



FEDERAL CIVIL PROCEDURE NEWS

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AMERICANS WITH DISABILITIES ACT

2nd Circuit tells N.Y. federal court to decide if obesity is 'disability'

Spiegel et al. v. Schulmann et al., No. 06-5914, 2010 WL 1791417 (2d Cir. May 6, 2010).

The 2nd U.S. Circuit Court of Appeals has remanded a wrongful-termination case brought by two karate instructors for the lower court to decide if obesity is a disability under New York City anti-discrimination law.

In its *per curiam* decision, the panel said no New York courts have yet determined whether obesity alone, that is, without an underlying medical condition, constitutes a disability for the purposes of the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107.

However, state courts have noted that, under the city's Local Civil Rights Restoration Act of 2005, Local Law No. 85, analysis of NYCHRL claims is

(See ADA on page 11)

CERCLA

Non-settling PRPs can intervene in CERCLA settlements, 9th Circuit says

United States et al. v. Aerojet General Corp. et al., No. 08-55996, 2010 WL 2179169 (9th Cir. June 2, 2010).

In a CERCLA case involving Los Angeles' San Gabriel Basin, the 9th U.S. Circuit Court of Appeals has joined the 8th and 10th circuits in ruling that a non-settling party can intervene in litigation to oppose a settlement the federal government reached with other parties.

The court found such intervention is allowed under both the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, and Federal Rule of Civil Procedure 24(a)(2), which governs intervention.

(See CERCLA on page 12)

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FED. R. EVID. 403

Judge allows medical payment evidence in UIM dispute

Tripp v. Western National Mutual Insurance Co., No. CIV. 09-4023-KES, 2010 WL 2228353 (D.S.D., S. Div. June 1, 2010).

A South Dakota federal judge has refused to exclude evidence in an insurance bad-faith trial related to medical payments made by an insurer in a dispute over underinsured motorist benefits.

U.S. District Chief Judge Karen E. Schreier of the District of South Dakota said the information is "relevant" as to whether the insurer acted in bad faith in handling the claim and unlikely to confuse the jury.

The dispute stems from a September 2004 automobile accident involving Cindy Tripp, who was insured by Western National Mutual Insurance Co.

Tripp told Western National about the accident.

She subsequently sued the other driver for negligence and agreed to settle the lawsuit for nearly \$90,000, according to court documents.

In January 2009 Tripp demanded Western National settle her claim for \$150,000, the available policy limit of her UIM coverage.

After Western National offered Tripp \$10,000 to settle her UIM claim, she sued the insurance carrier for breach of contract and bad faith.

Western National's settlement offer included waiver of a subrogation claim based on \$5,000 in medical payments the insurer had made on behalf of Tripp.

Here, citing Fed. R. Civ. P. 403, Tripp sought to exclude evidence concerning the medical payments Western National had made following the accident.

She argued the probative value of the evidence is overshadowed by the likelihood that the jury will be confused by it.

The insurer countered the evidence is critical in showing that it did not act in bad faith.

Judge Schreier sided with Western National, finding the evidence both "relevant" and "probative" with regard to the insurer's alleged bad faith.

"There is nothing to suggest that the jury will be unable to understand the concept of subrogation or otherwise confuse it with the concept of bad faith," she said.

Finding that the possibility of jury confusion does not significantly outweigh the evidence's probative value, the judge denied Tripp's motion to exclude.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010): 1:303 (law governing jury instructions in jury trials) 11:374.2; 11:495; 14:175.15; 14:177.1; 15:77.15 (Fed. R. Evid. 403)

FED. R. EVID. 702

Ind. federal judge bars tests by plaintiff's counsel in seat belt case

Green v. Ford Motor Co., No. 1:08-cv-0163-LJM-TAB, 2010 WL 1726620 (S.D. Ind., Indianapolis Div. Apr. 29, 2010).

A federal judge in Indianapolis has barred the plaintiff in a rollover case against Ford Motor Co. from using his lawyer's own seat belt test results as evidence.

U.S. District Judge Larry J. McKinney of the Southern District of Indiana said the tests did not sufficiently replicate the conditions of the accident in which plaintiff Nicholas Green was injured.

