RECENT DEVELOPMENTS IN PRODUCTS, GENERAL, AND CONSUMER LIABILITY LAW

Patricia A. Sexton, Adam T. Suroff, Daniel R. Zmijewski, and LaTrice N. McDowell

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Patricia A. Sexton and Adam T. Suroff are shareholders in the Kansas City office of Polsinelli Shughart P.C. Daniel R. Zmijewski is an attorney in the Kansas City office of Miller Schirger LLC. LaTrice N. McDowell expects to receive her J.D. in 2012 from North Carolina Central University School of Law. Ms. Sexton is a vice chair of the TIPS Products, General, and Consumer Law Committee.
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I. PRODUCTS LIABILITY

A. Defenses

1. Assumption of Risk

In Sheenan v. North American Marketing Corp.,\(^1\) the First Circuit confirmed that certain risks are so self-evident that a person who ignores the risk and is then injured will be deemed to have assumed the risk of injury.\(^2\) Plaintiff alleged that while attempting to dive into a shallow above-ground swimming pool she lost her balance and fell into the pool head first at a steep angle. She suffered a fraction of the C5 vertebra, and the injury left her quadriplegic.

Applying Rhode Island law, the court affirmed summary judgment and dismissed plaintiff’s claim. The pool contained signs that read “NO DIVING-SHALLOW WATER.”\(^3\) Plaintiff saw the signs and knew the pool was shallow. Before entering the pool, plaintiff was standing on a flat piece commonly known as coping.\(^4\) The coping was an aluminum ridge that encircled the pool and was about six inches wide. Its function was to connect the pieces of the pool wall.\(^5\) Plaintiff argued that even though the coping was not intended for use as a platform, it invited users to stand on top of it. If used as a platform, the coping was narrow and unstable subjecting users to the risk of losing their balance and falling.\(^6\) Plaintiff argued that she may have assumed the risk of diving, but not the risk of falling from the narrow coping.

The court rejected this argument. The court emphasized that plaintiff stood on the coping in order to dive and the injury she suffered was the one contemplated by the warning signs.\(^7\) Because plaintiff assumed the risk of diving, “she assumed the risk that she might fall while diving.”\(^8\) Had she fallen simply while standing on the unstable and narrow coping, the outcome may have been different.

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1. 610 F.3d 144 (1st Cir. 2010).
2. Id. at 145.
3. Id. at 146.
4. Id. at 147.
5. Id. at 146.
6. Id. at 148.
7. Id. at 155.
8. Id. at 154.
2. Economic Loss Rule

In *Sapp v. Ford Motor Co.*, the South Carolina Supreme Court explained and applied the economic loss rule. Here, both plaintiffs purchased Ford F-150 trucks that caught fire and were badly damaged. A defect in the cruise control switch allegedly caused both fires.

Plaintiff alleged that Ford had prior knowledge of a design defect in the cruise control switch that created a risk of fire. Each plaintiff purchased his truck used “as is”. Neither plaintiff suffered personal injury or property damage, other than to the trucks themselves.

As the court explained, the economic loss rule provides that “there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself”. On the one hand, tort law protects society from physical harm to person or property. On the other hand, contract law protects consumers from not receiving the benefit of their bargain. Simply put, these plaintiffs only suffered the loss of use of their trucks that each purchased “as is” from someone other than Ford. Consequently, the economic loss rule barred their tort actions. A key point from the case is that the court applied the economic loss rule despite damage to the entire truck. One could argue exceeds the mere contractual damage that replacing the damaged cruise control switches would have caused absent the fires.

3. Learned Intermediary

In a case of first impression, the Colorado Court of Appeals adopted the learned intermediary doctrine in *O’Connell v. Biomet, Inc.* In this action against a medical device manufacturer and its sales representative, the court affirmed summary judgment for the defendants on plaintiff’s claim of failure to warn. After plaintiff fractured his elbow, his physician decided to use an external elbow fixator, the EBI OptROM. The device manufacturer “provided a package insert and surgical technique manual with the fixator describing installation techniques, risks, and potential adverse

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10. Id. at 48.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 147.
16. Id.
17. Id.
18. Id. at 150. The court declined to expand the exception to the economic loss rule it created in *Kennedy v. Columbia Lumber & Manufacturing Co.*, 384 S.E.2d 730 (S.C. 1989) (creating exception to the economic loss rule for residential homebuyers).
20. Id. at *1.
events in the use and application of the device.” The physician applied the fixator to plaintiff’s “humerus using bone screws, during which the drill bit or the bone screw pierced his radial nerve, wound it up, and tore a section of it out of his arm, resulting in permanent injury.” After the surgery, plaintiff’s physician sent a letter to defendants recommending revisions to the surgical technique manual in an effort to prevent similar future occurrences.

In the lower court, defendants moved for partial summary judgment on the failure to warn claim, asserting that the warnings and instructions in the package insert and surgical technique manual were adequate as a matter of law. On appeal, the court affirmed the trial court’s grant of summary judgment and recognized in the context of prescription medication, “where prescription drugs are concerned, the manufacturer’s duty to warn has been limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug’s use.” Thus, the court held that the trial court correctly applied the learned intermediary doctrine in the context of the failure to warn claim as a matter of law and correctly held that the product warnings need to be given only to the physician.

In *Dean v. Eli Lilly & Co.*, the Second Circuit rejected the “overpromotion” exception and affirmed a district court’s dismissal of a suit by a Zyprexa user who claimed that Eli Lilly & Co.’s antipsychotic medication caused him to develop diabetes. Plaintiff, a Florida resident whose case was transferred to the Eastern District of New York as part of the Zyprexa multidistrict litigation, sued Lilly for failure to warn. Plaintiff, a schizophrenic, used Zyprexa almost continually from June 2002 until October 2006, when he was diagnosed with diabetes. Plaintiff claimed he would not have been prescribed the drug had Lilly properly warned of its dangers. In the appeal, plaintiff challenged the district court’s reliance on the learned intermediary doctrine, arguing that this case was subject to the “overpromotion exception.”

