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Products Liability
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Win Your Daubert Hearing At Trial Level

LeMaire v. Ciba-Geigy, 99-1809 (La.App. 1 Cir. 5/11/01)

A recent decision of the Louisiana First Circuit Court of Appeal demonstrates the difficulty of successfully challenging an adverse trial court ruling admitting unreliable expert testimony on appeal.

In *LeMaire v. Ciba-Geigy*, 99-1809 (La.App. 1 Cir. 5/11/01), plaintiff claimed that he sustained several different injuries from exposure to atrazine at Ciba-Geigy. Defendant denied that atrazine caused the type of injuries claimed by plaintiff (general causation) and also denied that atrazine exposure at its facility caused plaintiff's injuries (specific causation). Plaintiff retained two expert witnesses, a pediatrician and an occupational medicine physician, to establish both general and specific causation. At defendant's request, the trial judge conducted a *Daubert* hearing to determine whether the experts' testimony was sufficiently reliable to be admissible. The trial judge allowed the two experts to testify because he thought it would be helpful and "no more confusing than any other expert." His entire reasons for the ruling are included in the dissent. The reasons demonstrate a lack of understanding of the purpose or requirements of *Daubert* and a failure to apply to *Daubert* criteria in any thoroughgoing manner. Despite this, the First Circuit, by a 2 to 1 decision, and with little comment, found that the trial judge had conducted the requisite hearing and had not abused his vast discretion to determine the admissibility of expert testimony.

In contrast to the trial judge's reasons, Judge Gonzales' dissent demonstrates a thorough understanding of the purpose of *Daubert* and its progeny, *i.e.*, to ensure that expert opinion testimony is based on sound methodology. Judge Gonzales points out that the trial judge failed to address any of the indicia of reliability (whether the opinion can or has been tested, peer review, error rate and general acceptance). He then goes further and demonstrates that the two experts' testimony established a lack of reliability.

The experts' opinions that atrazine could cause the type of injuries claimed by plaintiff were based solely on incomplete knowledge of some animal studies. The experts did not know the dosage administered to the animals and had no concept of the dosage received by plaintiff. They failed to demonstrate that the results of the animal studies could be reliably extrapolated to humans. Moreover, they admitted that there was no literature establishing general causation in humans, and that they were not aware of any other scientists who agreed with their opinion. They had not conducted any tests or published any articles. Therefore, there was no error rate or peer review that could be considered. Essentially, the experts admitted that their opinions did not satisfy any of the *Daubert* indicia of reliability.

Despite these obvious deficiencies, the First Circuit refused to overturn the trial judge's ruling admitting the testimony. If this attitude prevails in other appellate courts, the discretion of the trial judge regarding the admissibility of expert testimony may be nearly absolute.

- *William L. Schuette*

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Sand Supplier Not Liable To Shipyard Under Warnings Theory

Cowart v. Avondale Industries, Inc.,
2000-0894 (La.App. 4 Cir. 7/3/01), 2001 WL 767595

In a two to one decision the Fourth Circuit has reversed a trial court decision and granted summary judgment to a supplier of silica sand on the ground that the shipyard it sold to was a sophisticated user, not requiring warnings, and that the warning given was in any event adequate.

In *Cowart* the plaintiff contracted silicosis allegedly due to working as a chipper and grinder at Avondale from 1978 to 1995. He sued Avondale, and various other defendants including Unimin, a supplier of silica sand. Plaintiff alleged an assortment of products theories against Unimin. The court found that Unimin's liability was governed by the LPLA (effective date 9/1/88). The court discounted plaintiff's defective design theory since Unimin merely supplied a natural raw product (sand) and did nothing to process or alter the sand. Therefore, the court held the only possibly viable theory under the LPLA was failure to warn.

The court found that Unimin carried its burden of proving that Avondale was a sophisticated user by introducing evidence that Avondale had a safety department responsible for assuring compliance with OSHA and that Avondale was aware of the health hazards of silica sand and the need to protect its workers by providing them with respirators and ventilation systems.

