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AUTOMATIC DOOR CLOSES ON WOMAN BUT DOOR TO RECOVERY REMAINS OPEN

***Smith v. Dialysis Clinic, Inc.*, No. 06-2381, 2008 WL 4601912 (W.D. La. Oct. 15, 2008)**

Georgia Smith was struck by an automatic door as she entered a dialysis clinic in Shreveport, Louisiana. She later sued the manufacturer of the automatic door, the Stanley Works ("Stanley"). Claiming damages totaling more than $2.6 million, Smith alleged that the automatic door was "unreasonably dangerous" under the Louisiana Products Liability Act ("LPLA").

Stanley filed a motion for summary judgment in an effort to have the case resolved in its favor. In support of its motion, Stanley introduced a software engineer's report, which opined that the accident was the result of improper maintenance rather than faulty design.

Smith responded by presenting the testimony of a clinic employee who claimed to have witnessed the door opening erratically and refusing to close. Smith also testified herself that she did not remember seeing any warning signs or notices on the morning she entered the building.

Judge Hicks of the United States District Court for the Western District of Louisiana held that the expert's report did not conclusively establish that the automatic door system was not "unreasonably dangerous" under the LPLA. Finding that Smith had demonstrated genuine, material issues of fact with respect to her claim, Judge Hicks denied Stanley's motion for summary judgment. Smith will thus have the opportunity to prove at trial that the automatic door and its components were defective in design, manufacture, construction, composition, operation, and/or warnings.

– *Tarak Anada*

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COURT LIMITS SWEET POTATO FARMER'S EVIDENCE AGAINST HERBICIDE MANUFACTURER

***Dawson Farms, LLC v. BASF Corp.*, 2008 WL 4600934 (W.D. La. Oct. 15, 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. Before trial, Judge Robert James dismissed Dawson's claim that BASF negligently rushed Outlook to market for the 2005 growing season. Judge James limited Dawson's claims against BASF to sale of a product unfit for ordinary use (redhibition) and design defect under the Louisiana Products Liability Act.

As the parties prepared for trial, BASF filed a number of motions asking the court to exclude certain evidence and testimony that Dawson planned to use at trial. The following rulings by Judge James are of particular interest:

- BASF wanted to exclude Dawson's evidence that other farmers' 2005 sweet potato crops were damaged. In products liability actions, evidence of similar accidents or injuries may be relevant to the manufacturer's knowledge that the product might be dangerous, the magnitude of the danger, the manufacturer's ability to correct a known defect, the product's lack of fitness for use, and causation. Judge James denied BASF's motion, stating he would allow the evidence if Dawson first proved that the other farmers' damages were similar to his own in three respects: 1) same crop (sweet potatoes); 2) same region (Louisiana); and 3) same time period (2005).

- Dawson sought to put on evidence regarding the sufficiency and quantity of BASF's testing of Outlook for use on sweet potatoes. The Court found that evidence related to the sufficiency of the tests BASF conducted was directly relevant to whether Outlook was defective or suitable for use as a sweet potato herbicide. But, evidence pertaining to the number of tests related only to negligence, a theory that was dismissed earlier in the case, and was therefore irrelevant and inadmissible.

- After the 2005 sweet potato growing season, BASF took Outlook off the sweet potato market. The Federal Rules of Evidence prohibit the admission of evidence of measures taken by a defendant that, "if taken previously would have made the injury or harm less likely to occur." Dawson argued that BASF's withdrawal of Outlook from the market was not an inadmissible remedial measure because BASF denied the existence of a defect. Judge James rejected this argument because the rule excluding evidence of subsequent remedial measures is designed to encourage defendants to take remedial measures without the fear of conceding liability. Accordingly, the evidence was inadmissible.

- BASF also moved to exclude the testimony of Dr. James Cannon, Dawson's expert witness. BASF argued that Dr. Cannon was not qualified to testify as to

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how Outlook was absorbed by plants. Dr. Cannon, a PhD in horticulture, was a specialist for sweet potatoes at Louisiana State University's Agricultural Center, and was himself a sweet potato farmer. The Court found Dr. Cannon uniquely qualified by education and experience to opine that Outlook was defective, despite his not being a chemist. Dr. Cannon did not need to understand how Outlook worked at the molecular level to provide an opinion on Outlook's use on sweet potatoes. Thus, Judge James allowed Dr. Cannon's testimony and report.

The theme that emerges from Judge James' opinion is that all evidence tending to show BASF's negligence was excluded or limited. Where Dawson showed its evidence was relevant to the defective design of Outlook, or the herbicide's unfitness for use on sweet potatoes, it was allowed.

