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## Product Liability

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## PRODUCT LIABILITY

*C.A. Assoc. v. Dow Chem. Co.*, 918 F.2d 1485

Author: Judge Bratton, sitting by designation

Plaintiff, C.A. Associates (“Associates”), appealed a special jury verdict in favor of defendant, Dow Chemical Company (“Dow”). The jury found that mortar mixed with Sarabond, a Dow product, caused no more masonry cracking than conventional mortar in buildings. Consequently, Dow made no misrepresentations to Associates concerning Sarabond. Associates argued that the district court abused its discretion in excluding evidence of Sarabond-related failures in other structures.

The Tenth Circuit affirmed the district court’s decision. The court held that the district court acted within its discretion in precluding the evidence. The district court was concerned that the number of buildings Associates wished to refer to would confuse the jury and cause delay and prejudice. Although the court found that the evidence of similar accidents may be relevant, Associates’ experts were able to offer extensive evidence concerning other buildings. This allowed Associates to rebut the defenses raised by Dow without violating the district court’s ruling.

*Carter v. Unit Rig & Equip. Co.*, 908 F.2d 1483

Author: Chief Judge Holloway

Plaintiff, Carter, brought a product liability action against defendants, Unit Rig & Equipment Company (“Unit Rig”) and General Electric (“GE”) for the wrongful death of her son, Terry. The jury found Unit Rig liable for Terry’s death and assessed damages of \$366,667. GE, on the other hand, settled with Carter for \$20,000. Applying Colorado’s comparative fault statute, the jury found Unit Rig twelve-percent responsible and Terry eighty-eight percent responsible. After deducting the \$20,000 GE settlement from the total damages, the district court entered judgment for Carter for \$41,600. Carter subsequently appealed, arguing that the district court improperly instructed the jury to consider Terry’s contributory negligence when apportioning responsibility for the accident. Carter asked that the construction of Colorado’s comparative fault statute be certified to the Supreme Court of Colorado. Finally, Carter claimed that the district court erred by refusing to give a sudden emergency instruction to the jury. Unit Rig cross appealed, arguing that the \$20,000 GE settlement should have been deducted solely from Unit Rig’s assessed damages and not from the total damages.

The Tenth Circuit upheld the district court’s construction of Colorado’s comparative fault statute. While the statute rejects the common law doctrine of contributory negligence as a total bar to recovery, it requires that the negligence of a product liability plaintiff be considered and damage awards be reduced to the extent of the plaintiff’s responsibility for his own injuries. The court declined to certify this issue to the

Supreme Court of Colorado, finding substantial support for this interpretation of the statute. The court found, however, that the district court committed reversible error in refusing to give the sudden emergency jury instruction. The court reasoned that the district court determined a factual issue which should have been submitted to the jury. Finally, the court reviewed decisions construing the 1977 Colorado Contribution Act. The court concluded that the district court properly reduced the \$20,000 setoff from the entire judgment before making the comparative negligence reduction. The judgment was reversed and the case remanded for a new trial.

*Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470

Author: Chief Judge Holloway

Plaintiff, Huffman, was awarded \$475,000 in a product liability action against defendant, Caterpillar Tractor Co. ("Caterpillar"). Huffman appealed a reduction in damages. Huffman argued that the district court erred when it instructed the jury that under Colorado's comparative fault statute, Colo. Rev. Stat. § 13-21-406, ordinary negligence constitutes fault. In addition, Huffman asserted that the district court's refusal to award expert witness fees "as costs" violated Colo. Rev. Stat. § 13-33-102(4). Caterpillar cross-appealed, claiming that Huffman failed to establish a *prima facie* case of strict product liability. Caterpillar also claimed that the district court erred by excluding testimony of the decedent's co-workers regarding his lack of competence to operate the vehicle on which he was killed. Finally, Caterpillar argued that the Tenth Circuit should overrule its previous decision that evidence of subsequent remediation of a product defect is admissible in strict liability actions.

After examining the language and legislative history of Colorado's comparative fault statute, the Tenth Circuit concluded that the term "fault" was intended to include ordinary negligence. Consequently, the reduction in Huffman's damage award was appropriate. Second, since federal law controls the assessment of costs in a diversity case, expert witness fees may only be awarded "as costs" in accordance with 28 U.S.C. § 1821(b), unless authorized by express agreement or by another federal statute. In addition, the court found that Huffman's evidence was more than adequate to support the jury's determination that the vehicle was unreasonably dangerous under the consumer expectation test, that the defects caused the accident, and that the warnings accompanying the vehicle were inadequate. The court held that the district court did not abuse its discretion in excluding the testimony of decedent's co-workers and refused to overrule its prior decision that Rule 407, regarding remedial measures, does not apply to strict product liability cases.

