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Products Liability
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Propulsid Case Dismissed on Summ. Judgm't When Plaintiff Experts Fail to Pass Daubert Muster

In re Propulsid Products Liability Litigation,
2003 WL 21108338 (E.D. La. 5/16/03).

In a recent decision challenging the reliability of expert testimony under the standards set forth in Federal Rule of Evidence 702, Louisiana Eastern District Judge Fallon excluded the testimony of expert witnesses and granted defendants' motion for summary judgment dismissing plaintiff's case.

Plaintiff's claim was one of several suits filed in August 2000 for damages under the Louisiana Products Liability Act ("LPLA") supposedly caused by the drug Propulsid. Propulsid, generically referred to as cisapride, is used to treat gastroesophageal reflux disease (GERD). Plaintiff alleged that Propulsid was defective because it caused her to have a prolonged QT interval (the time it takes for the ventricle in the heart to contract and recover), which she claimed placed her at risk for sudden death. She argued that she should be monitored and treated for potential future cardiac problems. The defendants agreed that Propulsid can temporarily induce a prolongation of QT intervals but argued that this had not been shown to be a lasting effect. Plaintiff sought to admit the opinions of two expert witnesses, Dr. William Shell and Dr. Dwain Eckberg, to prove that the effects of Propulsid on the QT interval are permanent. Defendants moved to exclude the opinions of the two expert physicians on the basis that the experts' opinions were unreliable under the standards set forth in Federal Rule of Evidence 702.

Federal Rule of Evidence 702 was amended in 2000 to codify the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). *Daubert* held that before an expert is allowed to testify, the trial court must assess the *reliability* of the methodology used by the proposed expert and the *relevance* of the testimony to the facts at issue. In performing its gatekeeping duties, trial courts employ the non-exclusive list of factors identified by the Supreme Court in *Daubert:*

1. whether the theory has been tested;
2. whether the theory has been subject to peer review and publication;
3. the known or potential rate of error; and
4. the general acceptance of the methodology in the scientific community.

Once an expert's testimony is challenged, the burden of proof is on the party attempting to admit the expert testimony to prove its reliability and relevance.

In making its determinations of reliability and relevance here, the court reviewed the testimony of plaintiff's two experts, Drs. Shell and Eckberg. The court expressed some sympathy for the plaintiff because Propulsid had been withdrawn from the market making it difficult for plaintiff's experts to conduct their own studies or obtain peer review. Nonetheless, the court rejected the expert testimony

finding that Drs. Shell and Eckberg's theories were not supported by valid scientific evidence. For example, the experts argued that their theories were biologically plausible citing to other substances known to permanently prolong the QT interval. But they failed to show that Propulsid was so similar to those other drugs that the same result would necessarily occur. "Sound scientific method does not support an extrapolation from one substance to another without some showing of identity or at least close similarity." Further, a study relied upon by one of the experts was found to be unreliable because the subjects were all plaintiffs in the Propulsid litigation and some of them had medical histories which made it difficult to determine the cause of their QT prolongation. Additionally neither expert's testimony was entirely consistent with the other. Lastly, there was no proof that the plaintiff's particular QT interval was any different now than it was before she took Propulsid, and therefore, there was no showing of relevance to this particular case.

After concluding that the expert testimony of Drs. Shell and Eckberg had to be excluded, the trial court granted summary judgment to the defendants finding that without that expert testimony, plaintiff had no way of proving causation.

To see how this case progressed from start to finish see our previous articles: FED. COURT REFUSES TO CERTIFY NATIONAL MEDICAL MONITORING CLASS IN PROPULSID DRUG LITIGATION (July 2002); LPLA CLAIMS AGAINST PHARMACISTS IN PROPULSID DRUG LITIGATION DISMISSED (August 2002); HEARTBURN MEDICINE NOT SHOWN TO BE DEFECTIVELY DESIGNED PER LA. EASTERN DISTRICT COURT (March 2003); PROPULSID DRUG CASE TO PROCEED ON WARNINGS CLAIM; RESTRICTED USE PROGRAM EVIDENCE EXCLUDED (April 2003).

