

**A.O. SMITH CORPORATION,
ET AL.**

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NO. 2003-C-0088

VERSUS

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COURT OF APPEAL

PERFECTION

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FOURTH CIRCUIT

CORPORATION, ET AL.

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-15646, DIVISION "F"
HONORABLE YADA MAGEE, JUDGE

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JUDGE MICHAEL E. KIRBY

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(Court composed of Judge Charles R. Jones, Judge James F. McKay III,
Judge Michael E. Kirby)

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Relators seek this Court's supervisory jurisdiction to review three rulings from a December 13, 2002 trial court judgment.

A. O. Smith Corporation, American Water Heater Company, Bradford White Corporation, Lochinvar Corporation, Rheem Manufacturing Company, and State Industries, Inc. (collectively, the "Tank Manufacturers") are manufacturers of water heaters. Perfection Corporation manufactures and sells "dip tubes" which are component parts of water heaters. American Meter Company is Perfection's parent company. Perfection Corporation and American Meter Company are hereinafter referred to collectively as "Perfection." The Tank Manufacturers utilized some 16 million of these dip tubes in the production of water heaters sold in Louisiana and elsewhere. The Tank Manufacturers contend these dip tubes were defective as they were subject to premature deterioration and abnormal failure.

As a result of these allegedly defective dip tubes, more than twenty

class action lawsuits were filed across the country against Perfection and the Tank Manufacturers. These suits included a consumer class action filed in federal court in Missouri, Heilman v. Perfection Corporation, et al., W. D. Missouri, No. 99-0679-CW-W-6, which culminated in a settlement between the Tank Manufacturers and the class, but not Perfection. The class assigned its claims against the Perfection to the Tank Manufacturers.

The Tank Manufacturers' claims can be summarized as follows:

1. The Original Petition filed in September 1999 asserts all claims revolving around the general allegation that the dip tubes were defective.
2. The First Amended Petition filed in March 2000 asserts against Perfection and American Meter claims assigned to them in the Heilman settlement: strict liability, negligence, breach of contract, breach of express warranty, breach of implied warranty, unjust enrichment, negligent misrepresentation, detrimental reliance, contribution and tort indemnity. The Tank Manufacturers also seek recovery for damages that include all amounts paid to consumers and plumbers.

Also, from the inception, the Tank Manufacturers claimed business reputation damage caused by negative news reports, which they described as

libelous and defamatory.

A discovery dispute followed. Perfection argues that even while representing to the trial court that discovery was complete, the Tank Manufacturers refused to produce financial statements to Perfection until June 14, 2002. Allegedly, the cutoff date for discovery was in August 2002, and Perfection suggests it did not have time (between June and August) to address the new discovery before the cut-off date.

The issues before this court in this writ application are: 1) whether the trial court properly granted a motion for partial summary judgment and a motion to strike that dismissed relators' damage to business reputation claim, and 2) whether the trial court properly dismissed relators' contribution/ tort indemnity cause of action. This second cause of action was also dismissed pursuant to a motion for partial summary judgment, which held that the relators cannot maintain their contribution claim without first obtaining a release of the non-settling joint tortfeasor, nor can they maintain an indemnity claim without there first being a judgment against them.

The relators argue that the dismissed issues are so intertwined with the remaining issues still before the trial court that if the dismissed issues are not addressed at this trial, a re-trial might be necessary; hence, the relators seek

to invoke the supervisory jurisdiction of this court, alleging irreparable harm.

In the interest of judicial economy, we will exercise our supervisory jurisdiction in this matter. The relators argue that “the failure of Perfection to honestly and proactively address the dip tube crisis also led to the Plaintiffs being unfairly and inaccurately portrayed in the news media. Numerous national media outlets such as *Good Morning America*, *Consumer Reports* and *The Wall Street Journal* published stories on the dip tube crisis. Extensive exposure also appeared in numerous local media outlets. The overriding theme throughout these publications was that the Plaintiffs had a problem with millions of water heaters (as opposed to Perfection’s dip tubes) and that the scope of the problem had been known for years.” In addition to \$100 million in out-of-pocket expenses, the relators also seek to recover for damages sustained to their business reputations. In addition to documentation of negative media reports, the relators have produced voluminous documents detailing the negative impact on their customers, including angry letters from customers, establishing the clients’ lack of faith in the companies they had previously trusted. Corporate witnesses have also been deposed, and their testimony addresses the harm to relators’ reputation because of the dip tube crisis. The relators also retained

