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Fifth Circuit Report

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In a case of first impression, the Fifth Circuit held that it would recognize age-based hostile work environment claims under the Age Discrimination in Employment Act. *Dediol v. Best Chevrolet, Inc.*, 2011 WL 4011079 (5th Cir.(La.)). The Court enunciated the basis for establishing such claims as requiring the plaintiff show that: "(1) he was over the age of 40; (2) the employee was subjected to harassment, either through words or actions, based on age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer." *Id.* at *4 (citation omitted). The Court clarified that the conduct complained of must be both objectively and subjectively offensive, meaning that "not only must a plaintiff perceive the environment to be hostile, but it must appear hostile or abusive to a reasonable person." *Id.* (quoting *EEOC v. WC&M Enters.*, 496 F.3d 393, 399 (5th Cir.2007)).

In *Wal-Mart Stores, Inc. v. Qore, Inc.*, the Fifth Circuit reversed and remanded the trial court's award of $810,000 in attorney's fees under an indemnification provision of a contract. *Wal-Mart Stores, Inc. v. Qore, Inc.*, 647 F.3d 237 (5th Cir. 2011). At issue was whether the indemnification language entitled Wal-Mart to recover fees incurred in pursuing all of the claims it asserted or only for the one claim resolved in Wal-Mart's favor. *Id.* at 247. The trial court determined that all of the claims were interwoven such that the resulting damages were "inherently linked" and not "easily separated". *Id.* at 246-247. Therefore, the trial court did not find a "need" to apportion the attorney's fees to the single successful claim. *Id.* at 247. The Fifth Circuit disagreed finding that Wal-Mart's claims "were readily capable of partition for fee award purposes" and therefore its recovery should have been limited to fees incurred in pursuing the successful claim. *Id.* at 247.

The Fifth Circuit, applying Texas law (substantively similar to Mississippi law regarding interpretation of insurance contracts) considered identical "your work" exclusions in a CGL policy and umbrella policy. *American Home Assurance Company v. Cat Tech L.L.C.*, 2011 WL 4583838, *1 (C.A.5 (Tex.)). In pertinent part, the exclusion read: "'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'." *Id.* at *2. The insurers sought a declaratory judgment that they did not have a duty to indemnify the insured company for damages awarded against it in an arbitration. *Id.* The damages stemmed from repair work performed by the insured on a reactor which subsequently forced the owner to shut the reactor down. *Id.* at *1. The trial court granted summary judgment to the insurers which the Fifth Circuit reversed and remanded. *Id.* In reaching its decision, the Court divided the property damage into three categories: (1) property damage to parts of the reactor upon which the insured performed defective work; (2) property damage to parts of the reactor upon which the insured performed non-defective work, but that were damaged as a consequence of the defective work; and (3) property damage to parts of the reactor upon which the insured did not work, but were nevertheless damaged. *Id.* at *3. The Court found that the "your work" exclusion precluded coverage for all property the insured performed work on whether "defective or otherwise" thus eliminating the first two categories. *Id.* It then found that the exclusion did not preclude coverage for any damage to the owner's property that the insured did not repair or service. *Id.* In a footnote, the Court also stated that the "products-completed operations hazard" language explained the amount of damages covered and "did not function to grant coverage". *Id.* at *6 n.4.

