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- Massachusetts Supreme Judicial Court Holds (1) Expert Disclosure Adequately Revealed Alleged Fact as Basis for Disclosed Opinion Regarding Negligence But Not as Separate Opinion of Negligence by Itself, (2) Web Pages with Unknown Authors and Addressed to Laypersons Not Admissible as Learned Treatises, and (3) Trial Judge Erred in Prohibiting Cross-Examination of Expert With Record Used With Him on Direct
- Massachusetts Federal Court Holds Plaintiff's Claims Not Time-Barred Under Massachusetts Relation Back Doctrine Because Claims Against New Defendant Arose Out of Same Injury Alleged in Original Complaint

Foley Hoag LLP publishes this quarterly Update concerning developments in product liability and related law of interest to product manufacturers and sellers.

Massachusetts Federal Court Holds Proof of Testing of Proposed Alternative Design Not Required in Design Defect Claim, Evidence Plaintiff Ignored Defendant's Warnings Did Not Establish He Was Sole Proximate Cause of Injury on Design Defect Claim But Did Negate Causation for Failure to Warn

In *Garfield v. Gorilla, Inc.*, 2015 U.S. Dist. LEXIS 85689 (D. Mass. July 1, 2015), a hunter setting up his tree stand was severely injured when the steel cables suspending the stand's platform gave way and he fell approximately 20 feet to the ground. The stand came with a full-body safety harness and both written and video safety instructions which repeated multiple times that "[u]sing your fall arrest device from the moment you leave the ground until the moment you return to the ground is the single most important action you can take to prevent a tree stand accident that could result in injury or death." The written instructions also warned the user to inspect the stand before use, never use it if damaged, replace the cables every three years and never keep the stand in a tree for more than two consecutive weeks. Plaintiff was familiar with and understood these instructions but was not wearing the harness at the time of his accident. He sued the stand's manufacturer and seller in the United States District Court for the District of Massachusetts for breach of the implied warranties of merchantability (the Massachusetts near-equivalent of strict liability) and fitness for a particular purpose, alleging the stand's cables were defectively designed because they were susceptible to weakening from corrosion over time and defendants failed to warn of this danger. The seller moved for summary judgment on all claims, arguing (1) plaintiff's proposed safer alternative design (stainless rather than galvanized steel cables) was untested and therefore not shown to be feasible, (2) his failure to wear the harness or heed other instructions was the sole cause of his injuries and (3) for the same reason additional warnings would not have prevented the accident.

Plaintiff's mechanical engineering expert opined that the primary cause of the stand's failure was corrosion, which would be expected over time in an outdoor environment even with the cables' galvanization. In his opinion, the cables should instead have been made with stainless steel, which is "more corrosion resistant" and would have significantly increased the cables' lifespan at an additional cost of only \$1.60. Defendant argued that because plaintiff's expert had never tested his proposed alternative design, his testimony was speculative and unreliable. The court held, however, that alternative design testing is not required in Massachusetts design defect cases and any disagreement over the feasibility of plaintiff's alternative design "[is] for the jury, and not the court."

Nor was the seller successful in arguing plaintiff was the sole proximate cause of his injury because he did not wear the safety harness or inspect the cables prior to use as

instructed. The court noted plaintiff's expert's testimony that the hazard created by corroding cables was not open and obvious and an average user would not have noticed corroded strands even on a close inspection. And, even though plaintiff conceded he was aware of the safety instructions and videos and understood the importance of wearing the harness, this was not one of the rare cases in which causation was so indisputable that it need not be submitted to the jury.

The court did, however, find summary judgment warranted on plaintiff's failure-to-warn claim, as plaintiff's failure to heed the very explicit warnings precluded a finding that a different warning would have prevented plaintiff's injury. Finally, the court held plaintiff's claim of breach of an implied warranty of fitness for a particular purpose failed as a matter of law because it was undisputed plaintiff only used the stand for its ordinary purpose: hunting.

