STATE COURT

DOCKET WATCH

The Federalist Society for Law and Public Policy Studies--State Courts Project

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SEXUAL HARASSMENT LAW (MICHIGAN)

The Michigan Court of Appeals recently upheld a twenty-one million dollar jury verdict in a sexual harassment case against the DaimlerChrysler Corporation. The verdict, along with interest, resulted in a judgment of more than thirty-million dollars, an amount more than seventy times the largest sexual harassment award ever affirmed in a published decision of the Michigan Court of Appeals.

Plaintiff Linda Gilbert was hired by DaimlerChrysler in 1992 to work as a millwright, a skilled trade involving the installation, maintenance, and repair of machinery. Prior to her position with DaimlerChrysler, Gilbert suffered from a longstanding drug and alcohol dependency, as well as severe depression. The severity of her addictions fluctuated over the course of several years, resulting in several arrests for drunk driving, and the onset of major depressive disorders. Gilbert was treated by various social workers and therapists for these problems.

Gilbert was one of the only female tradespersons at the Michigan assembly plant, and is said to have encountered hostility from her male coworkers. Gilbert alleged, for instance, that lewd cartoons and limericks were posted in or on her locker, and that a nude photograph was left atop her toolbox. More seriously, she allegedly discovered urine on a chair inside her private changing area. In all, Gilbert reported six incidents of alleged harassment over the course of seven years. None of the incidents involved physical contact, or sexual propositions.

Gilbert declined to identify all but one of the persons she believed were responsible for the most serious allegations of abuse, citing concerns over retaliation, and a lack of foundation. Gilbert also expressed satisfaction with the company's remedial efforts, and agreed that no additional actions could be taken to address improper workplace conduct.

In 1994, Gilbert filed suit against DaimlerChrysler claiming violations of the Michigan Civil Rights Act. By 1995, Gilbert had relapsed into addiction, requiring hospitalization for an apparent suicide attempt, as well as detoxification and therapy. Another suicide attempt followed in 1997.

At trial, Gilbert argued that despite her documented history of addiction, her prognosis for recovery

Continued on page 4

In this issue...

MASS TORT (MISSISSIPPI)

In 2000, a group of 155 plaintiffs filed suit against the manufacturers of the prescription drug Propulsid in a Mississippi state court. Just over one year later, a jury returned a one hundred million-dollar award against the manufacturers on the first ten verdicts reached in the cases. Despite the size of these verdicts, the result is increasingly common in the state of Mississippi, which since the mid-1990s has reigned as the leading forum for mass tort litigation. Mark Ballard, Mississippi Becomes a Mecca for Tort Suits, Nat'l L.J., Apr. 20, 2001. Dubbed the "lawsuit capital of the world," Mississippi has developed a massive civil litigation infrastructure funded by state expenditures averaging roughly $264.00 per resident. Tim Lemke, Best Place to Sue?, Wash. Times., June 30, 2002.

Mississippi's unlikely ascendancy in the specialized arena of mass tort litigation is partially the result of the State's procedural rules governing the aggregation of lawsuits. Although Mississippi has become home to massive multiparty actions, the State's Rules of Civil Procedure, ironically, do not permit class actions.

Mississippi's Civil Rules do, however, permit the joinder of multiple plaintiffs in a single action where the

Continued on page 6

Judicial Ethics (Alabama)

In litigation pending since 1996, 3,500 plaintiffs sued the Monsanto Company and two successor corporations for property damages arising out of alleged contamination by polychlorinated biphenyl's, known commonly as "PCBs." The Monsanto case was eventually tried to a jury, which found in favor of the Plaintiffs as to liability. During the subsequent proceedings seeking a reasonable remedy, Monsanto requested the presiding Judge R. Joel Laird, Jr. to recuse himself voluntarily under the Alabama Canon of Judicial Ethics. Monsanto's recusal request centered on Judge Laird's conduct during a purported settlement conference held on March 12, 2002 seeming to reveal adversarial participation in the case, and hostility towards the Defendants.

The conference began when the court ordered nine Monsanto executives to appear in person for a settlement discussions at the close of the trial on liability. Once inside the closed courtroom, Judge Laird announced that the conference could last for several days, and that no one would leave until the case was settled. Mindful of the Judge's admonishment to pursue vigorous discussions, the Defendants proposed holding the meeting outside of the courthouse. Judge Laird refused, insisting that the parties remain at the court by explaining that "in case I find somebody is not negotiating in good faith, they will be close to my jail."

