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Asbestos claim going back to 1960s fails on causation, duty to warn

The Illinois Appellate Court 4th District recently reversed a McLean County Circuit Court judgment entered in favor of the plaintiff after it found that the trial court should have granted the defendant's motion for judgment notwithstanding the verdict due to a lack of duty and causation.

The case is *McKinney vs. Hobart Brothers Co.*, Nos. 4-17-0333 (4th Dist. 2018).

Charles McKinney sued Hobart Brothers Co. and various other defendants after he contracted mesothelioma. McKinney had been an automobile mechanic where he handled brakes containing asbestos for more than 40 years. Following his work as a mechanic, he worked at Portable Elevator for eight months as a spot welder, where he encountered the defendant's welding rods.

McKinney alleged he contracted mesothelioma after inhaling asbestos while working with welding rods that contained asbestos for which the defendant failed to warn of the dangerousness of asbestos. The welding rods in question were the Hobart 6010 welding stick electrodes, which were manufactured and distributed by Hobart Brothers in the 1960s.

The welding rod comprised two parts: a steel core and a surrounding flux where the rod housed chrysotile asbestos. Hobart Brothers' expert, John DuPont, a professor of materials science and engineering, opined that it was impossible for the asbestos contained within the welding rods to have escaped from the rod and into respirable asbestos.

First, DuPont said that the asbestos fibers were encapsulated by the sodium silicate in the flux, so the asbestos particles could not escape. DuPont further opined that even if the sodium silicate particles that contained the asbestos were to break off from the flux, the particles would not be small enough to inhale.

DuPont also stated a second reason for the impossibility of respirable asbestos fibers to have escaped from the welding rods:

welding temperatures would be at least 2,700 degrees Fahrenheit, whereas asbestos burns at 1,500 degrees, thereby making it impossible that asbestos could have been released in the welding fumes.

McKinney's expert, Arthur Frank, a professor of occupational health, opined, however, that despite not having a background in material science, engineering or being qualified to perform any sort of fiber tests on the welding rods, Hobart's welding rods were capable of releasing respirable asbestos fibers.

Frank provided two reasons for his opinion. First, he testified that he had never known of an asbestos containing product that would not give off asbestos fibers if "properly manipulated." Second, basing his opinion on work done by one Dr. Dement that relates to fibers being released from welding rods, Frank was able to conclude that asbestos could be released.

On appeal, the defendant claimed a Supreme Court Rule 213(f)(3)(ii) violation against Frank on the basis that in the plaintiff's Rule 213 disclosures, he only stated that Frank's testimony would consist of "subject matter," rather than "conclusions and opinions."

Frank testified that McKinney's mesothelioma was caused by exposure to asbestos from the products of all defendants. At the time

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of Frank's discovery deposition, Hobart had not yet been a party to the case. As a result, Frank had no occasion to discuss Hobart's welding rods.

The trial court found that there was no sanctionable Rule 213 violation. The appellate court agreed because the relationship between mesothelioma and asbestos is commonly known and the logic that, if the welding rods

TOXIC TORT TALK



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did cause McKinney's mesothelioma, then it would follow that the welding rods released respirable fibers.

The defendant also argued that Frank's conclusory opinions based on Dement's welding rod study were speculative. The appellate court agreed that simply because other products that contained asbestos could release respirable asbestos that were contained therein did not necessarily mean the welding rods also released respirable asbestos; it was "sheer, unsubstantiated speculation."

The appellate court found, however, that there was no abuse of discretion when the trial court allowed this to be admitted because Frank's reliance on Dement's work was not argued to be unreasonable by the defendant; the defendant, by virtue of its silence, conceded the customariness and reasonableness of the reliance on Dement's work.

The defendant also appealed

the trial court's judgment on the admission of a third-party expert report that was used to impeach Timothy Hensley, a corporate representative of Hobart.

The plaintiff used the report as impeachment material and assured the court that the document would not go back to the jury. The defendant initially objected to hearsay, but the trial court overruled the objection and allowed the reports not for their truth or substantive evidence, but rather impeachment.

On redirect examination, the defendant published the report to the jury to assist in questioning to which the plaintiff requested, and the court agreed, should be admitted into evidence and go back with the jury for deliberations.

The appellate court disagreed and found that the defendant had not forfeited his hearsay objection and the redirect examination did not make the report admissible as substantive evidence.

The appellate court then reviewed the case de novo on the issue of whether Hobart owed a duty to McKinney. To determine whether a duty existed, the court had to answer whether "knowledge existed in the industry of the dangerous propensity of the manufacturer's product." The court found that there was no duty owed because the defendant could not have owed a duty to warn when, at the time, it was unknown to the industry that welding rods that contained encapsulated asbestos fibers could release respirable asbestos.

Additionally, the appellate court assessed whether there was sufficient evidence of substantial causation. The court found there was not enough evidence to prove that McKinney actually inhaled respirable asbestos fibers from the welding rods, and if he did, he did not show that he inhaled enough of the fibers to be a substantial factor in causing his mesothelioma.

As a result of the appellate court's finding on the question of duty and causation, the court held that the defendant was entitled to a judgment notwithstanding the verdict.