Lilly argued that plaintiff’s physician knew about Zyprexa’s diabetes risk when the medication was prescribed; therefore, the learned intermediary doctrine was applicable. The court recognized that under the doctrine,

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at *2.
25. *Id.* at *4.
27. *Id.* at *1, n.1.
28. *Id.* at *1.
29. *Id.*
30. See *id.* at *2.*
“a manufacturer of a prescription drug discharges its duty to warn by providing an adequate warning to the prescribing physician.”

Plaintiff’s physician testified he knew the drug carried a diabetes risk when he first prescribed it for plaintiff in June 2002. He also testified that nothing he learned about Zyprexa after 2002 would have caused him to change his decision regarding the prescription because he felt any risks were outweighed by the drug’s benefit.

Plaintiff nevertheless argued that the learned intermediary defense should not apply in his case because, under an exception to the doctrine, Lilly’s “overpromotion” of the drug negated any warnings. The Second Circuit was not persuaded by the argument and explained that while the record shows Lilly launched a “vigorous sales campaign for Zyprexa aimed at [plaintiff’s physician],” plaintiff offered no evidence that the company’s sales staff mislead the physician about the drug’s link to diabetes or caused him to prescribe it to plaintiff. The evidence instead indicated that the physician’s prescription of the drug to plaintiff was based on his “prior success” using the drug, “the express wishes” of plaintiff’s family, and the physician’s “own assessment” of plaintiff’s needs.

In Dietz v. Smithkline Beecham Corp., the Eleventh Circuit addressed Georgia’s learned intermediary doctrine. Plaintiff brought a wrongful death suit that arose out of her husband’s suicide while taking Paxil.

“Eight days after having filled and begun his Paxil prescription, Dietz committed suicide by throwing himself in front of a train.” The Eleventh Circuit acknowledged that Georgia employs the learned intermediary doctrine, which holds that the manufacturer of a prescription drug does not have a duty to warn the patient of the dangers involved with the product. Instead, the manufacturer has a duty to warn the patient’s doctor, who acts as a learned intermediary between the patient and the manufacturer. The court explained that in cases where

a learned intermediary has actual knowledge of the substance of the alleged warning and would have taken the same course of action even with the

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32. Dean, 2010 WL 2802614 at *1.
33. Id. at *2.
34. Id.
35. Id.
36. 598 F.3d 812 (11th Cir. 2010).
37. Id. at 814.
38. Id.
39. Id. at 816.
information the plaintiff contends should have been provided, courts typically conclude that . . . the causal link is broken and the plaintiff cannot recover.\textsuperscript{40}

In this case, plaintiff’s doctor provided “explicit uncontroverted testimony that, even when provided with the most current research and FDA-mandated warnings, he still would have prescribed Paxil for Dietz’s depression.”\textsuperscript{41} The Eleventh Circuit affirmed, pursuant to Georgia’s learned intermediary doctrine, noting such testimony eliminates any potential chain of causation through which Dietz could have sought relief, and the claims therefore failed.\textsuperscript{42}

4. Sophisticated User
The Michigan Court of Appeals addressed the sophisticated user defense in \textit{Heaton v. Benton Construction Co.}\textsuperscript{43} In this case, plaintiffs entered a contract with defendant, Pristine Home Builders, operated by defendant Daniel Bonawitt, to construct their retirement home.\textsuperscript{44} Bonawitt hired defendant Great Lake Superior Walls to design, manufacture, and install precast concrete foundation walls in the home.\textsuperscript{45} “During the construction of the home, the foundation walls twice shifted, first in September 2005 after the retaining foundation wall was partially backfilled and again in October 2005 after shear (supporting) walls were installed on the advice of defendant and further backfilling.”\textsuperscript{46} Plaintiffs sued under theories of breach of contract, express and implied warranties, and negligence.\textsuperscript{47}

Defendants appealed the trial court’s denial of its motion for judgment as a matter of law. The trial court denied the motion because “(1) plaintiff’s claim was not one of products liability but rather one for ordinary negligence, and (2) under the facts of the case, Bonawitt was not a ‘sophisticated user’ as contemplated by the statute.”\textsuperscript{48} First, the appellate court clarified the parties’ attempt to distinguish between an action for ordinary negligence and an action for products liability. The court stated that the foundation walls were a product as defined by the products liability statutes.\textsuperscript{49} Additionally, the court explained that “the fact that Plaintiff’s theory of liability was one of negligence does not preclude its action from com-

\textsuperscript{40} \textit{Id.} (citing Ellis v. C.R. Bard, Inc., 311 F.3d 1272, 1283 n. 8 (11th Cir. 2002)).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} 780 N.W.2d 618 (Mich. 2009).
\textsuperscript{44} \textit{Id.} at 621.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 623.
\textsuperscript{49} \textit{Id.}
ing within the statutory definition of a products liability action because negligence is a ‘legal . . . theory of liability brought for . . . damage to property.’”\textsuperscript{50}

Because the court found that the claim was in the purview of a products liability action, it evaluated whether Bonawitt was a sophisticated user. Michigan law defined a sophisticated user as “a person or entity that by virtue of training, experience, a profession or legal obligations, is or is generally expected to be knowledgeable about a product’s properties, including potential hazards or adverse effects.”\textsuperscript{51} However, if employees do not have “actual knowledge of the product’s potential hazard or adverse effect that caused the injury,” they are not sophisticated users.\textsuperscript{52} The defendants argued that Bonawitt met this definition, and therefore, it had no duty to warn him of the need for shear walls. However, Bonawitt testified that he had only built twelve houses under his builder’s license and had never before used the type of foundation walls that Great Lakes provided.\textsuperscript{53} Thus, the appellate court affirmed the trial court’s conclusion that Bonawitt was not a sophisticated user as defined by the Michigan statute.\textsuperscript{54}

5. Statute of Repose

Statutes of repose can also serve as a bar in products liability actions sometimes even when the statute was enacted by a foreign country. In \textit{Chang v. Baxter Healthcare Corp.},\textsuperscript{55} the Seventh Circuit, using California’s choice of law rules, applied a Taiwanese ten-year statute of repose to a case filed in California.\textsuperscript{56} In that case, the court explained that statutes of repose are specifically designed for products liability cases because they preclude liability after a fixed number of years, regardless of whether the plaintiff should have discovered within that period that he had a claim.\textsuperscript{57} In \textit{Chang}, plaintiffs claimed that defendants acquired blood from high risk donors, and then improperly processed the blood in California, where the clotting factors were manufactured.\textsuperscript{58} Plaintiff also claimed that after discovering that the blood clotting factors were contaminated by HIV, defendant allegedly continued to distribute the product in foreign countries while withdrawing them from the distribution in the United States.\textsuperscript{59} The court