Soon after the talks commenced, Judge Laird apparently became dissatisfied with the amount of the Defendant's settlement offer and angrily suggested that one or more of company executives would soon be jailed for failing to demonstrate "good faith." No similar threats were directed at the Plaintiffs or the Plaintiffs' counsel.

Prior to the conference, the court assured the Defendants' representatives that their attendance was required solely to facilitate, and if appropriate, authorize settlement of the litigation. Without warning, however, Judge Laird ordered John C. Hunter, Chief Executive Officer of Defendant Solutia, to take the witness stand where the Judge personally questioned Hunter on his views of an appropriate remedy. Judge Laird's interrogation included the unusual practice of overruling the Defendant's evidentiary objections to the Judge's own questions. In overruling one particular objection, Judge Laird remarked that:

> This Court has heard testimony since the second week of January, and it's obvious to this Court that the same attitude that . . . Monsanto exhibited years ago still exists today, and that is a lack of concern for the environment, a lack of concern for their neighbors and the plaintiffs in this case and it's obvious to this Court that it is simply the defendants' strategy and plan to keep from facing the music in this case as long as they possibly can and stretch it out as long as they possibly can.

While Hunter was still on the stand, Judge Laird also sought to have representatives of the Plaintiffs and governmental agencies make settlement proposals for Hunter to accept or reject, without the assistance or guidance of counsel.

The settlement conference concluded with the court calling one of the defense lawyers to the bench, and stated that "I'm not even going to bother to hold you in contempt," because "I don't know that sending you to the county jail would change any actions on your part in the future whatsoever." The Judge further concluded that counsel and his firm "have lost every bit of credibility with this Court." Judge Laird declined, however, to detail the grounds for his dissatisfaction.

Judge Laird failed to rule on Monsanto's motion for recusal, leading to petition the Alabama Supreme Court for a writ of mandamus. The Supreme Court agreed, granting the petition in less than two hours, and ordered Judge Laird to consider and decide the recusal motion. Judge Laird elected to side-step the issue, and transferred the matter to the presiding judge for his circuit.

From the Editors...

The Federalist Society, in an effort to increase knowledge of and dialogue about state court jurisprudence, presents this first issue of *State Court Docket Watch.* This publication, which will be issued three times a year, is one component of the Society's State Courts Project. *Docket Watch* will present original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts.

The articles and opinions reported here will, we hope, help to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statute, and scrutinizing legislative and executive action. We hope thi resource will increase the legal community's interest in more assiduously tracking state court jurisprudential trends.

This issue presents four case studies. One decision from Michigan concerns sexual harassment law, expanding what constitutes notice of a hostile environment and raising questions about the role of a judge as a gatekeeper in harassment cases. A case from Mississippi concerning the prescription drug Propulsid presents the challenges by state mass tort and class action litigation. Cases from Alabama and Mississippi concern issues of judicial bias.

We look forward to hearing your comments and suggestions. Please feel free to contact us at fedsoc@radix.net.

Judicial Ethics (Mississippi)

On a rainy afternoon in 1996, Mr. Turner Frierson, Jr. exited a Wal-Mart store in Indianola, Mississippi after a shopping trip. Mr. Frierson slipped and fell in the vestibule, an accident he claimed resulted from a wet tile floor. Mr. Frierson and his wife Pinkie Mae filed suit against Wal-Mart claiming that dripping shopping carts in the vestibule, and an open doorway, created a dangerous condition that caused the fall. Following trial, a jury returned a verdict in favor of the Frierson's in the amount of $125,000.00.

Prior to trial, the parties disagreed as to the proof the Plaintiffs could offer regarding medical expenses. As the Friersons had no private health insurance, Mr. Frierson's medical expenses were partially covered by Medicaid and Medicare. The balance of the unpaid expenses were "eradicated" or "written-off" by the service providers, meaning that the Plaintiffs would never be required to pay the remaining amounts. Accordingly, Wal-Mart argued that the Plaintiffs should not be permitted to introduce evidence of these unpaid "expenses" to avoid awarding the Friersons a potential windfall. The Plaintiffs naturally disagreed, and the matter came before Judge Gray Evans. The question appeared novel: whether Medicare payments should be subject to the collateral source rule stating that a tortfeasor cannot mitigate damages by factoring compensation received from insurance.

