

Products Liability LAW BLOG

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Case Brief: Graves v. CAS Medical Systems, Inc.

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On August 29, 2012, the Supreme Court of South Carolina issued its opinion in *Graves v. CAS Medical Systems, Inc.* This case continues the trend of South Carolina's appellate courts closely scrutinizing expert witness testimony. I will be blogging more about this case later with regard to its impact on the necessity of expert testimony in a South Carolina products liability case.

FACTUAL BACKGROUND: Plaintiff-parents had a six-month-old girl who was monitored by Defendant-manufacturer's baby monitor. The monitor was designed to sound an alarm if the patient experienced certain events, and it also included various back-up alarms and logging features to track vital signs and sounding of the alarm. Plaintiffs awoke one morning and checked the infant only to find she was dead. Neither Plaintiffs nor another family member heard the monitor sound an alarm. The logging for the monitor reflected various apneic and bradycardic events, and it also indicated the alarm went off.

PROCEDURE: Plaintiffs filed claims for strict liability (design defect), negligence and breach of warranty against Defendant, claiming the monitor's software design caused the alarm to fail. Plaintiffs identified three software experts, none of whom did any real testing. Instead, they used a "reasoning to the best inference analysis," which the court likened



to a differential diagnosis where other potential causes are excluded. The experts evaluated three potential causes: complaint error (i.e., that the machine was misused or the alarm sounded but was not heard), hardware error (i.e., whether the machine functioned properly), and software error. The experts excluded hardware error because the monitor was tested and functioned properly. Therefore, the issue was whether complaint error or hardware error occurred.

One of Plaintiff's experts, Dr. Walter Daughterity, excluded complaint error purely on grounds that he did not believe anyone could sleep through the alarm. He discounted the monitor's log that the alarm sounded by pointing to the undisputed testimony of fact witnesses that it did not go off. Therefore, he opined software error was the only cause. Plaintiff's second expert, Dr. William Lively, primarily relied on the conclusions of Dr. Daughterity to arrive at his opinion that software error was the cause. He did no real analysis himself.

Plaintiff's third expert, Frank Painter, concluded (similar to Daugherty) that complaint error could be excluded in spite of the monitor's log. He also admitted he did not really examine the software code. Plaintiffs designated an additional expert, Dr. Donna Wilkins, to opine as to whether the infant could be revived. She admitted she was not an expert in Sudden Infant Death Syndrome ("SIDS"), but she opined the infant likely could have been revived if the alarm sounded.

Defendants moved to exclude all experts based on lack of reliability, and also for summary judgment (on grounds that without expert testimony Plaintiffs had no evidence of design defect). The circuit court granted both motions.

ISSUES: (1) Whether the circuit court erred in excluding opinions of Plaintiffs' experts; and (2) whether the circuit court erred in granting summary judgment.

DISPOSITION: Affirmed with modifications (finding the medical expert's opinions should not have been excluded on reliability grounds, but upholding summary judgment in spite of this modification).

RULES AND OPINION: The opinion is basically divided into two parts, as follows:

Exclusion of Experts

Expert testimony must meet the requirements of South Carolina Rule of Evidence 702 whether it is scientific, technical, or other expert testimony. Therefore, it must (1) be beyond the ordinary knowledge of the jury, (2) the expert must be qualified, and (2) the substance of the testimony must be reliable. The reliability prong is the central feature of the inquiry. Defendants conceded Daugherty, Painter, and Lively satisfied the first two elements. The only issue was whether the opinions were reliable.

The court focused on whether these experts had grounds to exclude complaint error based on objective criteria. For all three experts, the court found they simply assumed the alarm did not sound based on the assertions of the individuals alleging failure of the monitor. They did not provide objective criteria for eliminating complaint error as a cause. The court also found the experts improperly relied on reports of other failures to support their conclusions that software error was to blame. A plaintiff bears the burden of proving that other incidents are "substantially similar to the accident at issue," and

the other incidents relied on by Plaintiffs' experts did not suggest software error to be a cause. (Citing *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010)). The court agreed with the circuit court that the opinions were unreliable and that complaint error was a real possibility.

Of great concern to us is that each of them began with the assumption that the monitor failed and then discounted evidence to the contrary based on the ipse dixit of the plaintiff who hired them, an analysis we find lacking in the indicia of reliability required for reasoning to the best inference.

Accordingly, there was no abuse of discretion in excluding Daugherty, Painter, and Lively. (As a side note... BOOM Goes the Dynamite! I love it when a court drops the "ipse dixit" bomb in review of an expert's opinions...it is kind of like when someone quotes your brief back to you and drops in "[sic]" to telegraph that you made a grammatical error...but I digress).

With regard to Dr. Donna Wilkins, the court found the circuit abused its discretion in not finding her qualified based on her own testimony that she did not consider herself an expert in SIDS. She had thirty years of experience and stayed current on SIDS literature. Furthermore, the circuit court committed an error of law in finding her testimony unreliable. "[A] doctor who merely applies his knowledge to everyday experiences does not need to satisfy the additional [reliability prong required by South Carolina law in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)]."

Summary Judgment

Without expert testimony, Plaintiffs had no direct evidence of whether the monitor was unreasonably dangerous because there was no identification of a specific design flaw. The court then turned to whether there was sufficient circumstantial evidence of defect to survive summary judgment. The court clarified it had not foreclosed the use of circumstantial evidence for design defect claims. "[W]e recognized in [*Branham v. Ford Motor Co.*, 390 S.C. 203, 230, 701 S.E.2d 5, 20 (2010)] that other similar incidents can be used to show a design defect, which is classic circumstantial proof." It is up to the trier of fact to determine if it is worth as much merit as direct evidence.

In this context, the court stated that one cannot draw an inference of defect from the mere fact a product failed. (Citing Sunvillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990)). A plaintiff must offer evidence beyond the product's failure to prove a product is unreasonably dangerous. Testimony by Plaintiffs and other fact witnesses that the alarm did not sound is not sufficient. "In some design defect cases, expert testimony is required to make this showing because the claims are too complex to be within the ken of the ordinary lay juror." Whether expert testimony is required is a matter of law. In the instant case, the court found as a matter of law that Plaintiffs' case required expert testimony; it involved design and structure of software. Therefore, without it, Defendant was entitled to summary judgment.

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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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Collins & Lacy is a defense litigation firm in South Carolina that delivers valuable legal representation for our clients through solid preparation, thorough execution, and client-oriented service aimed at success. With offices in Charleston, Columbia, Greenville and Myrtle Beach, the firm represents local, regional and national clients in the areas of:

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