The tests were "so far removed from the events that actually occurred" that their "slight probative value is substantially outweighed by the potential for juror confusion," the judge said.

According to the opinion, Green lost control of his 1999 Ford Explorer Sport, struck a guardrail and rolled over. He suffered paralyzing injuries in the 2006 crash.

Green sued Ford, alleging the Explorer was defective and unreasonably dangerous because the seat belts failed to protect him.

The automaker moved to bar evidence of the plaintiff counsel's testing of alternative restraint system designs, which he performed on several exemplar vehicles.

In the tests, the judge said, the attorney used a Bobcat loader and a forklift to tip over two 1999 Explorers and down a hill.

Green claimed the tests showed the alternative seat belt design was safe and available to Ford at the time the 1999 Explorer was manufactured.

Judge McKinney said the tests did not replicate the actual accident to the extent required under the law.

While "tests used to demonstrate scientific principles upon which an expert will rely do not require strict adherence to the facts," the judge said, these tests were simply too far removed from the actual events.

For example, he noted they did not approach the speed at which Green's Explorer was traveling when the accident happened.

Motions on expert testimony

Meanwhile, the judge granted Green's motion to bar Ford from using the testimony of expert Jeffrey Pearson, who tested a 2003 Ford Ranger.

"Throughout this litigation, Ford successfully opposed discovery into Ford Rangers on the basis that those vehicles were dissimilar to the 1999 Explorer," Judge McKinney said.

He noted the automaker's admission that it could have performed similar tests without using a Ranger vehicle.

Finally, the judge ruled Green could present restraint system testimony from expert Gary Whitman and biomechanical analysis testimony from expert Dennis Shanahan.

Ford argued that Whitman was not qualified and that Shanahan could not identify the point when Green was injured during the accident sequence.

Whitman's education, experience and training satisfied Federal Rule of Evidence 702, and he based his opinions on sound methodology, the judge said.

"Moreover, his testimony about the 1999 Explorer's restraint system, Ford's failure to adequately test that system and potential alternative designs will assist [the] jury in its determination on the ultimate issue," Judge McKinney held.

As to Shanahan, the judge said a qualified expert witness can offer a hypothetical explanation of injury causation, and the jury can decide the weight of that opinion after direct and cross-examination.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010): 11:54; 11:366; 14:173; 14:175-175.1; 14:175.10; 14:177.1 (Fed. R. Evid. 702)

FED. R. CIV. P. 8(A)(2)

Louisiana federal court upholds Reglan user's nerve damage suit

Waguespack v. Pliva USA Inc. et al., No. 2:10-cv-692, 2010 WL 2086882 (E.D. La., New Orleans May 24, 2010).

A federal judge in New Orleans has allowed a man who used a generic version of the reflux drug Reglan to proceed with his personal injury suit against the medicine's makers and seek any compensation available under the Louisiana Products Liability Act, but the judge dismissed certain individual claims.

In a ruling granting separate dismissal motions by the defendant drug companies, U.S. District Judge Mary Ann Vial Lemmon said that while plaintiff Jules Waguespack's individual claims for negligence, strict liability, implied warranty and misrepresentation are preempted by the LPLA, La. Rev. Stat. § 9:2800.51, he remains free to seek all compensation due him under that statute.

Waguespack sued Pliva USA Inc., parent Barr Pharmaceutical, Teva Pharmaceuticals USA Inc., Actavis Inc. and Actavis Elizabeth LLC in the U.S. District Court for the Eastern District of Louisiana this year, saying he sustained permanent neurological damage after taking the generic form of Reglan in 2007 and 2008.

Waguespack claims the manufacturers understated the long-term effects of taking the gastro-esophageal reflux drug and failed to provide adequate warnings that it can cause tardive dyskinesia, a debilitating neurological condition characterized by random, uncontrollable muscle movements.

The defendants moved to dismiss, arguing Waguespack failed to plead his claim with necessary detail. Namely, they said he neglected to say why he took the generic, the dosage used, how long he used it and which defendant's generic he took.

Actavis and Pliva said that without such data, it is unclear whether either is a genuine party to the suit, and Waguespack failed to meet his burden under the LPLA of showing there was an alternative design available for the drug that could have prevented his injuries.

