling the vehicle to a person who would undoubtedly replace all of the damaged parts. Both motions were denied.

In April 2000, a jury found in favor of Mercedes Benz. The case was settled on appeal. However, at some time after the underlying case was resolved, the plaintiffs discovered that in 1999, attorneys for Mercedes Benz had purchased the damaged vehicle and did not disclose that fact to the plaintiffs, the court, or even their own experts. Even at this point, however, Mercedes Benz's answers to plaintiffs discovery were still *technically* correct. In 2003 the plaintiffs filed an action against Mercedes Benz and its attorneys seeking damages and to nullify the judgment "based upon fraud or ill practices and spoliation of evidence."

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The defendants filed exceptions of no cause of action and prescription and a motion for summary judgment claiming that the plaintiffs had not pled facts sufficient to support its claims, and that the defendants had no obligation to disclose the purchase of the vehicle. The trial court granted the defendants' exceptions and motion, and the plaintiffs appealed.

The Second Circuit reversed the trial court's rulings. With respect to the exception of no cause of action, the Second Circuit held that the plaintiffs should have been given an opportunity to amend their petition in order to cure the deficiency. If the deficiency can be cured by amendment, giving the opportunity do so is "mandatory" under Article 934 of the Louisiana Code of Civil Procedure. With respect to the summary judgment motion, the Second Circuit found genuine issues of material fact concerning the Mercedes. In particular, the court pointed out that whether an examination of the car could have benefited the plaintiffs' case is unknown, but that the defendants had a duty to amend their prior discovery responses and disclose the fact that they were in possession of the vehicle. The court rejected the argument that the defendants' original responses were still technically correct. Accordingly, the court reversed the trial court, and effectively gave the plaintiffs an opportunity to amend their petition and conduct discovery related to the Mercedes.

Judge Stewart dissented on the grounds that the claim of fraud or ill practices was unsupported by the record. The defendants had no duty to disclose their purchase of the car. Judge Stewart pointed out that the plaintiffs knew that the defendants had been tracking the car down, and, indeed, the defendants informed them that they had found the car. But the plaintiffs never attempted to retrieve the car or any evidence from the car. Moreover, the car was sold by Wright's widow with the consent of her attorney.

Ultimately, the defendants' failure to disclose the purchase of the vehicle will prove a costly mistake. The Second Circuit rejected the defendants' technical arguments. Whether or not it is true that the defendants' discovery responses remained "technically" correct after they purchased the vehicle, the court found that they had a duty to disclose that fact to the plaintiffs. Now, the defendants must defend the nullity action, and, if the plaintiffs are ultimately successful, may have to revisit and re-defend the underlying action. In hindsight, the better course of action would have been full disclosure.

—*Emily E. Eagan*

SURPRISE EVIDENCE OF BROKEN SHOVEL NO REASON TO REVERSE JUDGMENT FOR TOOL MAKER

***Raiford v. U.S. Industries/Ames Lawn & Garden Tools,* 2005-0815 (La.App. 4 Cir. 5/3/06), ___ So.2d ____**

Karen Raiford was planting a rose garden using a shovel purchased from Rockery Ace Hardware and manufactured by Ames. As she was pushing the shovel into the ground with her foot, she claimed the shovel broke causing her to fall forward injuring her back and both wrists. Several days before, a friend of Raiford was digging in the same garden with the same type of shovel which also broke. The friend returned the shovel to Rockery Ace Hardware and received an identical replacement – the shovel Raiford was using at the time of the accident.

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Raiford kept the second broken shovel and turned it over to her attorney, who had it examined by an expert for defects, and introduced the shovel as Exhibit 29 at trial against the shovel manufacturer, Ames. On the second day of trial, however, Ames produced another shovel and claimed that their shovel was the one that Raiford was using at the time of the accident. The attorney for Ames stated that he had just come into possession of the shovel as a result of a telephone call from the wife of the owner of Rockery Ace Hardware. A Rockery Ace Hardware witness testified that the first shovel returned to the store had been thrown away, and that Raiford had also returned the second shovel to the store, where it had been kept until after the commencement of the trial. Over Raiford's objection, the trial court allowed Ames to introduce the second shovel as Exhibit 31.

