

RECENT DEVELOPMENTS IN PRODUCTS LIABILITY

Over the past twelve months and across the country, both state and federal courts have issued several helpful and instructive opinions in products liability cases. Many of those opinions can be categorized under the topics of subsequent remedial measures, preemption, expert testimony, and post-sale duties. The cases addressing each of these four topics are summarized below.

Subsequent Remedial Measures

In *Dewick v. Maytag Corporation*, 296 F.Supp.2d 905 (N.D. Ill. 2003), a ten-month-old infant was seriously injured when he crawled inside the broiler section of his parents' kitchen range. The parents sued the manufacturer, alleging their range was "defective, unreasonably dangerous, and not reasonably safe for its intended and foreseeable uses". Among their other allegations, plaintiffs suggested that the broiler door on the range could be opened with minimal force. Further, the parents asserted that Maytag knew about this problem well before this incident, because there were earlier, substantially similar situations with the same range model, and that it failed to properly investigate those incidents. *Id.* Finally, the parents alleged that Maytag redesigned the range so that more force would be needed to open the broiler door after this particular injury. *Id.* at 907.

The court in this case faced the issue of whether the pre-injury decision to change the design of the broiler door, which was not implemented until after the injury was sustained, would be admissible pursuant to Federal Rule of Evidence 407.

Id. at 910. Rule 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court concluded that the evidence of Maytag's pre-injury decision to increase the necessary force to open the broiler door was admissible. *Id.* at 911. The court reasoned that Rule 407 only excludes evidence of measures taken after an event, and since the decision to change the design was made before this incident, such evidence was admissible. *Id.* However, the court also ruled that the evidence of implementation, which did not occur until after the injury, was inadmissible.

In the case of *Gray v. Hoffman-LaRoche, Inc.*, 2003 WL 22854643, 82 Fed.Appx. 639 (10th Cir. 12/3/2003), the plaintiff sued a drug manufacturer, alleging that the prescription drug Accutane caused her to experience severe depression. At the trial court level, the jury returned a verdict against plaintiff and in favor of the

manufacturer. *Id.* On appeal, plaintiff argued that the trial court erred in excluding evidence that the manufacturer changed the warnings after she stopped taking the drug. *Id.* at 646. The appellate court held that the trial court acted within its discretion in excluding the evidence because the medical form sought to be introduced into evidence was more prejudicial than probative, and “courts must exclude evidence if ‘the dangers of prejudice or confusion substantially outweigh the probative value of the evidence’”. *Id.* at 646-47 (citing Fed.R.Evid. 407 Advisory Committee’s note (1997 Amendments)). The court reasoned that the form established both the doctor’s and the manufacturer’s subsequent remedial measures and if such evidence had been admitted at trial, the jury might have used the form against the manufacturer in violation of Rule 407.

The court also examined the three exceptions to the general rule in Fed.R.Evid. Rule 407, including impeachment, feasibility, and other purposes. The court concluded that the impeachment exception did not apply here for several reasons. *Id.* at 648. First, the informed consent document itself would not contradict the doctor’s testimony that he did not routinely follow instructions from drug companies. Second, there is no indication that the doctor used the document immediately after receiving it. Third, the document differed in form and content from the warning, which plaintiff suggested should have been given earlier. Finally, the doctor’s testimony

indicated he received the new information about Accutane's potential side effects around the time plaintiff stopped taking the drug and before he adopted the form. *Id.* at 647. The court also concluded that neither the feasibility nor the other purposes exceptions applied because feasibility was not in contest, and since contributory negligence was not raised as a defense at trial, plaintiff had no need to introduce the form to demonstrate she was not guilty of such. *Id.* at 648.