Judge Evans began his colloquy on the matter by asking the parties to explain what the "Appellant Courts [sic] said about this?" The parties informed the court that no relevant authorities had been located. However, Judge Evans's research was more comprehensive. From the bench, he shared that "I think I can pull up one" case of import, a unpublished decision of the United States Court of Appeals for the Fifth Circuit captioned Evans v. H.C. Watkins Memorial Hospital, Inc., 778 F.2d 1021 (5th Cir. 1985), but warned the parties "You can't cite it though." Judge Evans revealed he was acquainted with the decision because "It involves my mother." Judge Evans explained that in the Evans case, the trial court ruled that unpaid medical expenses were inadmissible, and noted that the "judgment we got was extremely low." After the verdict, "[w]e appealed it to the Fifth Circuit, and they said he was in error." Triumphantly, Judge Evans added "By the way, we settled our case for a considerable amount," informing the attorneys that "I thought ya'll ought to know that."

Seizing on the Judge's comment, the Friersons' attorney argued that if he was unable to introduce Mr. Frierson's unpaid expenses "then it's maybe exactly like in your mama's case," with a strong likelihood that the jury would undervalue the injury, and thus decide "we're not going to return much of a verdict." Judge Evans concurred: "That's where the argument comes to me. I agree with you a hundred percent . . . ."

Wal-Mart appealed the case, arguing that Judge Evans had violated the provision of the Mississippi Code of Judicial Conduct prohibiting judges from allowing their "family, social, or other relationships to influence" their judgment. The Mississippi Supreme Court concluded that while Judge Evans's comments about the size of his mother's settlement may have been improper, the totality of the record did not reveal sufficient prejudice to rebut the presumption of impartiality afforded to judges under Mississippi law. In dissent, two Justices found sufficient evidence of personal bias to demonstrate that Judge Evans allowed his interest in his mother's case to control his decision. These dissenters chastised the majority for sanctioning this conduct, fearing the decision would undermine the integrity and impartiality of the state judiciary. In a separate opinion, two other Justices found Judge Evans's remarks improper, but concluded the error was harmless as the full amount of medical expenses was properly admitted under Mississippi law.

The opinion of the Mississippi Supreme Court is reported at Wal-Mart Stores, Inc. v. Frierson, 818 So.2d 1135 (Miss. 2002).

Michigan--Continued from page 1

had significantly improved prior to joining DaimlerChrysler. Gilbert therefore argued that only the sexual harassment she encountered on the job forced her back into alcoholism. Gilbert attempted to support this theory by arguing that the company's management had failed to adequately investigate her complaints. For instance, Gilbert elicited testimony showing that the company had not installed surveillance cameras in the plant, designated a floor supervisor for complaints, or analyzed the handwritten notes containing the offensive references. Gilbert also testified that she endured a continual and persistent pattern of sexual harassment throughout the course of her employment, far beyond the six occurrences she formally reported to the company.

Steven Hnat, a social worker, testified as an expert on Gilbert's behalf. Hnat opined that despite the severity of Gilbert's alcoholism, her likelihood of recovery was in the top ten percent of patients who sought professional treatment. However, Hnat concluded that Gilbert was instead "dying" from a combination of alcoholism and a major depressive disorder, both primarily caused by the harassment at work. In addition, although Hnat testified that he lacked training or education as a physician, he opined that Gilbert's brain chemistry had been permanently altered because of her disorders, and that her impairments would likely lead to physical ailments including pancreatitis. The testimony of a second social worker largely restated these conclusions.

In response, DaimlerChrysler argued that Gilbert's difficulties, if any, stemmed from her own interpersonal problems with the other millwrights. The defense also argued that the alleged harassment constituted no more than commonplace shoptalk, and was not intended to be offensive. DaimlerChrysler also noted Gilbert's long history of illness and addiction to suggest that her relapses were attributable solely to her own disorders. Finally, the company argued that the few reported instances of harassment over a lengthy period of years could not evidence a hostile work environment. Rather, the company noted that it had investigated each of these complaints, and taken remedial steps where appropriate.

