A. WASHINGTON APPEALS COURT RULES NON-MANUFACTURER DEFENDANT DID NOT OWE DUTY TO WARN

Yankee v. APV North America Inc., Nos. 64312-6-I and 65019-0-I, 2011 WL 2775982 (Wash. Ct. App., Div. 1 July 19, 2011).

Dennis Yankee worked as a laborer and mill-wright at an Alcoa aluminum mill in Vancouver, Washington from 1969 until 1997. At the mill, Yankee worked on carbon mixers manufactured by defendant APV, North America Inc.'s corporate predecessor. The carbon mixers contained insulation, gaskets, packing, and other replacement parts manufactured by defendant Garlock Sealing Technologies. Yankee died of mesothelioma in June 2008 and his wife, Sandra Yankee brought suit, alleging product liability and negligence claims stemming from asbestos exposure.

APV filed a motion for summary judgment arguing that Dennis was not exposed to an asbestos-containing product manufactured or sold by APV. The plaintiff countered that APV specified use of asbestos-containing replacement parts in its product, and therefore had a duty to warn individuals exposed. The King County Superior Court denied APV's motion and APV appealed.

On appeal, the plaintiff argued that the seminal case *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 380 (2008), imposes a duty to warn when a non-manufacturer specifies the use of asbestos-containing replacement parts in its product. However, the Court of Appeals found that the evidence relied on by the plaintiff did not show that APV made any specifications. Accordingly, because there was insufficient evidence supporting the plaintiff's claims, the trial court's order was reversed.

B. PLAINTIFF'S EXPERT TESTIMONY FAILS DAUBERT STANDARD

Butler et al. v. Union Carbide Corp., No. A11A0481, 2011 WL 2347505 (Ga. Ct. App., 1st Div. June 15, 2011)

From 1965 to 1973, Walter Butler worked as a "preforming" operator at a Madison plant where he came into contact with chrysotile asbestos-containing molding compound manufactured by Union Carbide Corporation. His widow, Laura Butler brought suit against Union Carbide and 16 other companies, asserting claims of product liability, negligence, and loss of consortium. At issue was whether asbestos from Union Carbide's molding compound contributed to causing Mr. Butler's mesothelioma.

During trial, plaintiff's expert Dr. John C. Maddox testified that Mr. Butler's exposure to asbestos containing products "contributed in a cumulative fashion to his total asbestos dose, which is what caused his mesothelioma." Dr. Maddox concluded that although amphible types

of asbestos are more potent than chrysotile asbestos, each exposure above background level is a substantial contributing factor to causing mesothelioma.

Union Carbide joined another defendant's motion to strike Dr. Maddox's testimony and a *Daubert* hearing was held. Under the *Daubert* standard, reliability is determined by (1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has attained general acceptance within the scientific community. *Daubert v. Merrell Down Pharmaceuticals*, 509 U.S. 579, 593-594 (1993).

The trial court determined that Dr. Maddox's testimony failed the first and third elements of *Daubert* since Dr. Maddox's theory had never been tested. The court added that Dr. Maddox was the "quintessential expert for hire," and without Dr. Maddox's testimony, the plaintiff lacked any evidence of specific causation. Consequently, the trial court granted summary judgment for Union Carbide and the appeals court affirmed.

C. TEXAS COURT HOLDS RETROACTIVE APPLICATION OF STATE PROCEDURAL LAW UNCONSTITUTIONAL

Union Carbide Corp. v. Synatzske, et al., No. 01-09-01141-CV (Texas 1st Dist. Ct. App. June 30, 2011)

The Texas District Court of Appeals held that retroactive application of Chapter 90 in the Texas Civil Practice and Remedies Code was unconstitutional. Recently enacted Section 90.010(f)(1)(B)(ii) requires a clamant to serve on defendant(s) a verification that the "exposed person" had a pulmonary function test performed on him or her.

Plaintiff's complaint alleged that decedent Joseph Emmite Sr. was exposed to asbestos during his thirty-year employment with Union Carbide. Union Carbide filed a motion to dismiss for failure to verify Mr. Emmite underwent a pulmonary function test, as required in Chapter 90. The plaintiffs contended retroactive application of the rule was unconstitutional as Mr. Emmite died before enactment of the new rule and before a pulmonary test could be performed. The trial court agreed with the plaintiffs and Union Carbide appealed.

The appellate court opined that whether retroactive application of the provision is unconstitutional depends upon "whether the provision has the effect of either establishing or eliminating such liability for conduct that occurred before the enactment of the statute." The court reasoned that application of the provision would relieve Union Carbide of tort liability the company would otherwise be held accountable for because the plaintiffs cannot comply with Chapter 90. Accordingly, the court held that retroactive application of the law was unconstitutional and Union Carbides' motion to dismiss was denied.

D. PLAINTIFF'S VERDICT OF $2.6 MILLION REVERSED IN TAKE HOME EXPOSURE CASE

Holmes, et al. v. Pneumo Abex LLC, et al., No. 4-10-0462 (Ill. 4th Dist. Ct. App. June 22, 2011)

After a jury awarded plaintiffs $2.6 million in a take-home exposure lawsuit against Honeywell and Abex, an Illinois appellate court reversed. Plaintiffs brought claims on behalf of decedent Jean Holmes who was allegedly exposed to asbestos fibers on her husband's work clothing from 1962 to 1963. After the jury verdict was reduced to $1,546,361.66, defendants Honeywell and Abex appealed.

The companies argued that they did not have a special relationship with Mrs. Holmes and therefore did not owe her a duty to warn. Moreover, the companies contended that a duty to warn should never exist in take-home exposure cases.

The Illinois 4th District Court of Appeals held that because Mrs. Holmes' injury was not foreseeable, the companies did not owe a duty to warn of the dangers from asbestos exposure. The court explained that evidence of the dangers from take-home exposure were not known until 1964 when the first epidemiological study showing an association between disease and asbestos fibers brought home from the work place was published. As Mrs. Holmes' injuries occurred prior to 1964, Honeywell and Abex could not have reasonably foreseen that an employee's wife would suffer such an injury. Plaintiffs' argued that literature illustrating the dangers of take-home exposure existed as of 1913. The court, however, rejected the argument because plaintiffs' did not offer evidence showing defendants were aware of the information.

The Asbestos Litigation Alert is intended to keep readers current on matters affecting asbestos litigation and is not intended to be legal advice. If you have any questions or would like a copy of any of the above articles, please contact Darlene Wood at 412.566.5938 or dwood@eckertseamans or any other attorneys with whom you have been working.