

TADC

PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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Editor:

Joseph S. Pevsner
Thompson & Knight LLP

Co-Editor:

Kathleen V. Wade
Thompson & Knight LLP

I. SUMMARY

1. The U.S. Supreme Court overturned a \$2.7 million discovery sanctions award against Goodyear stemming from Goodyear's failure to produce or disclose the existence of tire test results supporting Plaintiffs' claim of a tire defect. In its decision, the Court limited the inherent power of federal courts to award attorneys' fees to sanction bad faith conduct in litigation, restricting such penalties to the fees incurred solely as a result of the misconduct. *Goodyear Tire & Rubber Co. v. Haeger et al.*, No. 15-1406.

2. The Fifth Circuit Court of Appeals affirmed a summary judgment in a toxic tort action brought by soldiers based on their injuries allegedly caused by exposure to sodium dichromate. The Fifth Circuit held that the plaintiffs' epidemiological study evidence was insufficient as it did not demonstrate "statistically significant doubling of the risk" of plaintiffs' injuries, the expert testimony was unreliable, and the combined evidence did not adequately explain the connection between plaintiffs' exposure levels and their injuries. *McManaway v. KBR, Inc.*, 852 F.3d 444 (5th Cir. 2017).

3. The Fifth Circuit Court of Appeals, citing its prior decision in *Hyde v Hoffman-La Roche, Inc.*, 511 F.3d 506 (5th Cir. 2007), held that Texas Civil Practice & Remedies Code § 71.031(a) is a codified choice of law provision and applies in federal court. The Fifth Circuit applied the choice of law provision to require an out-of-state plaintiff to meet the requirements of the shorter of two possible statute of limitations periods: the Texas statute of repose and the applicable limitations of the foreign state where the wrongful act took place. *Burdett v. Remington Arms Company, LLC*, No. 16-11216, 2017 WL 1401105 (5th Cir. Apr. 19, 2017).

4. The Northern District of Texas found that plaintiffs alleging a medical device defect had not improperly joined a sales representative as a defendant to destroy diversity jurisdiction. Despite the indemnity provided to sellers under Texas Civil Practice & Remedies Code § 82.001, the plaintiffs had plead allegations of alteration and modification of the medical device sufficient to permit the claim against the sales representative and preclude removal. *Kirby v. Smith & Nephew, Inc.*, No. 3:15-CV-2543-I, 2017 WL 661373 (N.D. Tex. Feb. 17, 2017).

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II. DISCUSSION

1. *Goodyear Tire & Rubber Co. v. Haeger et al.*, No. 15-1406.

The U.S. Supreme Court limited the inherent power of federal courts to sanction bad faith conduct by ordering the bad actor to pay the other side's legal fees; in such cases, the award is limited to fees incurred solely because of the misconduct.

Plaintiffs, members of the Haeger family, sued defendant Goodyear for claims related to an alleged tire failure that caused the family's motorhome to swerve off the road and flip over. Plaintiffs contended that the tire's failure was due to a defect in the tire's design that caused it to overheat when used at highway speeds. After years of contentious discovery, in which Goodyear provided consistently slow responses to Plaintiffs' repeated requests for tire test results, the parties settled the litigation. Months later, Plaintiffs' counsel learned that Goodyear had disclosed tire test results in another litigation matter that revealed the particular tire became unusually hot at highway speeds. Goodyear conceded during the sanctions process that it withheld this information from plaintiffs.

Plaintiffs sought sanctions against Goodyear for discovery fraud, claiming that Goodyear had knowingly concealed these test results and seeking attorneys' fees and litigation costs. The District Court found misconduct on the part of Goodyear and awarded Plaintiffs \$2.7 million, equal to all costs incurred by Plaintiffs after Goodyear's initial dishonest discovery response. Supporting the award, the District Court claimed that although a court's inherent authority to sanction is ordinarily limited to fees caused by the misconduct, in cases of egregious behavior, there is no need to limit fees to those causally linked to the misconduct. Alternatively, the District Court awarded a contingent award of \$2 million, subtracting the \$700,000 in expenses spent on claims against other defendants. The Ninth Circuit Court of Appeals upheld the award, and Goodyear appealed.