\textsuperscript{50.} \textit{Id.}
\textsuperscript{51.} \textit{Id.} at 622.
\textsuperscript{52.} \textit{Id.}
\textsuperscript{53.} \textit{Id.} at 623.
\textsuperscript{54.} \textit{Id.}
\textsuperscript{55.} 599 F.3d 728 (7th Cir. 2010).
\textsuperscript{56.} \textit{Id.} at 733.
\textsuperscript{57.} \textit{Id.}
\textsuperscript{58.} \textit{Id.} at 732.
\textsuperscript{59.} \textit{Id.}
explained that California courts would apply the Taiwanese ten-year statute of repose because plaintiffs’ tort claims arose in Taiwan under Taiwanese law. The court rejected plaintiffs’ argument that the claims arose in California because of defendants’ failure to process the clotting factors in a way that would prevent contamination by HIV occurred in California. The court ruled that the action arose where the injury occurred, which was in Taiwan. Based upon Taiwan’s ten-year statute of repose, the court concluded “[a] California court would reason that if Taiwan will not provide a remedy to its own citizens, there is no reason for California to do so.”

In Butler v. Ford Motor Co., the federal court in South Carolina addressed the application of the North Carolina statute of repose to a case pending in South Carolina. Plaintiffs alleged strict liability, negligent design, negligent failure to warn, breach of implied warranty of merchantability, misrepresentation, and fraud claims—all stemming from Ford’s design, testing, manufacture, and sale of a E350 van that rolled over when the left rear tire detreaded. Ford sought dismissal of the action based on North Carolina’s six-year statute of repose for products liability actions. The court explained that South Carolina’s Supreme Court treated North Carolina’s statute of repose as substantive law, and in applying South Carolina conflicts of law provisions, the court was required to apply the law of the state where the injury occurred. The court applied North Carolina’s statute of repose, which precluded plaintiffs’ claims against Ford. The court went on to evaluate the one exception to the general rule, i.e., foreign law will not be applied if such law is repugnant to South Carolina’s public policy. The court did not find that the North Carolina statute qualified as an exception. Therefore, the court concluded that Ford was entitled to dismissal because plaintiffs’ asserted products liability claims more than six years after the initial date of purchase of the vehicle.

6. Innocent Seller

The defendant in Zapien v. Home Depot, USA, Inc. claimed that they were shielded from plaintiff’s claims under the innocent seller provision of the

60. Id. at 733–34.
61. Id.
62. Id.
64. Id. at 579.
65. Id.
66. Id. at 580.
67. Id. at 581.
68. Id.
69. Id. at 583.
70. Id. at 581.
Colorado Product Liability Act. The statute provides, in part, that “[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or the manufacturer of the part thereof giving rise to the product liability action.”

Plaintiff filed suit for injuries he received from an electrical shock while using a sewer snake rented from Home Depot. Plaintiff alleged claims for strict products liability, breach of warranty, breach of implied warranty of merchantability and fitness for a particular purpose, strict product liability for misrepresentation, and negligence. In response to defendant’s motion to dismiss, plaintiff claimed the statute did not apply because defendant had knowledge of the defect and altered or modified it in a significant manner after the product came into its possession. The judge rejected plaintiff’s argument after finding that plaintiff failed to provide anything other than “subjective beliefs or speculation about what may have occurred” regarding defendant’s knowledge or actions. Summary judgment was entered for defendant.

B. Particular Products
1. Asbestos

The Court of Special Appeals of Maryland in *John Crane, Inc. v. Linkus*, examined the boundaries of making a submissible case for direct asbestos exposure. In *Linkus*, the court held that the son of a worker who was exposed to rope and wicking products did not need expert testimony to show that the products emitted levels of asbestos fibers capable of causing pleural mesothelimoa. Plaintiff, who died during the pendency of the appeal, worked at a shipyard from 1952 through the 1970s. His work included removing old insulation from valves and putting new wicking or rope packing on the valves. When he cut the wicking and rope, it produced “quite a bit of dust” that “would . . . get all over you.”

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72. Id. at *1.
73. Id. at *2 (citing Colo. Rev. Stat. § 13-21-402 (2010)).
74. Id. at *1.
75. Id.
76. Id. at *2.
77. Id. at *3.
78. Id. at *5.
80. Id. at 523.
81. Id. at 514.
82. Id. at 516.
83. Id.
After the jury entered a verdict for plaintiff, an appeal was taken. On appeal, the defendant argued that in order for a plaintiff to prevail against an asbestos manufacturer or seller, he must prove that exposure to the products was a substantial contributing factor in causing the injury. The court agreed but found that lay testimony on the amount of dust created by handling asbestos products, along with expert testimony on the lack of a safe threshold of exposure above background levels, was sufficient to create a question for the jury.84 The court noted, “there was lay testimony that [plaintiff] worked with defendant’s products regularly and frequently and the products produced considerable visible dust.”85 The court thus concluded a jury reasonably could infer that the rope and wicking emitted enough asbestos fibers to cause mesothelioma.86

2. Tobacco

Plaintiff in Grisham v. Philip Morris, Inc.,87 asserted that she smoked the defendants’ cigarettes, and as a result, suffered from periodontal disease and chronic obstructive pulmonary disease.88 Plaintiff argued that the chemicals contained in cigarette smoke directly caused her injuries; defendants failed to remove or neutralize the harmful chemicals; and defendants’ conduct caused plaintiff to smoke more cigarettes than she would have otherwise smoked.89

Plaintiff asserted that she was first diagnosed with the beginning stages of emphysema on March 28, 2001, and she was diagnosed with periodontal disease and gingivitis in April 2001.90 She filed her complaint on March 15, 2002.91 At the time she filed, the California statute of limitations for personal injury actions was one year.92 Following discovery, defendants filed a motion for summary judgment relying on the one year statute of limitations. Defendants presented evidence that plaintiff first started suffering periodontal harm at least as early as 1990, not April 2001 as asserted in the complaint.93