two outside experts, Dr. Silas Lee and Dr. Darryl Williams, to independently evaluate the harm to the relators' business reputations. Lee, an expert in "consumer and product satisfaction," conducted a nationwide survey of consumers and concluded that the dip tube problem will cause a lack of consumer confidence. Williams, an expert economist, valued the damage to the businesses at \$150-230 million.

Perfection argued in favor of its motion for partial summary judgment on the loss of business reputation claim that:

- 1) the relators failed to offer sufficient proof to support damages to business reputation;
- 2) the law does not recognize loss of business reputation claims separate from claims for lost profits;
- 3) the relators' experts' calculation of damages was too speculative; and
- 4) the relators did not have standing to assert the claims.

The motion to strike was based on an argument that the relators failed to quantify the damages timely.

Perfection's argument that a company must prove lost profits in order to maintain a claim for damage to business reputation is without merit. This court has specifically recognized that damages are awardable for loss of business reputation as a distinct claim. In Kogos v. Rittiner, 228 So.2d 62,

71 (La. App. 4 Cir. 1969), this Court stated:

There is no doubt in our minds that in addition to the loss of income over the period covered by [the expert's] projection, plaintiff's business was damaged to the point that he had virtually to start over again. The damage to his reputation as a businessman, which involves his ability to obtain credit and secure new customers, is an additional element of damage which will make his recovery all the more difficult.

Other cases also support a conclusion that damages are indeed recoverable for loss of business reputation. See, e.g., Karageorge v. Cole, 565 So.2d 502 (La. App. 2 Cir. 1990); Koncinsky v. Smith, 390 So.2d 1377 (La. App. 3 Cir. 1980). A review of the evidence presented by relators shows that they have raised genuine issues of material fact, through competent evidence, as to their claim for damage to their business reputations.

The respondents argue that the damage estimates offered by relators' expert witness are too speculative and cannot be proven at trial. Relators have raised a question of fact on this issue. Whether the relators' evidence of their damages is sufficient is a question for the trier of fact, and is not an issue appropriately disposed of on summary judgment.

Respondents' argument that relators lack standing to bring a claim for damage to their business reputation is without merit. Relators are the proper parties to seek recovery for damage sustained to their reputations.

As for the motion to strike, the respondents argue that the relators' claims were made too late and violate discovery cut-off dates. However, the claims were germane to the essence of the suit from the suit's inception. In addition, the relators turned over all discovery before the cut-off dates.

For these reasons, we find that the trial court erred in granting partial summary judgment dismissing relators' claims for damage to their business reputations and in granting the motion to strike those claims.

The second issue presented by this writ application is whether the trial court properly dismissed relators' claims for indemnity and contribution. As stated above, these claims were also dismissed pursuant to a motion for partial summary judgment, which held that the relators cannot maintain their contribution claim without first obtaining a release of the non-settling joint tortfeasor, nor can they maintain an indemnity claim without there first being a judgment against that joint tortfeasor.

When the Tank Manufacturers settled the consumer class action, they were assigned the consumers' claims against Perfection. The Tank Manufacturers have paid a finite debt that they claim was incurred because of the actions of Perfection in making defective dip tubes, fraudulently concealing the defect, and deflecting the blame onto them. The Tank Manufacturers have the right to pursue indemnity and contribution claims.

See, Illinois Central Gulf v. Deaton, Inc., 581 So.2d 714 (La.App. 4 Cir. 1991). Perfection chose not to participate in the settlement; and if it is truly at fault, it must bear the ultimate blame and incur the appropriate damage. The trial court erred in dismissing the relators' claims for indemnity and contribution.

This writ application is hereby granted, and the trial court rulings complained of are reversed. This matter is remanded to the trial court for further proceedings.

**WRIT APPLICATION GRANTED; TRIAL COURT RULINGS
REVERSED; REMANDED**