- Mary Mitchell Felton

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State Health Department Held Liable In Tourist's Death Caused By Eating Raw Oysters

Gregor v. Argenot Great Central Insurance Company,
2002-C-1138 (La. 2003), ___ So.2d ___.

This case concerns the liability of the Louisiana Department of Health and Hospitals ("DHH") and Pascal's Manale restaurant for the wrongful death of a tourist, who died after eating raw oysters sold and served by Pascal's Manale.

Because of DHH's growing concern over deaths caused by vibrio vulnificus infection, a bacterial infection caused by the consumption of raw oysters by persons with certain illnesses and conditions, §23:006-4 of the sanitary code concerning the sale of oysters was amended to require establishments that sell or serve raw oysters to provide clearly visible warnings about vibrio vulnificus at the point of sale. Pascal's Manale decided to post this warning above its oyster bar, where approximately 75% of its raw oysters were sold and consumed. The other 25% of its raw oysters were consumed in the restaurant's dining rooms. The DHH had inspected Pascal's Manale four times prior to August 1996, but had never cited the restaurant for a violation of §23:006-4.

Daniel Gregor, who had been recently diagnosed with Hepatitis C, ate raw oysters in one of the dining rooms at Pascal's Manale in August 1996. Gregor immediately became sick and eventually died. Plaintiffs filed suit against Pascal's Manale, its insurer, the oyster wholesalers, DHH, and the Louisiana Department of Wildlife and Fisheries. Prior to trial, plaintiffs settled with Pascal's Manale and its insurer, and dismissed all other defendants, leaving DHH as the only defendant.

The trial court found DHH liable for negligently enforcing the Sanitary Code. The court declined to grant immunity to DHH, finding that DHH's enforcement did not involve a discretionary function which entitled DHH to immunity under La. R.S. 9:2798.1 – a statute which provides that liability shall not be imposed on public entities based upon "the exercise or performance or the failure to exercise or

perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." The trial court apportioned 75% fault to DHH and 25% fault to Pascal's Manale for negligently violating the sanitary code. The court found that Pascal's Manale reasonably relied on the DHH sanitarian's approval of the sign. The court found no fault on the part of Gregor nor on the part of the oyster wholesaler. The trial court rendered judgment in favor of plaintiff and against DHH for $450,000.00. The court of appeal affirmed.

The Louisiana Supreme Court affirmed the lower courts' holdings that DHH was not immune to liability under La. R.S. 9:2798.1. The Court, however, reversed the lower courts' apportionment of liability. Because the DHH sanitarian inspected Pascal's Manale four times prior to Gregor's death and never cited the restaurant for a violation of § 23:006-4, the Court agreed that DHH should be apportioned some liability. However, it found that the lower court's apportionment of liability to Pascal's Manale was manifestly erroneous. Analogizing the restaurant and oyster suppliers's liability to a product liability case for failure to warn – where the manufacturer is held to the knowledge and skill of an expert – the Court analyzed whether Pascal's Manale knew or should have known of the potential danger to certain people from eating raw oysters. The Court found that Pascal's Manale was well aware of the required oyster warning requirement and the reasons for the requirement. Further, Pascal's Manale knew that it served 25% of its raw oysters in its dining rooms. Nevertheless, Pascal's Manale chose to display the sign only in the oyster bar, and did not provide the mandatory warning to customers who ordered raw oysters from menus at tables in the dining rooms. Accordingly, the Court held that Pascal's Manale failed to give any warning to customers who ordered raw oysters in its dining rooms and that it also failed to give adequate warning to its customers in the oyster bar because of the clutter surrounding the sign. The Court reassessed Pascal's Manale with 50% fault and DHH with 50% fault.

Justices Kimball and Knoll dissented, arguing that they would apportion Pascal's Manale with substantially more fault.

- *Stacie M. Hollis*

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Alabama Asbestos Plaintiff's Suit Sent Back To Alabama By Louisiana Court

Roley v. Eagle, Inc.,
2002-CA-1466 (La.App. 4 Cir. 5/21/03)

This mesothelioma wrongful death case has been dismissed in Orleans Parish court with instructions to refile the case in Alabama.