*Dillon v. Fibreboard Corp.*, 919 F.2d 1488

Per Curiam

Plaintiff, Dillon, brought suit against defendant, Fibreboard Corp. ("F.C."), contending her husband contracted lung cancer from asbestos fibres emanating from defendant's product. The district court granted summary judgment against Dillon, finding that she presented insufficient evidence of exposure to F.C.'s product. On appeal, Dillon's representative contended that the district court placed an improper burden of proof upon her.

The Tenth Circuit reversed and remanded, stating that Dillon need only prove that her husband had sufficient contact with identifiable products manufactured by F.C. The court found that Dillon submitted sufficient testimony to support a significant probability that F.C.'s products caused the cancer. The court explained that testimony placed Dillon in repeated, regular, and direct physical contact for over twenty years with F.C.'s asbestos products. Thus, Dillon proved a causative link between her husband's disease and F.C.'s products. This was sufficient to show there was a genuine issue for trial. Accordingly, summary judgment was improper.

*Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481

Author: Judge Anderson

Plaintiff, Dow Chemical Corporation ("Dow"), brought suit against defendant, Research Products Company ("Research"), for equitable subrogation and codefendant, Hartford Accident and Indemnity Company ("Hartford"), for tortious interference with a prospective contractual relation. The district court found in favor of Dow, and both Research and Hartford appealed, contending: (1) the statute of limitations was improperly applied; (2) that a release or assignment was necessary for subrogation; and (3) the district court erred in excluding certain evidence and admitting other evidence without a limiting instruction.

The Tenth Circuit ruled that the statute of limitations was improperly based on the time the payment was made rather than the time the underlying tort claim arose. Second, the court held that release or assignment is not necessary for asserting subrogation claims. Finally, exclusion of two pieces of evidence was held to be abuse of discretion by the district court. Evidence necessary for the jury to apportion the amount of settlement to each defendant was improperly suppressed. Moreover, a memorandum incorrectly characterized as remedial in nature should not have been excluded under Rule 407. Accordingly, the judgments were reversed.

*Kloepfer v. Honda Motor Co.*, 898 F.2d 1452

Author: Judge Barrett

Plaintiffs, the Kloepfers, initiated a product liability action after

their son was killed while riding as a passenger in a Honda all-terrain vehicle. The action was based on theories of negligence, strict liability, false advertising, negligence and strict liability for failure to warn, and violation of reporting requirements of the Consumer Products Safety Commission Act. The Kloepfers appealed an adverse jury verdict, contending that: (1) the district court erred in failing to respond to a question from the jury; (2) the use of the special verdict form was improper; (3) it was error to exclude certain evidence, including specific questions to Cindy Kloepfer, and to admit post-accident riding activities of the vehicle's owner and driver; (4) reversible error resulted from defense counsel's gross misconduct; (5) the *voir dire* was improper.

The Tenth Circuit first held that the district court was not required to give additional instructions to the jury regarding whether the term "user" in an interrogatory referred to all users of all-terrain vehicles, or to this specific driver. Second, the Kloepfers waived their right to challenge the special verdict form. The court reasoned that at trial they declined the opportunity to submit their own verdict form. Third, the evidentiary rulings complained of on appeal were proper. Fourth, the defense counsel's conduct did not give rise to reversible error. Fifth, since *voir dire* questions were not included in the record on appeal, the adequacy of *voir dire* was not reviewable.

*Riley v. Brown & Root Inc.*, 896 F.2d 474

Author: Judge Timbers, sitting by designation

Plaintiff, Riley, appealed an order granting summary judgment in favor of defendant, Rust Engineering Company ("Rust"), and denying her request to certify a question of state law to the Oklahoma Supreme Court. The district court held that Riley's product liability action was barred by a special statute of repose, Okla. Stat. tit. 12, § 109. This statute provides that no tort action to recover damages for deficiency in design, planning, supervision, or observation of construction of an improvement to real property shall be brought more than ten years after substantial completion of the improvement. On appeal, Riley argued that: (1) the machine in question was not an improvement to real property; and (2) even if the machine were an improvement to real property, § 109 is unconstitutional because it abrogates the right of action to recover for injuries resulting in death.