The trial court ruled against Raiford finding that she had not proven that the shovel was defective and Raiford appealed asserting two points of error. First, she argued that the trial court erred in admitting "newly discovered evidence", *i.e.*, the second shovel which she first learned of when it was sought to be admitted during the trial. Second she argued that the trial court erred in finding that the testimony of the Rockery Ace Hardware witness was credible.

The Fourth Circuit had some sympathy for the plaintiff faced with "surprise evidence." However, the Fourth Circuit observed the trial court found that even if it were assumed that Exhibit 29 (Raiford's exhibit) were the shovel involved in the accident, the expert testimony from Ames' expert in wood science convinced the court that the shovel was not defective. The court also found that even if the mere fact of the accident created a presumption of a defect – non-defective shovels should not break under these circumstances – Ames' expert sufficiently rebutted that presumption by testifying that his examination revealed that the shovel had broken, not due to a defect, but rather because the handle was overstressed in a forward motion. Ames' expert opined that this could have occurred if Raiford had fallen onto the handle of the shovel as she fell.

The Fourth Circuit also dismissed Raiford's second argument concerning the credibility of the Rockery Ace Hardware witness by observing that the trial court had not based its decision on the Rockery Ace Hardware witness's testimony, but rather upon the factual testimony of Ames' expert.

Judge Jones dissented vehemently: "The very tool with which she was injured was surreptitiously withheld from her until trial had commenced; no expert testing thereof; and yet, the district court found that plaintiff did not prove her case. And, in fact, the district court chose to adopt the expert testimony of an expert who also tested the wrong tool. Go figure."

The reader may wish to contrast this case with the article immediately preceding this one (LESS THAN FULL DISCLOSURE LEAVES CAR MAKER FIGHTING NULLITY ACTION). Both deal with late discovered evidence, but each has a different outcome.

—*Madeleine Fischer*

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SELLER OF WALL COVERING HAS NO DUTY TO WARN "SOPHISTICATED USER" OF MOLD RISKS

Tunica-Biloxi Indians of Louisiana d/b/a Paragon Casino Resort v. Pecot, 2006 WL 1228902 (W.D.La. 5/3/06)

This case involved mold contamination in connection with the construction of the Paragon Casino Resort in Marksville, Louisiana. The vinyl wall covering procured and installed at the casino was alleged to have contributed to extensive mold contamination. Paragon sued DesignTex, the entity who supplied the vinyl wall covering, alleging that DesignTex failed to warn of proper use; failure to instruct regarding proper installation; failure to provide sufficient design information; and failure to research and advise installers of the known risk of mold contamination. The issue framed by the court was whether or not DesignTex had a duty to warn Paragon of the dangers or defects of the vinyl wall covering. The district court found that DesignTex had no duty to warn of dangers associated with the product because Paragon was a "sophisticated user" that should have been aware of the dangers associated with the product.

This court previously determined that DesignTex was not a manufacture under the Louisiana Products Liability Act ("LPLA"). (See PLACING PRODUCT ORDERS DOES NOT RESULT IN MANUFACTURER LIABILITY UNDER THE LPLA, Jones Walker March 2006 E*Zine). The court found DesignTex to be a non-manufacturer seller which imposes a less stringent standard than the LPLA would impose upon a manufacturer. A non-manufacturer seller can be held liable for damages only if he knew or should have known that the product was defective and did not warn the consumer. However, he is not required to inspect the product before the sale to determine whether the product has any defects.

The "sophisticated user" doctrine holds that users who have knowledge of a product can be presumed to know about its dangers because of their familiarity. The court had to determine whether or not Paragon had the requisite level of familiarity with the vinyl wall covering to make it a "sophisticated user." The court found that the architect supervising the construction was acting as an agent for Paragon. The court cited his twenty-five years of experience; his supervision of the project; his knowledge of mold remediation and abatement; and his knowledge regarding the potential for mold growth associated with vinyl wall covering in the Paragon construction project did provide the requisite level of familiarity with the vinyl wall covering. As such, the architect, thereby Paragon, was sufficiently knowledgeable regarding the vinyl wall covering and its inherent risks. DesignTex had no duty to warn Paragon.

While this case alleviates a considerable burden on the seller's part to warn all purchasers of all risks, it does not limit the sellers duty to warn of defects if he knows or should have known that a product is defective, and failed to warn the purchaser. The determination that a purchaser is a "sophisticated user" was a fact intensive query made by the court, and the court made a clear determination that Paragon was knowledgeable with regard to this product.

