A. NO DUTY OWED TO WIFE IN TAKE-HOME EXPOSURE CASE

Price v. E.I. duPont de Nemours & Co., Del., No. 719, 2009 7/11/11.

Finding that the wife of a former employee did not have a legally significant "special relationship" with the defendant, Delaware's Supreme Court held no duty was owed in a take home exposure case.

Patricia Price was allegedly exposed to asbestos fibers while washing her husband's work clothing. Patricia's husband, Bobby, worked for E.I du Pont de Nemours & Co. as a maintenance technician from 1957 until 1991. After contracting bilateral interstitial fibrosis and bilateral pleural thickening of the lungs, Patricia sued DuPont on a nonfeasance theory, alleging she was a reasonably foreseeable victim of the company's misconduct.

While Price's case was pending, the Delaware Supreme Court decided a similar case with the same underlying facts, *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009). In *Riedel* the Court explained unequivocally that the facts underlying the plaintiff's claim constituted nonfeasance. In light of the Court's decision in *Riedel*, Price filed a Motion to Amend her complaint to state a claim based upon a theory of misfeasance.

The Delaware Supreme Court explained that in the case of misfeasance, a party who does an affirmative act owes a general duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the affirmative act. But, in the case of nonfeasance, a party who merely omits to act owes no general duty to others unless there is a special relationship between the actor and the other which gives rise to the duty. Therefore, in a case involving misfeasance, the defendant's duty is automatic, whereas in a case involving nonfeasance, the defendant's duty arises only if there is a legally significant "special relationship" between the parties.

The Court concluded that the conduct alleged by the Prices constituted nonfeasance despite the plaintiffs' attempt to recast the defendant's conduct as misfeasance. Further, because Mrs. Price and the defendant shared no "special relationship," the defendant owed Mrs. Price no duty.

B. FEDERAL JUDGE REMANDS CASE BACK TO STATE COURT, DENIES FEDERAL OFFICER JURISIDCTION

Sublett v. Air & Liquid Systems Corp., S.D. Ill., No. 311-cv-00433, 6/20/2011.

The United States District Court for the Southern District of Illinois remanded an asbestos exposure case back to state court after finding it lacked subject matter jurisdiction. Originally,

Plaintiffs Joseph Sublett and Virginia A. Sublett filed suit against General Electric Company ("GE") in the Circuit Court of the Third Judicial Circuit, Madison County, Illinois. The Subletts sought damages for mesothelioma that Mr. Sublett contracted from alleged exposure to asbestos while working for GE. GE removed the case to federal court under the "federal officer" removal statute, 28 U.S.C. § 1442(a)(1), and the Subletts moved to have the case remanded.

GE claimed that it was entitled to invoke federal officer jurisdiction because at least part of Mr. Sublett's alleged exposure occurred while he was serving in the U.S. Navy aboard vessels for which GE manufactured asbestos containing turbines. To effect removal, GE had to prove that it acted under the direction of a federal officer. Thus, GE needed to show that the U.S. Navy approved specific warnings that prohibited GE from complying with its state-law duty to warn. Second, GE had to show that the company had a colorable federal defense to state-law liability.

GE claimed that in designing equipment for the U.S. Navy vessels, the company acted under the direction of the U.S. Navy and therefore was entitled to assert the so-called "government contractor defense." In support of its claim, GE submitted an affidavit given by a retired Navy admiral who claimed to have had personal involvement with the supervision and oversight of ship construction. Nonetheless, Judge Murphy found that in the past the Court attached little significance to such evidentiary material, unaccompanied by exemplar contracts between the Navy and its contractors.

Judge Murphy also said that even assuming that the U.S. Navy exercised final control over the content of the warnings, GE would still have had responsibility for designing the warnings. Lastly, Judge Murphy noted that federal officer removal is read narrowly in suits where only the liability of a private company purportedly acting at the direction of a federal officer is at issue. Accordingly, the plaintiff's motion for remand was granted.

C. FLORIDA SUPREME COURT DISALLOWS RETROACTIVE APPLICATION OF NEW LAW

American Optical Corp. v. Spiewalk, Fla. S. Ct., Nos. SC08-1616, 1640, 7/8/11.

The Florida Supreme Court has ruled that a new state law, which makes it more difficult for asbestos plaintiffs to assert a claim, does not apply retroactively although the legislature so intended.

Due to large amounts of asbestos litigation in state courts, the Florida Legislature enacted the Florida Asbestos and Silica Compensation Fairness Act ("the Act"). Under the Act, a claimant must plead and prove an existing malignancy or actual physical impairment for which asbestos exposure was a substantial contributing factor. Prior to the Act, plaintiffs were able to assert

claims of asbestosis, an interstitial lung disease resulting from asbestos exposure and pleural thickening, without establishing that any malignancy or physical impairment had already resulted.

