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MANUFACTURERS OF FEMA TRAILER AND BEDDING MATERIAL DISMISSED IN FIRE DEATH CASE

***Lacoste v. Pilgrim Intern*., No. 07-2904, 2009 WL 126847 (E.D. La., Jan. 15, 2009)**

Plaintiffs filed suit against Pilgrim International ("Pilgrim") (FEMA trailer manufacturer), ADT-American ("ADT") (bedding manufacturer), and CH2M Hill (installer of trailer), claiming damages for the injury and death of Dwayne Lacoste. The details of Lacoste's death were disputed. However, it was undisputed that a lit cigarette caused bedding materials in the trailer to ignite and that Lacoste died from carbon monoxide inhalation. The coroner's report also stated that Lacoste's blood tested positive for Soma (a muscle relaxant), Xanax (an anti-anxiety drug), cocaine, and cocaine metabolites.

Plaintiffs claimed that ADT's and Pilgrim's products were defectively designed and manufactured and that the defects caused or contributed to Lacoste's death. ADT and Pilgrim moved for summary judgment, arguing that the plaintiffs did not have sufficient evidence to prove their product liability claims.

The plaintiffs alleged that the bed sheets manufactured by ADT were "unreasonably dangerous in construction and composition in that they were not fire retardant," and that the sheets were "unreasonably dangerous in design because ADT did not take action to abate the danger of fire from cigarettes." The court reviewed the record and found that there was no evidence to indicate what ADT's specifications or performance standards were for sheets and no evidence that the particular sheets in the trailer were defective in a way that made them unreasonably dangerous. The court also rejected the plaintiffs' argument that if ADT had designed bed linens that were treated with fire-retardant chemicals, Lacoste would not have died. The only evidence of an alternative design that the plaintiffs submitted was a printout from the Amazon.com website featuring a brand of wearable polyester baby blanket—described as a "sleepsack"— which is

intended to be zipped around a baby like clothing. The court found that "a wearable baby sleep sack can hardly be considered an 'alternative design' that could substitute for ordinary adult bed sheets."

The plaintiffs alleged that the FEMA trailer manufactured by Pilgrim was defective in construction and composition because the materials used to build the trailer did not meet normal fire retardant specifications, the door handle included plastic parts that melted and prevented opening in case of fire, and the fire detectors incorporated by Pilgrim were defective. They also alleged that the trailer was unreasonably dangerous in design because it had only one door, insufficient other emergency exits, only one fire extinguisher, and non-fire-retardant mattresses, and the bathroom did not have an emergency exit or window.

Finding that the plaintiffs provided no evidence that the trailer deviated from its design specifications, that a design defect rendered the trailer unreasonably dangerous, or that a characteristic of the trailer proximately caused Lacoste's death, the court dismissed the plaintiffs' claims against Pilgrim. The plaintiffs argued that the trailer could have been designed with an extra escape hatch in the bathroom, which they claim would have prevented Lacoste's death by providing him with a more accessible means of egress. Because the plaintiffs failed to submit evidence of any "technical drawings, calculations, scientific study, or the publication of any engineering principles as to a proposed alternative design," the court rejected their argument and dismissed their claim.

Finally, the plaintiffs argued that an alternative design would have prevented Lacoste's death. Finding their argument unpersuasive, the court stated, "It would take an impermissible leap of faith for a jury to conclude, based on the vague hint that Lacoste might have opened the bathroom door at some point, that an extra escape hatch could have prevented Lacoste's death… Indeed, Lacoste's body was found next to one of the existing escape hatches. All of the evidence on record suggests that it was Lacoste's impaired condition, not the lack of an exit in the bathroom, that prevented him from escaping the fire."

Accordingly, the court granted the defendants' motions, dismissing them from the case.

– Carla T. Ashley

COURT REFUSES CLASS CERTIFICATION IN FEMA TRAILER FORMALDEHYDE LITIGATION

***In re FEMA Trailer Formaldehyde Products Liability Litigation*, MDL 07-1873, 2008 WL 5423488 (E.D. La. Dec. 29, 2008)**

In a lengthy opinion, Judge Kurt Engelhardt denied a motion by FEMA trailer residents to certify a class action in this case where they claim they were harmed by the presence of formaldehyde in their trailers. Judge Engelhardt held that

there were too many individual differences in the case in which dozens of different manufacturers were sued to make it feasible to try all cases in a class action.

