Young: Recall Alone Does Not Prove Defect

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It's reassuring to read decisions in which a court embraces its role as gatekeeper and stops a claim from proceeding to trial with evidence that, by its very nature, would require a jury to speculate. For us, it's doubly reassuring when it involves a medical device claim.

Young v. Olympus America, Inc., 2012 U.S. Dis. LEXIS 9096 (W.D. Tenn. Jan. 26, 2012), involved plaintiffs who claimed that the defendant's medical device (a bronchoscope) was defective and, when used during their father's bronchoscopy procedure, caused an infection. *Id.* at *2-3. Plaintiffs' only claim remaining at the time of this summary judgment decision was an implied warranty claim, which when applied under the Tennessee Products Liability Act reads much like a manufacturing defect claim. *Id.* at *7-8.

Plaintiffs believed they had sufficient evidence to get to a jury. In particular, they offered evidence that only a few months after the father's bronchoscopy procedure the defendant instituted a recall of several models of its bronchoscopes due to a manufacturing defect (a loose biopsy port) that plaintiffs' expert claimed led to the infection. *Id.* at *4-5, 11. Moreover, plaintiffs had interrogatory responses in which the hospital at which the bronchoscopy was performed admitted that it received a recall notice, it inspected the bronchoscopes in its inventory, it found two different models in stock, and "one or both" of those models were subject to the recall. *Id.* at *12-13. Plaintiffs argued that these admissions and the expert's opinion, along with the fact the father contracted an infection, should be enough to present the case to a jury. Unfortunately, some courts might agree.

But the Young court did not. It gave this evidence a close review and determined that it would only invite a jury to speculate on whether the device used actually contained the defect. First off, the hospital's admission addressed bronchoscopes that were in its inventory months after the procedure. *Id.* at *13. So there was no connection to the device used during the procedure. More important, the hospital said that "one or both" of the devices in its inventory were subject to the recall. That, at best, proves only that one was subject to the recall, not both. With that evidence, the jury could find defect only by speculating:

Plaintiffs have failed to adduce evidence from which a reasonable juror could find that the bronchoscope used in [the] procedure . . . was in defective condition. . . . On the contrary, this evidence without more would only invite a jury to speculate about whether the bronchoscope used in [this] case had the [defect].

Id. The plaintiffs also failed to present evidence to support the "prudent manufacture test," which among other things required plaintiffs to prove that the defendant knew of the bronchoscope's dangerous condition yet marketed it anyway. *Id.* at *22-23. Plaintiffs needed an expert to make this showing but did not have one. The expert that they did have never actually looked at any bronchoscopes and only "assume[d]" that the bronchoscope used in the procedure was defective. *Id.* at *23. That's not good enough.

One other note: While Young is certainly worth discussing if for no other reason than that it shows a court doing what it's supposed to do on a summary judgment motion – review the evidence and halt cases that have no business being heard by a jury – it also offers helpful precedent for the ever-more-present "parallel violation" claims. If preemption fails, one of the best remaining defenses to a "parallel violation" claim is failure of the plaintiff to present evidence that the device that he or she used actually had the defect. This places a significant burden on plaintiffs and, as the Young decision highlights, they cannot meet it by inviting speculation.