Worth attention are orders entered in two related cases, a declaratory judgment action in federal court and the underlying state court lawsuit: *Travelers Casualty and Surety Company of America v. Institute of Community Services, Inc.*, No. 3:10-00071 (N.D. Miss. September 30, 2011) (order denying plaintiff's motion for summary judgment); and Rule 54(B) Order Overruling Defendant's Motion for Judgment as a Matter of Law, *Luster-Johnson v. Institute of Community Services, Inc.*, No. L08-321 (Cir. Ct. Lafayette County, Miss. May 4, 2011). The state court jury awarded the plaintiff actual damages of $250,000 and punitive damages of $500,000 on her claim that she had been fired from her position as an Institute of Community Services, Inc. ("ICS") employee in violation of Mississippi state law as a result of reporting unlawful conduct. The state court denied ICS's motion for judgment as a matter of law and ordered additional discovery regarding its net worth before assessing punitive damages. Subsequently, the court determined that based on ICS's net worth, punitive damages would be limited to $14,862.40. Perhaps due to this paltry sum, the court decided to wait until the pending federal court declaratory judgment action concerning coverage was decided before assessing punitive damages. The court based its decision to reserve ruling on the plaintiff's provision of "legal support for the argument the statutory caps do not apply if there is applicable liability insurance available from which to pay damages including a punitive damages award". This statement by the court is interesting as no authority was in fact cited for this premise. At issue in the declaratory judgment action brought by Travelers Casualty and Surety Company of America, was whether the insured's failure to provide notice of the claim for 21 months under the "claims made" policy voided coverage. The Court denied Travelers' motion for summary judgment finding that ICS had presented facts which a jury could find constituted a "reasonable excuse" for its failure to provide notice "as soon as practicable". The Court then addressed whether an insurer must prove the delay in notice was prejudicial. The Court made an *Erie* guess that the Mississippi Supreme Court would require a showing of prejudice rejecting the argument that a "claims made" policy should be viewed differently than an "occurrence" policy concerning this issue. Not surprising, the case settled four days later. Unfortunately, both the state and federal court rulings create unfavorable results for insurers and due to the settlement of the federal case, appeal of the state court order has been halted. The statement made by the state court that "legal support" existed for the premise that liability coverage negated statutory caps for punitive damages may become self-fulfilling. Regardless, it is logical to forecast an increase in third party cases using punitive damages as a means to increase settlement amounts and making these cases more difficult to settle. The federal court's *Erie* guess surely supports any argument that an insurer must now show prejudice before denying coverage based on failure by the insured to provide notice in accordance with the terms of its policy. Also worth a mention is a Pennsylvania case in which the trial court found that the "bodily injury" definition in State Farm's auto policy was ambiguous. *Lipsky v. State Farm Mut. Auto. Ins. Co.*, PICS Case No. 11-4128 (Pa. Super. Sept. 1, 2011) (slip op.) The definition of "bodily injury" in question read "bodily injury to a person and sickness, disease or death which results there from." State Farm sought a declaration that the "bodily injury" definition excluded coverage for the emotional distress claims of the bystander victims who observed the death of a 16 year old pedestrian (son and brother of the bystanders) when he was struck by a drunk driver. This case is getting a lot of blog time with proponents espousing the point that State Farm's definition of "bodily injury" is an example of a circular definition which conveys no information and lacks a precise statement of the essential characteristics of the thing or term being defined. This argument is anticipated to make an appearance in a venue in your area soon.

Electronically stored information or ESI is becoming increasingly popular as a topic in both local and national seminars in the context of disclosure requirements under the federal rules. As the law has become more developed, federal judges have become more knowledgeable and less tolerant of violations. The Magistrate Judges for the Northern District made clear during a panel discussion held in October that they expect counsel to abide by the local rules, specifically L. U. CIV. PROC. 26(e)(2) which requires counsel to discuss ESI issues during the attorney conference and to include any ESI discovery parameters in the case management order. The rule identifies eleven ESI topics which are to be discussed including native format, format to be produced, protocol for capturing ESI and the burden and costs of producing material not reasonably accessible.

It is no longer uncommon that discovery costs related to gathering and preserving ESI are being assessed against the losing party pursuant to FED. R. CIV. PROC. 54(d). Under Rule 54(d), the court may only award costs described in 28 U.S.C.A. §1920. Courts typically tax costs associated with ESI under §1920(4) which was amended in 2008 to change the phrase "fees for exemplification and copies of **papers**" to "fees for exemplification and the costs of making copies of **any materials**." The development of this area of the law should help in corralling frivolous discovery requests by plaintiff's counsel. This along with the increased sophistication of judges, businesses and their legal counsel may account for the decreasing trend in sanctions being awarded even though the number of cases seeking sanctions more than double for the same period last year.