The court denied defendants’ motion for summary judgment and ruled that plaintiff’s cause of action did not accrue until plaintiff knew of her injuries and knew, or had reason to know, that the injuries were caused by defendants’ wrongful acts.94

84. Id. at 523.
85. Id.
86. Id. at 524.
88. Id. at 1018.
89. Id.
90. Id. at 1019–20.
91. Id. at 1019.
92. Id.
93. Id. at 1020.
94. Id. at 1023–24.
3. Pharmaceuticals

In *Bartlett v. Mutual Pharmaceutical Co., Inc.*, the federal court in New Hampshire addressed the interplay in a products liability case among failure to warn, defective design theories, and causation. On a motion for summary judgment, the court dismissed the failure to warn count for lack of causation, but allowed the defective design case to proceed to trial. The facts were that after seeking medical treatment for pain in her right shoulder, plaintiff filled a prescription for Sulindac, a generic version of a nonsteroidal anti-inflammatory drug. Plaintiff suffered severe side effects, including permanent blindness, and sued the manufacturer for various claims, including failure to warn and design defect. Plaintiff’s physician, in deposition, testified that he prescribed the Sulindac without reading or relying upon the warning label. Based on this testimony, the court granted summary judgment to the manufacturer. The court concluded that a change to the warning label would not have affected whether the doctor prescribed the drug.

However, the court denied summary judgment on the design defect claim. The court explained that changing the warning label would not have influenced a physician who did not read it, but changing the drug’s design or taking the drug off of the market could have prevented the injury. Interestingly, although the court dismissed the failure to warn claim, the court ruled that the defendant could use the warning label to demonstrate that its product was not defectively designed. Consequently, the adequacy of the warning label remained in play as a defense, but not as a theory for recovery.

In *Schilf v. Eli Lilly & Co.*, the District of South Dakota dismissed three theories that are unusual in a products liability case. Here, plaintiff alleged that her daughter committed suicide because of side effects caused by the drug Cymbalta. Among plaintiff’s theories were negligent failure to test, negligent overpromotion, and negligent infliction of emotional distress. The court dismissed all three claims on summary judgment. Addressing the claim of negligent failure to test, the court explained that South Dakota Supreme Court requires “expert testimony on causation when it is outside

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96. Id. at *1.
97. Id.
98. Id.
99. Id.
100. Id. at *5, 8.
101. Id.
103. Id. at *1.
104. Id. at *2.
the common experience and capability of a jury.” 105 Because plaintiff failed to provide expert testimony demonstrating that the failure to test caused the suicide, the claim failed under South Dakota law. 106 Plaintiff’s negligent overpromotion claim also failed, in part, because no South Dakota cases recognize overpromotion as a separate cause of action. Even assuming such a theory is viable, plaintiff’s claim would still fail because the facts were insufficient to support the allegation. 107 Finally, in dismissing the negligent infliction of emotional distress claim, the court recognized such a claim exists in South Dakota. However, plaintiffs did not observe the suicide, and they were not in the zone of danger. 108 Consequently, that claim also failed.

Defendants attempted to dismiss the remaining claims based on preemption by the Food Drug and Cosmetic Act (FDCA). 109 The court denied the motion to dismiss, noting that in Wyeth v. Lavine, the U.S. Supreme Court explained state claims are not preempted by the FDCA, and there is a need for “clear evidence” that the FDA would not approve additional changes to warning labels. 110 The court found that even though the FDA e-mailed defendant and indicated Lilly should not change the label until it received final FDA approval, this is not “clear evidence” that the FDA would have rejected attempts by defendant to get the word out in other ways. As a result, defendant lacked clear evidence of preemption. 111

In Wimbush v. Wyeth, 112 plaintiff, on behalf of the decedent, Mary Buchanan, pursued a strict product liability design defect claim after Buchanan ingested Redux for several months during 1996 and 1997, which allegedly caused her death in December 2003. 113 The Sixth Circuit granted summary judgment on plaintiff’s strict liability claim. 114 The court affirmed the order of summary judgment confirming

so long as adequate warning has been provided for a pharmaceutical product then the manufacturer cannot be strictly liable for design defect under Ohio law, regardless of whether there is a causal connection between the plaintiff’s use of the drug and the plaintiff’s injury or whether the product was unavoidably dangerous. 115

105. Id. at *1.
106. Id.
107. Id.
108. Id. at *2.
109. Id. at *3.
110. Id. at *4 (citing Wyeth v. Lavine, 129 S. Ct. 1187, 1194–95 (2009)).
111. Id.
112. 619 F.3d 632 (6th Cir. 2010).
113. Id. at 634–35.
114. Id. at 636.
115. Id. at 637 (citations omitted).
However, the Sixth Circuit reversed the district court’s order granting summary judgment on plaintiff’s common law negligence claims, stating:

[i]f Congress thought state lawsuits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA’s 70-year history. But despite its 1976 enactment of an express preemption provision for medical services, see § 521, 90 Stat. 574 (codified at 21 U.S.C. § 360(a)), Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.116

The court concluded that FDA approval does not automatically preempt state law tort claims for negligence and remanded the case for further proceeding.117 The court specifically noted that

we are aware of no federal appeals court decision since Levine concluding that FDA regulation preempts any aspect of state tort law, though we admit that, until today, there is also no post-Levine court of appeals authority for the proposition that the Levine rationale extends beyond the realm of failure-to-warn claims to apply to all pre-approval state law claims.118

4. Other Products

Can a plaintiff’s misuse of a product be grounds for granting summary judgment in favor of a manufacturer under a design defect theory? In Smith v. Yamaha Motor Corp. U.S.A.,119 the Superior Court of Pennsylvania reversed the ruling of the trial court and held that summary judgment is not appropriate unless it is established that the misuse solely caused the accident without the design defect contributing to the accident.120 Plaintiff, a seasoned rider of all-terrain vehicles (ATV), was alleged to not have been using the vehicle as intended when he carefully rolled backwards down a hill to avoid colliding with other ATVs in the area.121 In doing so, plaintiff’s foot slipped and became stuck in the ATV’s rear fender.122 The fender then collapsed, causing plaintiff’s foot to become trapped between the ATV’s frame and rear wheel.123 The ATV ultimately rolled backwards over plaintiff, causing severe injuries.124

116. Id. at 645.
117. Id. at 646.
118. Id. at 645.
120. Id. at 321.
121. Id. at 315.
122. Id.
123. Id.
124. Id. at 315–16.
Plaintiff and his wife sued the ATV manufacturer, focusing their case on the alleged defective design of the rear fender. Defendants focused their defense on plaintiff’s alleged misuse of the ATV. On appeal, the court reversed the grant of summary judgment by the trial court and concluded that plaintiff was using the ATV as intended at the time of the accident. The court explained, “[i]n the present case, the trial court conflated the doctrine of unintended use with the concept of misuse.” The court elaborated that “a plaintiff’s misuse of a product cannot be grounds for granting summary judgment in favor of the manufacturer under a design defect theory unless it is established that the misuse solely caused the accident while the design defect did not contribute to it.”