The Supreme Court acknowledged the lower court's assessment of Goodyear's actions as a "years-long course" of bad faith behavior and the "repeated and deliberate attempts" of Goodyear's counsel to interfere with the resolution of the case on its merits. However, the Court

determined that the lower courts applied an incorrect standard in determining the amount of the award when they disclaimed the need to causally link the legal fees to Goodyear's misconduct. As the Court reasoned, sanctions must be compensatory, not punitive, when imposed pursuant to civil procedures; therefore, courts must use a but-for standard to calibrate sanctions to the damages that would not have been incurred, but for the party's bad faith.

The Court noted that courts may still exercise discretion in assessing which litigation expenses to include in a sanction, and that, in exceptional cases, this but-for standard may allow a court to award a party's entire legal fees from a certain point in the case. As one example of such a case, the Court cited *Chambers v. NASCO*, 501 U.S. 32 (1991), in which the Court determined that all legal expenses in the case were caused by defendant's "fraudulent and brazenly unethical efforts" as part of a "sordid scheme" to defeat the plaintiff's valid claim.

At the time of the appeal, the parties already agreed on the but-for standard ultimately articulated and affirmed by the Court; however, Plaintiffs contended that the lower courts had correctly applied this but-for standard, and, even if they did not, that the award passed the but-for test. Plaintiffs argued that, but for Goodyear withholding the tire test results, the case would have settled as soon as the test results were disclosed, and that the withholding "so infected the lawsuit" that every expense incurred after that point was due to Goodyear's misconduct. The Court rejected both of these arguments. The Court noted that the lower court's ruling had explicitly disclaimed the need to find a causal link and that the record did not support Plaintiffs' contention that production of the test results would have necessarily led to a settlement and prevented further expense.

The Court remanded the case to the district court to determine the amount of the award using the appropriate standard.

2. *McManaway v. KBR, Inc.*, 852 F.3d 444 (5th Cir. 2017).

The Fifth Circuit Court of Appeals affirmed a summary judgment against soldiers' toxic tort action, holding that the soldiers did not adduce sufficient, scientifically reliable evidence that the

soldiers' alleged exposure to sodium dichromate caused their injuries.

Plaintiffs included British and American soldiers who were assigned to protect employees of the defendants KBR, Inc. and its affiliated entities as they restored an industrial water injection facility in Iraq. The facility previously used sodium dichromate, an anti-corrosive agent and known carcinogen and irritant, in its operations. As alleged by Plaintiffs, the prior facility operators improperly stored the sodium dichromate, leading to air and soil contamination. Plaintiffs claimed that KBR did not responsibly handle the sodium dichromate contamination at the facility, leading to Plaintiffs' exposure and subsequent injuries.

Defendants filed a motion to dismiss on the grounds that Plaintiffs' claims presented a non-justiciable political question and were thus barred from review. After the district court denied the motion to dismiss, Defendants filed a motion for summary judgment, arguing that Plaintiffs' evidence was insufficient to support a finding of causation. This motion was granted by the court. Both issues were appealed.

After finding that the political question doctrine does not bar Plaintiffs' claims, the Fifth Circuit turned to the evidence provided by Plaintiffs to support that sodium dichromate exposure caused their injuries. The district court had found Plaintiffs' evidence insufficient because (i) Plaintiffs failed to provide epidemiological support to show that sodium dichromate exposure caused their injuries and (ii) experts' methodology did not adequately explain the connection between Plaintiffs' exposure levels and their injuries.

The Fifth Circuit applied the standards set by the Texas Supreme Court in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), allowing plaintiffs to prove causation by providing more than one epidemiological study which demonstrated a "statistically significant doubling of the risk" of the injuries alleged, showing plaintiffs are similar to those in the studies, and negating other plausible causes of the injuries with reasonable certainty. Plaintiffs argued that the epidemiological studies were not their only evidence of causation, but the court emphasized the *Havner* standard's role as a threshold requirement of reliability. Plaintiffs cited no

studies that reflected the necessary "statistically significant doubling" of the risk of their injuries; one study cited did not quantify the increased risk and, although Plaintiffs referenced additional reports and scientific articles relied on by their experts tying sodium dichromate exposure to various symptoms and ailments, none of these studies were submitting into the record.