For more on this case see DAMAGED CROPS AND ALTERNATIVE DESIGN EVIDENCE KEEPS HERBICIDE DEFECT CLAIM ALIVE in our June 2008 issue.

– *Wade B. Hammett*

COURT FINDS BIRTH CONTROL DRUG'S BONE DENSITY LOSS WARNING SUFFICIENT

***Oliver v. Pharmacia & Upjohn Co., LLC*, 06-5737, 2008 WL 4691626 (E.D. La. Oct. 22, 2008)**

Adrianne Oliver took Depo-Provera, a birth control prescription drug manufactured by Pharmacia. Oliver claimed that the drug caused her to lose bone density, a medical condition known as osteopenia. She sued Pharmacia, contending that the warning on the drug was inadequate because, until it was changed in November 2004, the warning only included osteoporosis as a risk associated with the drug.

Pharmacia asked the court to dismiss Oliver's case in a motion for summary judgment. Oliver filed no opposition, so the court granted Pharmacia's motion and dismissed the case without considering the merits of the claim. Oliver then asked the court to reconsider, claiming that her failure to oppose Pharmacia's motion was an oversight. The court took Oliver's request as opportunity to take a second look at the merits of Pharmacia's arguments but ultimately concluded that its initial decision to dismiss Oliver's case was correct for several reasons.

First, the court re-examined Oliver's argument that the warning labels should have mentioned that Depo-Provera was not only a risk factor for osteoporosis but was an actual cause of osteopenia. Both of Oliver's prescribing doctors testified that the pre-November 2004 warning sufficiently informed them of the risks of taking Depo-Provera. Under Louisiana law, a manufacturer only has a duty to warn the prescribing physician of a prescription drug's risks. The manufacturer has no duty to directly warn

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a patient. The court rejected Oliver's claim that the warning was not good enough because Oliver's physicians were adequately warned. Alternatively, the court concluded that even if the warning was not adequate, the pre-November 2004 warning did not cause Oliver's osteopenia, because the doctors did not discontinue the prescription after the warning was changed.

Second, the court concluded that osteopenia was not an injury or disease in the legal sense. The court relied upon medical testimony that osteopenia is a slow process in the bone that can *lead* to an injury, such as fracture of a bone, but that osteopenia is not itself an injury. In support of this conclusion, the court cited decisions from two other federal courts in Ohio and Florida that also held that osteopenia caused by Depo-Provera is not an injury.

The court's final point—that not every change in physical condition constitutes a legally compensable injury—has arisen with increasing frequency not only in prescription drug cases, but also in cases involving exposures to chemicals and other substances that may result in injury or disease years later. Law and science intersect as judges decide these issues and evaluate the reliability of scientific expert testimony. This E*Zine will continue to report on the handling of scientific issues by the courts.

– *Madeleine Fischer*

COURT DEFLATES DEFECTIVE TIRE CLAIM AGAINST FRAUDULENTLY JOINED PARTIES

***Diaz v. Goodyear Tire & Rubber Co.*, No. 07-353, 2008 WL 4528186 (M.D. La. Oct. 1, 2008)**

Evaristo Fernandez suffered fatal injuries in an April 14, 2004, car accident. His wife, Rosario Diaz, contended that a defective Goodyear tire on the car purchased from Cajun Auto Sales caused the accident. Diaz filed a wrongful death suit in state court against Cajun Auto Sales, Goodyear USA, and Compania Goodyear USA du Brazil. Goodyear USA removed the suit to federal court in Baton Rouge, Louisiana. Cajun Auto Sales was a Louisiana citizen, a fact that would normally preclude filing in federal court. Goodyear USA argued, however, that Diaz "fraudulently joined" Cajun Auto Sales to prevent federal court jurisdiction and that the Court should therefore ignore Cajun Auto Sales' citizenship, allowing the case to remain in federal court. Judge Polozola agreed that Diaz "fraudulently joined" Cajun Auto Sales. Judge Polozola, therefore, denied Diaz's request for remand to state court.

The "fraudulent joinder" doctrine provides that a district court must disregard a non-diverse party's citizenship in determining whether the court can exercise jurisdiction over a dispute if no possibility exists for recovery against the party under state law. Here, Goodyear USA argued that Diaz could not prevail against Cajun Auto Sales under Louisiana law.

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Judge Polozola first considered Diaz's claim against Cajun Auto Sales under Louisiana's redhibition law. He concluded that Diaz could not recover in redhibition against Cajun Auto Sales for four reasons.