Refusing to totally dismiss Waguespack's suit, Judge Lemmon said the plaintiff had met the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) because the defendants have been given "fair notice" of the claims against them.

She said Waguespack plainly asserted the defendants have made a drug that harmed him because there was "something wrong with the drug about which doctors and patients were not warned."

She said that, at this stage, Waguespack need not prove the merits of his claim, only give the defendants fair notice.

She agreed, however, with the defendants' assertion that the plaintiff's exclusive route of recovery is through the LPLA and that any of his claims lying beyond those allowed under the statute, an issue to be later determined, "are unavailable to plaintiff."

See Hittner, Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — 5th CIR. ED. (The Rutter Group 2010):

8:54 (Fed. R. Civ. P. 8(a)(2))

9:1.1; 9:53; 9:239.5; 12:1 (motion to dismiss)

9:303-311 (effect of partial denial and partial grant)

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- Use quotation marks around phrases
- Use a space to indicate "or"
- Use an ampersand to connect terms
- Use a percent sign to exclude terms

FED. R. CIV. P. 9(B)

Suit against dermatology clinic survives heightened pleading test

United States ex rel. Lane v. Murfreesboro Dermatology Clinic et al., No. 4:07-cv-4, 2010 WL 1926131 (E.D. Tenn. May 12, 2010).

A former billing clerk provided enough details to continue to press her whistle-blower lawsuit against a Tennessee dermatology clinic and its owner, and she may refile her complaint to make it more specific, a federal judge has ruled.

U.S. District Judge Harry S. Mattice Jr. of the Eastern District of Tennessee refused to dismiss a *qui tam* suit brought by Darla Lane, finding that her complaint met the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) for at least two of the four billing fraud schemes she alleges.

Lane filed suit in 2007 against the Murfreesboro Dermatology Clinic and owner-operator Dr. Michael W. Bell, alleging that she and her co-workers were required to engage in four false billing practices that resulted in the submission of false claims to Medicare and TennCare, the state's Medicaid program.

The suit said the indiscriminate upcoding of the bills of all the clinic's patients were violations of False Claims Act, 31 U.S.C. § 3729, and the Tennessee Medicaid False Claims Act, Tenn. Code Ann. § 71-5-181.

The four patterns consisted of:

- Submitting all patients' specimens for pathology testing regardless of needs.
- Designating all cosmetic-procedure patients as having "irritated" skin conditions to qualify them for federal and state insurance coverage.
- Billing each contact Bell had with a patient regardless of duration.
- Adjusting every claim by adding a "Modifier-25" designation when that adjustment is only intended to be used when patients are seen separately for procedures and evaluations occurring on the same day.

The federal government declined to intervene, and the defendants moved for dismissal. They said the complaint failed to specify each alleged false claim, the times when the violations occurred, the identities of the individual patients and the documents used.

Lane also did not submit a statement describing her personal knowledge of the alleged scheme, according to the motion.

Judge Mattice ruled that Lane did state her personal knowledge as a billing clerk at the clinic for four years from 2002 to 2006. Moreover, he found Lane's allegations specific enough to support an FCA claim for the second and fourth patterns she described.

The judge said he agreed with her assessment that she could not currently access the claims since she is no longer employed by the clinic and could not identify individual patients without violating the Health Insurance Portability and Accountability Act, Pub. L. 104-191, and, therefore, those specifics would have to await discovery.

Judge Mattice denied the defendants' motion to dismiss and, although it was not strictly necessary, he also granted Lane's motion to amend the complaint to narrow the allegations to the two remaining claims and provide more details on those claims.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010):

8:21; 8:90; 8:155; 8:156.1-160; 8:171; 8:180; 8:192; 8:225; 8:232; 8:240; 8:321; 8:331; 8:340-341; 8:350; 8:360-361; 8:370; 8:372; 8:385; 8:406; 8:421; 8:649; 8:1053; 8:1490; 9:27.5; 9:196b; 9:382 (Fed. R. Civ. P. 9(b))
2:1236; 7:308; 8:340 (31 U.S.C. § 3729)
8:340 (pleading requirements for False Claims Act cases)

FED. R. CIV. P. 59

Judge tosses \$12 million verdict, grants new trial in toxic-exposure case

DePascale et al. v. Sylvania Electric Products Inc. et al., No. 07 CV 3558, 2010 WL 1817489 (E.D.N.Y. Apr. 30, 2010).

