TADC
PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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I. SUMMARY

1. In a negligence and products liability action, the Fifth Circuit Court of Appeals was asked to decide "whether, under Texas law, a driver's neurobiological response to a smartphone notification can be a cause in fact of a car crash." In its reasoning, the Fifth Circuit noted that it was not aware of any court in the United States that imposed liability on a smartphone manufacturer for a user's tortious acts because of a neurobiological response induced by a phone. Because imposing liability on a smartphone manufacturer in this instance "would entail an impermissible innovation or extension of state law," the Fifth Circuit affirmed the judgment of the district court. *Meador v. Apple, Inc.*, 911 F.3d 260 (5th Cir. 2018).

2. The Supreme Court set forth a new bright line rule for a product manufacturer's duty to warn in the maritime tort context. The Supreme Court recognized that federal and state courts had not reached a consensus on the proper application of the duty to warn principle "when a manufacturer's product requires later incorporation of a dangerous part in order for the integrated product to function as needed." In its decision, the Supreme Court held that "a product manufacturer has a duty to warn when (1) its product requires incorporation of a part, (2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (3) the manufacturer has no reason to believe that the product's users will realize that danger." *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

3. The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in a products liability action by excluding a supplemental expert report when the expert's new findings were "highly conclusory" and failed to meet the standard for admissibility of an expert opinion. The Fifth Circuit further held that the district court did not abuse its discretion by declining "to withhold costs on the basis of financial hardship alone" and thus the district court acted within its discretion by awarding costs to the prevailing party under Federal Rule of Civil Procedure 54. *Smith v. Chrysler Grp., L.L.C.*, 909 F.3d 744 (5th Cir. 2018).

II. DISCUSSION

1. ***Meador v. Apple, Inc.*, 911 F.3d 260 (5th Cir. 2018).**

In a negligence and products liability action, the Fifth Circuit Court of Appeals was asked to decide "whether, under Texas law, a driver's neurobiological response to a smartphone notification can be a cause in fact of a car crash." Because imposing liability on a smartphone manufacturer in this instance "would entail an impermissible innovation or extension of state law," the Fifth Circuit affirmed the judgment of the district court.

This case stems from an automobile accident. While driving a vehicle, the driver received and read a text message, at which point she collided with a vehicle carrying two adults and a child. This collision killed both adults and paralyzed the child. The driver was subsequently convicted for criminally negligent homicide.

Plaintiffs, representatives for the estate of the deceased motorists and for their child who was rendered paraplegic, sued Defendant Apple, Inc., for negligence and strict products liability. Plaintiffs allege that the accident occurred because Apple failed to include a lockout mechanism on the smartphone used by the driver, which would have prevented the driver from using a smartphone while driving, and because Apple failed to warn smartphone users about the risks of distracted driving. Further, Plaintiffs contend that "receipt of a text message triggers in the recipient an unconscious and automatic, neurobiological compulsion to engage in texting behavior," and thus Apple's smartphone was a substantial factor in the driver's tortious acts. Apple moved to dismiss the complaint, and the magistrate judge issued a report and recommendation that Apple's motion should be granted. The district court ultimately granted Apple's motion to dismiss. This appeal followed.

The Fifth Circuit began its analysis by acknowledging that under Texas law, causation for both negligence and products liability "turns on whether an alleged cause of an injury may be recognized as a substantial factor." The Fifth Circuit then utilized the definition of substantial from the Restatement (Second) of Torts, which the Texas Supreme Court has found to be instructive:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Based on this definition of substantial, the Fifth Circuit turned to the question at issue: "whether Texas law would recognize a smartphone's effect on its user as a cause at all." In its reasoning, the Fifth Circuit noted that it was not aware of any Texas case addressing this theory of liability nor was it aware of any court in the United States that imposed liability on a smartphone manufacturer for a user's tortious acts because of a neurobiological response induced by a phone.

With no guidance from Texas courts, the Fifth Circuit, in making an *Erie* guess, found that the closest analogy offered by Texas law is Texas' dram shop liability, which allows sellers of alcohol to be held liable for the subsequent torts or injuries of the intoxicated customers they served. The Fifth Circuit emphasized, however, that the dram shop law was passed through the Texas Legislature and thus "[t]o the extent there is a meritorious analogy between smartphone manufacturers and dram shops, it is for the state to explore, not us."