- First, only a buyer of a product may assert a claim under Louisiana's redhibition law. Here, Fernandez, not Diaz, bought the car from Cajun Auto Sales. Diaz argued that the car was community property, and thus she was a "buyer." Louisiana's community property laws did not apply to Diaz, however, because Fernandez and Diaz's matrimonial domicile was Mexico. Thus, Diaz was not a "buyer."

- Second, although Diaz claimed to be the designated representative of Fernandez's estate, she did not support this claim with evidence. Since Fernandez's estate had not yet been opened, no designated representative existed. The Court noted, however, that even if Diaz was subsequently designated as the estate representative, Diaz could not amend her petition after removal to destroy federal court jurisdiction.

- Third, Diaz claimed she was Fernandez's heir but again produced no evidence to verify this claim. Judge Polozola observed that even if Diaz was an heir to Fernandez's estate, this fact would "not permit [Diaz] to maintain an action in redhibition on [Fernandez's] behalf."

- Finally, Diaz could not obtain damages for the wrongful death of her husband in a redhibition suit. Under Louisiana law, a successful redhibition claim entitles the buyer to "rescission of the sale of the product in question and return of or reduction in the purchase price"—not to damages for injury or death.

Judge Polozola next considered whether Diaz could possibly succeed on her claim that Cajun Auto Sales negligently failed to "inspect, maintain, and warn plaintiffs about the alleged defects in the subject tire." Under Louisiana law, a non-manufacturing seller such as Cajun Auto Sales can only be liable for damages in negligence if it knew of the defect in the product and still sold the product without warning. Louisiana law does not require a non-manufacturing seller to inspect the product before sale "to determine the possibility of any inherent vices or defects." Here, Cajun Auto Sales' representative testified that he knew of no defects in the car or tires at the time of sale. Additionally, because the alleged defects were "latent in nature," there was no reason to impute knowledge of the defects to Cajun Auto Sales. Since Louisiana law did not require Cajun Auto Sales to inspect for latent defects, it "had no duty to warn of hidden defects." Diaz, therefore, could not reasonably prevail on her negligence claim against Cajun.

Judge Polozola also concluded that Diaz improperly joined Compania Goodyear, a Brazilian company. Diaz did not attempt to serve Compania Goodyear and failed to pursue any claims against Compania Goodyear after filing suit. Diaz even agreed to dismiss Compania Goodyear after entering into a stipulation with Goodyear

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USA that Goodyear USA was the company that actually manufactured and designed the allegedly defective tire. Although Judge Polozola referenced the lack of evidence demonstrating that personal jurisdiction over Compania Goodyear even existed, his determination that Diaz could not recover against Compania Goodyear rested upon Diaz's failure to serve Compania Goodyear.

Judge Polozola likely reached the correct decision here. But, more importantly, this decision serves as example of successful methods for defeating remand through use of the "fraudulent joinder" doctrine. Goodyear USA methodically isolated Diaz's individual claims and illustrated that Diaz had no reasonable chance of recovering against Cajun Auto Sales or Compania Goodyear under Louisiana law. In doing so, Goodyear USA satisfied its burden of proving "fraudulent joinder" and succeeded in retaining federal court jurisdiction.

– *Eric Michael Liddick*

WOOD PILINGS MAKER CANNOT BE SUED IN LOUISIANA WITHOUT STATE CONTACTS

***Ruppert v. George Kellett & Sons, Inc.*, 08-0182 (La. App. 5 Cir. Sept. 30, 2008); 2008 WL 4415837**

Fred Ruppert, a Montana resident, bought wood pilings for the construction of his Waveland, Mississippi, home. Claiming the pilings were defective, Ruppert then filed suit in Louisiana state court against the piling seller, Kellett, and the alleged piling manufacturer, KyKenKee, an Alabama corporation. KyKenKee asked the court to dismiss the case, since the company had never conducted business in Louisiana.

The United States Constitution requires that a party have "minimum contacts" with the state where the court is located before that party is required to defend an action in the state. A court cannot assert personal jurisdiction over a party that lacks "minimum contacts" in that state. A manufacturer has "minimum contacts" if it "purposefully avails itself of the privilege of conducting activities" in the state. This so-called "purposeful availment" test insures that companies such as KyKenKee reasonably anticipate defending themselves in that state's courts.