In *Diehl v. Blaw-Knox*, 360 F.3d 426 (3d Cir. 2004), the Third Circuit held that Rule 407 did not exclude evidence of subsequent remedial measures taken by a *non-party*. The court discussed the public policy behind Rule 407, which is to encourage manufacturers to improve the safety of their products by not being penalized by allowing evidence of such subsequent improvements to be introduced at trial. *Id.* at 429-30. However, this policy concern is not present for a non-party because admission of such evidence taken by non-parties will not expose them to liability, and thus they will not be discouraged from taking those remedial measures. *Id.* at 430. The rationale for not excluding evidence of subsequent remedial measures taken by non-parties is that "it hardly makes sense to speak of a party's fault being 'admitted' by someone other than the party". *Id.*

In *Irion v. Sun Lighting, Inc.*, 2004 WL 746823 (Tenn. Ct. App. 4/7/2004), plaintiff sued the supplier and seller of a halogen torchiere lamp, which caused a fire

when the plaintiff's son put a pillow on top of it. The court affirmed summary judgment in favor of both defendants, concluding that the post-sale UL and CPSC notices do not prove that the lamp was unreasonably dangerous or defective at the time it left the control of defendants. *Id.* at 14. Just because a wire guard or other device was incorporated into the product four years after plaintiff bought her lamp does not mean that the absence of such a guard resulted in the product being unreasonably dangerous or defective. *Id.* The plaintiff was required to prove that the product was unsafe for its anticipated use at the time she bought it in 1993; however, her evidence was insufficient to carry that burden.

Finally, in *John Crane, Inc. v. Jones*, 586 S.E.2d 26, (Ga. App. 2003), *reconsideration denied* (7/28/03), *certiorari granted* (1/22/04), plaintiff filed suit against several defendants, claiming that he contracted mesothelioma from his occupational exposure to the asbestos in their products. Plaintiff testified that he was exposed to defendants' products until his retirement in 1987. A specialist testified that each exposure would have contributed to plaintiff's development of mesothelioma, including exposures after 1980. *Id.* at 31. The court concluded that "evidence of warning labels placed on those products in 1983 could not, by definition, constitute evidence of subsequent remedial measures" because there was evidence establishing that these remedial measures were not subsequent to plaintiff's

injury. *Id.* The court also stated that even if this was evidence of subsequent remedial measures, it still would have been admissible to show the defendants' knowledge that their products contained asbestos. *Id.* An exception to Rule 407 allows such evidence when it tends to show contemporary knowledge of the defect, causation, etc. as long as it is not used to show awareness of negligence. *Id.*

Preemption

In *Frith v. Bic Corporation*, 863 So.2d 960 (Miss. 2004), a 10-year-old boy found a lost lighter and flicked it as he walked past a gasoline container near the rear of his house. The sparks from the lighter caused an explosion; and, the boy was severely burned. The Mississippi Supreme Court held that the Friths' common law claims were preempted by federal law. The court began its analysis by noting the different theories of preemption and by finding that implied preemption was applicable to this case. *Id.* at 965. The court concluded that the common law standard advocated by the Friths would apply a higher standard upon defendant than the standard required by federal law. *Id.* at 966. The court stated that "a more stringent standard would no doubt frustrate the objective of the disposable lighter regulations". *Id.* at 967. The primary concern was that, if a state law claim was successful in imposing stricter child-resistant guidelines for disposable lighters such that a 10-year-

old could not use the lighter, then the lighter would be too difficult for an adult to operate, which would result in adults resorting to less safe methods of producing fire, such as matches. *Id.*

