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2006PENNSYLVANIA FEDERAL COURT EXTENDS
ALTERNATIVE LIABILITY THEORY
TO PRODUCTS LIABILITY CASE

A recent decision of the United States District Court for the Eastern District of Pennsylvania has extended the reach of the alternative liability doctrine to the area of products liability. In *Drayton v. Pilgrim's Pride Corp.*, 2006 U.S. Dist. LEXIS 26047 (E.D. Pa. May 4, 2006), Judge Timothy J. Savage applied the alternative liability doctrine to hold that plaintiffs need not show which one of two turkey meat processing plants produced the allegedly contaminated turkey that they ingested; rather, the court held that the burden is upon each of the two meat processor defendants to show that the other's product caused the harm in order to escape liability. Should they be unable to do so, each may be held jointly and severally liable for plaintiffs' injuries.

Plaintiffs' claims for food products liability stemmed from an outbreak of listeriosis in the summer and fall of 2002, which allegedly caused the deaths and injuries at issue in four individual suits consolidated in *Drayton v. Pilgrim's Pride*. The outbreak reportedly was traced by the Centers for Disease Control to contaminated ready-to-eat turkey products produced either by a Franconia, Pennsylvania plant owned by Pilgrim's Pride Corporation or a Camden, New Jersey plant owned by Jack Lambersky Poultry Company, or both.

The court found that in each plaintiff's case the record would support a finding that the plaintiff had consumed turkey products processed by both of the defendants. Defendants argued in their motions for summary judgment, however, that this was insufficient because plaintiffs could not identify either defendant as the manufacturer of the specific turkey product that caused their illnesses. The court relied on *O'Donnell v. Big Yank, Inc.*, 696 A.2d 846, 849 (Pa. Super. 1997), and *Payton v. Pa. Sling Co.*, 710 A.2d 1221 (Pa. Super. 1998), in determining that a plaintiff need not identify the specific product that caused his or her harm if the original defective product blamelessly has been lost or destroyed. In such cases, the product may be identified by circumstantial evidence. The court found sufficient circumstantial evidence in *Drayton* to support product identification of defendants' processed turkey meats because plaintiffs had shown that (1) all plaintiffs or their decedents had purchased processed turkey meats manufactured by both defendants; (2) they all had access to both defendants' products; (3) the Centers for Disease Control test identified plaintiffs' listeriosis strain traced to both defendants; and (4) the specific listeriosis strain was found in the plant or product of both companies.

Importantly, defendants also claimed that because plaintiffs could not identify which defendant had manufactured the specific contaminated turkey that caused each plaintiff's injury, they could not be found liable, as plaintiffs had not shown direct causation. The court disagreed. It applied the alternative liability theory of Restatement (Second) of Torts Section 433(B)(3), which states that, in cases where two or more actors have committed a tortious act that is simultaneous and identical, but the harm is caused by only one of the two, the burden will be on those actors to prove that they did not cause the harm. The court also found that Pilgrim's Pride and Jack Lambersky Poultry were subject to alternative liability even though each was not aware of the other's actions.

Consequently, under the alternative liability doctrine applied in *Drayton*, it would not be plaintiffs' responsibility to show which meat processing company's product caused their injury. Rather, the burden of proof would be shifted to each meat processing company to show that the other, and not itself, was to blame. If the companies are unable to do so, each may be found jointly and severally liable. The court therefore denied defendants' summary judgment motions and granted plaintiffs' cross-motion to proceed under the alternative liability theory against defendants at trial.

The court was cognizant that its decision extended the alternative liability theory from the torts textbook realm of "hurled projectiles" to the products liability area, but stated that the fact that Pennsylvania appellate courts had not yet been called upon to address the issue did not mean that the alternative liability theory is inapplicable to product liability cases. This decision plainly could have significant implications for future litigants in Pennsylvania products liability litigation.

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