A New York federal judge has overturned a \$12 million jury verdict awarded to two former magazine distribution company employees who allege they were exposed to cancer-causing chemicals at their workplace, which was once the site of a nuclear fuel plant.

U.S. District Judge Leonard Wexler of the Eastern District of New York granted Verizon Communications' motion for a new trial under Federal Rule of Procedure 59 on the issue of the government contractor defense.

A new trial is granted under Rule 59 if the verdict is so against the weight of the evidence as to "constitute a seriously erroneous result."

The government contractor defense shields companies from tort liability that might arise in connection with their performance of government work.

Judge Wexler said the overwhelming evidence supporting the defense here "undermines the jury verdict to such an extent as to require granting a new trial."

Gerald DePascale and Liam Neville worked for Magazine Distributors in Hicksville, N.Y. The site formerly housed a Sylvania Electric Products plant used to make nuclear rods for the federal government during the 1950s and 1960s.

The men filed their lawsuit in 2007 in New York's Nassau County Supreme Court against Sylvania and its corporate successor, Verizon, alleging they were exposed to both radioactive and non-nuclear contaminants at the site.

The plaintiffs alleged Verizon breached its duty of care by failing to comply with applicable laws in generating, managing, storing and disposing of hazardous waste.

The men raised state law claims, saying they developed rare forms of cancer resulting from the exposure to the contaminants.

After Verizon removed the case to federal court under the Price-Anderson Act, 42 U.S.C. § 2210, the plaintiffs amended their complaint to add a claim under the federal law. Price-Anderson governs lawsuits alleging exposure to radioactive materials.

Verizon then moved to dismiss the Price-Anderson claims, arguing that the plaintiffs failed to show that their nuclear exposure exceeded federal permissible dose limits.

The plaintiffs filed a second amended complaint, removing any claim of injury related to exposure to radioactive materials and alleging only state law causes of action.

After stripping the complaint of any federal claims, the plaintiffs moved to remand the case to state court. Verizon opposed remand with a new defense that the suit should stay in federal court under the federal officer removal statute.

Judge Wexler agreed with the company, saying Verizon asserted sufficient facts that Sylvania operated its nuclear rod plant at the site at the behest of the U.S. government and therefore was protected from liability under the government contractor defense.

After a trial, a federal jury found Verizon liable and rejected the company's claim of a government contractor defense. The jury awarded \$12 million to DePascale and Neville.

Verizon moved for a new trial, arguing that it proved every element of the government contractor defense. These arguments included that the Atomic Energy Commission approved precise specifications for the work to be done at the site and that the work done conformed to those specifications.

Judge Wexler granted the motion, saying that from an examination of the trial transcript, he found very little evidence to support the jury's rejection of the defense.

"Allowing the jury verdict ... to stand would, in the court's view, result in a serious miscarriage of justice," he concluded.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010):

8:1465 (Fed. R. Civ. P. 59)

1:274 (Fed. R. Civ. P. 59(a))

5:270.1; 6:138; 8:1465; 12:159; 12:159.2; 12:159.4; 12:161.5; 13:216.1; 14:361; 14:363; 15:139.37; 16:102.10 (Fed. R. Civ. P. 59(e))

JURISDICTION

Case lands in state court after judge finds adjuster potentially liable

Cruz et al. v. Standard Guaranty Insurance Co. et al., No. H-10-352, 2010 WL 2269846 (S.D. Tex., Houston Div. June 4, 2010).

A federal judge has sent a Texas couple's insurance coverage suit over damage to their home by Hurricane Ike in 2008 back to state court, finding that an in-state adjuster could be held liable for unfair settlement practices.

In so ruling U.S. District Judge Ewing Werlein Jr. of the Southern District of Texas relied on a similar case that had been decided a month earlier.

