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Appellate court notes difference between an 'injury' and 'harm'

A divided Illinois appellate court recently held that asymptomatic pleural plaques and interstitial fibrosis in the lungs do not amount to physical harm sufficient to state a valid product-liability claim.

Joseph Sondag and his spouse sued Tremco Inc., claiming asbestos-containing tape manufactured by Tremco caused Sondag to develop pleural plaques and interstitial fibrosis. The jury returned a verdict in Sondag's favor, awarding damages. Tremco appealed and the 4th District Appellate Court reversed. *Sondag v. Pneumo Abex Corp., et al.*, 2016 IL App. (4th) 140918.

Sondag alleged that he worked as a plasterer from the 1950s to 1980s in locations that used asbestos-containing products manufactured and sold by Tremco. Sondag testified that on virtually every job, he used drywall tape bearing the label "Tremco."

Sondag's physician for more than 20 years, Al Rossi, testified that before 2007 Sondag's general health had been good. In 2007, Sondag went to Rossi complaining of dizziness, unusual sweating and a disturbance in the inner ear. Sondag underwent a chest X-ray and CT scan, which revealed pleural plaques and interstitial fibrosis in his lungs. Rossi diagnosed Sondag with asbestosis, a permanent condition, which had been caused, he believed, by Tremco's asbestos-containing tape.

The appellate court noted that, according to Rossi's testimony, Sondag had never complained of shortness of breath or chest pains. Sondag's family members testified that even though Sondag insisted he was "fine," they noticed he was short of breath.

According to Rossi, Sondag's

lungs were clear with no wheezing or restriction. Sondag also underwent a pulmonary function test to measure breathing capacity and the ability to exchange carbon dioxide for oxygen.

The test showed a diffusion capacity of 54 percent, which, in Rossi's opinion, was an "excellent diffusion capacity" for a man of Sondag's age who had smoked. Rossi also noted that at age 82, Sondag could climb two flights of stairs, at a running pace, without shortness of breath.

The question on appeal was whether Sondag's physical changes to the lungs resulting from the inhalation of asbestos dust, unaccompanied by any clinical symptoms, afford a cause of action for product liability.

In answering the question, the court analyzed the definitions of "physical harm" and "injury" under the Restatement (Second) of Torts Section 7. "Physical harm," which is an essential element of any action for product liability, is different from an "injury," the ma-

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majority said.

The majority noted that the reason for the distinction is that the common law recognizes a cause of action for conduct that invades or "injures" a legally protected interest, even though the conduct causes no harm.

The court explained that an assault — drawing back as if to deliver a punch but stopping

TOXIC TORT TALK



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short of delivering it — as an example of an "injury" in the absence of "harm."

"Harm," according to comment in the Restatement, implies a loss or detriment to a person, and not

Moreover, in so far as physical changes have a detrimental effect on a person, that person suffers harm.

Thus, the court held that Sondag did not suffer a physical harm and thus could not prevail on his product liability action.

The court reasoned that Sondag's pleural plaques and interstitial fibrosis are asymptomatic. They cause no physically impairing loss or detriment to Sondag. The majority noted that while they understand that no one wants pleural plaques and interstitial fibrosis, they don't see how the conditions have affected him in any practical, functional way.

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If, by battering Sondag, the court noted, someone had caused Sondag to develop these conditions, he would have a cause of action against the batterer for a violation of his right to freedom from the intentional infliction of offensive bodily contacts. Citing the Restatement, the majority noted that "a victim of an offensive bodily contact, a battery suffers 'bodily harm' if the contact alters the victim's body in any way — even if the alteration is physically beneficial.

The court noted that plaintiffs may argue that Sondag would be healthier had he not been exposed to the asbestos-containing tape.

"The problem with such reasoning," said the court, "is that there are hundreds of millions of air sacs in the lungs, and saying that 'physical harm' begins with the scarring of any one of these air sacs would tend to divest 'harm' of its practical meaning."