Following the close of proofs, the trial court instructed the jury on the law prior to closing arguments. The jury awarded Gilbert twenty million dollars for emotional damages, and one million dollars for future medical expenses. Currently, Gilbert remains employed by DaimlerChrysler.

DaimlerChrysler appealed, raising four general errors of law. First, DaimlerChrysler argued that the trial court erred in denying its motion for judgment notwithstanding the verdict. The company argued that Gilbert presented insufficient evidence to support the jury's findings of a hostile work environment, actual or constructive notice of the alleged harassment, and failure to take remedial actions.

The Court of Appeals rejected DaimlerChrysler's contention that Gilbert's testimony concerning a pattern of harassment was improperly admitted. The Court of Appeals noted that the company had only first learned of these new problems during Gilbert's deposition, and at trial. The Court of Appeals noted that Gilbert's case was "unusual," in that she continued to work for DaimlerChrysler after filing suit. Nonetheless, the Court of Appeals interpreted Michigan caselaw as examining the "totality of circumstances" surrounding the alleged harassment, thus entitling the trial court to look beyond the episodes formally reported to management. In so ruling, the Court of Appeals found that DaimlerChrysler had actual notice of both the incidents formally reported, and the occurrences described during Gilbert's deposition.

The Court of Appeals also reasoned that because the Michigan Civil Rights Act addresses a hostile work "environment," the employer need not necessarily have notice of every harassing incident to be charged with actual notice. Accordingly, the Court of Appeals found that the complaints Gilbert did submit were sufficient to notify the company that she considered her environment hostile because of her sex. In addition, the Court of Appeals again referenced Gilbert's deposition allegations, and concluded that these charges were also sufficient to alert management of the ongoing harassment, because the defense attorneys were acting as agents for the corporation in gathering information about the lawsuit. Finally, the Court of Appeals held that the question of DaimlerChrysler's remedial efforts was properly presented to the jury because of conflicting evidence.

Second, the Court of Appeals found no reversible error in the trial court's decisions regarding the conduct of Gilbert's attorney. During the closing statements, Gilbert's counsel argued that the jury "must consider" the "disease that she is suffering from, and that will kill her," in evaluating her emotional damages. Despite the absence of punitive damages under Michigan law, Gilbert's attorney suggested that "complete justice" for the alleged misconduct would require $140,000,000 and invited the jury to "break it up any way you want." Gilbert's counsel also compared her situation to the Israeli settlers after World War II, and the American civil rights movement. Most seriously, Gilbert's counsel alluded to the horrors of the Nazi holocaust, and referenced the German corporate ownership of the Defendant, before admonishing the jury to "ring the bell of justice" with a "loud, clear, and high" award that would get the attention of the executives in Stuttgart.

The Court of Appeals found that these comments were, in large part, supported by the record and "accurate characterizations" of Gilbert's situation. Although the Court recognized the implicit parallel between Nazism and the German owned corpora-

tion, the Court found that counsel "never drew any explicit connection," and thus DaimlerChrysler's corporate identity was not an issue. For these reasons, the Court of Appeals ascribed the jury's verdict to the persuasiveness of Gilbert's evidence, and not the suggestive arguments of her counsel. Accordingly, the Court found insufficient evidence to conclude that the arguments of Gilbert's attorney materially affected DaimlerChrysler's rights.

Third, the Court of Appeals considered the propriety of Gilbert's expert witnesses. Prior to testifying, Gilbert's expert Steven Hnat described his education to include a Masters degree in "psycho-biology" and a Masters in social work. Gilbert's attorney later restated this background to include a "degree in Psychology." Hnat listed among his credentials an award for his graduate thesis in psychology, and described his professional practice to center on psychiatric social work.

However, following a challenge by the Defendant, Hnat was forced to admit that he had not received an award for his graduate thesis, and that he did not hold a Masters degree in psycho-biology. Hnat also clarified that he was not trained as either a psychiatrist or a psychologist. The trial court denied DaimlerChrysler's motion to exclude Hnat as an expert, concluding that the misrepresentations were not sufficiently serious, and that his testimony was largely limited to non-medical opinions.

The Court of Appeals found no error in permitting Hnat to testify as an expert, finding little possibility that the jury misunderstood the scope of his expertise. The Court of Appeals noted that Hnat did actually hold a Masters degree in social work, and a limited state license to provide psychological therapy. The Court construed the Defendant's objection to argue that only medical doctors can render expert opinions, and thus inconsistent with the modern, broad, expert definition. Therefore, although noting that Hnat's testimony appeared to have a "medical dimension," his opinions were centered on his practice as a social worker, and free from express representations of medical expertise.