Based on this reasoning, the Fifth Circuit held that it "therefore cannot say that Texas law would regard a smartphone's effect on a user as a substantial factor in the user's tortious acts" and "[t]o say otherwise would be an innovation of state law that *Erie* does not permit us to make." Because the Fifth Circuit declined to consider "neurobiological compulsion" as a substantial factor under Texas law, it concluded that the

smartphone could not be a cause in fact of the injuries in this case.

2. *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

The Supreme Court clarified a product manufacturer's duty to warn in the maritime tort context and set forth the following bright line rule: "a product manufacturer has a duty to warn when (1) its product requires incorporation of a part, (2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (3) the manufacturer has no reason to believe that the product's users will realize that danger."

Plaintiffs, widows of deceased veterans, sued Defendants, manufacturers of equipment for Navy ships (the "Manufacturers"), for negligence and strict liability, alleging that veterans were exposed to asbestos on board Navy ships, developed cancer, and died. Plaintiffs contend that a manufacturer has a duty to warn when its product requires incorporation of a part that it knows is likely to make the integrated product dangerous for its intended uses. The Manufacturers argue that no such duty to warn exists because they did not incorporate a dangerous part (here, asbestos) into their equipment, but rather the Navy did.

The Manufacturers moved for summary judgment, which the district court granted. The Third Circuit Court of Appeals vacated and remanded, holding that a manufacturer has a duty to warn when it is foreseeable that its product would be used with a later-added asbestos-containing product or part. The Supreme Court granted certiorari to weigh-in on the divide amongst the Courts of Appeals as to a manufacturer's duty to warn when its product requires later incorporation of a dangerous part in order for the integrated product to function as intended.

The Court began its analysis by recognizing that federal and state courts have not reached a consensus on the proper application of the duty to warn principle when a manufacturer's product requires a later-added dangerous product or part in order to function. The Court examined three approaches: (1) "the more plaintiff-friendly foreseeability rule" that may impose liability when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part; (2) "the more defendant-friendly bare-metal defense" that does not impose liability if a manufacturer did not itself make, sell, or distribute the dangerous part or incorporate the dangerous part into the product; and (3) the intermediary approach that "a manufacturer does have a duty to warn when its product *requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses."

Based on its analysis of the three approaches, the Court agreed with the intermediary approach and set forth the following bright line rule: "a product manufacturer has a duty to warn when (1) its product requires incorporation of a part, (2) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (3) the manufacturer has no reason to believe that the product's users will realize that danger." In adopting this maritime tort rule, the Court emphasized it does not "purport to define the proper tort rule outside of the maritime context."

Although this bright line rule is limited to the maritime context, the dissent warned of "what might follow if the Court's standard were widely adopted in tort law," and stated:

> Would a company that sells smartphone cases have to warn about the risk of exposure to cell phone radiation? Would a car maker have to warn about the risks of improperly stored antifreeze? Would a manufacturer of flashlights have to warn about the risks associated with leaking batteries? Would a seller of hot dog buns have to warn about the health risks of consuming processed meat? Just the threat of litigation and liability would force many manufacturers of safe products to spend time and money educating themselves and writing warnings about the dangers of other people's more dangerous products. All this would, as well, threaten to leave consumers worse off. After all, when we effectively

> require manufacturers of safe products to subsidize those who make more dangerous items, we promise to raise the price and restrict the output of socially productive products. Tort law is supposed to be about aligning liability with responsibility, not mandating a social insurance policy in which everyone must pay for everyone else's mistakes.

In conclusion, the dissent emphasized that "nothing in today's opinion compels courts operating outside the maritime context to apply the test announced today" and that "[i]n other tort cases, courts remain free to use the more sensible and historically proven common law rule."

3. ***Smith v. Chrysler Grp., L.L.C.*, 909 F.3d 744 (5th Cir. 2018).**

The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in a products liability action by excluding a supplemental expert report when the expert's new findings were "highly conclusory" and failed to meet the standard for admissibility of an expert opinion. The Fifth Circuit further held that the district court did not abuse its discretion by declining "to withhold costs on the basis of financial hardship alone" and thus the district court acted within its discretion by awarding costs to the prevailing party under Federal Rule of Civil Procedure 54.