We would caution our clients who do not have a plan for dealing with ESI discovery issues to deal with this problem without delay. Many courts are finding that a party's obligation to preserve relevant information arises when it learns of the litigation or can reasonable determine that litigation will ensue, concluding that a hold letter is not required to trigger the duty.

At the state level, comments are being sought on a proposed amendment to MISS. R. CIV. PROC. 26. The proposed amendment of Rule 26(b)(5), in addition to eliminating the reference to "data or information in electronic or magnetic form" also provides a non-exhaustive list of the types of conditions a judge may place on electronic discovery. The deadline for comments is December 1st.

Workers Comp

Findings from two studies based on data from the 2010 claim year were released in September. The first report was from a study on the use of prescription drugs in workers compensation claims. Data from this study indicates "a sudden and significant growth" in the percentage of overall medical costs associated with prescription drugs. According to the study, 19% of all workers comp medical costs is attributed to prescription drugs.

The second report looked at claim frequency data and showed there was a 3% increase from the previous year. This increase is significant because it the first since 1997 and only the fourth since 1990. The report points to increased employment as a plausible reason for the rise:

- Addition of new hires who generally file more claims than long-term employees;
- Workers less fearful of losing their jobs for filing claims; and
- Filing of claims postponed because of job insecurity.

Despite the upward trend, the study also showed that growth in average indemnity and medical cost per claim slowed during the same period. Both studies were conducted by NCCI

(National Council on Compensation Insurance, Inc.), and are available on its website at www.ncci.com.

Medicare Secondary Payor Act

We first reported on *U.S. v. Stricker* in our Fall 2010 newsletter. At issue in *Stricker*, was whether the government could recover payments under the Medicare Secondary Payer Act (MSP) from parties to a $300 million settlement agreement in a class action lawsuit settled in 2003. The U.S. sought Medicare reimbursements from counsel for the Plaintiffs' class and the three corporate defendants as both third party payers and entities that received payment under a primary plan pursuant to MSP.

The government's argument was based on the theory of continuing accrual which would allow Medicare to recover funds from all parties to a settlement at almost any point payment is made which in this case extended over a ten year period. The government asserted that every installment payment constitutes a primary payment under the Medicare Secondary Payor Act which resets the statute of limitations for recoupment by the government. In September 2010, the Court dismissed the government's case finding that the statute of limitations had expired before the case was filed.

In our Spring 2011 newsletter, we reported that the government's Motion for Reconsideration of the dismissal was heard by the Court on January 26, 2011. In August, the Court rendered its opinion on the Motion for Reconsideration, in which it recognized Medicare's right to recoup payments from settlement funds. However, the Court was not willing to conclude that "waiting more than *six years* to file claims for reimbursement from settlement funds" was timely. *U.S. v. Strickler*, No. CV 09-BE-2423-E (N.D.Ala. Aug. 12, 2011) (order denying motion for reconsideration) (emphasis in original).

Finding that the government had failed to show the Court committed "clear error" in reaching its decision to dismiss the case, the Court declined to alter its previous ruling.

SMART Act

The Strengthening Medicare and Repaying Taxpayers (SMART) Act was recently introduced in the U.S. Senate having been introduced in the House earlier in the year. The legislation is intended, in part, to clarify how MSP repayments are calculated and submitted and correct problems with reporting provisions for property insurers created by the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) of 2007. The Act is supported by the Medicare Advocacy Recovery Coalition (MARC), whose members include businesses, insures and third-party administrators impacted by the MSP. MARC thinks the proposed legislation will make the system more efficient and effective by:

Allowing parties to settle faster, by obtaining from the Government the amount of Medicare repayments owed before settlement, rather than after.