In Beauregard v. Continental Tire North America, Inc., The federal court for the Middle District of Florida granted summary judgment to a tire manufacturer in a tread separation case based upon lack of evidence. In this case, a seven-year-old was killed after being thrown from a Jeep Grand Wagoneer after it struck a guardrail and overturned. The suit alleged that the driver lost control as a result of tread separation from the right front tire. Plaintiff alleged Continental should be held strictly liable for negligently designing and manufacturing the tire.

Continental moved for summary judgment based upon the assertion there was neither evidence to show that any tire failure caused the accident nor any proof that the tire was defective when it left the company’s control. Continental’s expert demonstrated the tire was previously punctured and repaired. Furthermore, the evidence showed damage to the tire as the result of its being mounted and remounted on different rims, and also showed that the tire had been improperly inflated.

The court granted summary judgment in Continental’s favor, reasoning that plaintiff “failed to produce more than a scintilla of evidence” that the tire belts were aged or otherwise defective when they left Continental manufacturing facility. The court disagreed with the opinion of plain-

125. Id. at 320. Defendants alleged that plaintiff misused the vehicle because he consumed one beer and ingested his daily prescription dose of oxycontin on the day of the accident. Id. at 317.
126. Id. at 321.
127. Id.
128. Id.
129. 695 F. Supp. 2d 1344 (M.D. Fla. 2010).
130. Id. at 1345.
131. Id. at 1346.
132. Id.
133. Id. at 1347.
134. Id. at 1355.
135. Id. at 1354–55.
136. Id. at 1351.
tiff’s expert that certain marks and stray cords he noticed in the subject tire were evidence of a defect. The court explained those pattern marks and cords were not present at the location of the tire where it failed and that tread did not separate for more than eleven years.\textsuperscript{137}

II. PREEMPTION

In \textit{Kurns v. A.W. Chesterton, Inc.},\textsuperscript{138} plaintiffs brought suit on behalf of decedent’s alleged exposure to asbestos during his years of employment by a railroad company.\textsuperscript{139} Plaintiffs allege that from 1947 to 1994, the decedent served as a welder, machinist, and supervisor for the railroad; and during that time, he was exposed to asbestos from removing insulation from locomotive boilers and installing brake shoes on locomotives.\textsuperscript{140} After decedent’s retirement, he was diagnosed with malignant mesothelioma, the one cause of which is exposure to asbestos.\textsuperscript{141} Plaintiffs appealed from the district court’s entry of summary judgment by arguing that federal law did not preempt their claims.\textsuperscript{142}

On appeal, plaintiffs contended that the Locomotive Inspection Act (LIA) did not preempt state law design defect and failure to warn product liability claims.\textsuperscript{143} “The plaintiffs urged that LIA preempts the regulation of locomotive equipment, but does not preempt railroad workers personal injury claims under state tort law for failure to warn about hazardous substances released during the repair of locomotives which [are] not in service.”\textsuperscript{144}

Plaintiffs further argued that the LIA only governed road injuries and was irrelevant when a locomotive was not in use.\textsuperscript{145} The court stated that even if the fact that the locomotive parts and appurtenances that allegedly contained asbestos in the present case were not connected to a locomotive which was in transit at the time of exposure prevents the plaintiffs from bringing an action under the LIA, there are other federal causes of action available for such a claim.\textsuperscript{146}

Not persuaded by this argument, the Third Circuit affirmed the judgment of the district court and held that federal law preempted the claims.\textsuperscript{147}

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137. & \textit{Id.} at 1353. & \\
138. & 620 F.3d 392 (3d Cir. 2010). & \\
139. & \textit{Id.} at 393. & \\
140. & \textit{Id.} at 393–94. & \\
141. & \textit{Id.} at 394. & \\
142. & \textit{Id.} at 395. & \\
143. & \textit{Id.} & \\
144. & \textit{Id.} & \\
145. & \textit{Id.} at 397, n.5. & \\
146. & \textit{Id.} & \\
147. & \textit{Id.} at 399. & \\
\end{tabular}
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In *McQuiston v. Boston Scientific Corp.*, 148 the U.S. District Court for the Western District of Louisiana held that federal law preempted plaintiff’s design defect claims. 149 Plaintiff filed suit after having a heart catheterization procedure. 150 The TAXUS Express Paclitaxel-Eluting Coronary Stent System, (TAXUS Stent) designed, manufactured, and sold by Boston Scientific, was implanted into his coronary artery. 151 Plaintiff alleged that the TAXUS Stent “malfunctioned and failed to deflate, causing permanent and serious injuries to him.” 152 Furthermore, plaintiff contended that “the TAXUS stent was negligently designed, manufactured, marketed, sold, tested, and distributed.” 153

Congress enacted the Medical Device Amendments (MDA) to “provide for the safety and effectiveness of medical devices intended for human use.” 154 The TAXUS stent is a Class III device under the MDA, which means it was subjected to the highest scrutiny under the MDA by virtue of its approval through the “rigorous” premarket approval process set forth for Class III devices. 155 Boston Scientific argued that it was entitled to summary judgment because McQuiston’s state law claims conflict with federal requirements imposed by the Food and Drug Administration (FDA). 156

The court held that federal law preempted the state claims. 157 The court also noted that “McQuiston [was] aware that Boston Scientific intended to assert preemption as a defense . . . yet . . . [he did not once seek] to amend his complaint to assert claims that Boston Scientific failed to comply with FDA requirements.” 158 The motion to dismiss was granted.