—*Bernard H. Booth*

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LADDER MAKER'S BROKEN RUNGS—DEFECT IN MANUFACTURE OR DAMAGE BY SUBSEQUENT USE?

***Shockey v. Polar Corp.*, 2006 WL 1151362 (W.D.La. 4/20/06)**

Plaintiff, an operator of an 18-wheeler owned by CTL Corporation, was delivering a chemical product to the Weyerhaeuser Company facility in Campti, Louisiana. The product was contained in a tank trailer with a side-mounted ladder system manufactured by Polar. Upon descending the ladder after unhooking a hose, the first and second rungs from the top of the ladder broke causing plaintiff to fall and break his right leg and injure his left leg. Plaintiff alleged that Polar was liable under the Louisiana Products Liability Act (LPLA) for manufacturing a defective ladder, failing to warn, failing to correct the defect, and failing to prevent the defect. Plaintiff belatedly sought to assert a design defect claim, but Magistrate Judge Hayes found the claim to be untimely and refused to allow evidence of such a claim to be admitted at trial.

Polar moved for summary judgment on the remaining LPLA Claims. Polar submitted testimony and expert opinions supporting its contention that the ladder was not unreasonably dangerous when it left the manufacturer, that the ladder was struck by vehicles and/or objects while owned by CTL, and that the damage sustained by the ladder during these impacts was the cause of the rungs breaking and the plaintiff's fall. Polar asserted that damage to a ladder by side impacts is not an expected, foreseeable event that Polar was required to anticipate as a manufacturer of the product.

In his opposition to the motion for summary judgment, plaintiff offered testimony and expert opinions supporting his contention that Polar's original welds failed on the rungs that gave way, which caused plaintiff to fall. The conflicting testimony and expert opinions, plaintiff argued, presented a genuine issue of material fact and was sufficient to defeat Polar's motion for summary judgment.

Given the inconsistencies in testimony and conflicting theories of expert witnesses, Magistrate Judge Hayes found that there remained a genuine issue of material fact as to whether the ladder was defectively manufactured or damaged by subsequent use, and thus, denied Polar's motion for summary judgment.

—*Don A. Rouzan*

HEART ATTACK VICTIM'S CASE AGAINST ASTHMA DRUG MAKER DISMISSED

***Ortolano v. BDI Marketing*, 2005-0989 (La.App. 5 Cir. 4/25/06), ___ So.2d ____**

Plaintiff, Kermit Ortolano, an eighteen year old in excellent health, suffered a heart attack after taking Mini Brands Two-Way Action medication. He filed suit against BDI Marketing, Body Dynamics, Inc. and Mediplas Innovations, Inc., alleging that they were liable to him for the distribution and marketing of the Mini Brands without regard to user safety because: (1) the product was inferior in design and marketed to a group other than the drug's intended users, (2) the product was unreasonably dangerous in construction or composition, (3) the product was unreasonably dangerous in design, (4) the product was unreasonably dangerous because of inadequate warnings to consumers, and (5) the defendants were negligent.

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All of the defendants eventually filed motions for summary judgment arguing that their only source of liability was the Louisiana Products Liability Act, and that there was no claim under the Louisiana Products Liability Act for which the plaintiff could recover. The trial court granted the motions finding that Ortolano could not prevail on any of the theories of recovery provided by the Louisiana Products Liability Act.

Ortolano admitted in his deposition that he took six tablets within fourteen and a half hours, averaging two and a half pills every four hours. Accordingly, he specifically disregarded the recommended dosage of one-half to one tablet every four hours, or not more than six tablets in twenty-four hours. Therefore, he abused the dosage, which according to the trial court, was not a reasonably anticipated use of the product.

Ortolano also admitted that he did not read the entire label but read only the dosage information and warnings. As a result, the trial court found that he would not have been aware of a "sufficient" warning, even if one had existed. Additionally, the trial court opined that the warning claim could not have been the proximate cause of his damages. Finally, the trial court found that there were no genuine issues of material fact because the plaintiff did not establish that he would be able to satisfy his evidentiary burden at trial that the product was unreasonably dangerous under the LPLA.