•Fixing the onerous reporting process, eliminating the need for companies to collect customer Social Security numbers in order to report payments (as the Agency requires today.

•Including other important benefits, such as threshold set to ensure the Government does not spend more on collecting small claims than it stands to recover.

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For the last 24 years, the circuits have been split over when a federal court sitting in diversity may exercise personal jurisdiction over a foreign corporate defendant in a products liability context following. The U.S. Supreme Court failed to render a majority opinion when it decided *Asahi Metal Industries Co. v. Superior Court of Calif.*, 480 U.S. 102 (1987), and as a result each circuit was afforded the opportunity to adopt Justice O'Connor's plurality opinion or Justice Brennan's concurring opinion. Prior to *Asahi*, the test for whether personal jurisdiction could be obtained over a foreign corporation was whether the entity delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *Asahi*, Justice O'Connor narrowed the test finding that the mere foreseeability that a defendant corporation's products would end up in the forum state is insufficient to trigger personal jurisdiction "without further conduct directed at the state." *Ainsworth v. Cargotec USA, Inc.*, 2011 WL 4443626 at *5 (S.D. Miss.) (citing *Asahi Metal Industries Co. v. Superior Court of Calif.*, 480 U.S. 102, 112-113 (1987)). The test outlined by Justice Brennan is less narrow finding that personal jurisdiction is proper over a foreign corporation aware "that the final product is being marketed in the forum state". *Id.* (citing *Asahi Metal Industries Co. v. Superior Court of Calif.*, 480 U.S. 102, 116-17). The Fifth Circuit has adopted Justice Brennan's test. *Choice Healthcare, Inc. v. Kaiser Foundation Health Plan*, 615 F.3d 364, 373 (5th Cir.2010).

In September, the U.S. Supreme Court attempted to address the uncertainty created by the *Asahi* opinions. The attempt fell short as evidenced by the split decision reached in *McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). In *McIntyre*, Justice Kennedy wrote for a four justice plurality favoring Justice O'Connor's view that foresee ability alone is not sufficient to perfect personal jurisdiction. *Id.* at 2784. Justice Breyer wrote the concurring opinion reaching the same result, but declining to endorse either of the *Asahi* tests. *McIntyre*, 131 S.Ct. at 2792. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Ainsworth v. Cargotec USA, Inc.*, 2011 WL 4443626 at *6 (S.D. Miss.) (quoting *Garland v. Roy*, 615 F.3d 391, 399 (5th Cir.2010)). Under this premise, the *Ainsworth* court determined that Justice Breyer's concurring opinion in *McIntyre* would be used in the Fifth Circuit. *Id.* *Ainsworth* was initially decided before *McIntyre* was handed down. Subsequently, the defendant in *Ainsworth* moved for rehearing asserting that *McIntyre* governed and as such, the Court should reconsider its finding that the minimum contacts prong had been satisfied as to its connection with the forum state. Citing the Fifth Circuit rule that its Courts are to follow the narrowest opinion should the U.S. Supreme Court author a plurality opinion, the District Court stated its belief that *McIntyre* had limited application in this circuit:

> As Justice Breyer declined to choose between the *Asahi* plurality opinions, *McIntyre* is rather limited in its applicability. It does not provide the Court with grounds to depart from the Fifth Circuit precedents establishing Justice Brennan's *Asahi* opinion as the controlling analysis. At best, it is applicable to cases presenting the same factual scenario that it does.

Id. at *7.

The *Ainsworth* court did not address that the New Jersey Supreme Court, from which *McIntyre* was appealed, based its decision in part on Justice Brennan's *Asahi* opinion. Until the Fifth Circuit has an opportunity to consider *McIntyre*, it appears the test in Mississippi remains the same. However, other courts in the circuit have cited *McIntyre* as precedent without comment. *See e.g. Bluestone Innovations Texas, LLC v. Formosa Epitaxy, Inc.*, No. 2:10cv171, 2011 WL 4591922 (Sept. 30, 2011).

