50th ANNIVERSARY EDITION: NEWSLETTER

PRODUCTS LIABILITY UPDATE

By Rocky Little

1. *Mata v. Energy Absorption Sys.*, No. 01-09-01097-CV (Tex. App. – Houston, March 31, 2011).

In 2006, as part of a highway construction project, a concrete barrier was installed with a crash cushion in front of it. The crash cushion was a REACT 350 Narrow Crash Attenuation System, which consists of a row of high-density plastic barrels sitting in a metal frame. Along each side of the barrels run two or four rows of metal cables which are affixed with bolts on the front of the frame. The main purpose of the cables is to provide redirective capacity for side-impacts. Mata was driving a tractor trailer through the construction zone when his tractor unit hit the crash cushion. Upon impact, the unit's left front wheel and axle were removed. The tractor trailer crossed both lanes of traffic until it stopped on the grass, where it became engulfed in flames. Mata died from smoke inhalation and extensive burns. Testimony from an independent witness along with the Plaintiff's retained expert, as well as the investigating police officer who is an accident reconstructionist, was that the cables on the React 350 caused the wheel removal. However, the court held that there was no evidence that the wheel removal was a producing cause of the fuel tank rupture or the start of the fire that caused Mata's injuries. In other words, there was no evidence to show that the React 350's exposed cables were a producing cause of Mata's injuries. The court noted the standard definition for "producing cause" to be "a substantial factor in bringing about an injury, without which the injury would not have occurred". Therefore, summary judgment in favor of the Defendant was proper.

2. *F&F Ranch v. Occidental Chem. Corp.*, No. 14-09-00901-CV (Tex. App. – Houston, March 29, 2011).

The estate of Shane Bowers alleged that while working on the F&F Ranch, Bowers was exposed to the chemicals 2-4 D and 2-4-5 T (collectively referred to as the "chemicals"), which caused non-Hodgkins' lymphoma and subsequently death. At the ranch, the chemicals were used to control the growth of undesired trees. Following a bench trial, the court found in favor of Bowers against the ranch. Thereafter, the ranch sought indemnity from the manufacturer of the chemicals pursuant to Chapter 82 of the Civil Practice & Remedies Code, claiming that the ranch was an innocent "seller" of these chemicals. The Court of Appeals, however, held that the ranch was not a seller, but was at most a user of the chemicals. Therefore, the ranch was not entitled to indemnification from the manufacturer of the chemicals.

3. *Shaw v. Trinity Highway Prods.*, No. 05-09-00561-CV (Tex. App. – Dallas, December 20, 2010).

This case arose from a one-car collision with a highway guardrail and the end cap known as the E.T.-2000. The end cap was designed to absorb and dissipate the energy of a vehicle impacting the end of a guardrail. Shaw died from injuries sustained in the crash. Shaw's estate

filed this lawsuit against Trinity, the manufacturer and seller of the end cap under a products liability cause of action. The Shaws alleged a marketing defect for failing to provide proper warnings, guidelines, and instructions for the installation and maintenance of the end cap. A marketing defect occurs when a defendant knows or should know of a potential risk of harm presented by the nature of the product, and markets it without adequately warning of the danger or providing instructions for safe use. Among the various elements needed to prevail on a marketing defect claim, a plaintiff must establish that the failure to warn or instruct constituted a causative nexus in the product user's injury. Although Trinity's expert witness attributes the end cap's failure to pre-existing guardrail damage downstream from the initial impact, there was no evidence that this damage would have been discovered before the accident had the desired warnings or instructions been given. The court held that the Shaws provided no evidence of what the proper warnings and guidelines should have been, nor did they submit any evidence that a warning about the guardrail system's sensitivity to the installation configuration would have prevented the harm at issue. Because the Shaws failed to produce evidence that the alleged marketing defect was the producing cause of Shaw's damages, the trial court granted a take-nothing summary judgment in favor of the Defendant which was affirmed by the Court of Appeals.

4. *Jones v. Landry's Seafood Inn & Oyster Bar*, No. 14-09-00767-CV (Tex. App. – Houston, December 16, 2010).

This case arose when Jones ate lunch at Grotto, a restaurant owned by Landry's. Jones cracked a tooth while eating "Oysters Mimmo". Oysters Mimmo is described as a dish made of processed ground oyster meat. Landry's was granted a summary judgment on the basis that Jones' claims were barred under Section 82.004 of the Texas Civil Practice & Remedies Code. More specifically, under that section, in a products liability action, a manufacturer or seller shall not be liable if the product is inherently unsafe, and known to be so by an ordinary consumer, and is a common consumer product intended for personal consumption such as an oyster. However, the Court of Appeals held that Jones' claims were not barred by Section 82.004 because the product she consumed was not a simple "oyster"; rather the product was Oysters Mimmo, a cooked oyster dish made of processed ground oyster meat.