This case arises from a fatal car crash, which involved a 2013 Jeep Wrangler. The driver of this vehicle died. Shortly after the car crash, Chrysler Group, L.L.C., sent out a Recall Notice explaining that the transmission oil cooler in certain 2012 and 2013 Jeep Wranglers may leak, which could ultimately cause a fire in the underbody of the vehicle.

Plaintiffs, the deceased driver's family, contend that the Jeep at issue had this recall defect, which ultimately caused the Jeep to catch fire and crash. Plaintiffs sued Defendant Chrysler for claims of strict products liability, negligence, breach of warranty, and violations of the Texas Deceptive Trade Practices Act.

As the case progressed, the parties designated their experts and provided expert reports before the district court's deadline of May 16, 2016. Plaintiffs' timely filed their fire cause expert's report, in which the expert "opined that he could not determine if the fire was caused by the recall defect." Several months later, Plaintiffs moved to compel Chrysler to produce documents relating to other fires in any model Jeep Wrangler. Plaintiffs' motion to compel was granted, and Chrysler produced ten years' worth of documents relating to incidences of other Jeep fires caused by defects *other than* the specific recall defect at issue in this case.

Chrysler moved for summary judgment and moved to strike Plaintiffs' fire cause expert's initial report. In response to this motion, Plaintiffs attached a supplemental expert report for their fire cause expert, which mainly consisted of "analysis of information that was available to [Plaintiffs' fire cause expert] at the time of his original report, and made only cursory reference to the further information furnished by Chrysler in its supplemental discovery production." Interestingly, in the supplemental expert report, Plaintiffs' fire cause expert declared that this new information allowed him to conclude that it is more likely than not that the recall defect caused the fire that caused the crash at issue. Chrysler moved to strike this supplemental expert report as untimely and unreliable.

The magistrate judge ultimately recommended entering judgment for Chrysler on all claims and striking the supplemental expert report. With regards to the supplemental expert report, the magistrate judge reasoned that the supplemental expert report was untimely because it was based upon documents that were available to Plaintiffs' fire cause expert prior to the expert report deadline in May 2016. The magistrate judge further concluded that Plaintiffs' fire cause expert's new opinion regarding causation was not reliable because "the additional discovery provided by Chrysler about other vehicle defects does not explain why [Plaintiffs' fire cause expert] should be allowed to reverse his opinion that there is sufficient evidence for him to have an opinion about *this* defect." Because of these deficiencies, the magistrate judge recommended that Chrysler's summary judgment motion be granted. The district court ultimately granted Chrysler's motion for summary judgment and struck the supplemental expert report. This appeal followed.

The Fifth Circuit began its analysis by addressing whether the district court abused its discretion by excluding expert testimony. In evaluating the supplemental expert report, the Fifth Circuit emphasized that Plaintiffs' fire cause expert acknowledged that the categories of evidence upon which he relied to form his new opinion were a "partial restatement of his original report and deposition testimony." Moreover, the Fifth Circuit noted that the newly produced evidence, regarding incidences of Jeep fires caused by defects *other than* the specific recall defect at issue in this case, "does not allow us to conclude that [the] Jeep [at issue] had a defect nor that the alleged defect could cause a fire or, more particularly, whether it could cause the fire that caused this crash." Because Plaintiffs' fire cause expert neglected to explain his methodology for reaching his new conclusion and his new findings were "highly conclusory," the district court did not abuse its discretion in excluding the supplemental expert report.

After holding that the district court did not abuse its discretion in excluding the supplemental expert report, the Fifth Circuit swiftly noted that Plaintiffs' failure to produce a fire expert who could identify the cause of the fire was ultimately fatal to their success on all claims.

Finally, the Fifth Circuit addressed Plaintiffs' objections to the district court's awarding costs to Chrysler, as the prevailing party, under Federal Rule of Civil Procedure 54. Relying on *Pacheco v. Mineta*, 448 F.3d 783 (5th Cir. 2006), Plaintiffs contend that the district court abused its discretion in awarding any costs to Chrysler in light of Plaintiffs' "impoverished condition" and good faith in bringing this lawsuit. The Fifth Circuit disagreed and explained that although *Pacheco v. Mineta* permits a district court to deny a prevailing party costs, it does not require a district court to do so. Accordingly, the Fifth Circuit held that the district court did not abuse its discretion by declining "to withhold costs on the basis of financial hardship alone" and thus the district court acted within its discretion by awarding costs to the prevailing party under Federal Rule of Civil Procedure 54.