The decedent Leonard Roley lived his entire life in Alabama and spent his working career at a shipyard in Mobile, Alabama where he was allegedly exposed to asbestos. When he contracted mesothelioma and later died a suit was filed on his behalf in New Orleans, Louisiana. Plaintiffs argued the suit was proper in New Orleans, because one of the thirteen defendants was domiciled in Louisiana and a few of the ships that Roley worked on in Mobile were originally constructed in Louisiana.

The defendants filed a motion to dismiss for *forum non conveniens* (inconvenient forum) arguing that the suit should have been brought in Alabama where the great majority of contacts for the suit lay. The trial court (Judge Michael Bagneris) granted the motion, conditioned upon the defendants agreeing that the date of filing in Orleans Parish would serve as the date of filing in Alabama for purposes of determining whether prescription (statute of limitations) had run.

Louisiana's Fourth Circuit Court of Appeal in an opinion written by Judge Joan Armstrong agreed with the trial court's ruling and affirmed the decision. The Fourth Circuit noted that Roley had never spent any time in Louisiana; most of the ships he worked on in Alabama were built in locations other than Louisiana; and his medical treatment occurred in Alabama and nearby Pensacola, Florida. The court concluded that little if any evidence would be found in Louisiana. The Fourth Circuit also rejected

the argument that the defendants delayed too long in bringing the *forum non conveniens* motion before the trial court. The delays encountered by the defendants were due to the need to develop facts to support the motion together with normal delays encountered by rigid scheduling practices imposed by trial courts in asbestos cases.

This case illustrates the common practice of plaintiffs filing suit in a forum which does not logically fit the facts of the case, but which is perceived as more favorable in terms of applicable law and/or higher potential jury awards. The trial court correctly applied Louisiana's *forum non conveniens* law and the Fourth Circuit correctly affirmed the trial court's ruling as being well within the bounds of the trial court's discretion.

- *Madeleine Fischer*

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LA 3rd Cir. Finds Blood Products Case Not Prescribed – Hepatitis B Differs From Hepatitis C

Bourque v. Louisiana Health Systems Corp.,
2003-56 (La. App. 3rd Cir. 4/30/03), ___ So.2d ___.

Finding that knowledge of one disease (hepatitis B) does not impute knowledge of a related disease (hepatitis C), Louisiana's Third Circuit reversed the trial court's finding of prescription, and held that the plaintiff's claim that she caught hepatitis C from a 1975 blood transfusion was not prescribed.

This is a blood products case that arises out of a 1975 blood transfusion. Plaintiffs, Bertha and Nelson Bourque, filed suit in Lafayette Parish on March 1, 1999, naming Lafayette General Hospital as the defendant. The hospital filed a third-party demand against its blood products provider, Blood Systems, Inc., and plaintiffs later amended their petition to include allegations against Blood Systems.

Bertha and Nelson Bourque suffered severe injuries in a motorcycle collision in August of 1975. As a result of a blood transfusion that Mrs. Bourque received during the treatment of her injuries, she contracted hepatitis B. Mrs. Bourque was diagnosed with the disease within weeks of her release from the hospital, and told that she likely contracted the illness from the blood transfusion. However, it was not determined that she had hepatitis C, in addition to the previously diagnosed hepatitis B, until April of 1998.

Finding that Mrs. Bourque knew shortly after her motorcycle accident that: 1) she had contracted hepatitis, and 2) the blood transfusion was the likely cause of the disease, the trial court granted the peremptory exceptions of prescription filed by Lafayette General and Blood Systems, dismissing plaintiffs' claims against both defendants and Lafayette General's third-party demand. The Louisiana Court of Appeal for the Third Circuit disagreed, reversing the decision and holding that Mrs. Bourque was not put on notice that she had hepatitis C until April, 1998. Therefore, the suit was filed timely, within the one year prescriptive period set forth in Louisiana Code of Civil Procedure article 3492.