Although the court found Avondale to be a sophisticated user, it nonetheless went on to evaluate the warnings Unimin did provide. Unimin provided warnings of the health hazards of silica dust on its invoices and on the sand it supplied in bags. Plaintiff argued that the warnings didn't go far enough and that the warnings should have specifically required the use of HEPA filters or air supplied respirators. The court disagreed: "Having advised Avondale of the need to protect its workers from the dangers of inhaling silica dust, and of the need to follow OSHA safety and health standards, Unimin was under no further duty to instruct Avondale, a sophisticated user, of the precise type of respirator that should be used by its foundry employees when working with Unimin's sand." The court also held that the LPLA did not require Unimin to warn users of the existence of safer alternative products. "Once having found Avondale to be a sophisticated user, the trial court should have granted Unimin's motion for summary judgment...."

- *Madeleine Fischer*

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Timely Products Suit Interrupts Prescription Against Med Mal Defendants

Pendarvis v. State of Louisiana, Through the Department of Health and Hospitals,
2000 0784 (La. App. 1st Cir. 6/22/01), ___ So.2d ___, 2001 WL 701602

The Louisiana First Circuit Court of Appeal recently held that a timely filed products liability claim interrupts the prescriptive period applicable to medical malpractice actions when the complaint alleges that the product manufacturer and qualified health care provider are solidarily liable.

In *Pendarvis*, the plaintiff parents filed suit on July 14, 1993, individually and on behalf of their minor daughter, for injuries the child allegedly sustained when the "Johnny Jump Up" she was sitting in broke. Plaintiffs contended that the product manufacturers were liable for a defective product, and that the state was liable for medical malpractice due to improper diagnosis of the child at Earl K. Long Hospital. Plaintiffs claimed that the defendants were solidarily liable for their damages.

On September 3, 1993, the trial court granted the State's exceptions of prematurity and lack of subject matter jurisdiction due to Plaintiffs' failure to file a request for a medical review panel, a statutory prerequisite to filing a malpractice suit against a qualified health care provider pursuant to LSA-R.S. 40:1299.47. A medical review panel was conducted in due course, during which time Plaintiffs dismissed their claims against the product manufacturers, with prejudice. Subsequently, Plaintiffs filed the suit at issue here against the State, two weeks after receiving notice of the medical review panel's decision. The State filed an exception of prescription, which was overruled by the trial court.

In an opinion written by Judge Fogg, the court stated that the timely products liability suit filed against all solidarily liable defendants interrupted the prescriptive period as to the medical malpractice claim against the State. Since Plaintiffs filed the instant suit within ninety days of receipt of the medical review panel's decision and within one year of the dismissal of the products liability defendant, the trial court properly denied the State's exception.

Judge Gonzales wrote a dissenting opinion stating his belief that LSA-R.S. 9:5628, which provides for the suspension of prescription in medical malpractice cases, should be applied alone, not in conjunction with any general civil code articles on prescription. As such, "[t]he premature filing of a medical malpractice suit does not serve to interrupt prescription, even if the plaintiff has alleged a solidary relationship between or among the defendants." *Pendarvis* at *7.

- *Meredith Young* back to top

Fifth Circuit Finds Product Liability Claims Against Pacemaker Company Preempted

Martin v. Medtronic, 254 F.3d 573 (5th Cir. 2001).

In *Martin*, plaintiffs asserted state law tort claims against the manufacturer of an allegedly defective pacemaker. The Fifth Circuit ruled that such claims were preempted because the device manufacturer complied with the rigorous premarket approval (PMA) provisions of the Medical Device Amendments (MDA) to the FDCA. See 21 U.S.C. § 360(e)(c (1). Reaffirming its earlier decision in *Stamps v. Collagen Corp.*, 984 F2d 1416(5th Cir.1993), the Court held that:

> ... a medical device manufacturer's compliance with the FDA's PMA process will preempt state tort law claims brought with respect to that approved device and relating to safety, effectiveness or other MDA requirements when the substantive requirements imposed by those claims potentially conflict with PMA approval. Thus, the plaintiffs' tort law claims relating to design, manufacturing process, and failure to warn are preempted by the MDA.

The Fifth Circuit court distinguished *Stamps and Martin* from the U.S. Supreme Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) which involved the 21 U.S.C. § 510(k) premarket notification process, "an exception to the far more demanding PMA review process.

- *Robert L. Walsh* back to top

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