The cases will continue to be consolidated in Multi-District Litigation for pre-trial purposes. Judge Engelhardt plans to begin trying individual bellwether trials later this year.

– Madeleine Fischer

TRIAL ON MERITS NEEDED TO DECIDE IF COIL MAKER INTENTIONALLY DESTROYED EVIDENCE

***Little v. Boston Scientific Corp*., No. 08-271 (La. App. 5 Cir. Jan. 13, 2009), 2009 WL 92019**

In 2001, Charlotte Little suffered two brain aneurysms and underwent an angiogram and coiling procedure. During the procedure, her doctor placed two coils, manufactured by Micrus Corporation ("Micrus"). While placing the second coil, the first coil dislodged and could not be removed, causing the doctor to perform an emergency craniotomy. During the procedure, Little suffered a stroke and other complications.

Little sued several defendants, including Micrus Corporation, for defective design and manufacture, failure to warn of the risks that the coils could dislodge, and spoliation of evidence, alleging that a Micrus representative, Sue Young, intentionally discarded the coil to prevent inspection. Micrus filed a motion for summary judgment, and the trial court granted the motion, dismissing Micrus from the case. Little appealed this judgment arguing that the trial court improperly dismissed her defective design claim and that the trial court improperly found that the defendant did not intentionally destroy evidence.

On appeal, the Louisiana Fifth Circuit Court of Appeal first reviewed the spoliation of evidence claim. In Louisiana, the theory of "spoliation of evidence" refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. The plaintiff must allege that the defendant intentionally destroyed the evidence, and it was not a result of mere negligent conduct. If this theory is applied to the case, the plaintiff is entitled to an adverse presumption that the destroyed evidence contained information detrimental to the party who destroyed it.

In reviewing the evidence, the Fifth Circuit found that questions of fact existed regarding whether or not Young received the coil. Young had testified that she did not know what became of the coil after the procedure and also did not know what became of the report that she had written following the surgery. She further testified that she did not perceive the problem to be a malfunction of the coil, so she did not ask to see the device or have it saved. However, Little's doctor testified that to his best recollection, Young was given the coil following the procedure. Additionally, a confidential Micrus report indicated the initial notification did not occur following the surgery, but rather occurred two months after Micrus had been served with the lawsuit.

Based on these conflicting facts, the Court held that it was inappropriate to judicially determine if and when Young received the coil which called for a weighing of credibility. As a result, the Court reversed the trial court's granting of summary judgment, noting that even though summary judgment is favored, it is not a substitute for a trial on the merits. As a result, the Fifth Circuit declined to address the remaining issues raised by Little against Micrus, and remanded the case back to the trial court for further proceedings.

– *Sara C. Valentine*

FEDERAL COURT INSTRUCTED TO KEEP FLEXIBLE PIPE CASE UNDER SUPPLEMENTAL JURISDICTION

***Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc*., No. 07-31154, 2009 WL 22876 (5th Cir. Jan. 6, 2009)**

In August 2003, several retail gas station owners brought a claim against a manufacturer of flexible thermoplastic pipe, its commercial liability insurer, and others. The gas station owners alleged that the thermoplastic pipe was defective. Although the owners originally filed suit in state court, the case was removed to federal court on May 26, 2004, because one of the defendants filed bankruptcy proceedings and the suit was "related to" the bankruptcy.

After the case proceeded in federal court for three years, a settlement was reached with the bankrupt defendant's insurer, leaving only issues of state law. The district court in its discretion refused to exercise supplemental jurisdiction over the remaining state law claims and sent the case back to state court.

The district court's decision was appealed, and Judge Benavides, writing for a panel of the United States Court of Appeals for the Fifth Circuit, held that a district court inappropriately exercises its discretion when it declines to decide a case in which only state law claims remain, but after investing a significant amount of judicial resources in the litigation during the time that complete federal jurisdiction existed. During the three years that this case proceeded in federal court, the district court had decided 41 motions, 14 motions to strike expert witnesses, and 7 motions ruling on the admissibility of evidence. Indeed, at the time of remand, the parties were in the final stages of preparing for trial. Judge Benavides determined that sending the suit back to state court would be a waste of judicial resources, and, as a result, it was an abuse of the district court's discretion to refuse to continue to handle the case under its supplemental jurisdiction.