The Court of Appeal concluded that "a plaintiff cannot be precluded from asserting a claim for a completely different disease diagnosed at a later time, from one contracted previously." Judge Thibodeaux went on to state that: "Hepatitis B and Hepatitis C are not the same diseases, and knowledge of one does not provide knowledge of the other. Thus, Mrs. Bourque was not put on notice of contracting Hepatitis C when she contracted Hepatitis B in 1975, and prescription did not begin to run until 1998." As such, the trial court's grant of the defendants' exceptions of prescription was found to be erroneous, and the case has been remanded to the district court for trial on the merits.

- *Meredith Prechter Young*

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Asbestos Action Not Prescribed Where Accrual Date Not Known

Greenfield v. Lykes Bros. S.S. Co.,
2002-CA-1337 (La. App. 1 Cir. 5/9//03), ___ So. 2d ___.

This decision from the Louisiana Fifth Circuit Court of Appeal is the latest expression on the timeliness of an action for alleged asbestos disease. Greenfield sued numerous asbestos defendants under general maritime and Louisiana products liability law, claiming that his occupational exposure to asbestos while servicing his employers' fleet of vessels caused him to contract an unnamed "asbestos-related disease". The trial court maintained prescription exceptions as to several defendants and the plaintiff appealed. The First Circuit reversed, reinstating and remanding the case to the trial court.

The First Circuit looked to the facts alleged in Greenfield's various pleadings to determine whether his claims against the defendants had prescribed. Greenfield alleged that he suffered from a disease that developed from exposure over 39 years to various materials containing asbestos fibers. The appellate court then applied the "significant tortious exposure" theory of the decision in *Austin v. Abney Mills, Inc.,* 01-1598 at 25-26 (La. 9/4/02), 824 So.2d 1137, 1154, for determining when a cause of action accrued in a long-latency occupational disease case. (For a full discussion of Austin, including the problems it raises for computation of prescription see LOUISIANA SUPREME COURT HOLDS ASBESTOS CAUSES OF ACTION ARISE AT TIME OF EXPOSURE, in our issue of October 2002, Vol. 21.) According to *Austin* the accrual of the action occurs when the exposures are "significant and such exposures later result in the manifestation of damages." Significance was in turn defined as "when asbestos dust has so damaged the body that the fibrogenic effects of its inhalation will progress independently of further exposure." Applying this test to Greenfield's allegations, the First Circuit concluded that it could not determine from the face of the petitions when or whether asbestos dust had so damaged Greenfield that the fibrogenic effects of its inhalation would progress independently of further exposure or when Greenfield, if ever, was on notice of such damage. The appellate court thus ruled that the defendants had failed to establish when Greenfield's cause of action accrued and, therefore, failed to prove when prescription began to run. The First Circuit therefore reversed the trial court, and remanded the matter to the trial court for further proceedings.

- *Judith V. Windhorst*

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Expert Testimony May Be Necessary To Prove The Elements Of A LA. Products Liability Claim

Scroggins v. Zimmer Holdings, Inc.,
2003 WL 21105101 (E.D. La. 5/9/03).

In this case Judge Sarah Vance of the Eastern District of Louisiana granted a products defendant's motion for summary judgment. Plaintiff alleged that she received a defective hip replacement implant and proceeded *pro se* against the manufacturer-distributor of the medical hardware. The defendant moved for summary judgment arguing that plaintiff did not have sufficient evidence to sustain her burden of proof under the Louisiana Products Liability Act ("LPLA"), La. R.S. 9:2800.54 that the product was unreasonably dangerous.

The motion for summary judgment was not opposed by Plaintiff, and the court granted the motion for summary judgment. In so doing, the court commented that Plaintiff had retained no experts and that without "expert testimony and discovery, the plaintiff cannot prove any of the essential elements of her case." The court's notation expresses the proposition that expert testimony is an absolute prerequisite in the evidentiary chain to establish the elements of a claim under the LPLA. While this principle may seem obvious, there are few cases which state it as clearly as this one.

- *L. Etienne Balart*

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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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