After multiple plaintiffs' asbestosis claims were dismissed for failing to meet the requirements of the Act, they appealed and asserted that the Act violated their state constitutional rights. The Fourth District Court of Appeal agreed and defendants' appealed.

The Florida Supreme Court first determined whether the plaintiffs' possessed a vested constitutional right. The Court said that with regard to asbestos-related diseases, an action accrues when the effects of a substance manifest in a way which supply some evidence of the causal relationship to the manufactured product. Despite the defendants' contentions, under Florida's common law particular physical symptoms were ***not*** needed for a "manifestation" to occur. Accordingly, the asbestosis plaintiffs each possessed a vested cause of action when the plaintiffs discovered, or had a duty to discover, their injuries.

Next, the Court considered whether the Act applied retroactively to the plaintiffs' causes of action. The Court reasoned that because Florida's Constitution protects property rights and a cause of action constitutes an intangible property right, the Act cannot be applied retroactively.

D. PLAINTIFF'S VERDICT OF $22 MILLION IN NEW YORK GASKET CASES

McCarthy, Et al. v. Goodyear Tire & Rubber Co., No. n/a (N.Y. Sup. Ct., New York Cty.).

After a five week trial presided over by Judge Martin Shulman, a New York jury awarded the families and Estates of Eugene McCarthy and Walter Koczur a total of $22 million.

The families and estates brought products liability suits against the Goodyear Tire & Rubber Company and Goodyear Canada, claiming McCarthy and Koczur were exposed to asbestos while working for the companies as a heavy equipment engineer and a steamfitter, respectively. McCarthy and Koczur, former smokers, both contracted lung cancer then later died as a result.

The jury awarded the Koczur family $13.5 million, allocating 27 percent liability to Goodyear Tire & Rubber Co. and 18 percent liability to Goodyear Canada. The McCarthy family was awarded $8.5 million with Goodyear Tire & Rubber Co. 7 percent liable and Goodyear Canada 5 percent liable.

E. CALIFORNIA JURY REACHES DEFENSE VERDICT IN MULTIPLE EXPOSURE CASE

Morrison, et al. v. Alfa Laval Inc., et al., No. BC441029 (Calif. Super. Ct., Los Angeles Cty. May 20, 2011)

Crane Co., Dana Companies LLC, and Ford Motor Co. were the three remaining defendants when a California jury reached a verdict in their favor. Judge Ernest M. Hiroshige presided over the case.

Chester Morrison served in the U.S. Navy where he was allegedly exposed to asbestos in Crane Co. valves. Morrison also alleged he was exposed to asbestos in products manufactured by Ford Motor and Dana Companies during his work on vehicles and other equipment. Morrison argued these various exposures caused him to contract mesothelioma.

As part of their defense, Ford Motor and Dana Companies contended both that their products contained an insufficient amount of asbestos to cause Morrison's injury and that Morrison failed to present adequate evidence of exposure to the companies' products. Crane Co. also denied liability, arguing the company's asbestos containing gaskets and packing were replaced by the time of Morrison's employment. Further, Crane Co. claimed its products contained chrysotile asbestos, which could not have caused Morrison's injury.

Although the jury found Morrison was exposed to asbestos in the defendants' products, the jury said the products were not defectively designed. In addition, the jury concluded that the products could have been defective for failure to warn, but that failure to warn was not a substantial contributing factor in the plaintiff's injuries.

F. APPEALS COURT AFFIRMS SUMMARY JUDGMENT TO UNION CARBIDE

Butler, et al. v. Union Carbide Corp., et al., No. A11A0481 (Ga. Ct. App. June 15, 2011)

The Georgia Court of Appeals affirmed an award of summary judgment for defendant Union Carbide based upon the inadmissibility of plaintiff's expert's testimony. The case was brought by the widow of Walter Butler. During Butler's eight year employment with a plastic manufacturer, he was allegedly exposed to asbestos in molding compounds. Prior to his death, Butler identified Union Carbide as one of the companies that manufactured the molding compounds.

The plaintiff offered the expert testimony of Dr. John C. Maddox as evidence of specific causation. Although the asbestos containing products supplied by Union Carbide comprised only one percent or less of the total amount of compound Butler was exposed to, Maddox testified that "each and every exposure to asbestos above background levels contributes to the development of mesothelioma." The trial court found that Maddox's theory that any exposure to asbestos in a defendant's product will cause injury fails to meet the *Daubert* standard for admissibility of scientific evidence and excluded Maddox's testimony. The plaintiff appealed.

On appeal, the court rejected the plaintiff's arguments that Maddox's methodology was accepted and reliable. Because the plaintiff offered no other evidence regarding specific causation, the Court of Appeals granted Union Carbide's motion for summary judgment.

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.