According to Ruppert, KyKenKee manufactured the pilings at its Alabama sawmill and sold them to Great Southern, another Alabama corporation. Great Southern chemically treated the pilings and sold them to Kellett, the Louisiana corporation that sold Ruppert the pilings. KyKenKee neither admitted nor denied manufacturing Ruppert's pilings. KyKenKee stated it did not sell its products in Louisiana and had no way of knowing whether third parties resold its products in Louisiana.

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KyKenKee only sold its products in Alabama, Mississippi, and Florida. KyKenKee never designated an agent for service of process; advertised in Louisiana media; employed personnel; maintained bank accounts; held meetings of officers, directors, or shareholders; entered into a contract; filed suit; transacted business; or caused any injury through an act or omission in the state.

In this case, Louisiana's Fifth Circuit properly refused to impute Kellett's actions in Louisiana to KyKenKee. Likewise, Ruppert's purchase of the pilings in Louisiana did not equate to purposeful contacts by KyKenKee with Louisiana. Even if KyKenKee did manufacture Ruppert's pilings, KyKenKee's only ties to Louisiana arose from Kellett's actions. Thus, Louisiana courts could not exercise jurisdiction over KyKenKee.

– *Sarah S. Brehm*

COURT LIMITS CLAIMS THAT MEDICAL DEVICE USED IN ANGIOGRAM WAS DEFECTIVE

***Rollins v. St. Jude Medical*, No. 08-0387, 2008 WL 4661622 (W.D. La. Oct. 20, 2008)**

In 2007, Linda Rollins underwent an angiogram, during which the doctor used a device known as an Angio-Seal. Following the angiogram, Rollins developed complications and was rushed into emergency surgery. The doctor who performed this emergency surgery reported that the Angio-Seal was not in the proper place and that Rollins suffered significant damage to the common femoral artery from these complications.

Rollins filed a complaint in state court against several defendants alleging that they were responsible for her injuries following the initial angiogram. After removing the case to federal court, the defendants filed motions to dismiss all of Rollins' claims, arguing that she failed to state a claim upon which relief could be granted. Defendants also argued that many of her claims were preempted by federal law because the Angio-Seal is a Class III medical device that has been approved by the Federal Drug Administration ("FDA") under the pre-market approval (PMA) process.

After allowing Rollins to amend her complaint, the court dismissed the majority of her claims. The court found that federal law preempted many of her Louisiana products liability claims. This case, the court noted, was factually similar to a Fifth Circuit case called *Gomez v. St. Jude Medical Daig Division, Inc*. In *Gomez*, the Fifth Circuit held that the PMA process of approving Angio-Seal, the same product here, in which the FDA studied the Angio-Seal's design, warnings, instructions, and training materials through the PMA process and approved it, necessarily preempted any state law claims of defective design, warnings, instructions, and training material. The *Gomez* court concluded that to permit a jury to second-guess the Angio-Seal's design,

warnings, instructions, and training materials by applying LPLA would risk interfering with the federally-approved design standards and criteria. Further, any success on a Louisiana products liability claim would require proof that the FDA requirements were deficient, and the Fifth Circuit held that such a showing would be inconsistent with federal regulatory requirements.

Following *Gomez*, the court here found that many of Rollins' claims were identical to the claims in *Gomez*, and, so, the court dismissed those claims. The court found, however, that federal law did not preempt her claims of state duties that "parallel" the FDA regulations, such as her claim that the defendants failed to comply with FDA requirements and that the defendants failed to manufacture the Angio-Seal in accordance with FDA specifications. The court allowed these claims to stand. Rollins' claims that defendants failed to manufacture and package the Angio-Seal in accordance with FDA specifications also survived dismissal because she included details of the required specifications and the defects that she alleged occurred.

Next, the court reviewed Rollins' claim that the defendants failed to appropriately train medical personnel in the proper use of the Angio-Seal and that they failed to train physicians and to address complications caused by the Angio-Seal. The court noted that these claims were mere conclusory statements, and allowed Rollins 10 days to amend her complaint.

Finally, the court reviewed Rollins' claim that the defendants did not comply with the FDA reporting requirements because they failed to include the lot number in 31 adverse event reports. The court noted that Rollins did not explain in her complaint how this alleged failure, standing alone, caused her injuries. Given this failure, the court allowed Rollins 10 days to amend her complaint to cure this problem or this claim would be dismissed.

As a result of the court's ruling, the only claims remaining against the defendants were the non-preempted failure to train, failure of the defendants to abide by FDA manufacturing and packaging specification, and the defendants' failure to abide by the FDA reporting requirements.

– *Sara C. Valentine*

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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