According to Judge Werlein's opinion, Hurricane Ike damaged the Spring, Texas, home of Faustino Cruz and Sonia Rodriguez in September 2008. The house was covered by a homeowners policy issued by Standard Guaranty Insurance Co.

After Cruz and Rodriguez filed an insurance claim, Standard assigned adjuster Patrick Glass to the case, the opinion said.

Cruz and Rodriguez claim Glass conducted a 20-minute inspection of the property. After the inspection, Standard denied some of their claims and failed to fully pay others, they said.

As a result, they sued Standard in the Harris County 11th District Court for breach of contract, bad faith and violations of the state's insurance code.

They also asserted claims against Glass for unfair settlement practices in violation of the insurance code.

They accused both defendants of engaging in common-law fraud and conspiracy to commit fraud.

Standard and Glass removed the case to the U.S. District Court for the Southern District of Texas based on diversity jurisdiction.

Standard is based in Atlanta, while Cruz, Rodriguez and Glass are Texas citizens.

The insurer argued that Glass was improperly joined to defeat diversity jurisdiction. It said the plaintiffs failed to establish a viable theory of recovery against the adjuster because they failed to specify which acts were committed by the insurer and which were undertaken by its agent.

Cruz and Rodriguez moved to remand.

In remanding the case Judge Werlein cited *Harris v. Allstate Texas Lloyd's*, No. H-10-0753, 2010 WL 1790744 (S.D. Tex. Apr. 30, 2010). The judge in *Harris*, a similar case involving Hurricane Ike, remanded the lawsuit after he found that the plaintiff's allegations, if determined to be true, created "a reasonable probability" that he could prevail in his claims against the insurance adjuster.

The Mostyn Law Firm in Houston, which specializes in hurricane-related cases, represents the plaintiffs in both *Harris* and the instant lawsuit.

Here, Judge Werlein noted that Cruz and Rodriguez's allegations and causes of action are almost identical to those asserted in *Harris*.

"The court sees no reason to diverge from the well-reasoned opinion in *Harris*," he said.

The judge also rejected Standard's reliance on *Lakewood Chiropractic Clinic v. Travelers Lloyds Insurance Co.*, No. H-09-1728, 2009 WL 3602043 (S.D. Tex. Oct. 27, 2009). In that case the court held that the plaintiff's failure to separate its allegations and causes of action with respect to the defendant insurance company and adjusters doomed its case.

While Cruz and Rodriguez stated the same allegations against both Standard and Glass, they did not lump the two defendants together in their causes of action or accuse the adjuster of conduct that he did not commit, he said.

See Hittner, Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — 5th CIR. ED. (The Rutter Group 2010): 1:272; 2:2; 2:5; 2:225; 2:234-235 (diversity jurisdiction) 2:670-687.1 (effect on removal of sham or fraudulent joinder) 2:905.5-905.6; 2:915.10 (effect of "sham" joinder on removal jurisdiction)

SUMMARY JUDGMENT MOTION

Plaintiff can prove medication errors led to his mother's death, motion says

Freudeman v. The Landing of Canton et al., No. 5:09 cv 175, plaintiff's opposition brief filed (N.D. Ohio, E. Div. May 15, 2010).

The son of an assisted-living resident who died after an alleged medication error has asked a federal judge in Ohio to deny summary judgment to the owners and operators of the facility.

Plaintiff Dennis Freudeman says in a brief in opposition to the defendants' motion for summary judgment that his physician expert witnesses have sufficient medical evidence to show at trial that nurses at The Landing of Canton assisted-living home likely administered the wrong drug to his mother, Dorothy.

According to the brief filed in the U.S. District Court for the Northern District of Ohio, evidence in Dorothy's medical records, as well as depositions from The Landing's nurses, demonstrates that employees commonly made medication errors.

Freudeman filed a medical negligence and wrongful-death action against The Landing of Canton, operator Emeritus Assisted Living Center and owner Wegman Cos., after his mother's death in 2008.

According to the first amended complaint, a nurse at The Landing violated company policy by leaving Dorothy's medication on her bedside table while she slept one morning in 2007.

Employees discovered her unconscious more than three hours later and called an ambulance.

