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SUPREME COURT CLARIFIES SCOPE OF OPEN AND OBVIOUS DANGER DOCTRINE AND DISCARDS 'SIMPLE TOOL' DOCTRINE IN PRODUCT LIABILITY ACTIONS

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In a product liability decision issued on July 19, 2006, the Michigan Supreme Court clarified and defined the scope of the open and obvious danger doctrine, which addresses the duty element of a prima facie case in the duty to warn setting.

In *Greene v AP Products,* ____ Mich ____ (2006) (Docket Nos. 127718 and 127734), the plaintiff purchased for personal use a spray bottle of African Pride Ginseng Miracle Wonder 8 Oil, Hair and Body Mist – Captivate in April 1999. The defendant in this case packaged, labeled and marketed the hair oil.

On the day of the incident, the plaintiff's 11-month old son was left unattended and obtained the bottle of hair oil, which had been left within his reach. He ingested and subsequently aspirated the oil. The child died approximately one month later as a result of chemical pneumonitis.

The plaintiff filed a product liability action against the manufacturer and seller of the product. She asserted that the defendants owed a duty to warn that the product could be harmful if ingested. The defendants were granted summary disposition in the trial court on several grounds, including that they had no duty to warn because the material risk associated with ingesting the product was known to the child's mother and would be obvious to a reasonably prudent product user.

Twelve years ago, in *Glittenberg v Doughboy Recreational Indust*, 441 Mich 379; 491 NW2d 208 (1992), the Supreme Court held that, where the risk of harm is open and obvious, the law does not impose upon a manufacturer a duty to warn of all conceivable consequences or injuries that might occur from the use of the product.

This legal principle was codified by the legislature in 1995 when it enacted MCL 600.2948(2), which provides:

> A defendant is not liable for a failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the

person upon whose injury or death the claim is based in a product liability action.

Despite that case and statute, the plaintiffs continued to argue that, even though it may be obvious to a reasonably prudent product user that use or misuse of a product may cause some injury, a product manufacturer has a legal duty to warn of the risk of specific severe consequences.

In 2004, the Michigan Court of Appeals reversed the trial court, holding that even if a reasonably prudent product user would be aware of a danger associated with the use or misuse of the product, a jury may, nonetheless, find that a warning was required to give the purchaser "a full appreciation of the life-threatening risks involved." *Greene v AP Products, Ltd,* 264 Mich App 391; 691 NW2d 38 (2004). The defendants sought leave to appeal to the Supreme Court and their applications for leave to appeal were granted.

On July 19, the Supreme Court issued its decision and held that:

1. A "material risk," as used in MCL 600.2948(2), is "an important or significant exposure to the chance of injury or loss." Slip Op, p 9.

2. It is obvious to a reasonably prudent product user that a material risk is involved with ingesting and inhaling Wonder 8 Hair Oil. Slip Op, pp 10-13.

3. When it is obvious to a reasonably prudent product user that a material risk is involved, there is no duty to warn of the specific consequences or injuries that could arise from use or misuse of the product, no matter how severe.

Significantly, the Supreme Court stated that the scope of the open and obvious danger doctrine under the product liability statute, MCL 600.2948, is broader than that under common law and that the statutory doctrine is not restricted to simple products. Slip Op, p 7, fn 8. This constitutes a significant change in the law for failure to warn claims, because the defendant will no longer need to establish that the product at issue is a "simple tool" before invoking the open and obvious danger doctrine.

Plunkett & Cooney shareholder Edward J. Higgins successfully represented the manufacturer in *Greene* at the trial court level, obtaining the summary disposition that was subsequently reversed by the court of appeals and which has now been reinstated by the Supreme Court.

Ernest R. Bazzana successfully represented one of the defendants in *Glittenberg v Doughboy Recreational Indust.,* and he represented the manufacturer defendants in *Greene v AP Products, Ltd.*

For a complete copy of the Michigan Supreme Court's ruling in *Greene v AP Products,* click here.

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