

[Products Liability Law Daily Wrap Up, TOP STORY—CHILDREN'S PRODUCTS—U.S.: High Court review sought of damages rulings in toxic Aqua Dots lawsuit, \(May 22, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Georgia D. Koutouzos, J.D.

The parents of a young child alleged to have suffered permanent brain injuries after eating toy Aqua Dots beads containing a toxic substance are seeking U.S. Supreme Court review of a federal appellate panel's decision upholding the Arizona federal court's refusal to permit the jury to consider punitive and other economic damages in the parents' product liability case against the toy's designer, distributor, and seller ([Monje v. Spin Master, Inc.](#), cert. filed May 15, 2017).

A 16-month-old child became seriously ill and allegedly sustained permanent neurological deficiencies after having consumed Aqua Dots—Chinese-made, brightly colored toy beads designed by an Australian company and imported into the United States. The toy, which subsequently was recalled, contained an industrial solvent swiftly metabolized by the human body into the "date-rape" drug gamma-hydroxybutyrate (GHB). The boy's parents sued the product's developer, Moose Enterprises, as well as its U.S. distributor, Spin Master, Inc., contending that the companies should have known that the imported beads were toxic and that had they tested the beads properly and monitored early reports of poisoning, they would have known about the toxicity in time to have prevented the boy's poisoning.

The case went to trial and the jury awarded approximately \$435,000 in compensatory damages for the short-term harm suffered by the child, but the trial court refused to allow the jury to consider awarding: (1) damages for the child's medical expenses or the parents' emotional distress and lack of parental consortium; (2) damages for the permanent neurological harm the child sustained after eating the toxic beads; and (3) punitive damages.

A federal appellate panel affirmed the Arizona federal trial court's decision, concluding in an [unpublished decision](#) that the lower court did not err in granting partial summary judgment favoring the defendants on the issue of punitive damages because there was no evidence from which a juror could conclude that they had acted with an "evil mind," the standard for recovering such damages in Arizona. In addition, the trial court did not abuse its discretion in holding that the boy's father was judicially estopped from asserting claims for loss of consortium, emotional distress, and the child's past and future medical expenses inasmuch as those claims had been omitted from the asset disclosure schedule in his Chapter 7 bankruptcy proceeding.

Finally, the panel found that the trial court did not err when it excluded the parents' expert witness from opining that Aqua Dots had caused the child to suffer permanent brain injuries. In that regard, the panel noted that the parents' expert had advanced two causation theories, one of which had not been disclosed until the expert's deposition and was excluded as a discovery sanction for untimely disclosure, while the other was excluded as unreliable after the expert witness unambiguously disavowed the theory in his deposition. It was well within the trial court's broad discretion to exclude both theories, the appeals court advised.

Questions presented. Because the child's father inadvertently failed to list claims for emotional distress, loss of consortium, and medical cost damages in a bankruptcy case in which he was the debtor, the trial court in the product liability lawsuit presumed that he had engaged in manipulation and judicially estopped the claims, the petitioners asserted, adding that the U.S. Court of Appeals for the Ninth Circuit also applied that presumption in contravention of the judicial estoppel principles established by the U.S. Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001). Noting a split between the appellate circuits in that regard, the petitioners' first

question was whether that conflict among the circuits and the Ninth Circuit's failure to follow *New Hampshire* required a grant of certiorari.

Secondly, arguing that both the trial court and the court of appeals had failed to apply Arizona punitive damages law, the petitioners queried whether the High Court should grant certiorari because the Ninth Circuit had "so far departed from the accepted and usual course of judicial proceedings in its treatment of the punitive-damages issue in this case, and has so sanctioned such a departure by the district court" as to call for the exercise of the Supreme Court's supervisory power.

Finally, contending that the trial court and the Ninth Circuit had contravened Arizona substantive law by rejecting key expert witness causation evidence, the petitioners queried whether the High Court should grant certiorari because "the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings in its treatment of substantive Arizona expert-witness causation principles, and has so sanctioned such a departure by the district court" as to warrant the Court's exercise of its supervisory power.

The petition is Docket No. [16-1380](#).

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Companies: Spin Master Inc.; Spin Master Ltd.; Moose Enterprises Proprietary Ltd.

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