Emergency room staff discovered Dorothy's blood sugar level was extremely low at the time of her admission and she had suffered brain damage. She remained in a coma for several days and then in a semi-comatose state for more than a year until her death, her son claims.

Dorothy's comatose condition may have been caused by the nurse's decision to let her sleep without taking

medication or the administration of an incorrect diabetes medication, the suit says.

The lawsuit alleges that employees at The Landing had given diabetes medication to Dorothy on at least one occasion before the 2007 incident.

Freudeman says the facility's reckless and willful misconduct breached the appropriate standard of care for nursing home residents and caused his mother's death. He seeks punitive damages for the defendants' alleged malicious and wanton wrongdoing.

The defendants moved for summary judgment on all charges. They claimed Freudeman failed to present evidence that his mother took the wrong medication.

Rather, Freudeman's expert witnesses relied on depositions from The Landing employees to form their opinions, the defendants said.

According to a memorandum in support of the defendants' motion, two of Freudeman's experts, Dr. James Lehard and Dr. John Philbrick, testified that Dorothy's hypoglycemic condition was likely caused by her ingestion of a diabetes medication.

Dr. Douglas Smucker, another expert for the plaintiff, testified that administration of an incorrect medication at any time would constitute a breach of the standard of care, the memorandum says.

The defendants argued that the experts' opinions were "speculative at best" and did not meet the standards for admissibility under Federal Rule of Evidence 702. There is no factual evidence of a medication error in Dorothy's records, and facility nurses did not file an error report on the days in question, they claimed.

Moreover, the defendants argued that Freudeman's punitive damages claim fails because he did not identify any specific acts that rose to the level of malicious conduct.

Freudeman's opposition brief cited an affidavit from a nurse at The Landing who claimed she overheard employees say that Dorothy received the wrong medication the night before she fell unconscious.

However, the expert witnesses did not base their opinions solely on inferences from the depositions, but relied on Dorothy's medical records to conclude that she ingested inappropriate medication, Freudeman argued.

Further, the record establishes that The Landing was routinely “careless” with medication, as one nurse attested in deposition to at least 10 previous drug errors at the facility, he claimed.

According to the brief, Dorothy’s medical records reveal that 51 of her prescribed pills are unaccounted for and that staff frequently failed to document when they administered her medication.

Credible evidence shows that The Landing and its owners and operators breached their responsibility to safely dispense Dorothy’s medicine, Freudeman alleged.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT’L ED. (The Rutter Group 2010):

14:100 (evidence in opposition to summary judgment motion)

14:173 (effect of expert opinions on summary judgment)

14:175-175.1; 14:175.10; 14:175.15-175.16; 14:175.20; 14:175.25-175.26 (effect of federal rules of evidence standards on summary judgment, expert opinions)

14:174-174.3; 14:174.10-174.11; 14:174.20-174.21 (expert opinions; summary judgment standards)

11:54; 11:366; 14:173; 14:175-175.1; 14:175.10; 14:177.1 (Fed. R. Evid. 702)

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SUMMARY JUDGMENT MOTION

Injured plaintiff fights Honda’s motion to dismiss stability suit

Vincent v. American Honda Motor Co., No. CV 108 067, response to summary judgment motion filed (S.D. Ga., Augusta Div. Mar. 12, 2010).

A man rendered quadriplegic when the 1999 Honda Accord he was riding in flipped over argues in opposing summary judgment that his expert’s testimony should be admitted and, in any event, his suit should not be dismissed.

Scott Vincent argues his expert Wade Allen, who will testify that the accident would not have happened if the Accord had been equipped with a stability control mechanism, is qualified under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the federal rules of evidence.

Even if his report is stricken, Vincent argues, a second expert report backs up his findings.

According to Vincent’s response, the accident occurred in 2006 when Vincent’s wife, Candice, lost control of their 1999 Honda Accord Coupe on an interstate highway while trying to avoid another driver who had cut her off. The car allegedly went through the guardrail and landed on its roof.

Vincent sued American Honda Motor Co. in the U.S. District Court for the Southern District of Georgia, alleging the Accord was defective because of its instability during a “foreseeable emergency avoidance maneuver like the one Candice was forced to make.”