Plaintiffs' experts likewise could not provide reliable evidence to support a finding of causation. Plaintiffs offered testimony from two experts: a medical doctor who specialized in treating individuals exposed to industrial chemical substances and an epidemiologist who has published articles on the health effects of chromium. The epidemiologist opined that, given the lack of overall data, it was impossible to estimate Plaintiffs' individual exposure levels. The medical doctor attempted to estimate Plaintiffs' exposure, using Plaintiffs' self-reported total length of time at the water injection facility to place plaintiffs in certain "exposure categories" and analyze the plausibility of Plaintiffs' symptoms and illnesses depending on exposure category. Nonetheless, the medical doctor testified that there were "no credible" measurements of Plaintiffs' exposure and that he did not know the dose of sodium dichromate that any particular Plaintiff was exposed to. The Fifth Circuit found the evidence presented by Plaintiffs' experts to be unreliable as a matter of law and, thus, insufficient to prevent summary judgment.

Plaintiffs further attempted to rely on differential diagnoses, excluding other potential causes of their injuries, as evidence of causation. The Fifth Circuit rejected this argument as placing Plaintiffs' specific causation cart before the general causation horse. As the court explained, a differential diagnosis that sodium dichromate caused a particular injury is only relevant after Plaintiffs have reliably established that sodium dichromate is generally capable of giving rise to that type of injury.

Finally, Plaintiffs argued that lay testimony could provide sufficient evidence of causation. Plaintiffs did, in fact, have testimony regarding their own and others' symptoms and illnesses, including nosebleeds, skin lesions, and severe gastrointestinal problems, during and after their time at the water injection facility. Yet, Plaintiffs had failed to present this argument in the district

court. Therefore, the Fifth Circuit declined to consider it.

As the Fifth Circuit noted, “[a] plaintiff cannot prove causation by presenting different types of unreliable evidence.” Because the Fifth Circuit found that Plaintiffs had not presented sufficient reliable evidence to establish that sodium dichromate exposure caused Plaintiffs’ injuries, the court affirmed the lower court’s grant of summary judgment and dismissal of Plaintiffs’ claims.

3. *Burdett v. Remington Arms Company, L.L.C.*, No. 16-11216, 2017 WL 1401105 (5th Cir. Apr. 19, 2017).

The Fifth Circuit Court of Appeals, applying the Texas choice of law provision codified in Texas Civil Practice & Remedies Code § 71.031(a), held that Texas’ statute of repose barred product liability claims brought in Texas federal court by an out-of-state plaintiff.

Plaintiff Edward Burdett was on a hunting trip with friends in Texas when his Remington Model 700 rifle unexpectedly discharged and fired a bullet through his left foot. Burdett was a resident of both Texas and Georgia. The rifle in question had been designed, manufactured, and assembled by Remington Arms Company, LLC (which later changed its name to Sporting Goods Properties, Inc.) in New York. Burdett filed suit against Remington and Sporting Goods in 2015, asserting five product liability claims, including one claim under a Georgia statute and one claim under Texas’ Deceptive Trade Practices Act.

Remington and Sporting Goods filed a motion for summary judgment on the grounds that Burdett’s claims were time-barred by Texas’ statute of repose, which provides that “a claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant.” As applied to Burdett, this statute of repose began running when Remington initially sold the rifle. Burdett purchased the rifle from a retailer in Georgia, but neither party was aware of when the rifle was first sold by Remington. However, according to Burdett, he purchased the rifle no later than 1998. Therefore, as the District Court found, Burdett’s claims were time-barred, and the District Court granted the motion for summary judgment. Burdett appealed the decision.

Burdett argued that New York, not Texas, law should apply to his claims. New York law does not include any statute of repose for product liability claims and therefore would allow the action. Burdett further argued that Texas Civil Practice & Remedies Code § 71.031(a) did not apply to actions filed in federal court.

Section 71.031(a) of the Texas Civil Practice & Remedies Code provides as follows:

An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country if:

- (1) A law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
- (2) The action is begun in this state within the time provided by the laws of this state for beginning the action; [and]
- (3) For a resident of a foreign state or country, the action is begun in this state within the time provided by the laws of the foreign state or country in which the wrongful act, neglect, or default took place; . . .

TEX. CIV. PRAC. & REM. CODE § 71.031(a)(1)-(3).

The Fifth Circuit, citing its prior decision in *Hyde v Hoffman-La Roche, Inc.*, 511 F.3d 506 (5th Cir. 2007), held that § 71.031(a), as enacted in legislation by the Texas Legislature, is a codified choice of law provision and applies in federal court.