On the same day *McIntyre* was decided, the U.S. Supreme Court also handed down a unanimous opinion involving the minimum contacts test under *International Shoe.* In *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), the Court addressed the quantum of contacts necessary to create general or all-purpose jurisdiction for a foreign subsidiary in a given forum state. The distinction between specific and general jurisdiction in this context dates back to International Shoe in which the Court suggested that jurisdiction for "causes of action arising from dealings entirely distinct from" the defendant's contacts with the forum state so long as the contacts are "continuous and systematic." International Shoe, 310 U.S. 317-18. Two points from Goodyear bear noting. First, the Court rejected the plaintiff's argument that Goodyear USA and Goodyear S.A. should be considered unitary businesses for the purposes of evaluating whether contacts were continuous and systematic. Goodyear, 131 S.Ct. 2857. Goodyear USA was not a party to the case, but as the entity marketing Goodyear tires in the United States, its continuous and systematic contacts with North Carolina, the forum state, where undisputed. The second, and more important aspect of Goodyear is the Court's pronouncement of a new test for the quantum of contacts necessary for general jurisdiction. The Court stated that the defendant's contacts must be such that it is "essentially at home" in the forum. Id. at 2851.

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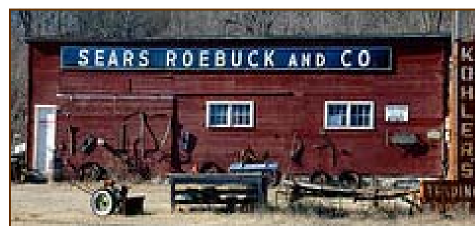
NEW In late August, the Mississippi Supreme Court affirmed a $4 million dollar verdict in a premises liability case. *InTown Lessee Associates, LLC v. Howard*, 2011 WL 2569287 (Miss.). The plaintiffs were guests of the defendant motel when they were injured in the course of an armed robbery on the motel premises. *Id.* at *1. A general verdict for $4 million was returned in favor of plaintiffs. *Id.* at *2. The motel appealed identifying five issues for the Court to consider. *Id.* at *5.

The first issue concerned the trial court's denial of the motel's motion for directed verdict and for JNOV. *Id.* The Court found the denials to be supported by legally sufficient evidence. *Id.* at *6. The second issue involved a jury instruction regarding the motel's duty to warn the plaintiffs of the dangerous condition, the "atmosphere of violence" surrounding the property. *Id.* The Court found that the defendant was procedurally barred from raising the issue because it did not make a contemporaneous objection at trial. *Id.* at *7. The third issue identified by the motel was the admission of highly prejudicial evidence. *Id.* Again, the Court found that the defendant failed to preserve this argument by objecting at trial. *Id.* at *8. The fourth issue raised by the defendant was the trail court's refusal of its comparative negligence jury instruction. *Id.* The Court determined that there was no case law to support the defendant's argument that the victims had a duty to mitigate their damages by immediately giving their money to the robbers instead of resisting. *Id.* at *9. "To penalize a crime victim for his failure to cooperate with his assailant would constitute a bizarre and perverse misapplication of the doctrine of comparative fault." *Id.*

The fifth and final issue assigned by the defendant was whether the trial court failed to apply the statutory cap for non-economic damages. *Id.* The defendant argued that the general verdict returned by the jury did not distinguish between economic and non-economic damages making it impossible to apply the statutory cap. *Id.* at *10. The Court considered four verdict jury instructions given to the jury and found that defendant's failure to object to the instructions at trial barred it from raising the issue on appeal. *Id.* at *10-12. The form of the jury verdict also prevented the Court from concluding the trial court abused its discretion in denying remittitur. *Id.* at 12.

