Products Liability Law Daily Wrap Up, WARNINGS ISSUES—ASBESTOS—W.D. Wash.: Deceased worker's family cannot establish post-sale failure to warn liability for asbestos-containing products, (May 31, 2019)

Products Liability Law Daily Wrap Up

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By Harold S. Berman, J.D.

The family of an automotive mechanic and former naval machinist who died from mesothelioma after decades of exposure to asbestos-containing products failed to prove their negligence theory based on a breach of a post-sale duty to warn.

The evidence provided by the family of a deceased worker who allegedly was exposed to asbestos-containing products while he worked as an automotive mechanic, a machinist in the U.S. Navy, and a machinist and nuclear inspector at the Puget Sound Naval Shipyard, was insufficient to show that a failure to warn by manufacturers and suppliers of the asbestos-containing products proximately caused his injuries and death from mesothelioma, a federal district court in Washington ruled. The court granted the defendant companies' motions for judgment as a matter of law following a mistrial in which the jury could not reach a verdict on the family's negligence claims. Although the court rejected the argument that it issued an erroneous jury instruction concerning the defendant companies' ongoing duty to warn, it granted the companies' motions, finding insufficient evidence from which a jury could conclude that the product manufacturers/suppliers' breach of their duty to warn proximately caused the decedent's injuries (*Jack v. DCO, LLC*, May 28, 2019, Robart, J.).

The worker developed mesothelioma allegedly caused by his exposure to asbestos-containing products during his mechanic and machinist work. Following his diagnosis with the disease, he sued multiple companies that allegedly supplied, manufactured, or sold asbestos-containing materials and equipment to which he was exposed over several decades. After he died, his wife and son proceeded as the plaintiffs in the case.

A jury trial was held on claims of negligence, strict liability for design defect, and strict liability for failure to warn, against DCo, LLC (f/k/a Dana Companies, LLC) (DCo) and Ford Motor Company (Ford). At trial, the wife and son brought evidence that the decedent used gaskets manufactured or sold by DCO, and brakes and clutches sold by Ford. The jury found that the plaintiffs did not prove their strict liability design defect or failure to warn claims. It also did not reach a verdict on the negligence claims, causing the court to declare a mistrial as to the negligence claims.

DCO and Ford then renewed their motions for judgment as a matter of law that they initially had brought during trial. The companies contended there was insufficient evidence for a reasonable jury to find that the decedent was exposed to asbestos while working with their products, or that any such asbestos exposure was a substantial factor in causing his mesothelioma. They also argued that the plaintiffs' assertion that the companies breached their duty to alert the decedent of their products' hazards after the point of sale was neither legally cognizable nor supported by substantial evidence.

Jury instruction on post-sale duty to warn. The court first rejected the companies' contention that the court erred in allowing the jury to consider whether the companies were subject to an ongoing duty to warn, and breached their duty to warn the decedent of the hazards of their asbestos-containing products after the point of sale. The jury instruction correctly explained under Washington law that the manufacturer was subject to a post-sale duty to warn only when it learned or should have learned of the danger connected with its products, and that "the manufacturer must act as a reasonably prudent manufacturer would under the circumstances." The instruction gave the jury proper latitude to determine whether or not either company breached a post-sale duty to warn the decedent of any hazards related to their asbestos-containing products.

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The court also rejected the companies' argument that it could allow a jury to consider breach of a post-sale duty to warn only if the plaintiffs had established that a post-sale warning was likely to reach him. The jury instruction accounted for the fact-specific nature of the form of a post-sale warning, noting that a continuing duty to warn was "satisfied if the manufacturer exercises reasonable care to inform product users," but did not suggest that a post-sale warning was adequate only if it reached the intended consumer.

No evidence that breach of post-sale duty to warn proximately caused injuries. The court next granted the companies' motions for judgment as a matter of law. The court determined that a reasonable jury could find, based on substantial evidence, that the companies' breach of their post-sale duties to warn the decedent about the dangers of their asbestos-containing products did not proximately cause the decedent's injury. For purposes of the motion, the court assumed that a reasonable jury could find that, at some time after the decedent purchased and used the companies' products, the companies knew or should have known of the asbestos-related hazards of their products, and so had a post-sale duty to warn which they breached. However, the plaintiffs failed to offer sufficient evidence to show that the companies' breach proximately caused the decedent's injury. Their theory of post-sale failure to warn liability was inherently speculative, and they did not point to any evidence that the decedent knew he was working with asbestos-containing products at the naval shipyard or in his automotive work. Consequently, a reasonably jury could not conclude that the decedent would have attempted to protect himself from asbestos even had the companies issued post-sale warnings about their own products.

The case is No. C17-0537JLR.

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Companies: DCO, LLC f/k/a Dana Companies, LLC; Ford Motor Co.

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