In *Steele v. Depuy Orthopaedics, Inc.*, 295 F.Supp.2d 439 (D.N.J. 2003), the district court held that the state law negligence, strict liability and breach of implied warranty claims were preempted; whereas the state law breach of express warranty and fraudulent concealment claims were not preempted. This case dealt with an implanted prosthetic knee joint. Plaintiff alleged several state-law claims regarding the safety and effectiveness of the knee joint. *Id.* at 441. The parties did not dispute that the prosthetic knee joint qualified as a Class III device under the FDCA. *Id.* at 442. The predominant issue for the court was whether the pre-market approval, which is required for Class III devices, and/or the pre-market supplemental approval by the FDA, impose particular requirements on the device that is approved within the meaning of the Medical Device Amendments and the FDA's regulations interpreting the scope of Section 360(a). *Id.* at 450. Following the Third Circuit's decision in *Michael v. Shiley, Inc.*, 46 F.3d 1316 (3rd Cir.), *cert. denied*, 516 U.S. 815, 116 S.Ct.67 (1995), the *Steele* court concluded that FDA approval does impose specific federal requirements applicable to that particular device, thereby triggering preemption under Section 360(a). *Steele*, 295 F.Supp.2d at 451-52.

However, with regard to plaintiffs' breach of express warranty claim, the court concluded that any express warranty claims based on representations made by the manufacturer concerning "non-FDA approved promotional and advertising materials" were not preempted by the Medical Device Amendments because such claims are the result of private contractual agreements rather than products of state action. *Id.* at 456. Finally, with regard to plaintiffs' fraudulent concealment claim, the court concluded that it could not grant defendant's motion for summary judgment because of questions as to whether or not the FDA imposed any requirements regarding defendant's obligation to disclose information to patients and other parties. *Id.* at 457. As such, the court could not make a definite decision as to whether or not this claim was preempted by the MDA. *Id.*

In *Davenport v. Medtronic, Inc.*, 302 F.Supp.2d 419 (E.D. Pa. 2004), the district court faced the issue of whether plaintiff's state law claims were preempted by the Medical Device Amendments to the FDA. Plaintiff, who suffered from Parkinson's Disease, underwent surgery to implant the Medtronic Activa Tremor Control System to help relieve him of the symptoms of this disease. *Id.* at 424. The court concluded that plaintiff's strict product liability and negligence claims were not preempted by the MDA because plaintiff alleged that the Activa systems implanted in him did not satisfy the federal standards set forth in the PMA/FDA. *Id.* at 433. The

determining factor for the court in this decision was that these state-law claims do not impose any different or additional standards than are already required by federal law.

Id.

The court also concluded that the express warranty claim was not preempted, using the same rationale as enunciated by the *Steele* court above, which was simply that such a claim arose from defendant's representations to plaintiff, not from "the independent operation of state law". *Id.* Finally, the court concluded that the implied warranty claim was preempted because judgment for plaintiff on this claim would result in different and additional design standards in Pennsylvania than federal law requires. *Id.* at 434.

In *Anthony v. Abbott*, 289 F.Supp.2d 667 (D.V.I. 2003), plaintiff sued defendant to recover damages for injuries resulting from an exploding airbag. The airbag had partially inflated during the automobile collision and had emitted fumes, causing severe injuries. The court ruled that the common law tort claim of failure to install a side airbag was preempted by the National Traffic and Motor Safety Act. *Id.* at 669. The court based its ruling on the Supreme Court's decision in *Geier v. American Honda Motor Company*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), which held that a negligence claim based on the defendant's failure to install an airbag conflicted with Section 208 of the Federal Motor Vehicle Safety Standards.

Section 208 did not require a car manufacturer to install a particular type of restraint like airbags or automatic seat belts. Thus, the *Anthony* court concluded that plaintiffs' allegation of a common law duty to install a particular restraint actually conflicted with federal law and thus was impliedly preempted. *Id.* The court granted summary judgment on this particular claim because defendant had the option to choose among several different restraints, and the option chosen complied with federal regulations and was fully functional. *Id.* at 669-70.