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In *Town of Lexington v. Pharmacia Corp.*, 2015 U.S. Dist. LEXIS 127670 (D. Mass. Sept. 23, 2015), a municipality conducted environmental testing at its schools following the United States Environmental Protection Agency ("EPA")'s 1996 issuance of guidelines for maximum levels of polychlorinated biphenyls ("PCBs") in school air. After the testing revealed that PCB levels in caulk at one school built in 1960-61 exceeded the limits set by federal regulations and air levels exceeded the new EPA guidelines, the municipality remedied these problems. It then sued three PCB manufacturers or successors in the United States District Court for the District of Massachusetts to recover the remediation costs, asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) based on design defect and failure to warn, and

violation of Mass. Gen. L. c. 93A (the Massachusetts unfair and deceptive practices statute) for breach of an alleged "continuing" duty to warn arising post-sale. One defendant, successor to a PCB manufacturer, moved for summary judgment on all claims, arguing the municipality (1) had no direct evidence the manufacturer produced the PCBs in the school; (2) failed to show privity of contract between the manufacturer and municipality; (3) failed to show a specific design defect by expert testimony; (4) failed to show a reasonably foreseeable risk giving rise to a duty to warn; and (5) failed to demonstrate a continuing duty to warn or that its breach constituted an unfair or deceptive trade practice.

On the first issue, the court held the municipality could rely on market share data to show defendant's predecessor was the PCB manufacturer. Although defendant offered some contrary evidence, it acknowledged its predecessor's market dominance during the relevant period—a share of up to 97.3%—and this was sufficient to create a fact issue. The court then rejected defendant's argument that plaintiff's injury occurred, if at all, when the PCB-containing caulk was installed in 1960 or '61 and hence before a Massachusetts law, Stat. 1973, c. 750 §§ 1, 2, eliminated the requirement of privity in warranty claims for injuries occurring after the statute's effective date. The court held that "a party that has no reason to be cognizant of his injury is not injured at all," and as the municipality had no notice of any need to test for indoor PCBs until the 1996 EPA guidelines, plaintiff was not required to prove privity.

Despite these favorable rulings, the court ultimately granted summary judgment against all the municipality's claims. Regarding design defect, the court agreed with defendant that expert testimony was needed, as PCBs are complex chemicals and hence a jury could not use its lay knowledge to determine whether they suffered from an unreasonable design defect. The court also rejected plaintiff's argument it could meet its burden by claiming PCBs are, as a class of products, inherently dangerous and thus per se defective. Citing precedent from cigarette and lead paint litigation, the court held that a defective condition cannot arise from inherent characteristics of a product; rather, plaintiff had to show a feasible safer alternative design, of which it offered no evidence. Moreover, a product's design must be assessed in light of foreseeable risks discoverable by reasonable testing at the time the product was sold, but plaintiff produced no evidence the manufacturer should have known in 1961 that PCBs used in building caulk would volatilize into a hazardous form. Similarly, the court found plaintiff's failure-to-

warn claim also failed for lack of evidence of foreseeability of the harm in 1961.

With respect to the 93A claim, because the municipality was an indirect purchaser, there was no evidence defendant's predecessor could have identified the municipality and communicated a warning to it even if it had a continuing duty to warn arising post-sale.

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In *Kace v. Liang*, 472 Mass. 630 (2015), plaintiff's son died of cardiac dysrhythmia stemming from viral myocarditis after being seen by defendant, an emergency room doctor, the previous day and diagnosed with bronchitis. Defendant's brief examination included a chest x-ray but not an echocardiogram ("EKG"). Plaintiff sued in Massachusetts Superior Court for wrongful death, alleging negligence and gross negligence (the latter permitting punitive damages). The jury found defendant had been negligent, and that his negligence caused decedent's death, but did not find defendant was grossly negligent. Defendant then moved for a new trial or remittitur on the grounds that, among others, (i) plaintiff had not adequately disclosed her expert's opinions, (ii) two web pages plaintiff's counsel had defendant read into the record did not satisfy the learned treatise exception to the hearsay rule, and (iii) defense counsel should have been permitted to use one of decedent's medical records in cross-examining plaintiff's expert. The trial court denied the motion, defendant appealed to the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court ("SJC") granted further appellate review on its own motion.

Regarding expert disclosure, the parties' pretrial memorandum disclosed plaintiff's expert would opine that the relevant standard of care required defendant to (i) recognize that fever,

chest pain, malaise and tachycardia could be signs of viral myocarditis, (ii) order an EKG and cardiac enzyme testing to rule that out, and (iii) immediately admit the patient for specialist consultations and steroid treatment if the diagnosis was not excluded. At trial, the expert also testified it was impossible for defendant to take a complete medical history and perform a proper physical examination in the five minutes he spent with decedent. The SJC agreed with the trial judge that this testimony was properly disclosed as a basis for the expert's disclosed opinion about the standard of care, as the pretrial memorandum listed the times decedent arrived at the hospital, was seen by the defendant and was discharged. But the court rankled at plaintiff's counsel's characterizations of this testimony both during openings and closing as separate grounds for finding a departure from the standard of care, creating an "unnecessarily" "close question" regarding reversal, because the disclosure should have been clearer if plaintiff's counsel intended to make that argument. Indeed, the court warned plaintiff's attorneys, whom it noted specialized in medical malpractice cases, to litigate in good faith and with fairness and integrity going forward. Nonetheless, even if plaintiff's argument was improper, it was harmless, as counsel argued the brevity of defendant's exam's was evidence of gross negligence but the jury rejected that claim.