He claimed the vehicle lacked proper roll stiffness distribution, which directly led to the loss of control, and Honda was negligent in failing to install its “vehicle stability assist” system in the 1999 Accord Coupe.

To support his argument, he offered the opinion of Allen, a directional stability expert whose report identified two feasible alternative designs for the 1999 Accord Coupe, either of which, Allen said, would reduce the risk of a driver losing control while having no adverse effect on the utility of the vehicle.

Allen said Honda could have either optimized the roll stiffness ratio of the Accord using a stabilizer bar or equipped the vehicle with its electronic stability control system.

Both of these alternative designs were known and available to Honda at the time Vincent's car was built, Wade claimed. He said Honda's vehicle stability assist system was available on vehicles in Japan as early as 1998.

Honda sought summary judgment, arguing the accident occurred because the vehicle was negligently maintained and its tires were worn.

Allen's testimony should be excluded, the automaker said, because his methodology is scientifically unreliable. The company claimed Allen is a "rogue scientist" with no support in the scientific community.

In response, Vincent counters that Allen's methodology is scientifically reliable, and his computer simulations are widely recognized and validated by other directional stability experts. The plaintiff says Allen is a published expert who directed the development of the specification for the national advanced driving simulator for the National Highway Traffic Safety Administration.

Vincent also argues that another of his experts, engineer Mickey Gilbert, opined the accident was an oversteer event that would have been prevented by an adequate electronic stability or vehicle stability control system.

Gilbert's opinion supports Allen's, and the case against Honda should proceed even if Allen's testimony is excluded, Vincent insists.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010):

14:100 (evidence in opposition to summary judgment motion)

14:173 (effect of expert opinions on summary judgment)

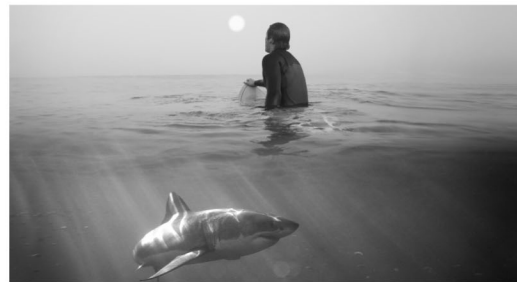
14:175-175.1; 14:175.10; 14:175.15-175.16; 14:175.20; 14:175.25-175.26 (summary judgment; expert opinions; federal rules of evidence standards)

14:174-174.3; 14:174.10-174.11; 14:174.20-174.21 (expert opinions; summary judgment standards)

1:410; 1:1060; 10:577.1; 14:173; 14:175.1; 14:175.15; 14:177 (*Daubert v. Merrell Dow Pharmaceuticals*)



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(ADA continued from page 1)

“uniquely broad and remedial” and goes “beyond state and federal civil rights law,” the three-judge panel said.

Plaintiffs Elliot Spiegel and Jonathan Schatzberg worked as karate instructors for defendants Daniel Schulmann and his company, UAK Management Co. Schulmann established a chain of Tiger Schulmann Karate Schools. Spiegel worked at a school in Connecticut, while Schatzberg worked in Queens, N.Y.

In June 2002, after Spiegel lost his job, he filed an employment discrimination charge with the Connecticut Commission on Human Rights and Opportunities, claiming he was let go because of his perceived disability, his obesity. At that time, Spiegel weighed about 300 pounds, according to the complaint.

In November 2002 the company fired Schatzberg, Spiegel's friend, roommate and co-worker, allegedly because he supported Spiegel in his actions against the defendants.

The two men then filed suit in the U.S. District Court for the Eastern District of New York, alleging Schulmann had retaliated against them in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101; the New York State Human Rights Law, N.Y. Exec. Law § 296; and the NYCHRL.

The court granted the defendants' motion for summary judgment, finding the plaintiffs failed to establish a *prima facie* case of discriminatory firing under the state and city human rights laws.

U.S. District Judge Sandra Townes concluded Spiegel failed to show that he was disabled because he had not demonstrated that his weight was the result of a medical condition.

The 2nd Circuit affirmed in part, vacated and remanded.