Finally, in *Dow Agrosciences, LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), Dow brought suit against 29 Texas peanut farmers, seeking a judicial decree that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts any state law claims the farmers might bring. Dow was responsible for producing and marketing a herbicide called Strongarm, which controlled the growth of weeds in peanuts. *Id.* Many of the farmers who bought Strongarm alleged that it stunted the growth of their peanut plants, reduced the total production of peanuts, and increased their expenses in harvesting future crops. *Id.* Since FIFRA is a comprehensive regulatory scheme, which contains an express preemption of any state law imposing different or additional requirements for labeling or packaging than those provided by federal law, the court was required to determine the scope of this express preemption. *Id.* at 328-29 (citing Section 136v of FIFRA).

Thus, the central issue was whether the scope of FIFRA's express preemption includes product effectiveness claims, which relate to the label on the product. *Id.* at 330. The court held that all of the claims for breach of warranty, fraud, DTPA, defective design, and negligence were preempted by FIFRA. The court reasoned that, if the farmers were successful on these claims, then Dow would be induced for fear of further litigation to alter its product label, which is prohibited by the preemption clause in FIFRA *Id.* at 333.

Expert Testimony

In *Miller v. Pfizer, Inc.*, 356 F.3d 1326 (10th Cir. 2004), a thirteen year old committed suicide one week after beginning to take the antidepressant drug Zoloft. His parents sued the manufacturer, alleging the drug induced their son's death. Plaintiffs hired an expert to testify that Zoloft could cause suicide and was the proximate cause of their son's passing. *Id.* However, the trial court ruled that this expert could not testify, which left the plaintiffs with no expert testimony regarding causation. *Id.* As a result, the trial court granted summary judgment in favor of defendants. *Id.*

The Tenth Circuit held that the trial court's exclusion of the plaintiffs' expert

was warranted because the district court “carefully followed *Daubert* in determining whether Dr. Healy’s opinions were founded on scientific principles”. *Id.* at 1335. The appellate court also found that the district court relied on the opinions of court-appointed experts to “carefully and meticulously review the proffered scientific evidence”, as is required by *Daubert*. *Id.* (citing *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997)). As such, the district court did not abuse its discretion and “properly performed its gatekeeping function under *Daubert*”. *Id.*

Similarly, in the unpublished case of *Newman v. Motorola, Inc.*, 2003 WL 22407 265, 78 Fed.Appx. 292 (4th Cir. 10/22/2003), the issue was whether or not the district court erred in its decision to exclude the causation opinion sought to be offered by an epidemiologist expert for the plaintiff. Plaintiff sued the cell phone manufacturer claiming that his use of a cellular phone, which exposed him to radiofrequency radiation, caused his malignant brain tumor. *Id.* The Fourth Circuit noted that the trial judge’s gatekeeping duty is to examine the expert testimony to ensure that it is both relevant and reliable before allowing it to be admitted. *Id.* at 294. Here, the expert’s research failed to indicate that cell phone users are disposed to an increased chance for developing malignant brain tumors. Moreover, his research failed to indicate that the chance of developing a malignant tumor increased according to a greater usage rate. *Id.* The trial court found these and other problems

with both the reliability and the relevance of the expert's testimony and methods. *Id.* Finding no abuse of discretion, the Fourth Circuit affirmed the trial court's decision to exclude the opinion.

In *Stotts v. Heckler & Koch, Inc.*, 299 F.Supp.2d 814 (W.D. Tenn. 2004), plaintiff brought suit against the manufacturer of a gun which discharged while decedent was cleaning it. The court held that plaintiffs' expert, Dr. Frank Peretti, could give expert testimony regarding his opinions as to the trajectory of the bullet through decedent's skull; as to the probability of whether the gun shot was the result of suicide; and as to the probability of whether the gun shot was the result of a homicide. *Id.* at 824. However, the court found inadmissible any opinion as to the probability that the shot happened with the gun on the table top; as to the actual ease decedent had pulling the trigger; as to the action mode or state of the gun at the time of the incident; and as to the probability of the gun being dropped, or grabbed in mid-air. *Id.* The court stated that this partial exclusion of Dr. Peretti's testimony was not an indictment of him, but was simply a recognition that the standard in Fed.R.Evid. 702 was not met in some respects. *Id.* Those opinions found to be inadmissible were based on "unsupported assumptions, lack of evidence, and lack of scientific reasoning supporting [his] methodology". *Id.*

