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TRACKING CASE NEWS AND DEVELOPMENTS IN BENZENE AND EMERGING TOXIC TORT LITIGATION

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Lawsuit Filed Against L'Oreal Says Chemicals in Hair Relaxing Products Caused Uterine Cancer

CHICAGO — A lawsuit has been filed in Illinois federal court against L'Oréal USA Inc., contending that the defendant's hair straightener and relaxer products caused her to develop uterine cancer.

Plaintiff Jennifer Mitchell filed the underlying lawsuit on Oct. 21 in the U.S. District Court for the Northern District of Illinois, contending that her use of the defendant's hair care products caused her "regular and prolonged exposure to phthalates and other endocrine disrupting chemicals."

Mitchell alleged that black people make up about 13 percent of the U.S. population, but by one estimate, "African-America spending accounts for as much as 22 percent of the $42 billion-a-year personal care products market, suggesting that they buy and use more of such products — including those with potentially harmful ingredients — than Americans as a whole."

"In an analysis of ingredients in 1,177 beauty and personal care products marketed to Black women, about one in 12 was ranked highly hazardous on the scoring system of EWG' Skin Deep Cosmetics Database, a free online resource for finding less-hazardous alternatives to personal care products," the complaint said. "The worst-scoring products marketed to Black women were hair relaxers, and hair colors and bleaching products. Each of these categories had an average product score indicating high potential hazard. In the U.S. alone, Black consumers spending over $1 trillion each year, with a significant amount of that spending toward hair care products. In 2020, the global Black Hair care market was estimated at $2.5 billion, with the hair relaxer market alone estimated at $718 million in 2021, with the expectation of growth to $854 million annually by 2028."

The lawsuit alleges that the products are an inessential cosmetic product and that safer alternatives "have been readily available for decades."

"Defendants owed a duty to all reasonably foreseeable users to design a safe product," the lawsuit said. "Defendants breached their duty by failing to use reasonable care in the design and/or manu-

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California Appellate Court Permits Defense Expert Testimony Regarding Causation To Meet Lower Standard When Offered to Challenge Plaintiff's Causation Evidence

A Commentary by Michael L. Fox and Audrey M. Adams of Duane Morris LLP. See Author Bios on Page 5

Causation in personal injury actions, including product liability claims related to drugs and medical devices and toxic tort actions related to exposure to hazardous substances, must be proven within a reasonable degree of medical probability based upon competent expert testimony. That's typically the plaintiff's burden of proof. Do the defendants bear the same burden? In *Kline v Zimmer*, the California Court of Appeal recently held that, in challenging the plaintiff's causation evidence, defense expert testimony should be held to a standard of "less than a reasonable medical probability."[1]

Kline involved the plaintiff's claim that the Durom Cup hip implant, manufactured by defendant Zimmer, Inc. and utilized in his first hip replacement surgery, was defective and caused him to require an additional surgery, which resulted in further injury. Evidence presented by the plaintiff at trial included an expert who testified to a reasonable medical probability that the Durom Cup's defects caused the plaintiff to need the additional surgery, which resulted in changes in his muscles and soft tissues causing him chronic pain.[2]

Zimmer had offered to present expert testimony that the plaintiff's injuries had possible alternative causes, such as arthritis and excess weight.[3] However, the trial court had excluded this evidence, as well as certain parts of the plaintiff's expert testimony that was also not stated to a reasonable medical probability.[4] The exclusion left Zimmer with no expert testimony, while the plaintiff's experts were permitted to testify.[5] The trial court relied on existing California personal injury law, which states that causation "must be proven within a reasonable medical probability based upon competent expert testimony."[6] The jury returned a verdict in the plaintiff's favor, and Zimmer appealed.

The Court of Appeal, reviewing the judgment de novo, found that in offering evidence that undermined the plaintiff's expert's testimony in an effort to demonstrate the plaintiff could not meet his burden of proof on causation, the defense expert was improperly excluded from testifying as to other possible causes of the plaintiff's injury.[7] The appellate court agreed with Zimmer that the Ortho Pharmaceutical rule cannot apply to a party without the burden of proof.[8] That is, a defendant, when trying to show that the plaintiff has not met his burden, does not need to prove potential or possible alternative causes of injury to a reasonable medical probability.[9]

The court acknowledged that "[l]ess than a reasonable probability is a wide spectrum that begins at 50 percent likely and ends at impossible,"[10] and that all such testimony is not necessarily admissible. For example, opinions based on "assumed facts" without any support for the truth of those facts will properly be excluded.[11] Thus, trial courts continue to have discretion to determine the line between an opinion regarding a possible cause and mere speculation.[12]

Importantly, the court noted that not all defense expert testimony can be presented in this manner. For instance, when the defendant is trying to show that a third party is liable, the defendant's causation experts will need to testify to a reasonable medical probability in order to meet the defendant's burden of proof.[13]

Because the trial court's ruling excluding Zimmer's expert was a structural error, the Court of Appeal ordered a reversal without analysis of whether or not the error changed the result of the trial.[14]

With this decision, California now tracks states like Florida, Nevada, Wisconsin, Kentucky, New Hampshire, and Pennsylvania, which have similarly held defense expert testimony to this lower standard when offered to show plaintiffs cannot satisfy their burden of proof.[15]

Endnotes

[1] *Gary Kline v. Zimmer Inc.*, 79 Cal. App. 5th 123 (2022) (review denied August 31, 2022).

[2] *Id.* at 128.

[3] *Id.* at 134, n. 7.

[4] *Id.* at 127.

[5] *Id.* at 128.

[6] *Jones v. Ortho Pharmaceutical Corp*. 163 Cal. App. 3d 396, 402 (1985).

[7] *Kline*, 79 Cal. App. 5th at 130.

[8] *Id*. at 130-131.

[9] *Id*. at 131.

[10] *Id*. at 134.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 132, n 3.

[14] *Id*. at 136-137.

[15] *R.J. Reynolds Tobacco Co. v. Mack*, 92 So.3d 244, 248 (Fla.Dist.Ct.App. 2012) (challenging smoking as cause of laryngeal caner); *Williams v. Eighth Judicial Dist. Court of Nev*. 262 P.3d 360, 363 (Nev. 2011) (challenging drug manufacturer's defective vials as cause of hepatitis C); *Roy v. St. Lukes Medical Center,* 741 N.W.2d 256, 259 (Wis.Ct.App. 2007) (challenging theory that radiologist negligently ignored signs that procedure was causing stent to dislodge); *Sakler v. Anesthesiology Assocs. P.S.C.*, 50 S.W.3d 210, 213-214 (Ky.Ct.App. 2001) (possible alternative causes of patient's injury in a medical malpractice case); *Wilder v. Eberhart*, 977 F.2d 673, 674-675 (1st Cir. 1992) (challenging stomach stapling surgery as cause of tear to esophagus) *Kennedy v. Sell*, 816 A.2d 1153, 1158 (Pa. Super., 2003)(challenging car accident as sole cause of shoulder injuries).

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Editor's Note: This article was previously published in a committee newsletter of the International Association of Defense Counsel (IADC), of which Mr. Fox is a member.