– *Eric Michael Liddick*

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GUN MANUFACTURER RUNS OUT OF AMMUNITION IN PRODUCTS LIABILITY SUIT

***Rider v. O.F. Mossberg & Sons, Inc*., No. 08-980, 2008 WL 5397309 (W.D. La. Dec. 23, 2008)**

On July 10, 2008, a MOSSBERG 100 ATR 30-06 rifle exploded in Heath Rider's face. Rider brought a products liability suit against O.F. Mossberg & Sons, Inc. ("Mossberg") in the United States District Court for the Western District of Louisiana. Rider later sought to add Maverick Arms, Inc. ("Maverick"), Mossberg's sister corporation, as a defendant. Mossberg opposed the joinder of Maverick, characterizing Maverick's presence in the lawsuit as "unnecessary or futile."

Because plaintiff alleged that Maverick assembled or constructed the rifle, including the defective component that allegedly caused the injury, and because plaintiff alleged that Maverick destroyed relevant repair records, Magistrate Judge Karen L. Hayes held that Rider did have a potentially valid claim against Maverick. Rider was thus allowed to add Maverick as a defendant.

– *Tarak Anada*

SWEET POTATO FARMER WINS EVIDENCE FIGHT, BUT MAY LOSE WAR ON DESIGN DEFECT CLAIM

***Dawson Farms, LLC v. BASF Corp*., 2008 WL 5220517 (W.D. La. Dec. 12, 2008); and *Dawson Farms, LLC v. BASF Corp*., 2008 WL 5351998 (W.D. La. Dec. 18, 2008)**

The 2005 sweet potato growing season yielded a severely damaged crop for Dawson Farms, LLC ("Dawson"). Dawson contended that the herbicide Outlook stunted and malformed its sweet potatoes and sued BASF, Outlook's manufacturer. A May 16, 2008, judgment by Judge Robert James narrowed Dawson's claims against BASF to three: (1) redhibitory defect, (2) breach of the implied warranty of fitness for ordinary use, and (3) design defect under the Louisiana Products Liability Act ("LPLA").

Despite having allowed both the design defect and breach of implied warranty of fitness claims to proceed, the court still questioned whether the LPLA preempted Dawson's breach of implied warranty of fitness claim. On October 15, 2008, Judge James requested supplemental briefing from Dawson and BASF on the court's own motion to dismiss the warranty of fitness claim.

Judge James held that the LPLA does not preempt a breach of implied warranty of fitness claims. The LPLA expressly states that it provides the exclusive theory of liability for manufacturers for damages caused by their products,

except that economic loss damages are recoverable under the LPLA only to the extent the redhibition articles of the Louisiana Civil Code do not allow recovery for damage to the product or economic loss.

Judge James held that the claim for breach of implied warranty of fitness arises under the redhibition articles and that the LPLA was specifically intended to preserve, not displace, claims in redhibition. Thus, Dawson's breach of implied warranty claim was not preempted.

However, Dawson's win on this issue may lead to the dismissal of Dawson's design defect claim. Judge James questioned whether Dawson could pursue a pure economic loss claim under the LPLA. Judge James placed Dawson on notice of his intention to dismiss the LPLA design defect claim, giving Dawson 10 days to oppose the dismissal.

Several days later, on December 18, 2008, Judge James revisited several of BASF's motions asking the court to exclude certain evidence and testimony that Dawson planned to use at trial. Judge James made the following rulings:

- Dawson would be allowed to present evidence of the claims of a number of other farmers who had experienced losses substantially similar to his own.
- Dawson could use BASF's marketing brochure, which touted qualities of Outlook that Dawson claimed increased Outlook's potential for injuring the sweet potatoes.
- Lastly, because the brochure was admissible, the court denied BASF's motion to exclude the testimony of Dawson's expert witness, Dr. Cannon, which relied on statements contained in the brochure.

According to these recent rulings, this case is scheduled for trial in the near future.

For more on this case see DAMAGED CROPS AND ALTERNATIVE DESIGN EVIDENCE KEEPS HERBICIDE DEFECT CLAIM ALIVE in our June 2008 issue and COURT LIMITS SWEET POTATO FARMER'S EVIDENCE AGAINST HERBICIDE MANUFACTURER in our November 2008 issue.

– *Wade B. Hammett*

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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