Regarding the learned treatise issue, the trial judge permitted plaintiff's counsel to force defendant on cross-examination to read into the record printouts from the websites of the John Hopkins University School of Medicine and the Mayo Clinic describing the symptoms of myocarditis. The SJC held the web pages were not admissible as learned treatises under Mass. G. Evid. § 803(18)(B) because they were not "treatises" for physicians but rather summaries for laypersons, and the absence of specified authors precluded any showing they were "reliable authorities." Use of the web pages on cross-examination was also improper because defendant was not testifying as an expert but rather solely as a party. Nonetheless, the evidentiary error was harmless as both sides' experts agreed with the web pages' content.

Finally, the trial judge precluded defense counsel from using one of decedent's earlier medical records when cross-examining plaintiff's expert even though plaintiff had used the record on direct examination. The record was from a separate illness, years before decedent's emergency room visit, and stated he had complained of pain while coughing, but did not specify whether the pain was in his chest. The SJC held

that since the exhibit was agreed upon and used on direct, defense counsel should have been permitted to use it on cross and discuss it during closing, which the trial judge had also precluded. Again, however, a new trial was not required because the record was brief and did not contain sufficient information to warrant reversal.

Massachusetts Federal Court Holds Plaintiff's Claims Not Time-Barred Under Massachusetts Relation Back Doctrine Because Claims Against New Defendant Arose Out of Same Injury Alleged in Original Complaint

In *Labrador v. Indus. Contractors' Supplies, Inc.*, No. 13-13029-MLW, 2015 U.S. Dist. LEXIS 133050 (D. Mass. Sept. 30, 2015), plaintiff sued an industrial supplier in the United States District Court for the District of Massachusetts for, among other things, breach of express and implied warranties of merchantability (the Massachusetts near-equivalent of strict liability), product liability and willful, wanton, reckless or grossly negligent conduct, alleging defendant had manufactured, designed or sold a die grinder bit which broke when plaintiff used it, causing him severe and permanent injury. After defendant's disclosure revealed it was the successor-in-interest of the actual manufacturer, plaintiff promptly moved to amend to add that entity as a defendant and the court granted the motion, but the statute of limitations had expired even before the original defendant was served. The new defendant then moved to dismiss, arguing the claims against it were time-barred.

The court denied the motion. Under Fed. R. Civ. P. 15(c), an amendment relates back to the date of the original complaint if any of the sub-parts of the rule is satisfied, including if the law that provides the applicable statute of limitations allows relation back. Here Massachusetts law applied, and the liberal provisions of Mass. R. Civ. P. 15(c) allow relation back when a new defendant is added as long as the claims asserted against that defendant "ar[is]e out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." As plaintiff's claims against the new defendant arose out of the same injury alleged in the original complaint, the

claims were not time-barred.

The court stated that the new defendant's motion to dismiss was essentially asking it to revisit the decision on the motion to amend, a decision issued by a different judge. The court declined to do this, even though the new defendant had not yet been served when the motion was granted, because plaintiff's belief the original defendant had manufactured the bit was "an honest error" that plaintiff promptly sought to correct after discovering the mistake. The court rejected defendant's argument it would be prejudiced by having to defend an action brought almost four years after the alleged injury occurred, as defendant failed to identify the alleged prejudice with any specificity, such as by pointing to the unavailability of relevant witnesses or evidence. The court also rejected the argument defendant had no notice within the limitations period that it might be added as a party, holding Mass. R. Civ. P. 15(c) does not require such notice. In addition, it was not determinative whether plaintiff had made a mistake in naming a defendant or simply lacked knowledge. Instead, the fundamental inquiry under Mass. R. Civ. P. 15(c) was whether the amendment "would enable a plaintiff to maintain the action which he originally intended to bring," and here it was clear plaintiff intended from the outset to bring a claim against the bit manufacturer.

This Update was prepared by Foley Hoag's Product Liability and Complex Tort Practice Group, which includes the following members:

David R. Geiger Chair and Editor	Catherine C. Deneke Associate Editor
Matthew C. Baltay	Creighton K. Page
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