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Categories:
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Ninth Circuit Rejects Consumer Expectations Test and Affirms Exclusion of Metallurgist Dr. Robert N. Anderson

[Beth Schneider Naylor](#) and [Doug Dennis](#) successfully defended summary judgment in the Ninth Circuit Court of Appeals in the product liability case of *Shalaby v. Newell Rubbermaid, Inc., et al*, App. No. 09-56331 (9th Cir., May 17, 2010). The decision upheld their successful summary judgment originally obtained in the Southern District of California. The Ninth Circuit cited *Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1365 (Cal. Ct. App. 2005) and rejected plaintiffs' contention that the "consumer expectations" test applied. The court concluded that plaintiffs' theory of defect and causation was highly technical in nature and would not be within the common experience of a jury—therefore it would require an expert. The Ninth Circuit affirmed the district court decision to exclude the plaintiffs' experts for failing to meet the minimum standards under Rule 702 and *Daubert* either for reliability or for relevance. The appellate panel held that, because the plaintiffs were unable to establish a prima facie case without experts, summary judgment in favor of the defendants was proper—and affirmed the trial court decision.

Plaintiffs' case failed when the court excluded testimony from plaintiffs' expert, metallurgist Dr. Robert N. Anderson, in part because he disregarded relevant fact testimony regarding user error. The panel conceded that Dr. Anderson's view of the facts supported a theory that the gas cylinder plaintiff used suffered "abuse" beyond its intended use and was a likely cause of the incident. But, Dr. Anderson's conclusions were shown to be unreliable because he failed to rule out plaintiff's failure to follow simple cautionary instructions as another cause of the incident. Thus, Dr. Anderson's conclusions that a design or manufacturing defect caused the incident were unsupported. In

addition, Dr. Anderson's discussion of an allegedly safer alternative design was unreliable and unscientific because he failed to use the scientific method or standards to test it and failed to demonstrate that it would have prevented this incident.

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