III. GENERAL LIABILITY

A. Workers’ Compensation Act Immunity

Does a fellow employee have immunity from civil liability arising from a workplace accident? In *Robinson v. Hooker*, 159 the Missouri Court of Appeals held that no such immunity applied 160 under the Missouri Workers’ Compensation Act. 161 Plaintiff, who was an employee of the City of Kansas City,

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149. *Id.* at *24.
150. *Id.* at *1.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at *2* (citing Medtronic, Inv. v. Lohr, 518 U.S. 470, 476 (1996)).
155. *Id.* at *4* (citing *Lohr*, 518 U.S. at 477).
156. *Id.*
157. *Id.* at *5.*
158. *Id.* at *7.*
160. *Id.* at 421.
Missouri, was injured after being struck in the face by a high-pressured hose, leaving him blinded in his right eye.162 After receiving workers’ compensation benefits, the injured employee sued his co-worker in negligence for “failing to use ordinary care while operating a high-pressure hose.”163

The Missouri Court of Appeals reversed the trial court’s dismissal of the civil action and held that employees no longer have immunity from civil actions filed by co-worker for injuries covered by the Act.164 In reaching its decision, the court abandoned prior law providing that, “a co-employee could not be sued unless there was a showing of ‘something more’ than a breach of the employer’s duty to provide a safe workplace.”165 The decision in Robinson was based on strict statutory construction of amendments to the Act passed in 2005, finding the Act contained no express provision releasing “employees” from liability to their injured co-workers.166 The Act as written expressly released only employers from liability in exchange for providing workers compensation benefits.167

B. Strict Liability for Abnormally Dangerous Activities

The Supreme Judicial Court of Maine in Dyer v. Maine Drilling & Blasting, Inc.168 adopted the Restatement (Second) of Torts approach to strict liability for abnormally dangerous activities.169 Plaintiff in Dyer owned a home and was informed by defendant that it would begin blasting rock near her home in connection with the construction of a bridge.170 The written notice assured plaintiff that defendant used “the most advanced technologies available” for blasting and further assured plaintiff blasting vibration would not “exceed the established limits that could potentially cause damage.”171

Prior to any blasting, defendant performed a survey of plaintiff’s home, and plaintiff’s son documented the condition of the home by videotape.172 Over a one-year period, defendant proceeded to conduct over 100 blasts, including one approximately 100 feet from plaintiff’s home.173 Plaintiff ultimately discovered numerous cracks in her foundation and other problems in her basement, not the least of which was the fact that the floor had dropped nearly three inches.174

162. Robinson, 323 S.W.3d at 421.
163. Id.
164. Id.
165. Id. at 423 (discussing Badami v. Gaertner, 630 S.W.2d 175 180 (Mo. Ct. App. 1982)).
166. Id.
167. Id.
168. 984 A.2d 210 (Me. 2009).
169. Id. at 219 (discussing Restatement (Second) of Torts §§ 519–20).
170. Id. at 213.
171. Id.
172. Id.
173. Id.
174. Id. at 214.
Plaintiff filed a lawsuit alleging strict liability and negligence. The case was dismissed by the lower court on summary judgment.\textsuperscript{175} The court refused to adopt a strict liability standard and viewed the plaintiff’s proof of damage to be insufficient to survive summary judgment.\textsuperscript{176} On appeal, the Supreme Judicial Court, after a careful analysis of jurisdictions across the country, adopted the Second Restatement’s imposition of strict liability for abnormally dangerous activities.\textsuperscript{177} The court commented that the Second Restatement’s approach “advocates considering the activity in light of surrounding circumstances on the facts of each case. This, in essence, shifts consideration from the nature of the activity to the nature and extent of the risk.”\textsuperscript{178} The court recognized that although blasting is often a beneficial activity, it can cause damage even when performed carefully. A strict liability standard places the cost on those that benefit, rather than on an innocent homeowner.\textsuperscript{179}

\textbf{IV. PRODUCTS LIABILITY CLASS ACTION DEVELOPMENTS}

In \textit{Shady Grove Orthopedic Association v. Allstate Insurance Co.},\textsuperscript{180} the U.S. Supreme Court addressed whether a state can prohibit a federal class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The case involved a New York statute which precludes lawsuits that seek to recover a “penalty” from proceeding to a class action.\textsuperscript{181} Plaintiff, a group of physicians, filed a putative class action against Allstate claiming that Allstate routinely failed to pay statutory interest on overdue benefits.\textsuperscript{182} The district court dismissed the suit for lack of jurisdiction on grounds that statutory interest is a penalty under New York law, and thus § 901(b) prohibited the proposed class action.\textsuperscript{183} Shady Grove conceded that its individual claim was worth roughly $500 and fell far short of the statutory minimum.\textsuperscript{184} The Second Circuit affirmed, finding that: (1) Rule 23 and § 901(b) did not conflict; and (2) § 901(b) was “substantive” and must be applied by federal courts sitting in diversity.\textsuperscript{185}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{175} \textit{Id.} at 215.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 219.
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{Id.} The court also reversed the lower court’s ruling that plaintiffs had submitted insufficient proof of damages.
  \item \textsuperscript{180} 130 S. Ct., 1431, 1437 (2010).
  \item \textsuperscript{181} N.Y. Civ. Prac. Law Ann. § 901(b).
  \item \textsuperscript{182} \textit{Shady Grove}, 130 S.Ct. at 1437.
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textit{Id.; see also} 28 U.S.C. § 1332 (a).
  \item \textsuperscript{185} \textit{Id.}
\end{itemize}
\end{footnotesize}
In a five-to-four decision, the Supreme Court reversed; Justice Scalia, who delivered the opinion of the Court with respect to Parts I and II-A, held that “§ 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23.” The majority of the Court agreed that a two-step process applied to its analysis. First, the Court must determine “whether Rule 23 answers the question in dispute.” If it does, then Rule 23 applies “unless it exceeds statutory authorization or Congress’s rulemaking power.”

