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# Pima County Superior Court Jury Trials

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THE TRIAL REPORTER of Southern Arizona

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7/25/16 - Judge JEFFREY T. BERGIN - CV 2013-3772 - BAZURTO (Jeffrey A. Imig and Heather L.H. Goodwin of Haralson, Miller, Pitt, Feldman & McAnnally, P.L.C.) v ARCHER COMPANY USA, INC. (David L. Curl of Curl & Glasson, P.L.C.) - PERSONAL INJURY - PRODUCT LIABILITY - EXPANDING CONCRETE. Plntf, male, age 40, a backhoe operator and construction worker, was in the course and scope of his occupational duties, working with Dexpan, an expanding concrete/grout product, manufactured by Dfnt, used to break up and demolish concrete foundations. Plntf alleged that as he and a coworker were pouring Dexpan into drilled holes in the concrete foundation, the Dexpan blew out into his face, knocking off his safety glasses, and he was struck in the left eye by the cement-like product, which is heavily alkaline. Plntf also alleged the product warnings were insufficient and should have advised him to wear safety goggles, rather than safety glasses. Additionally, Plntf argued the warnings should have warned of an increased incidence of blowouts at higher temperatures of water used or the heat of the concrete. Plntf used the deposition of Thomas Scott, P.E., a safety engineer, who was of the opinion that Dexpan should have been more thoroughly tested before being sold. It was also Mr. Scott's opinion that the material safety data sheet was inadequate because it did not require safety goggles. Additionally, it was Mr. Scott's opinion that the warnings on the product were insufficient and inadequate. Dfnt denied liability, advancing the defense that the warnings were adequate and appropriate. Dfnt argued that the warning label warned not to look in a filled hole as blowouts might occur; and users should wear safety glasses, rubber gloves, and a dust mask. Dfnt also argued the testing performed prior to marketing was sufficient. Additionally,

Dfnt argued that no report of injury had been received with the use of the product or similar products. Dfnt called Melvin R. Kantz, Ph.D., a materials engineer, who was of the opinion that safety glasses are appropriate for the material because glasses are designed to protect from impact, and safety goggles are required when working with chemicals where there is a danger of splashing. It was also Dr. Kantz's opinion that Plntf's employer was negligent when it failed to adequately train its employees to work with the product. Additionally, it was Dr. Kantz's opinion that Plntf's employer did not understand what to do when confronted with unexpected events, did not know how to react in an emergency; and did not have sufficient training to be working with the product. Dr. Kantz opined that it was unlikely that, all things being equal, the holes from the third batch of Dexpan would experience a blowout before the holes in the first or second batch. It was Dr. Kantz's opinion that the product does not blow out during the first four minutes after being poured, and Plntf would have had to have his head directly over the hole to be struck in the eye. Plntf sustained a severe burn to the left eye, and lost vision in the eye for approximately one year. Plntf underwent surgery for placement of a ProKera lens. Plntf also underwent an amniotic membrane transplant, and a Boston Keratoprosthesis. Plntf alleged he is now being treated for glaucoma and will likely lose vision in the left eye within ten years. Plntf also alleged that, because he is embarrassed by his eye, he is more withdrawn and depressed. Plntf used the deposition of his treating physician, Ann Z. McColgin, M.D., a corneal ophthalmologist, who saw Plntf two days post-accident. Dr. McColgin recommended various specialists, including those for treatment of glaucoma, insertion of plastic cornea, sewing the eye shut

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for a period of time to allow healing, and a protective lens over the left eye to protect it from dirt and harm. It was Dr. McColgin's opinion that, even with the recommendations, Plntf will lose sight in the left eye within ten years. Parties stipulated to a summary of Warren H. Heller, M.D., an ophthalmologist, who performed an independent medical examination. It was Dr. Heller's opinion that Plntf will lose vision in the left eye within ten years. Plntf called John E. Buehler, Ph.D., an economist, who was of the opinion that the present-day value of Plntf's future care was \$437,400. Prayer: Just and reasonable compensatory damages; \$109,913.14 past medical expenses; \$439,000 (per P) or \$437,000 (per D) future medical expenses; plus \$14,000 lost wages. Dfnt made a \$25,000 pretrial offer of judgment (D). (Dfnt uninsured.) During closing arguments, Plntf's counsel asked jury to award Plntf \$600,000 for his specials, plus \$600,000 for pain and suffering. Defense counsel argued the product was not defective, and Plntf's employer was responsible. Five day trial. By stipulation, ten jurors deliberated. Jury out three-plus hours, over a two-day period. FOUND FOR DFNT. 7 - 3. (Post-trial, Dfnt filed a motion for Rule 68 sanctions, plus \$19,785.10 in costs.)

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