On appeal the Fifth Circuit reexamined the plaintiff's claims under the LPLA and affirmed the trial court's ruling. In addition to agreeing with the trial court's holding regarding the composition, construction, and design of the product, the Fifth Circuit also noted that Ortolano presented no evidence that the medication did not conform to an express warranty. Furthermore, the Fifth Circuit noted that the plaintiff admitted to taking the medication to lose weight and gain energy. The medication in question was for asthma relief. However, Ortolano did not have asthma. This, according to the Fifth Circuit, was also not a reasonably anticipated use of the product.

Accordingly, the trial court's judgment was affirmed and Ortolano's case was dismissed.

—*Michelle D. Craig*

U.S. 5TH SAYS OUTER CONTINENTAL SHELF ACT GOVERNS CONSTRUCTION ACCIDENT IN GULF

***Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., Inc.*, ___ F.3d ____ (5th Cir. 5/5/06)**

In a products liability action arising out of an accident during the construction of the deepwater Petronius oil and gas production facility in the Gulf of Mexico, a panel of the United States Fifth Circuit holds that maritime law does not apply, and that the district court must use state law as applied through the Outer Continental Shelf Lands Act. The Fifth Circuit thereby revived plaintiff's hopes of having the case tried to a jury, and opened the possibility of a retrial and a different result for plaintiff who lost the first time around.

The case involved two separate actions consolidated for trial, the one here of interest being a products liability action brought by Texaco and its co-lessee, Marathon Oil, against AmClyde Engineered Products Company, Inc. and Friede Goldman Halter, Inc. Texaco invoked jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 ("OCSLA"), and, in the alternative, admiralty under 28 U.S.C. § 1333. The Petronius facility was being con-

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structed in approximately 1750 feet of water, thereby necessitating the use of vessels, primary among them the Derrick Barge 50 ("DB-50"). While one of the deck modules for the Petronius facility was being lifted by the DB-50 from a material barge to the platform, a load line on the crane mounted on the DB-50 snapped. The deck module fell to the ocean floor.

In prior proceedings, a panel of the United States Fifth Circuit stayed litigation between Texaco and J. Ray McDermott, Inc. (designer and builder of the platform) pursuant to an arbitration clause and ordered that Texaco's claims against the other defendants proceed. *Texaco v. AmClyde*, 243 F.3d 906 (5th Cir. 2001). The trial court then granted a motion to strike Texaco's jury demand on the basis of the application of admiralty law and Rule 38 of the Federal Rules of Civil Procedure. The case proceeded to a twenty-four day bench trial. The trial court, applying substantive maritime law, concluded that Texaco failed to prove liability against the remaining defendants. Texaco appealed this adverse ruling.

In a lengthy opinion, the Fifth Circuit held that the district court erred in concluding that its subject matter jurisdiction derived from the federal court's admiralty and maritime jurisdiction. After analyzing the history of OCSLA, including its broad grant of jurisdiction over a "wide range of activity occurring beyond the territorial waters of the states on the outer continental shelf of the United States," the court held that OCSLA alone governed Texaco's claims and provided the court's subject matter jurisdiction. Despite the fact that a vessel was involved, the court held that Texaco's causes of action were "insufficiently connected" to "traditional maritime activity" supporting the application of admiralty law. Applying the Supreme Court's admiralty jurisdiction test set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the court concluded that any connection to maritime law implicated by the maritime activities surrounding the construction work was eclipsed by the connection to the development of the Outer Continental Shelf ("OCS"), and that Congress intended to treat causes arising out of OCS development differently from traditional maritime claims. Because maritime law did not apply of its own force, the court held OCSLA-adopted state law as governing Texaco's claims. The court therefore remanded for proceedings before the district court and rejected AmClyde's last-ditch argument that the denial of a trial by jury was harmless error because Texaco's case failed to survive AmClyde's motion for judgment as a matter of law.

This decision represents the often ambiguous jurisdictional source for claims arising out of the oil and gas industry. The use of vessels or "maritime instrumentalities" in claims "arising out of or in connection with" development of the OCS is widespread. In reaching its decision, the court appears to have characterized the construction of offshore platforms, even when accomplished by the use of vessels, as an activity that cannot be found "traditionally maritime" so as to invoke application of maritime law. Paraphrasing the court, the use of vessels preceding or surrounding the construction of a platform located on the OCS is insufficient to support admiralty jurisdiction or the application of substantive maritime law.

—*L. Etienne Balart*

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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