The Fifth Circuit then applied § 71.031(a) to Burdett’s case, finding the same outcome results whether Burdett is considered a resident of Texas or Georgia. As the Fifth Circuit analyzed the provision, Texas residents must meet the first and second requirements under § 71.031(a), while out-of-state residents must satisfy the first, second, and third. In other words, out-of-state residents must bring their case within the time provided by the applicable statute of limitations of both Texas and the relevant foreign state. In either case, § 71.031(a)(2) requires an out-of-

state plaintiffs to bring a products liability claim within fifteen years after the date of sale, as provided by Texas law, and § 71.031(a)(3) effectively applies to borrow another state's limitations period only where such limitations period is shorter than the same under Texas law. Therefore, the only difference if Burdett is considered a resident of Georgia would be that Burdett would additionally be required to have brought the action within the time limits prescribed by the laws of New York (and no such limits existed).

The Fifth Circuit affirmed the lower court's entry of summary judgment, finding Burdett's claim time-barred.

4. Kirby v. Smith & Nephew, Inc., No. 3:15-CV-2543-I, 2017 WL 661373 (N.D. Tex. Feb. 17, 2017).

In the Northern District of Texas, the court found that a plaintiff was not improperly joined for the purpose of destroying diversity jurisdiction and therefore remanded the case to state court.

The lawsuit arose from injuries suffered by Plaintiff Bonnie Kirby after she underwent two hip replacement surgeries. The surgeries used metal-on-metal hip implants, the components of which were designed, manufactured, and sold by medical device company Smith & Nephew. Kirby and her husband filed suit against Smith & Nephew, as well as Brian Childress, a Smith & Nephew sales representative. Plaintiffs originally sued two other Smith & Nephew sales representatives and their respective companies, but these claims were dismissed by joint stipulation.

Plaintiffs are both Texas citizens, and Smith & Nephew is a Delaware corporation with a principal place of business in Tennessee; Childress, however, is a Texas citizen. Nevertheless, Smith & Nephew filed a notice of removal based on diversity jurisdiction, arguing that Childress was improperly joined and should be disregarded for purposes of diversity jurisdiction. Plaintiffs moved for remand.

Plaintiffs' claims against Childress included negligence, marketing defect, design defect, and conspiracy. Plaintiffs alleged that Smith & Nephew employed a commission-based sales force to circumvent FDA regulations and engage

in conduct that Smith & Nephew could not, including the promotion of unapproved uses and design changes of Smith & Nephew's medical devices. One of these unapproved uses, Plaintiffs contended, was the mix of device components used in Kirby's two surgeries. Plaintiffs alleged that Childress, acting under his representative sales agreement with Smith & Nephew, actively distributed Smith & Nephew components and even, at times, commented on and assisted with device implantation surgery. In this role, Childress served as Smith & Nephew's contact with physicians and exercised substantial control over the information, warnings, and instructions physicians received regarding the implants. Plaintiffs further alleged that Childress changed the design of devices before distribution by removing a metal liner and other parts from the approved device and combining devices with other Smith & Nephew component parts.

To determine whether Childress was improperly joined, the court analyzed the viability of Plaintiffs' claims against Childress. In their opposition to the motion for remand, Smith & Nephew relied on excerpts of Childress' deposition and a declaration made by Childress. As noted by the court, these excerpts contained only "non-specific denials" by Childress of his involvement in the design, manufacture, and marketing of the implant devices. Ultimately, the court found that the excerpts did not identify "discrete and undisputed facts" that would trigger a summary-type analysis by the court to result in a finding that any recovery by plaintiffs against Childress was precluded. Therefore, the court turned to Plaintiffs' pleadings and conducted a 12(b)(6)-type analysis to determine whether Plaintiffs had a viable claim against Childress.

As the court explained, Childress was a non-manufacturing seller and eligible for the blanket protection against liability afforded to nonmanufacturing sellers under Texas Civil Practice and Remedies Code § 82.003; however, Plaintiffs plead that Childress is liable under an exception to the blanket protection, which provides that a seller may be liable where the "seller altered or modified the product and the claimant's harm resulted from that alteration or modification." TEX. CIV. PRAC. & REM. CODE § 82.003(a)(2). The court found that Plaintiffs' pleadings contained "detailed factual allegations" in support of this contention, pointing in particular to Plaintiffs' allegations

regarding Childress removing the metal liner from certain implant devices. Based on these allegations, the court concluded that Plaintiffs plead a plausible claim for recovery against Childress and, therefore, Childress was not improperly joined to the action. Because Childress' Texas citizenship destroyed diversity jurisdiction, the court remanded the action to state court.