Applying this framework, the Court first found that Rule 23 answers the question at issue, i.e., whether Shady Grove’s suit could proceed as a class action. The Court noted that Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.” The Court found that Rule 23 and § 901(b) were in conflict because Rule 23 “provides a one-size-fits-all formula for deciding the class-action question,” and § 901(b) “attempts to answer the same question—i.e., it states that Shady Grove’s suit ‘may not be maintained as a class action’ . . . because of the relief it seeks.” “Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements.” The Court concluded that a conflicting state class action provision could apply in a diversity suit only if “Rule 23 is ultra vires,” or outside the scope of the Rules Enabling Act, 28 U.S.C. § 2071, et seq.

In Part II-B of the opinion, Justice Scalia, writing on behalf of himself and three other Justices, found that a Rule of Federal Procedure is within the Rules Enabling Act as long as it regulates procedure only. He noted that, if the Rule “governs only the manner and the means by which the litigants’ rights are enforced, it is valid; if it alters the rules of decision by which [the] court will adjudicate [those] rights, it is not.” Applying this criteria, Justice Scalia concluded that Rule 23 is within the Rules Enabling Act because it is procedural in nature: it “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits” and “it leaves the parties’ legal rights and duties intact and

186. Id. at 1433.
187. Id. at 1437.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id. at 1439.
193. Id. at 1437.
194. Id. at 1442.
195. Id.
the rules of decision unchanged.” Justice Scalia further noted that “the substantive nature of New York’s law, or its substantive purpose, makes no difference.” Instead, it is the “the substantive or procedural nature of the Federal Rule” that matters. Where a Federal Rule regulates procedure, it is authorized by the Rules Enabling Act, “and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.”

V. PREMISES LIABILITY

In Rippy v. Home Depot U.S.A., Inc., plaintiff alleged that he was injured while shopping when a box of tiles fell on and fractured his big toe. The court dismissed his claim because he could not show that the defendant knew or should have known of an unsafe condition, and further found that the condition was open and obvious. The injury occurred when the plaintiff and his wife were shopping for floor tiles and cabinetry. In the floor covering aisle, plaintiff took a box of vinyl tiles from the top of a stack. As he reached to lift the box, another box fell on his right foot. Plaintiff suffered a fractured toe.

Plaintiff asserted a premises liability claim. He alleged that the boxes of tiles that fell on his foot were stacked unsafely and that defendant failed to inspect the area at regular intervals to correct problems. The parties agreed that plaintiff was an invitee and that defendant owed him a general duty to provide a safe premises. Defendant, however, argued that it did not have notice, either actual or constructive, of the allegedly unsafe condition. Defendant pointed to its policy of monitoring each aisle throughout the day.

The court stated, “[w]ithout establishing when the condition arose, plaintiff cannot rebut defendant’s argument that it lacked notice of the ‘scrambled’ boxes of tile.” Specifically, the fact that the boxes of tiles...
were “scrambled” does not alone support an inference that the condition had existed for a considerable period of time, which would have allowed the inference that defendant should have known of its presence. The court also stated, “plaintiff has failed to show that the alleged condition was not open and obvious.”

Instead, he argued that he could not be expected to notice the twisted boxes because his attention was focused elsewhere at the time. Both plaintiff and his wife admitted that nothing had obstructed his vision of the tile display.

In addition, plaintiff failed to demonstrate that there were special aspects of the condition that rendered it “unreasonably dangerous,” e.g., that the twisted stacks of boxes caused an unavoidable danger or posed “an unreasonably high risk of severe injury.” The court granted defendant’s motion for summary judgment.

In Melton v. Boustred, the California Court of Appeal addressed a homeowner’s duty to those invited to a party. Defendant held a party at his residence at which he served alcoholic beverages and featured live music. He issued an open invitation on MySpace.com. Plaintiffs accepted the open invitation. Unfortunately, when they arrived they were attacked, beaten, and stabbed by a group of unknown individuals. The particulars of the attack were not described by the court; although it is clear that defendant did not participate in or condone the attack.

Plaintiffs argued that defendant created an unreasonable risk of bodily harm by widely broadcasting an unlimited and unrestricted invitation to a party that included live music and alcohol. Defendant provided no security and apparently made no attempt to control admission.

The court rejected plaintiff’s argument and sustained the trial court’s dismissal of the case. The court reasoned that despite issuing the unrestricted invitation, defendant had not created the peril that harmed plaintiffs. The court emphasized that the violence that harmed plaintiffs was not a necessary or intended component of defendant’s party.

211. Id.
212. Id. at *4.
213. Id.
214. Id.
215. Id. at *5.
216. Id.
218. Id. at 527.
219. Id.
220. Id.
221. Id. at 528.
222. Id. at 527.
223. Id. at 544.
224. Id. at 535.
225. Id.
tion, despite plaintiffs’ status as invitees to defendant’s party, there was no special relationship between them that would impose upon defendant a duty to protect plaintiff from third parties and a criminal attack.\footnote{226} According to the court, the criminal attack was not reasonably foreseeable. The court stated that “(s)tipped of its bare contentions, the complaint contains no allegations that defendant was aware that his invitation would result in the criminal assault on the plaintiffs.”\footnote{227} The court repeatedly came back to the point “defendant did not engage in any active conduct that increased the risk of harm to plaintiffs”\footnote{228}.

VI. EVIDENTIARY CASES

A. Other Alleged Incidents

In \textit{Watson v. Ford Motor Co.},\footnote{229} the South Carolina Supreme Court explained the foundation necessary in a design defect products liability case for the admission into evidence of other similar incidents. This case arose from a single car accident involving a 1995 Ford Explorer.\footnote{230} The driver of the Explorer lost control of the vehicle which then “veered off the left side of the interstate and rolled four times.”\footnote{231} The occupants of the Explorer were ejected from the vehicle.\footnote{232} The plaintiff alleged the cruise control system and seat belts were defective.\footnote{233} The theory of liability was predicated on the Explorer’s cruise control system allegedly being defective as it “allowed electromagnetic interference (EMI) to affect the system.”\footnote{234}

The court reversed a jury verdict and entered judgment for defendant based, in part, on the trial court’s admission into evidence of other similar incidents.\footnote{235} At trial, plaintiffs were allowed to introduce

the deposition testimony from a separate case of a former Ford employee who investigated a number of claims of unintended acceleration of Explorers driven in Britain. The former employee read from an email where he referenced ‘35 incidents that have been categorized as unexplainable’ in which the vehicles suddenly accelerated.\footnote{236}
Plaintiffs further presented three witnesses “who recalled incidents in which their Explorers suddenly accelerated and their cruise control would not disengage.”