The Court of Appeals also affirmed the trial court's decision to exclude a proposed medical expert to rebut Hnat's testimony. DaimlerChrysler moved to call this witness after Hnat's testimony, despite having endorsed Hnat as a witness before trial. DaimlerChrysler argued that it had no reason to anticipate the breadth of Hnat's testimony, or the overt medical dimension to his opinion. The Court of Appeals noted the trial court's ruling appeared to center on the belief that DaimlerChrysler had not adequately prepared for trial. Viewing the matter as a close question, the Court of Appeals ultimately deferred to the trial court's discretion, finding it "impossible" to conclude the ruling was baseless.

Finally, the Court of Appeals affirmed the jury's award of twenty-one million dollars in damages. DaimlerChrysler argued that the jury's verdict was grossly excessive in relation to jury awards in comparable sexual harassment cases. The Court of Appeals, however, characterized the results in similar cases as "not particularly germane," to the core analysis of whether the evidence submitted to the jury supported the award. Applying this standard, the Court speculated that the jury could have credited Gilbert's evidence "that she would die an untimely death because of the effects of the harassment that [DaimlerChrysler] knew existed and did nothing to stop." The Court similarly reasoned that Gilbert introduced sufficient evidence of her future medical expenses, the high costs of treating her disorders, and the "completely joyless" life she faced "because the harassment had caused her to develop major depressive" disorders.

The Court of Appeals also noted that the jury "exercised its independence by awarding Gilbert only about fifteen percent of the $140,000,000 [her attorney] said was appropriate," thereby evidencing an award based on evidence, rather that "passion, bias, or misunderstanding." Accordingly, the Court of Appeals found no abuse of discretion by the trial court in declining to reduce the award.

The decisions of the trial and appeals court have received wide publicity, including coverage in the *New York Times,* the *National Law Journal*, and several foreign newspapers. DaimlerChrysler has filed a petition for review of the decision in the Michigan Supreme Court. The unreported opinion of the Court of Appeals is available at Gilbert v. DaimlerChrysler, No. 227392, 2002 WL 1766672 (Mich. Ct. App. July 30, 2002), or http://courtofappeals.mijud.net/documents/OPINIONS/FINAL/COA/20020730_C227392(124)_227392.OPN.PDF.

Mississippi--Continued from page 1

parties "assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action." Miss. Code Civ. Proc. 20(a). Rule 20 is identical to the joinder mechanism in virtually every other state, and the joinder provisions of the Federal Rules of Civil Procedure. Under a procedure known as "one and all," Mississippi trial courts began using Rule 20 to join suits filed in separate counties, creating quasi-class claims for adjudication before a single judge.

In Am. Bankers Ins. Co. v. Alexander, 818 So.2d 1073, 1079-80 (Miss. 2001), the Mississippi Supreme Court affirmed the use of the one and all procedure. In 1998, plaintiffs in four Mississippi counties began filing suits against the American Bankers Insurance Company of Florida and Fidelity Financial Services. Each of the plaintiffs alleged that the defendants orchestrated a generalized scheme to defraud customers by imposing insurance premiums at substantially inflated rates, and "forcing" the plaintiffs to purchase collateral protection insurance offered by the coconspirators. In a series of rulings, the trial judges presiding over these suits began consolidating the actions under Rule 20, resulting in five combined cases involving approximately 1,371 plaintiffs.

In an interlocutory appeal, a sharply divided decision of the Mississippi Supreme Court upheld each of the five consolidated cases. Citing the plaintiffs' common allegations of fraud, and noting a single master insurance policy issued by American Bankers to Fidelity, the five-member majority concluded that each of the plaintiffs' claims arose from the "same transaction" within the meaning of Rule 20. In dissent, four Justices argued that the record lacked sufficient facts to evidence a logical relationship between the plaintiffs' allegations, and the purported damages. Noting the high number of out-of-state plaintiffs included in the consolidated actions, the dissenters reasoned that judicial economy cautioned against joining cases involving disparate evidentiary proofs. Id. at 1086-88 (Waller, J., dissenting). Subsequent decisions have re-affirmed this "liberal approach" to joinder under Rule 20. See Prestage Farms, Inc. v. Norman, 813 So.2d 732 (Miss. 2002); Illinois Central R.R. Co. v. Travis, 808 So.2d 928 (Miss. 2002).