UPDATE The long awaited decision by the Mississippi Supreme Court in response to the Fifth Circuit's certified question: "[I]s Section 11-1-60(2) of the Mississippi Code, which generally limits non-economic damages to $1 million in civil cases, constitutional?" … remains pending. On September 15, 2011, the Mississippi Supreme Court issued an order in the *Sears v. Learmonth* case which requires additional briefing on this issue:

> In light of the language in Mississippi Code Section 11-1-60(2)(b) that "the trier of fact" cannot "award the plaintiff" more than $1 million for noneconomic damages, this Court's recent pronouncement on the effect of failing to request a jury instruction that segregated economic damages from noneconomic damages, and the statement that the jury did not divide the award into separate categories to distinguish between economic and noneconomic damages, what fact(s) and/or legal authority exist for this Court to accept a stipulation regarding the amount of noneconomic damages found by the jury.



Sears Roebuck & Company v. Learmonth, No. 2011-FC-00143-SCT (Miss. Sept. 15, 2011)(order directing supplemental briefing).

Briefing concludes November 28, 2011.

The Mississippi Court of Appeals reversed and remanded case out of Desoto County on due of several grounds raised by the Plaintiff, who was a driver injured in a two car accident. *Rhoda v. Weathers*, 2011 WL 3452121 (Miss. Ct. App. 2011). The plaintiff brought the suit against the other driver and jury returned a verdict for the defendant. Id. at *1.

The Court of Appeals determined that the trial court judge abused his discretion when he failed to impose sanctions against the defendant for failure to admit to the admissibility of the plaintiff's medical records. Id. At *6. The defendant did not object to admission of the medical records at trial, but failed to admit during discovery that the records were genuine and admissible. Id. Plaintiff argued that he incurred expenses by having to authenticate his medical records at trial and that sanctions should be imposed against the defendant to compensate plaintiff for this costs. Id.

The Defendant responded to plaintiff's argument asserting that she had "no specific knowledge" of the authenticity of plaintiff's medical records and "no medical training" to evaluate them. Id. The appellate court found the defendants argument without merit as Miss. R. Civ. Proc. 36 states that claiming a "lack of information or knowledge' does not excuse a party from failure to admit or deny unless the party also states he "made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny." Id. Holding that the trial court did not make a finding that the requests for admissions were either "objectionable" or "of no substantial importance" and that there was nothing in the record that would provide the defendant reasonable grounds to prevail the Court reversed and remanded for a determination of the amount of sanctions which should be imposed against defendant. Id.

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Announcements

CLM The Council on Litigation Management announced recently the change of its name to the Claims and Litigation Management Alliance. The group is still using the moniker CLM. According to CLM, its new name "more accurately reflects the focus of the CLM as it continues to welcome both claims and litigation management professionals as Fellows of the organization." CLM will be adding new products and services for the claims management arena in furtherance of its new focus.

In January, CLM will begin publication of a monthly magazine, ***Claims Management*** in addition to its ***Litigation Management*** magazine. The CLM will also be introducing CLM Tracker, which facilitates the tracking of adjuster licenses and continuing education requirements. Dan Webb serves as co-chair of both the CLM's Insurance Fraud Committee and the Region 5 Mississippi and Louisiana CLM Insurance Bad Faith Committee.

In October, Dan renewed his passport and traveled to New York City to attend the Litigation Management Institute at Columbia Law School. Formulated by CLM, the Institute is an intensive program for outside counsel that focuses on the business of litigation management from a client perspective. To learn more about the CLM, please visit its website at www.TheCLM.org.

WSW Several of our attorneys have been recognized for their achievements recently. Dan Webb, Wayne Williams and Roechelle Morgan were selected for inclusion in the 2011 edition of Mid-South Super Lawyers. Mid-South Super Lawyers evaluates candidates on 12 indicators of peer recognition and professional achievement. Super Lawyers are limited to 5% of all lawyers per jurisdiction and Rising Stars are limited to 2.5% of all lawyers per jurisdiction. Dan (Insurance Coverage) and Wayne (Personal Injury Defense) were both named as Super Lawyers and Roechelle (Insurance Coverage) as a Rising Star.