VERDICTS, SETTLEMENTS & TACTICS

A PERSONAL INJURY LITIGATION REPORTER

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MEDICAL LIABILITY

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tool was stuck so he applied slight pressure to remove the tool from its spot. The tool dislodged quicker than he had anticipated, and, in an attempt to balance himself, plaintiff put his right hand on the pipe, and inadvertently in the jaws of the tool. In the process of regaining his balance, plaintiff pressed the button that engages the crimping motion of the tool he was holding in his left hand.

The crimping tool requires a single push of a button to engage the crimping jaws, rather than a double trigger mechanism. Once the crimping starts, the jaw clamps down with over 7,000 pounds of force for seven seconds. The tool does not have an emergency off switch. Plaintiff alleged that the tool was defectively designed and that there were inadequate warnings.

Defendant contended that the tool was not defectively designed or unreasonably dangerous, and that the warnings were adequate. Defendant disputed plaintiff's claim that emergency stop switch would have prevented or mitigated plaintiff's injury. The defense argued that no other press tool on the market uses a double acting switch. The defense contended that the injury was caused by plaintiff's negligence in positioning himself on the ladder.

General Injury: Open compound fracture of plaintiff's right fourth metacarpal with lacerations of the dorsal and palmar aspect of his right hand.

Plaintiff has returned to work as a plumber, but has residual difficulties with his hand.

Medical expenses: $22,561.05

Lost earnings: $23,000.

Result: Jury verdict in favor of defendant.

Plaintiff's Expert Witness: John Orlowski, P.E., Norwood, Massachusetts

Defendant's Expert Witnesses: James E. Hamm, engineering and crimping tool design, Elyria, Ohio; Erick H. Knox, engineer, accident reconstruction, Aurora, Illinois

Plaintiff's Attorney: Maureen Counihan, Burlington, Massachusetts

Defendant's Attorneys: David A. Barry and Serena D. Madar, Sugarman, Rogers, Barshak & Cohen, Boston. Massachusetts

Barowy v. Ridge Tool Company, No. 08-10719 (U.S. District Court, Mass. February 5, 2010)

Pharmaceutical Products

$9,450,000 Verdict In Suit Arising From Use Of Prempro

Audrey Singleton, who was born on April 17, 1951, and worked as a bus driver, took Prempro from August 1997 to January 2004 for menopause symptoms as well as bone and heart prevention. Before starting Prempro, she had a mammogram that was normal. Both Mrs. Singleton and her prescribing physician, Dr. Donald, did not believe there was a significant breast cancer risk associated with the use of Prempro. In July 2002, a government-funded study's Women's Health Initiative (WHI) results were released regarding Prempro. Plaintiff's prescribing physician, Dr. Donald, believed that the only new finding from that study was that Prempro did not provide heart benefit. Because Mrs. Singleton was on the drug for more than just heart benefit, Dr. Donald recommended that she continue to take Prempro. Dr. Donald did not appreciate that the WHI study also showed an increased breast cancer risk associated with Prempro until he saw Wyeth's updated label, which was printed for the first time in the PDR book in February of 2004. However, that was too late for Audrey Singleton. In January 2004, she was diagnosed with breast cancer.

She underwent a mastectomy, which confirmed invasive ductal cancer that had spread to the lymph system (s of 2 SENTINEL lymph nodes positive for metastasis and 1 of 18 AXILLARY lymph nodes positive). She underwent chemo, radiation and remains on continuous anticancer drug treatment (Arimidex) today.

Suit was brought against Wyeth.

General Injury: Metastatic breast cancer.

Result: Jury verdict awarding plaintiff $3,250,000 in compensatory damages, $200,000 in compensatory damages to plaintiff's husband, and $6 million punitive damages.

Plaintiff's Expert Witnesses: Dr. Elizabeth Naftalis, breast surgeon on medical causation, Dallas, Texas; Dr. Suzanne Parisian, former FDA medical officer, on regulatory and liability issues, Phoenix, Arizona

Defendant's Expert Witnesses: Dr. Lewis Chodosh, cell biologist, on medical causation, Philadelphia, Pennsylvania; Dr. Susan Allen, FDA regulatory expert, Arlington, Virginia

Plaintiff's Attorneys: Zoe Littlepage and Rainey Booth of Littlepage Booth, Houston, Texas; Sam Abloeser of Williams, Cuker & Berezofsky, Philadelphia, Pennsylvania; Rich Lewis, Washington, D.C.

Defendant's Attorneys: David Dukes of Nelson Mullins, Columbia, South Carolina; Heidi Hubbard of Williams & Connolly, LLP, Washington, D.C.; Barbara Binis of Reed Smith LLP, Philadelphia, Pennsylvania

Singleton v. Wyeth, No. 002885 January Term (Philadelphia Cty. Ct. of Common Pleas, PA Feb. 22, 2010)

COMMENTS

Plaintiff's attorneys comment that this was the first hormone therapy case where a substantial amount of Prempro use occurred after the WHI study. It was thus important for plaintiff to establish that Wyeth downplayed the results and importance of the WHI study in order to encourage

physicians to continue to proscribe its drug, even after the WHI study showed serious risks for long-term use.