These interpretations of Rule 20 have resulted in a documented increase in class action style claims, despite the fact that Mississippi has never codified class action litigation. In particular, certain Mississippi counties such Copiah, Claiborne, and Jefferson Counties have become a "Mecca" for mass tort suits against a variety of national industries. Ballard, Mississippi Becomes a Mecca for Tort Suits. For instance, in Jefferson County, a rural community of 9,700 residents, more than 21,000 people have been plaintiffs in the county since 1995. Robert Pear, Mississippi Gaining as Lawsuit Mecca, N.Y. Times, Aug. 15, 2001. Analysts have speculated that the explosive increase in suits filed in Jefferson County stems from "trial lawyers think[ing] they will get large verdicts out of a predominately poor, uneducated and thus impressionable jury pool." Lemke, Best Place to Sue?. According to a recent study, prior to 1995, no Mississippi jury verdict surpassed nine million dollars per plaintiff. However, since 1995 at least nineteen verdicts in Jefferson County over nine million have been reported, six topping $100 million, and together totaling more than two billion dollars in damages. Jimmie E. Gates, Dozens of Tort Reform Bills Filed, Clarion-Ledger, Jan. 22, 2002.

Propulsid is a prescription drug used in the treatment of severe nighttime heartburn caused by gastroesophageal reflux disease. Propulsid, which was manufactured by Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson, had been approved by the Food and Drug Administration (the "FDA") in tablet form in 1993, and later in suspension form in 1995. Beginning in about 1993, and continuing through 2000, Propulsid's labeling was modified on six occasions to better inform physicians and patients about the risks that may be associated with the product. On March 23, 2000, the FDA announced that Janssen would withdraw Propulsid from the United States market. The FDA stated that Propulsid had been linked to 341 reports of heart rhythm abnormalities, some eight of which included reports of death. Http://www.fda.gov/bbs/topics/ANSWERS/ANS01007.html (last visited July 10, 2002).

On July 6, 2000, a group of 155 plaintiffs filed suit against Janssen and J&J in the Jefferson County Circuit Court. In their amended complaint, the Plaintiffs asserted claims based on Propulsid's alleged defects, including causes of actions in strict liability, breach of warranty, negligence, and negligent misrepresentation.

As the case moved towards trial, numerous problems concerning case management began to emerge. For instance, although the Office of the Circuit Clerk produced a list of 150 prospective jurors, many residents registered conflicts with the plaintiffs. The venire included six Jefferson County residents named as plaintiffs in suits involving Propulsid, five of which were Plaintiffs in the very case they were called to decide. Upon review, the parties discovered that nearly seventy percent of the venire were related by blood or marriage, or shared common surnames with the Plaintiffs or the Plaintiffs' families. Finally, when even the Circuit Clerk's sister-in-law was found among the Plaintiffs, the case was moved to neighboring Claiborne County.

The task of seating an impartial and unbiased jury in Claiborne County, however, proved equally problematic. Thirty-eight of the 155 Plaintiffs in the lawsuit lived in Claiborne. A total of 114 Claiborne County residents had pending suits against the Defendants involving Propulsid. Prominent Claiborne County citizens including a police officer, and the wife and daughter of a County Supervisor, were Plaintiffs in the case. Other well-known community members including a former County Supervisor, a deputy sheriff, the brother of the Claiborne County Circuit Clerk,

and the father of a jury commissioner, were plaintiffs in other pending Propulsid cases. From this pool, the Circuit Clerk selected a new venire of 146 residents.

The Claiborne venire composition, however, appeared to retain many of the same problems encountered in Jefferson County. Six of the prospective jurors were plaintiffs in Propulsid suits, with another five planning to file their own actions. Seventy-one relatives of the members had been prescribed Propulsid, with a total of thirty members of the pool related to persons who took the drug, or who had filed suits against the Defendants. Three of the Plaintiffs involved in the case were summoned to jury duty in their own lawsuit, appeared, and mingled with the entire venire for some time. These conflicts were compounded by negative publicity regarding Propulsid and its manufacturers. Plaintiffs' attorney ran advertisements for new claims in local papers, and sponsored litigation seminars. Nonetheless, the trial judge denied the Defendants' motion to transfer the case to a new venue.

