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## Defendant able to reverse asbestos verdict after jury finds for plaintiff

The 4th District Appellate Court recently reversed a McLean County Circuit Court judgment entered in favor of the plaintiff in a failure-to-warn case, finding that the defendant was entitled to judgment notwithstanding the verdict where the plaintiff established neither that the defendant owed the plaintiff a duty nor that the defendant substantially caused the plaintiff's injury.

In *McKinney v. Hobart Brothers Co.*, 2018 IL App (4th) 170333, Charles McKinney sued Hobart Brothers Co., alleging he developed mesothelioma following his exposure to asbestos-containing welding rods that the defendant had manufactured and which the plaintiff came in close proximity to for eight months in the early 1960s.

The plaintiff alleged that Hobart caused his mesothelioma by willfully and wantonly, or at least negligently, failing to warn of the dangerousness of its product. Additionally, the plaintiff asserted claims against other defendants not party to this appeal and alleged that insulation and brakes manufactured by these other defendants, which he was exposed to during the 40 years he spent as a car mechanic, had exposed him to asbestos as well, also leading to his development of mesothelioma.

At trial, a jury returned a verdict in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict, which the trial court denied.

The defendant alleged four issues on appeal. First, that portions of the opinions of the plaintiff's expert adduced at trial were not properly disclosed in the plaintiff's response to an interrogatory under Supreme Court Rule 213(f) and that the expert employed improper methodology in arriving at those opinions and, thus, they should have been excluded.

Second, the defendant contended that third-party nontestifying expert reports were improperly admitted as substantive evidence and, as a result, there was no properly admitted substantive evidence demonstrating that the welding rods could have released respirable asbestos fibers.

Third, the defendant argued that it had no duty to warn the plaintiff of the dangers of asbestos because the defendant had no actual knowledge that its product was dangerous.

The defendant's final argument was that the record contained no evidence that the welding rods were a substantial cause of the plaintiff's mesothelioma.

In regard to the defendant's contention that the opinions adduced at trial of



### TOXIC TORT TALK

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the plaintiff's expert were not disclosed prior to trial, particularly the opinion that the welding rods could release respirable asbestos fibers when properly manipulated, the appellate court disagreed.

The court noted that the plaintiff had properly disclosed his expert's conclusion that the defendant's asbestos-containing welding rods had caused the plaintiff's mesothelioma. An expert may testify to logical corollaries of his disclosures and this particular opinion was a clear logical corollary.

Moreover, the court determined that the defendant's argument that the expert relied on improper methodology failed as well. The plaintiff contended that the expert relied on facts or data gathered by a third-party expert.

The defendant failed to address this argument in a reply brief. Thus, the court assumed the defendant had conceded the reasonableness of the expert's reliance on the work of a third-party expert. Finding no abuse of discretion by the trial court, the court held that the testimony of the expert was properly admitted.

The 4th District also disposed of the defendant's argument that had third-party expert reports not been improperly admitted as substantive evidence, the record would be devoid of substantive evidence that the welding rods were capable of releasing respirable asbestos fibers.

While the court agreed that these third-party expert reports were improperly

admitted as substantive evidence, it did not agree that the record lacked any competent evidence that the welding rods were capable of releasing respirable asbestos fibers.

The court agreed that the defendant had no duty to warn the plaintiff of the dangers of asbestos where the record was devoid of any evidence that the defendant should have reasonably foreseen that the use of asbestos-containing welding rods may have posed a risk to individuals exposed to them because of their potential to produce respirable asbestos fibers.

The Illinois Supreme Court imposed a knowledge requirement in failure-to-warn cases, holding that the plaintiff must prove that the defendant knew or should have known of the danger that caused the injury. *Woodill v. Park Davis & Co.*, 79 Ill.2d 26, 35 (1980). Interpreting *Woodill*, the appellate

court clarified that the existence of the duty depends on whether knowledge existed in the manufacturer's industry of the dangerous propensity of the manufacturer's product at the time the injury occurred. In this case, the product of the manufacturer in question was not raw asbestos — it was the welding rods themselves.

Where the testimony offered by the plaintiff evinced only that the industry had contemporaneous knowledge of the dangers of raw asbestos, and not contemporaneous knowledge of the danger of the defendant's welding rods, the testimony was insufficient to demonstrate that the defendant had knowledge such that it had any duty to warn the plaintiff.

The court held that the resulting lack of duty entitled the defendant to a judgment notwithstanding the verdict.

For the sake of argument, the court also addressed the

defendant's final contention that the record contained no evidence that the welding rods were a substantial cause of the plaintiff's mesothelioma.

Citing the logic of *Thacker v. UNR Industries Inc.*, 151 Ill.2d 343, 354-55 (1992), the court said that proving merely that the plaintiff came into frequent, close and regular contact with the welding rods in question "would not prove substantial causation any more than proving he routinely walked on floor tiles containing asbestos would prove substantial causation."

Considering the evidence on the record in the light most favorable to the plaintiff, the court agreed that it would be a reasonable inference that the plaintiff had breathed some asbestos fibers released by the welding rods in the workplace. However, this fell short of the plaintiff's burden of proving that he inhaled enough

asbestos fibers from the welding rods to make them "a material element and a substantial factor in bringing about his mesothelioma."

Considering the plaintiff's own testimony regarding his exposure to the welding rods, the court said he did not present sufficient evidence to prove that but for his exposure to the welding rods, he would not have contracted mesothelioma in the 40 years he spent as a car mechanic working with asbestos-containing products.

The court explained "for all that appears in the record, the amount of asbestos fibers released from defendant's welding rods ... was no more than the amount one would have encountered with a natural environment."

As a result, the court held that the lack of any evidence of substantial causation also entitled the defendant to a judgment notwithstanding the verdict.