

B&B REVIEW

Product Liability and Casualty Litigation Update

For Further Information Contact . . .

Allen Baker
205.226.3416
abaker@balch.com

Steve Casey
205.226.3454
scasey@balch.com

Teresa Minor
205.226.8721
tminor@balch.com

Allen Estes
205.226.8717
aestes@balch.com

Visit our website:

www.balch.com

Address Change . . . If you no longer wish to receive this update or have an address change, please contact:

Nora Yardley
205.488.3476
nyardley@balch.com

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ELEVENTH CIRCUIT WIN

IN A WRONGFUL DEATH CASE

On November 9, 2006, Balch & Bingham LLP obtained a significant win in the Eleventh Circuit Court of Appeals for Evenflo Company, Inc. and Toys 'R' Us in *Thomas v. Evenflo Company, Inc., et al.*, Case No. 05-16076, 2006 WL 3248031 (11th Cir. Nov. 9, 2006) (slip op.). The case involved the strangulation death of a six month old infant while restrained in a child restraint system designed and manufactured by Evenflo and sold by Toy's 'R' Us. The plaintiff asserted claims of negligence/wantonness, breach of warranty, and violations of Alabama's common law product liability law, the Alabama Extended Manufacturer Liability Doctrine. In support of these claims, the plaintiff tendered Gary R. Whitman, a mechanical engineer employed by ARCAA, Inc., a national forensic engineering, medical and litigation consulting firm. Mr. Whitman opined that the child restraint system was defectively designed and presented an unreasonable risk of danger because its seat-belt was too long and too far away from the seating position, the buckle lacked a spring-eject mechanism, the handle could be rotated in such a manner that the seat could be propped at a dangerous angle, and that the seat did not contain an angle indicator.

After the close of discovery, the defendants filed a motion *in limine* to exclude Whitman's nine opinions based on *Daubert v. Merrell Dow Pharmaceuticals* and its progeny and moved for summary judgment on the grounds that the plaintiff could not meet his burden of proof without the opinions of Mr. Whitman. The Northern District of Alabama, after a six hour hearing and two extensive rounds of briefing, agreed with the defense that Mr. Whitman's opinions did not satisfy *Daubert's* reliability and relevancy standards. Of particular note, the District Court found that Mr. Whitman could not establish that he utilized generally accepted engineering principles in conducting his testing, failed to document essential aspects of his testing, utilized surrogates that were not the same weight and height as the decedent, manipulated the surrogates to make a conclusion that a result "could" occur, and failed to complete essential aspects of his testing. The Court also found that the plaintiff could not make a prima facie showing of breach of any legal duty or causation without Mr. Whitman's testimony; therefore, summary judgment was due to be granted.

After briefing and oral argument on appeal, the Eleventh Circuit affirmed the district court's exclusion of Mr. Whitman and further found that Mr. Whitman was not qualified to render an opinion on the mechanism of injury because he was not an accident reconstructionist or biomechanic.

The case was handled by S. Allen Baker, Jr., Teresa G. Minor, and Sean W. Shirley in Balch & Bingham LLP's Birmingham, Alabama office.