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EXPLORING THE CHANGING FACE OF PRODUCT LIABILITY

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Hazardous Hair Oil Case Should Have Gone To The Jury

By Bob Holt

In *Green v A.P. Products, et al*, the Michigan Court of Appeals ruled, in a published, November, 2004 opinion, that the manufacturers and sellers of “Wonder 8” hair and body oil faced potential liability for the death of an eleven month old child who died after ingesting the oil. This case makes it clear that the obviousness of the risk and the adequacy of the warning can remain as issues to be resolved by the jury, notwithstanding Michigan’s product liability tort reform statute.

FACTS

Cheryce Green bought a bottle of “Ginseng Miracle Wonder 8 Oil, Hair and Body Mist – Captivate” from Super 7 Beauty Supply. The hair and body moisturizer was made and marketed by A.P. Products and Revlon. Wonder 8 was marketed as natural oil with “good ingredients” like coconut oil and carrot oil, and various vitamins. The bottle did not warn that it contained hydrocarbons (as it did) or that Wonder 8 was toxic and potentially fatal if ingested. There was no warning to keep it out of the reach of children. The bottle had no child safety cap.

Cheryce Green had two children, including eleven month old Keimer Easley. Ms. Green had “child-proofed” her home. She kept products that she thought were dangerous in a locked cabinet. Because she didn’t think the Wonder 8 oil was dangerous, she kept it in the medicine cabinet.

In June, 1999, Ms. Green’s thirteen year old niece, Nicole Price, was babysitting Keimer. Nicole was allowed to use the Wonder 8 oil, and sometimes did. At the time of the accident, Ms. Green, Ms. Price and Keimer were all in the house. Ms. Green thought Keimer was in his playpen. Ms. Price, however, had deposited Keimer in Ms. Green’s bedroom, unknown to Ms. Green.

Cheryce Green turned around to find Keimer coughing, standing next to her night stand, with the bottle of Wonder 8 oil in his hand, and oil in and around his mouth. Keimer was admitted to Children’s Hospital for one month, but died of hydrocarbon ingestion with chemical pneumonitis (inflammation of the lung). Green’s doctors told her that “the problem was that the oil got into his lungs.”

THE LAWSUIT AND THE MOTION

Cheryce Green sued the makers and sellers of Wonder 8, claiming that the product should have had a warning to keep it out of the reach of children, and that it was potentially harmful or fatal if ingested. Cheryce Green admitted, at deposition, that she knew not to let her baby drink Wonder 8 oil, but drew a distinction between knowing that a child shouldn’t have the product, and knowing that the product was potentially fatal.

The seller, Super 7, moved to dismiss, claiming that there was no evidence that it independently breached any warranty, or that it was independently negligent. Super 7 claimed there was no proof that the hair oil was unfit for its intended purpose as a beauty product. The manufacturers, A.P. Products and Revlon, moved to dismiss claiming that there was no evidence that the lack of warning caused the injury, where the Plaintiff admitted that she knew not to give the hair oil to her child. These Defendants also claimed that the product was misused in an unforeseeable manner.

SECRET WARDLE NOTES:

This case, like the recent Federal court case, *Swix v Daisy Manufacturing* (reported in State of the Art, Nov. 23, 2004) shows that Appellate Courts will let Michigan product liability cases go to the jury, where there is potential difference of opinion as to the obviousness of the risk, or the foreseeability of admitted misuse. Both cases involved serious injuries to children. In *Swix*, the court emphasized the manufacturer’s marketing of BB guns to children. In *Green*, the Court seemed to be unfavorably impressed with the lack of warnings on a “natural” product that contained potentially lethal hydrocarbons.

Manufacturers, sellers and insurers must pay attention to how a product is marketed, and whether adequate warnings are given. They must analyze and anticipate foreseeable misuse. Defendants must be aware of the issues and avenues for recovery that remain in product liability law, even after tort reform.

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The trial court granted summary disposition to all Defendants, adopting the arguments of the manufacturers regarding Plaintiff's knowledge of the danger, misuse, and the lack of a duty to warn.

THE APPELLATE RULINGS

The Court of Appeals reversed the trial court, and sent the case to the jury. The Court rejected Defendant's argument, raised for the first time on appeal, that the danger of ingesting Wonder 8 hair oil was open and obvious and that, in any event, Cheryce Green knew that the product could be harmful if her baby ingested it.

The Court of Appeals held:

- (1) The obviousness of the risk was an issue that should have been decided by the jury. The 1996 Michigan Tort Reform Statute says that a defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent person, or a risk that is a matter of common knowledge to persons like the user.

Here, the risk of becoming ill from ingesting Wonder 8 was probably obvious to a reasonable person. The risk dying, however, was not, at least as a matter of law. The Tort Reform Statute doesn't prohibit a jury from determining the obviousness of the risk, and that question should have been determined by the jury here.

- (2) The issue of proximate cause should have gone to the jury, where there was evidence in an affidavit, submitted after Cheryce Green was deposed, that she would have used the product differently, by locking it up, if she had known that it could cause death.
- (3) Defendants were not protected by the "misuse" defense in the Tort Reform Statute where a jury could find that the misuse was reasonably foreseeable. If the jury determined that a warning was required, such as "keep out of the reach of children," "do not ingest," or "ingestion can be fatal," then the jury must have concluded that the danger was not open and obvious. Misuse of the hair oil, in that case, would be deemed to be reasonably foreseeable.
- (4) Defendants could not shift the duty to protect Keimer on to his parent, Cheryce Green, if the warning was inadequate. If the jury found that the Defendants should have warned Cheryce differently, then she was not in a position to carry out her parental obligation to take prudent steps to protect her child. This issue, too, should have gone to the jury.
- (5) The retail seller could be liable for breach of implied warranty, based on the allegations of inadequate warnings. Under the Uniform Commercial Code, for goods to be merchantable, they must be adequately contained, packaged and labeled.

This is a published decision. It is binding precedent for Michigan trial courts.

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We welcome your questions and comments.

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