On appeal, the court recognized the following factors in determining whether to admit evidence of other incidents to support a claim that the present accident was caused by the same defect: “(1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents.” In reaching its decision, the court held that plaintiffs “failed to show that the incidents were substantially similar and failed to establish a special relation between the other incidents and plaintiff’s accident.” The court elaborated that the “products were not similar because most of the other incidents involved Explorers that were made in different years from the [accident] Explorer and were completely different models with the driver’s seat located on the right side of the vehicle.” Critical to the court’s analysis was the fact that plaintiff “failed to show a similarity of causation between the malfunction and [the] case and the malfunction in the other incidents and failed to exclude reasonable explanation for the cause of the other incidents.” The court noted that plaintiffs presented only the testimony of other drivers. They did not present any expert evidence to show that EMI was a factor in the malfunction in the other incidents.

B. Spoliation

The U.S. District Court for the Eastern District of California in Knight v. Deere & Co. refused to preclude testimony about the condition of the brakes on a John Deere utility vehicle, finding no proof that plaintiff spoli tated evidence. The case arose from a fatal accident involving a John Deere utility vehicle owned by plaintiffs. In September 2006, the owners of the utility vehicle were using the vehicle to lead a pony from their residence to a nearby home. Ultimately, while traveling down a gravel road, the vehicle’s brakes allegedly failed. The vehicle flipped over, throwing three of the passengers from the vehicle and fatally injuring another.

237. Id.
238. Id.
239. Id.
240. Id.
241. Id.
242. Id.
243. Id.
245. Id. at *1.
246. Id.
247. Id.
Shortly after the accident, the California Highway Patrol inspected the vehicle and concluded the brakes were not properly maintained.\textsuperscript{248} The owner of the vehicle testified that he had replaced the braking mechanisms on the utility vehicle after the Highway Patrol’s inspection. However, several weeks after the repairs, he could not locate the brake components that he allegedly removed.\textsuperscript{249}

The manufacturer asserted that plaintiff’s failure to preserve the brake components spoliated the evidence and that the court should use its inherent authority to preclude any evidence about the condition of the brakes at the time of the accident.\textsuperscript{250} The court denied defendant’s motion to exclude the brake pad evidence. The court explained that there was a factual dispute concerning which brake pads remained on the utility vehicle after the accident and which ones had been removed and lost.\textsuperscript{251} The owner of the vehicle testified he had removed the pads from the left side of the vehicle, but the spoliation claim centered on the right side brake component. The court refused to grant the spoliation motion.\textsuperscript{252} The court stated, “in essence defendant’s motion asked the court to resolve the factual dispute concerning which brake pads Homer Fagan removed. . . . A motion in limine should not be used to resolve factual disputes or disputed evidence.”\textsuperscript{253}

C. Experts

In Gunderson v. U.S. Department of Labor,\textsuperscript{254} plaintiff was exposed to coal dust during the course of his employment and developed chronic obstructive pulmonary disease.\textsuperscript{255} There, plaintiff received a letter informing him that an x-ray taken as part of a monitoring program indicated that he suffered from pneumoconiosis, “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”\textsuperscript{256}

In response to this letter, Gunderson sought benefits from Blue Mountain Energy, his longtime employer, under Title IV of the Federal Coal Mine Health and Safety Act of 1969.\textsuperscript{257} He alleged that he suffered from “clinical pneumoconiosis” and “legal pneumoconiosis.”\textsuperscript{258} The district director of

\textsuperscript{248} Id. at *1–2.
\textsuperscript{249} Id. at *2.
\textsuperscript{250} Id. at *3.
\textsuperscript{251} Id. at *5.
\textsuperscript{252} Id.
\textsuperscript{254} 601 F.3d 1013 (10th Cir. 2010).
\textsuperscript{255} Id. at 1015.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
workers’ compensation programs granted Gunderson’s claim for benefits, but Blue Mountain Energy appealed that decision to an administrative law judge (ALJ). The ALJ heard conflicting evidence from Gunderson’s experts and Blue Mountain Energy experts and opined that Gunderson’s respiratory problems were caused by chronic obstructive pulmonary disease arising from his smoking habit instead of exposure to coal.

Gunderson appealed the decision. The Tenth Circuit held that the “ALJ did not offer a scientific explanation for his conclusion that the experts’ testimony was evenly balanced, and should receive equal weight,” and as a result, Gunderson had failed to establish that he suffered from legal pneumoconiosis. The case was remanded. The decision was based on the ALJ’s failure to provide a sufficient scientific explanation for his decision.

In Rhonda Hendrix v. Evenflo Co., Inc., the Eleventh Circuit affirmed the grant of summary judgment for Evenflo in a case in which a fifteen-day-old boy who sustained a closed head injury as a result of an allegedly defective infant safety seat. Plaintiff claimed her son was severely injured when a child-restraint system manufactured by defendant failed during a low-speed accident. Plaintiff alleged her son’s injuries caused him later to develop autism spectrum disorder (ASD), as well as a spinal cord cyst.

Before trial, the trial court granted defendant’s motion to exclude the testimony of plaintiff’s expert witnesses regarding the “purported cause” of the ASD; holding that the experts’ conclusions were not sufficiently reliable under Daubert. As a result of the ruling, the court granted partial summary judgment for the manufacturer on the plaintiff’s ASD-related claims.

The Eleventh Circuit affirmed the trial court’s ruling and held that plaintiff had no reliable scientific evidence to support the assertion that brain injuries can lead to autism. The court ruled that the plaintiff’s expert did not (1) create a list of all possible causes of ASD, (2) demonstrate from scientific literature that traumatic brain injury can cause brain injury, and (3) rule out all other plausible causes in this case. The court concluded by stating, “[t]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.”

259. Id.
260. Id.
261. Id. at 1027.
262. Id. at 1026.
263. 609 F. 3d 1183 (11th Cir. 2010).
264. Id. at 1188.
265. Id. at 1190.
266. Id.
267. Id.
268. Id. at 1198.
269. Id. at 1187.