Defense Verdict In Suit Against Manufacturer Of Botox

Kristen Spears, a 7-year-old with juvenile cerebral palsy, allegedly died as a result of Botox injections on November 24, 2007, in Amarillo, Texas. Plaintiff alleged that Kristen's BOTOX® injections caused Kristen to suffer seizures that contributed to her death.

Kristen Spears received Botox injections for limb spasticity, an off-label use. Plaintiff alleged that Allergan promoted the off-label use of Botox by Kristen Spears' doctor. Plaintiff alleged that Allergan encouraged this doctor to inject cerebral palsy children with a Botox dosage approximately 50 times stronger than the approved cosmetic dosage. Allergan sales representatives allegedly made dozens of sales calls on Kristen's doctor-a pediatrician-even though there are no approved pediatric uses of Botox. After receiving a series of Botox injections in 2006 and 2007, Kristen Spears developed pneumonia, and her seizures worsened dramatically, plaintiff alleged. Plaintiff further alleged that Allergan had information that Botox caused or exacerbated seizures as early as 2004, but intentionally withheld this information from the medical community and the public, including Kristen Spears' family and physician. She also developed muscle weakness in her neck, which left her unable to hold her head up. Kristen Spears died on November 24, 2007, as an alleged result of her Botox injections. Her mother, Dee Spears, is her surviving heir and successor-in-interest. Dee Spears would not have consented to the Botox injections if she had been informed of the risks of symptoms of botulism and seizures.

Defendant disputed plaintiff's allegations, and defendant argued that plaintiff failed to establish that BOTOX® injections can cause seizures and that Kristen's BOTOX® injections actually caused Kristen's seizures. Defendant further contended that plaintiff failed to show that Allergan failed to disclose any information about BOTOX® to Kristen's pediatrician that Allergan had a duty to disclose and that would have caused Kristen's pediatrician to do anything differently.

General Injury: Death.

Result: Jury verdict in favor of Allergan.

With respect to the strict liability claim for failure to warn, the jury found that the potential risks or side effects present a substantial danger to users of Botox, but the jury found that at the times that Botox was administered to Kristen Spears, ordinary consumers would not have recognized the potential risks or side effects. The jury further found that at the times that Botox was administered to Kristen Spears, Allergan, Inc. did not fail to adequately warn of the potential risks or side effects.

With respect to the claim for negligent failure to warn, the jury found that at the times that Botox was administered to Kristen Spears, Allergan, Inc. did not know or should reasonably have known that users would not realize the danger.

Plaintiff's Expert Witnesses: Michael (Rusty) J. Nicar, Ph.D., toxicologist; Jeffrey J. Barnard, M.D., Dr. Shayne Gad, toxicologist

Defendant's Expert Witnesses: Dr. Hank Chambers, expert witness on the use of Botox in cerebral palsy children; Dr. Mauricio Montal, molecular biophysicist with the University of California, San Diego

Plaintiff's Attorneys: Ray Chester, Patton G. Lochridge, Jessica Palvino of Robinson, Calcagnie & Robinson, Inc.

Defendant's Attorneys: Ellen L. Darling, Saleem K. Erakat and Caitlin C. Blanche Snell & Wilmer L.L.P.

Spears v. Allergan, Inc., No. 30-2008-00180033-CU-MT-CXC (Orange County Superior Court of California March 2, 2010)

Recreational Products

Settlement In Suit Alleging Defective Paintball Goggles

On March 19, 2006, plaintiff Jorge Martinez played paintball at Skirmish's facility in Jim Thorpe, Pennsylvania, as part of a group that had traveled to Jim Thorpe from New York. Paintball is an activity in which two or more teams, or separate individuals, engage in mock war games. Participants shoot their opponents with paintballs, which are gelatin encased balls of dye that are propelled from paintball guns by the use of carbon dioxide gas or compressed air.

Skirmish sells and rents paintball equipment to participants who do not have their own, including paintball guns, goggles and paintballs. Martinez did not own his own paintball equipment. Consequently, when Martinez arrived at Skirmish's Jim Thorpe paintball facility, he rented a paintball gun, paintball goggles and a camouflage suit and purchased paintballs from Skirmish. A referee provided by Skirmish rode the bus with Martinez's group and reviewed the rules of play. Martinez was not supposed to take his goggles off during paintball games.

The pair of goggles that Martinez rented from Skirmish on March 19, 2006, were returned to Skirmish's general inventory after his injury and have not been located. Martinez has, however, identified the goggles he rented from Skirmish on March 19, 2006, as VForce Armor Rental Field Black Goggles. The word "VForce" was printed on the top of the goggles.