Although Spiegel provided a letter from his physician diagnosing him with a hormonal imbalance, the panel

found too little evidence in the record to create a genuine factual dispute concerning whether Spiegel was medically incapable of losing weight. The NYSHRL requires such a showing to avoid summary judgment, the panel noted.

Next, the court determined that Judge Townes had erred with respect to evidence proffered by Spiegel to show that the defendants' reasons for terminating him were pretextual. Spiegel sought to introduce a statement made by Schulmann that Spiegel was fired because of his weight.

The judge had concluded that this evidence was inadmissible hearsay.

The appeals court said that this ruling was error. Spiegel's statement about Schulmann would have been admissible under Federal Rule of Evidence 801(d)(2)(A), because Schulmann was a party to the proceeding, and the statement was his own, the appeals court explained.

In addition, a statement by a co-owner of the corporation about the alleged reason for firing Spiegel would have been admissible under Rule 801(d)(2)(D), the court said.

Had Judge Townes considered Spiegel's evidence on this point, she would not have relied on the lack of evidence of pretext as a basis for granting the defendants summary judgment, the panel said. As a result, she did not address the question of whether obesity alone is a disability under the NYCHRL, the court said.

Therefore, the question must be remanded to the District Court, the appeals court panel decided.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — NAT'L ED. (The Rutter Group 2010):

14:159.27 (summary judgment proceedings in employment retaliation cases)

16:65.6a (42 U.S.C. § 12101)

11:1801 (Fed. R. Evid. 801(d)(2)(A))

2:1109a; 2:1118.1; 2:1118.6; 2:1135-1139.6 (orders granting remand on appellate review)

(CERCLA continued from page 1)

According to the opinion, in September 2000 the Environmental Protection Agency prescribed a 30-year remedial plan to clean volatile organic compounds from the San Gabriel Basin. The basin is a groundwater reservoir in eastern Los Angeles County that provides drinking water to more than 1 million people.

CERCLA requires polluters to pay for cleaning up contaminated sites.

The agency identified 67 potentially responsible parties (current or former owners or operators of facilities in the basin that had used hazardous substances) and asked them to present good-faith offers to comply with the remedial plan and to pay certain of the EPA's past costs.

The total cleanup cost was estimated at \$87 million.

In March 2007 a settlement was reached with a number of PRPs. The following year, Aerojet General Corp., Art Weiss Inc., Astro Seal Inc., Del Ray Industrial Enterprises Inc., Shelley Linderman, M&T Co., Multi Chemical Products Inc., Quaker Chemical Corp., Time Realty Investments Inc. and Tonks Properties sought to intervene in the case.

The applicants sought assurance from the court that they would not be assessed an unfair burden because of the presence of unapportioned damages, called "orphan shares."

In March 2008 the U.S. District Court for the Central District of California denied the motion to intervene. The would-be intervenors then appealed to the 9th Circuit, contending they had a right to intervene under CERCLA Rule 24(a)(2) and Section 113(i).

The appeals court agreed and allowed intervention to "protect their interests in contribution, and in the fairness of the proposed consent decree."

Citing *United States v. Albert Investment Co.*, 585 F.3d 1386 (10th Cir. 2009), and *United States v. Union Electric Co.*, 64 F.3d 1152 (8th Cir. 1995), the 9th Circuit said, "PRPs have interests sufficient to support intervention as of right."

As non-settling parties, the applicants are potentially liable for response costs under CERCLA, and the proposed consent decree directly affects their interest in maintaining a right to contribution, the panel said.

"Further, because non-settling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, applicants have an obvious interest in the amount of any judicially approved settlement," the 9th Circuit held.

See Schwarzer, Tashima & Wagstaffe, RUTTER GROUP PRAC. GUIDE: FED. CIV. PRO. — 9th CIR. ED. (The Rutter Group 2010): 2:50; 2:366; 2:701.1 (42 U.S.C. § 9601) 7:210.1 (intervention in CERCLA cases) 7:179; 7:205; 7:212; 7:214; 7:218.1-218.2; 7:221; 7:231; 7:231.2-232; 7:238.1; 7:250 (Fed. R. Civ. P. 24(a)(2))

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