Finally, in *Seibel v. JLG Industries, Inc.*, 362 F.3d 480 (8th Cir. 2004), the

plaintiff was injured when the elevated platform on which he had been working fell over at the construction site. He brought suit against the designer and manufacturer of the lift. The district court found that “the expert’s testimony that Builders provided the lift without a manual and adequate training was irrelevant because ‘there is insufficient evidence in the record to show that additional training or the presence of a manual would have prevented the accident’”. *Id.* at 483. The Eighth Circuit agreed and concluded that plaintiff did not establish that there was a lack of reasonable care employed by defendants in informing plaintiff of the dangerous condition of the lift. *Id.* at 484. Even plaintiff indicated that he was aware of the purpose of a kill switch, how to use one, that an aerial platform without one is dangerous, and that the kill switch was missing on the day of the incident. *Id.* at 483-84. As a result, the appellate court affirmed the trial court’s decision to enter judgment as a matter of law in favor of defendants. *Id.* at 484.

Post-Sale Duties

In *Ostendorf v. Clark Equipment Company*, 122 S.W.3d 530 (Ky. 2003), plaintiff was severely injured when his forklift tipped over while he was driving and pinned his right foot to the ground. For these injuries, he brought suit against the manufacturer. The court held that Kentucky does not recognize a common law duty

to retrofit an existing product which was not defective when sold. *Id.* at 533. The primary reasons cited by the court for not imposing this duty were (1) that invoking such a duty is the job of the administrative or legislative branch of government, and (2) that there is no reason for such a duty because negligence and strict product liability principles suffice. *Id.* at 534. The court also held that the defendant did not voluntarily assume a duty to retrofit, sufficient to impose liability, when it held a voluntary retrofit campaign. *Id.* at 540. The court stated that the manufacturer of a *defective* product may be subject to post-sale duties; however, for a non-defective product as of the time of sale, the seller's post-sale conduct must contribute to the injury before liability may be imposed. *Id.* at 539.

In *Ahrens v. Ford Motor Company*, 340 F.3d 1142 (10th Cir. 2003), plaintiff sued defendant for the wrongful death of her husband, alleging strict liability for a design defect, failure to warn, and inadequate post-sale warnings. The factual issue was “the degree to which the ordinary consumer would contemplate the danger of not having a seat belt [on a tractor] in the event of a collision”. *Id.* at 1146. Oklahoma law provides for a duty to warn only when the manufacturer has no reason to expect ordinary users of the product to uncover the danger associated with the product. *Id.* The court concluded that the danger of falling off a tractor with no seat belt is obvious to the ordinary consumer, and as a result, the tractor was not defective for

failure to warn about the lack of a seat belt or the associated risks of the tractor having no seat belt. *Id.* at 1147. The court noted that it was unclear as to whether or not Oklahoma law recognized post-sale warnings; however, since there was no defect in the tractor and no duty to warn, the post-duty claim was without merit. *Id.* Therefore, the Tenth Circuit Court of Appeals affirmed the district court's decision to grant summary judgment in favor of defendants.

Finally, in *Savage v. Scripto-Tokai Corporation*, 266 F.Supp.2d 344 (D. Conn. 2003), plaintiffs sued the seller of a utility lighter used by a seven-year-old child to start a house fire. Plaintiffs argued that the lighter was defective because it did not have a child-resistant feature. Plaintiff also alleged that the defendant was liable because it failed to recall the lighter. *Id.* at 351. The court concluded that the "post-sale duty to warn" theory is legally viable in Connecticut. *Id.* Therefore, unlike the previous two cases within this category, the court found a post-sale duty to warn. Summary judgment was precluded as there was a genuine issue of material fact regarding whether defendant breached this duty.

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