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More on Graves v. CAS Medical Systems, Inc.

By Collins & Lacy, P.C. Attorney Brian Comer
Chair of Products Liability Practice Group
803-255-0446 | bcomer@collinsandlacy.com
Posted October 30, 2012
http://scproductsliabilitylaw.blogspot.com/

Last week I did a case brief of the South Carolina Supreme Court's decision in Graves v. CAS Medical Systems, Inc. (see the brief here and the full decision here). This case deserves more blog time because it has some significance to trends in South Carolina's products liability law. There is also some language I do not care for very much, but this is just my personal opinion. Set forth below are observations of Graves in order of their significance (to this blogger).

(1) The court backed off of prior decisions suggesting expert testimony is required for a design defect case. As you may recall from this post, prior South Carolina appellate court decisions suggested a design defect theory requires use of expert testimony to sustain the burden of proof. In Graves, the court backed off this position. "In some design defect cases, expert testimony is required to make this showing [of defect] because the claims are to complex to be within the ken of the ordinary lay juror." (Emphasis added). The court provided extensive string citation to examples of complex cases requiring expert testimony. Then, it dropped the bombshell: "Whether expert testimony is required is a question of law." The court found Plaintiffs' claim to involve complex issues of computer science; accordingly, Plaintiffs' claim required direct evidence of defect in the form of expert testimony.

Be that as it may, this language by the court leaves open the possibility that a design defect claim may not require expert testimony. This is contrary to the impression given by the appellate courts in Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) and 5-Star, Inc. v. Ford Motor Co., 395 S.C. 392, 718 S.E.2d 220 (2011).

(2) Use of circumstantial evidence to prove design defect is alive and well. Defendant argued that without expert testimony (which the court had excluded), Plaintiff had no direct evidence of defect. Taking it one step further, Defendant argued the court foreclosed use of circumstantial evidence in a design defect case in Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). To borrow an expression from Lee Corso, "Not so fast my friend!" The court said any issue can be proven by circumstantial evidence, and it is just as good as direct evidence if it is equally as convincing to the trier of fact. The court also pointed out that it allowed the plaintiff in Branham to use other similar incidents, "which is classic circumstantial proof." However, the court did not have to get into analyzing if there was sufficient circumstantial evidence in Graves because it determined the claim involved complex issues that required expert testimony as a matter of law (see number 1 above).

(3) Okay, I get it…but I don't like it. So basically, the court is now saying it is going to take a case-by-case approach to the necessity of expert testimony in design defect cases. Furthermore, if the case is not very complex and does not require expert testimony, then convincing circumstantial evidence may be offered as proof. I have two problems with this approach.

- **First, virtually every product's design is beyond the ordinary knowledge of a layperson.** For example, I understand the concept of paint. You mix some chemicals and pigments, and voila…you have paint. However, is it really that simple? I recently had a plaintiff try to use circumstantial evidence that a paint job's allegedly improper appearance supported a design defect claim. My argument was that although the paint may not appear correctly, he had to prove the design of the paint was defective. If the painter mixed it incorrectly, that is not a design defect. If the manufacturer released a manufacturing lot with to much solvent in it, that is not a design defect. As I sit here, it is difficult for me to come up with an example of a product where its design is within the common knowledge of a layperson. My coffee cup is pretty simple, but I could not tell you why the manufacturer chose its composition, dimensions, etc. I also could not tell you how any changes to any aspect of the design of the cup may affect the manufacturer's ability to produce the cup…which brings me to my second point…
- **I could not tell you a reasonable, feasible, alternative way to make my coffee cup.** This is a big problem with leaving the door open to use of layperson testimony or circumstantial evidence in a design defect claim. In Branham, the court stated a design defect claim requires proof of reasonable alternative design. Branham, 390 S.C. at 225, 701 S.E.2d at 16-17. If it is possible for a plaintiff to prove a design defect claim by circumstantial evidence (theoretically), does that mean a plaintiff can also prove alternative design by layperson testimony or circumstantial evidence? In theory, are we going to allow Joe Sixpack to opine that a tighter fitting coffee lid is a reasonable, feasible design when he has no idea about the manufacturer's ability to produce the cup for a profit with his layperson-approved design? I do not think so, but the court's case-by-case approach certainly leaves open this possibility.

4) Introducing the "reasoning to the best inference" methodology for arriving at expert opinion(s). From my own searches, I cannot see that this methodology has ever been addressed by a South Carolina court, and the court's language in Graves suggests same. ("Although this is our first opportunity to assess the reliability of an opinion rendered using the reasoning to the best inference methodology . . . ."). As stated by the court, this analysis is "similar to a differential diagnosis in the medical field where potential causes of the harm are identified and then either excluded or included based on their relative probabilities." The court cites to Bitler v. A.O. Smith Corp., 400 F.3d 1227 (10th Cir. 2004) to provide guidance. With this approach, experts must provide objective reasons for eliminating alternative causes. Other possible causes of an accident must be eliminated as "highly improbable," and the cause must be identified as "highly probable." As stated by the court:

> Although the expert need not categorically exclude alternate causes, that does not relieve the expert of his burden to prove the alternate cause is at least highly improbable based on an objective analysis. We believe this objectivity requirement is consistent with the quality control element of [State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)].

(5) The court is going to give some deference to physicians, even when they may not understand the legal significance of being designated as an "expert." Plaintiffs named a doctor to opine as to whether the infant in Graves could have been revived if someone heard the alarm. Although the doctor admitted she did not consider herself a Sudden Infant Death Syndrome ("SIDS") expert, the court found her to be qualified based on the fact that she had thirty years experience as a neonatologist, was current on SIDS literature, and encountered SIDS in her practice. Furthermore, the recognized again that most doctors do not give scientific testimony. If the doctor is merely applying his/her knowledge to every day experiences, then s/he does not need to satisfy the standard for reliability in State v. Council.

(6) "Res ipsa loquitor…get back in your cell!" South Carolina still does not accept res ipsa loquitor as a liability theory in products liability claims…period. Although the court did not use the term, it is pretty clear from its language: "It is well-established that one cannot draw an inference of a defect from the mere fact a product failed."

(7) Finally (and as you have likely realized by now), this decision continues a trend of greater focus on expert testimony by South Carolina's appellate courts. Beginning with Watson, the appellate courts have really been scrutinizing both whether expert testimony is required for a defect theory and the reliability of any testimony by a proffered expert. Graves continues this trend.

I welcome any comments.

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About Brian Comer

Brian Comer is a shareholder and Chair of the firm's Products Liability Practice Group. Brian was a magna cum laude graduate of the University of South Carolina Honors College where he majored in International Studies and Economics. He also served as Student Body President during his undergraduate career. Brian received his Juris Doctor from the University of South Carolina School of Law and has an International Masters in Business Administration from the University's Moore School of Business. During law school, he was a member of the South Carolina Law Review and the Order of Wig and Robe. Prior to joining Collins & Lacy, Brian was a partner with a large national firm based in Columbia, South Carolina.

Brian is the founder and contributing author of South Carolina Products Liability Law Blog, for individuals and product manufacturers who are interested in this area of law. His goal is to provide current information on trends in products liability law in the Palmetto State.

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