

VIRGINIA LAWYERS WEEKLY

TRIAL REPORTS

Products Liability

Breach of Implied Warranty - Violation of Federal Hazardous Substance Act

By Virginia Lawyers Weekly Staff
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Type of Action - Products liability - negligence

Type of Injuries - Plaintiff sustained 3rd degree burns over his chest, neck, hands and forearms

Name of Case - Mitchell v. Victor Automotive Products Inc., et al

Court/Case No. - City of Roanoke Circuit Court Case No. CL99-302 and City of Roanoke Circuit Court Case No. CL00-277

Special Damages - Past medical expenses, \$230,000 - future medical expenses, \$50,000

Settlement - Settled in mediation for \$2,100,000; with Henkel Adhesives paying \$50,000, CVS paying \$300,000, and \$1,750,000 paid on behalf of Victor and Advance

Attorneys for Plaintiff - Bruce D. Rasmussen, Charlottesville; Paul R. Thomson III, Roanoke; William H. Cleaveland, Roanoke

Investigator for Plaintiff - Fred D. Sylvester, Roanoke

Plaintiff's Experts - Gordon Whittaker, P.E., chemical engineer; Robert J. Cunitz, Ph.D., and E. Patrick McGuire, warnings, Federal Hazardous Substance Act (FHSA) and CPSC regulations and practices

Defendant's Experts - Richard F. Krenek, Ph.D., P.E., warnings; Vincent Morabit, warnings and CPSC regulations and practices; James D. Rancourt, Ph.D., chemical engineer; Bob Hendry and Charles Muhs, flammable and non-flammable adhesives; Bernard S. Appel, retail sales practices; numerous other experts were identified but their depositions were not taken prior to settlement

Insurance Carriers - CGU Insurance for Victor, et al; Chubb Insurance, umbrella policy for Advance Auto; CVS is self-insured.

Other Useful Information - Plaintiff alleged that defendants Advance Auto and CVS breached their implied warranties and were negligent in selling an extremely flammable glue and cigarette lighter to an unsupervised 11-year-old child, who later suffered severe burns when lighting the glue to patch a flat tire. Plaintiff also contended that the glue manufacturer, Victor Products, sold the patch kit in violation of the Federal Hazardous Substance Act (FHSA) and the glue was unreasonably dangerous because non-flammable glues were commercially available and on the market.

The 11-year-old plaintiff was sold an extremely flammable glue and bicycle tire patch kit by Advance Auto, and a cigarette lighter by CVS. The cigarette lighter warning said, "Keep Away from Children." Other similar glues in the Advance store contained the warning "Keep Out of the Reach of Children." The plaintiff then attempted to patch his bicycle tire by lighting the glue to obtain a better seal. This practice was widespread in the plaintiff's neighborhood. This practice was known to numerous CVS and Advance Auto employees and dates back many years.

While attempting to squeeze the glue out of the tube, it got on the plaintiff's hands and he wiped it on his shirt. The child thought he had wiped all of the glue off of his hands. He then smeared some glue on the inner tube and struck the lighter. Plaintiff was severely burned on his hands, chest and neck and underwent multiple surgeries at the University of Virginia Medical Center.

The glue tube in question violated labeling requirements by the FHSA which required the words "Keep Out of the Reach of Children" and "Keep Away From Heat or Flames." Defendants contended that a proper warning would have made no difference. The defendant Victor had been investigated by the CPSC previously for the same labeling violations and had plead guilty to an unrelated felony of mislabeling its merchandise.

Plaintiff contended that defendants breached their implied warranties of fitness for a particular purpose and merchantability in selling products which were dangerous to an unsupervised 11-year-old child. Plaintiff also contended that the defendants negligently entrusted the glue and lighter to him. Finally, plaintiff alleged that the glue was unreasonably dangerous because non-flammable tire adhesives were commercially available and on the market.

Defendants contended that they could sell a child of any age a product labeled "Keep Away From Children" and that the warning did not apply to the retailer. However, with regard to the lighter, these were shipped in bulk cardboard containers to retailers, bearing the warning "KEEP AWAY FROM CHILDREN." These boxes were never seen by the consumer.

Prior to plaintiff's accident, defendant Victor became aware of another incident involving the lighting of adhesives in a tire patch repair kit. On July 11, 1997, a 10-year-old boy was burned while attempting to light its adhesive with a lighter in order to patch a tire. Plaintiff also learned that Advance Auto had been sued in 1977 for the sale of a flammable adhesive to a child, in violation of a label marked "KEEP AWAY FROM CHILDREN." One of the children in that case had sustained severe burns to his face and leg when the adhesive was lit on fire.

The case settled in mediation after approximately eight hours of mediation for \$2.1 million.

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