The Tenth Circuit vacated the district court's order, which granted summary judgment in favor of Rust. Accordingly, the court remanded for reconsideration in light of a change in state law. During pendency of the appeal, the Oklahoma Supreme Court announced in *Smith v. Westinghouse*, 732 P.2d 466 (Okla. 1987), a test to determine when electrical equipment constitutes improvement to real property. The court also stated that the constitutionality of § 109 should not be decided if the case could be resolved on the narrower question of the application of § 109. Accordingly, the court ruled that this question of state law should be decided by the Supreme Court of Oklahoma.

*McHargue v. Stokes*, 912 F.2d 394

Author: Judge Sam, sitting by designation

Plaintiff, McHargue, injured his hand in a plastic injection molding machine. At trial, McHargue's expert witness minimized the credibility of the machine's safety device, which complied with the American National Standard Institute ("ANSI") guidelines. The expert stated that ANSI guidelines were a minimum consensus standard. On cross examination, defendant, Stokes, asked the expert if Occupational Health and Safety Act ("OSHA") recognized any national consensus standards other than ANSI. McHargue asserted that the district court abused its discretion by allowing this cross examination. McHargue appealed the district court's denial of his motion for a new trial after the jury returned a no cause of action verdict for Stokes.

The Tenth Circuit held that the error resulting from the cross examination was harmless. Although one cannot use OSHA standards to provide a basis for liability, they can be referred to as guidelines for determining standards of care. Stokes did not introduce OSHA standards either to prove that the machine met OSHA requirements, or to establish a standard of care. Rather, Stokes referred to ANSI standards merely to demonstrate that OSHA recognizes them generally, and that no other standards existed for the machine in question. Furthermore, Stokes discussed the standards only after McHargue placed the credibility of ANSI standards in issue.

*Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149

Author: Judge Henley, sitting by designation

During her pregnancy, plaintiff, Wilson, ingested Benedectin, a drug manufactured by Merrell Dow Pharmaceuticals, Incorporated's ("Merrell Dow's") predecessor, Richardson-Merrell, Incorporated. Wilson alleged that the drug caused her son to be born missing one finger on each hand. Wilson consequently brought suit against Merrell Dow on theories of product liability, fraud and misrepresentation, breach of express and implied warranty, strict liability, and negligence. The jury, however, returned a general verdict in favor of Merrell Dow. Wilson subsequently appealed, alleging the district court erred in: (1) failing to give the jury a missing witness instruction; (2) allowing defense counsel to tell the jury that the absent witness was equally available to the plaintiff; (3) admitting into evidence Merrell Dow's sales charts because they were hearsay and they failed to take into account when the Benedectin was consumed; and (4) failing to grant Wilson's motion for judgment notwithstanding the verdict or for a new trial.

The Tenth Circuit affirmed the decision of the district court. First, the district court properly denied Wilson's request to give the jury a missing witness instruction. The court noted that the decision to not give a missing witness instruction rests largely within the district court's discretion. The court also based its decision on a four part test: (1) the

party must have the power to produce the witness; (2) the witness must not be one who would ordinarily be expected to be biased against the party; (3) the witness's testimony must not be comparatively unimportant, or cumulative, or inferior to what is already utilized in trial; and (4) the witness must not be equally available to testify for either side. The court concluded that Wilson was unable to prove two of the four requisite elements necessary to mandate a missing witness instruction. Specifically, the expert witness's testimony was cumulative and had relatively insignificant probative value, and the expert was equally available to both parties. Second, it was permissible for the district court to allow in closing argument a comment that the expert witness was equally available to both parties. Essentially, when an absent witness is available to both parties, either party is open to the inference that the missing testimony would have been adverse. Third, the court used an abuse of discretion standard to review the district court's decision to admit Merrell Dow's sales charts. After examining the trial transcript and sales charts, the court held that even though the charts were hearsay, they were nonetheless a type reasonably relied upon by experts and, therefore, admissible under Fed. R. Evid. 705. Moreover, the failure of the charts to take into account when the Benedectin was consumed, rendered them less valuable. This failure, however, affected the weight and not the admissibility of the charts. Also, Wilson's counsel had ample opportunity to cross-examine the experts regarding the charts. This questioning proved sufficient to bring to the jury's attention the inadequacy of the charts. Finally, there was sufficient evidence for the jury to return a verdict in Merrell Dow's favor. Merrell Dow presented sufficient expert testimony to create a conflict in the evidence. Accordingly, when the evidence is in conflict, the jury alone has the power to weigh the evidence and assess the witnesses' credibility. Thus, it was within the district court's discretion to deny Wilson's motion for judgment notwithstanding the verdict or for a new trial.