In American Bankers, the Mississippi Supreme Court's acceptance of mass consolidation under Rule 20 rested in part on the fact that each of the more than 1,300 plaintiffs "alleged the very same claims involving the very same insurance policies." In that case, the plaintiffs' allegations of fraud arose "out of the same pattern of conduct," and, the Court held, would "involve interpretation of the same master policy." Am. Bankers, 818 So.2d at 1079. The Supreme Court noted that despite their number, "[a]ll of the plaintiffs' claims are similar with the exception of the actual dollar amount charged on premiums." Id. On these facts, the high court saw no likely prejudice or confusion that could not be remedied "by a carefully drafted jury instruction." Id.

In contrast, the claims of the Propulsid Plaintiffs seemed to lack these unifying similarities. Therefore, the trial court determined that the 155 pending cases would be severed into a series of separate trials consisting of "trial groups" of ten plaintiffs. This solution, however, did not necessarily address the widespread factual and legal differences in the claims of the first trial group assembled.

To begin, the core issue of Propulsid's alleged "defectiveness" necessarily turned on individualized facts, as the warnings regarding the drug issued by the Defendants changed six times from August 1993 to July 2000. The first ten trial Plaintiffs ingested Propulsid during at least six different warning periods, requiring the jury to rule on at least six distinct fact matters, based on six separate classes of scientific evidence and expert testimony. The jury was also required to make distinct findings on the issue of causation, based largely on the testimony of approximately twenty different treating physicians. The role of each treating physician presented additional complexity given Mississippi's "learned intermediary" doctrine that makes the decisions of a prescribing physician a focal point of any tort trial. The learned intermediary doctrine, for instance, requires the treating physician to evaluate the propensities of a prescription drug with respect to the individualized needs and sensitivities of the patient. Accordingly, a portion of each plaintiff's trial burden centers on establishing that a more adequate warning from the drug manufacturer would have convinced the physician not to prescribe the medication. Even more critically, an inadequate warning is insufficient to impose liability where the treating physician was subjectively aware of the particular risk posed by the drug. Consolidated trial of the Propulsid Plaintiffs thus required an abundance of specialized and distinct medical testimony to be digested by a single jury.

The personal histories of the ten trial Plaintiffs were also disparate. One of the Plaintiffs was a seventy-nine year old man disabled since the 1950s with a history of heart attacks. Another was a fifty-year-old woman who had received monthly medical treatments for over thirty years for a variety of stomach disorders. The difficulty of the jury's task was most clearly complicated by the inclusion of a four-year old girl as one of the ten trial Plaintiffs. The infant Plaintiff was prescribed Propulsid for pediatric use, despite the fact that Propulsid was indicated for use in adults, and only recently approved by the FDA for use in children in the United States. As the regulatory studies and clinical research performed by the Defendants centered on adult consumption, this evidence appeared to have no logical or legal relevance to a pediatric complaint.

After the close of the four-week Propulsid trial, the jury returned ten separate verdicts awarding ten million dollars of compensatory damages to each of the ten plaintiffs, for a total judgment of one hundred million dollars. Surprisingly, the jury took less than two hours to reach the ten verdicts.

The speed of the jury's verdict, however, may have been achieved by the decision to award each of the ten Plaintiffs the same compensatory amount, despite wide variations in each Plaintiff's complaints, pre-existing medical conditions, alleged injuries, exposure to Propulsid, and expected life span. For example, the trial group included both a seventy-nine year old Plaintiff on disability for almost two decades, as well as a four-year-old Plaintiff lacking any cardiac damage. Similarly, the expenses alleged by the Plaintiffs at trial ranged from $535.00 to $100,116.80, with one Plaintiff submitting no evidence of medical expenses at all.

Following the jury decision, the trial court declined to allow the jury to consider an award of punitive damages against the Propulsid manufacturers. Jimmie E. Gates, Ruling Favors Propulsid Maker, Clarion-Ledger, Sep. 30, 2002. Several months later, the trial court also granted the Defendants' motion for remittitur, and reduced the jury award to $48.5 million dollars. An appeal of the revised award is now pending.

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