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BIC FLICKS PRODUCT LIABILITY JUDGMENT

In the second round of appeals of this product liability case, we learn that even if a case is not preempted by federal law, the Plaintiff still has a very difficult road ahead.

The Texas Supreme Court recently reversed a \$3 million judgment in favor of a woman on her state-law product liability claim that a cigarette lighter manufactured by BIC had manufacturing defects that allowed her son to accidentally set fire to her daughter's dress, causing her severe burns. *BIC Pen Corp. v. Carter*, 54 Tex. Sup. J. 1168, 2011 Tex. LEXIS 418 (Tex. June 17, 2011). Though this judgment was overturned, one of the significant results is that the defective *manufacturing* claim itself was not preempted by federal laws regulating lighter safety, though an earlier opinion in the same case had found that the federal regulatory scheme *does* preempt the related *design* defect claim. The Court reversed because the expert evidence presented was not enough to prove causation.

FACTS OF THE CASE

In 1997, 6-year-old Brittany Carter suffered third-degree burns over more than 55 percent of her body when her 5-year-old brother, Jonas, accidentally set fire to her dress using a lighter manufactured by the BIC Corp. The lighter was supposed to be child-safe. Janace Carter, the children's mother, sued BIC in 1998, alleging that manufacturing and design defects in the lighter caused her daughter's injuries.

In 2003, a jury in Matagorda County awarded Carter \$3 million in actual damages. After finding that BIC acted with malice, the jury awarded another \$2 million in exemplary damages. The trial court reduced the \$2 million award to \$750,000 to comply with the Texas statute that caps awards for exemplary damages.

In the first round of appeals, the Supreme Court held that the *design defect* claim was preempted by federal safety regulations, and remanded the case for the court of appeals to consider the remaining issues. *BIC Pen v. Carter*, 251 S.W.3d 500 (Tex. 2008).

On remand, the court of appeals concluded that Carter's *manufacturing defect* claim was not preempted by federal law, that the jury's finding on that claim was supported by the evidence, and that there was no evidence BIC acted with malice. The appeals court therefore affirmed the trial court's judgment for actual damages and reversed as to exemplary damages.

The Supreme Court, in this case, agreed that the *manufacturing defect* claim was **not** preempted by federal law, but found that there was no evidence to support that the defect caused the resulting fire and injuries. Accordingly it reversed the judgment.

THE COURT'S DECISION

The Court concluded that, though Carter's design defects are preempted by Consumer Product Safety Commission (CPSC) regulations, her manufacturing defect claims were not preempted. In the prior appeal, the Court explained that the savings clause in the Consumer Product Safety Act allows state-law tort claims so long as they do not conflict with applicable federal regulations. Because the lighter's *design* complied with federal standards, the claim that its design was defective could not proceed; it was preempted by federal law. But the *manufacturing* claim is different.

Carter's claim was that BIC failed to manufacture the lighter to the design specifications BIC submitted to the CPSC. She claimed that the resulting manufacturing defect lessened the force required to operate the lighter, and the lighter was therefore unreasonably dangerous because of the reduced force required.

According to the opinion, the lighter design passed CPSC child safety standards, because a 1995 test found that 10 percent of children younger than five years old could not operate the lighter. Carter claimed that Jonas would not have been able to light the lighter had BIC manufactured it according to the specifications it submitted to the CPSC. The Court decided that this does not add to the federal requirements for child resistant status. Therefore this state claim was not preempted.

But the claim failed anyway because there was no legally acceptable proof of causation. BIC tested the lighter twice post accident, and found that the force required to turn the sparkwheel and depress the fork, necessary to light the lighter, was slightly lower than specifications both times. The Court found that these deviations, though evidence of a manufacturing defect, without more, are not proof of liability.

The Court reaffirmed its holdings in several recent cases that the producing cause of an event ("producing cause" is the correct standard for product liability cases) "must be a substantial factor in bringing about the injury, and a cause without which the injury would not have happened." But evidence that "components of a product deviated from manufacturing specifications, an accident occurred, and the deficient parts were involved in the accident is insufficient evidence to support a causation finding." Proof of a causal connection requires expert evidence because a layperson would not understand how the

impact of the small deviations, in connection with the other safety features, would impact a child's ability to use the lighter.

According to the evidence, there were five characteristics of the lighter that BIC had represented to the CPSC made the lighter compliant for child safety. “The relationship between the five characteristics was not quantified and there was no determination of which characteristic was the most or least important....” If one or two in fact deviated slightly from specified characteristics, Carter needed expert evidence to show that these defects defeated the lighter’s total child safety features. Furthermore the federal regulations did not require that no child be able to operate the lighter. Lighters fully in compliance can still be operated by *some* children.

Carter had the burden to prove that Jonas probably would not have operated the lighter but for the manufacturing defects. In this she failed. The jury further heard evidence that Jonas was developmentally delayed and so may have been even less able to operate a compliant lighter than a normal child (though at five, he was slightly older than the target for regulations). But this too failed because there was no evidence to show that Jonas’s diminished abilities affected his ability to operate the lighter *had it met* manufacturing specifications.

Finally the Court clarifies the relationship of product liability cases like this one to earlier opinions under *Daubert* as to the sufficiency of proof of causation. In *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997) the Court had found that there was insufficient expert evidence of causation in that case where maternal use of a medication, while pregnant, had been alleged to increase risk of birth defect. The Court had opined that an epidemiological showing of *doubling* of the background risk may be enough to demonstrate a causal connection between toxic exposure and ultimate harm.

But this holding does not easily translate to other areas. In a toxic tort, epidemiology is often the only reliable evidence since actual human testing would be both impractical and immoral. But the nature of the injury-causing activities and testing that would have to be done to show causation in this case, involving nonharmful testing of whether children can operate a lighter, “are not similar to, nor do they pose the practical difficulties posed by, those we considered in *Havner*.”

WHAT DOES THIS MEAN?

The Court giveth and the Court taketh away. On the one hand, where a federal regulatory scheme preempts cases that impose greater burdens on a manufacturer’s design, the Court will nevertheless permit a Plaintiff to push forward with a claim that the final product fell short of the design specifications provided to the federal authority.

Plaintiffs may take some solace in knowing that just because the design of product is compliant with a preemptive regulation, its manufacture may not be. Defective design may form the basis of a state claim in the face of a defense of preemption.

On the other hand, though the manufacturing claim is not preempted, the Plaintiff must nevertheless demonstrate, typically by competent expert evidence, that the variations between design specifications (approved by the regulator) and the actual product at issue in fact caused the harm. And the Plaintiff will have to have the right expert, having performed the right tests. Mere product deviation from design specification is not enough. Nor is a statistical association ordinarily enough to prove causation, though it may count as evidence in a toxic tort case.

A Defendant in a products case must remember that, even if its product was *defective*, the issue is causation. And causation will very often boil down to expert opinion. The Defendant will need to properly and timely challenge any expert opinion offered to the extent that it fails to meet the rigorous standards laid out in the Court's growing body of *Daubert* opinions.



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