ECKERT SEAMANS

JULY/AUGUST 2010

ASBESTOS LITIGATION ALERT

A. WISCONSIN COURT HOLDS PRINCIPAL EMPLOYER NOT LIABLE FOR INJURIES TO CONTRACTOR'S EMPLOYEE

Tatera et al. v. FMC Corp. et al., No. 2008 AP 170, 2010 WL 2813643 (Wis. July 20, 2010)

The estate of a worker, who died from malignant mesothelioma following his employment with a contractor who subcontracted with a principal employer, brought action against the principal employer, alleging negligence. The Circuit Court entered summary judgment in favor of the principal employer, and the estate appealed.

The Supreme Court of Wisconsin found that, as a general rule, a principal employer is not liable in tort for injuries sustained by an independent contractor's employee while he or she is performing the contracted work. There are two exceptions to the general rule, and if either exception is met, the principal employer may be liable. The two exceptions are if the principal employer committed an affirmative act of negligence by failing to warn, or if the activity was extra-hazardous.

In finding that the first exception to the general rule does not apply, the Court held that the principal employer's alleged negligent conduct in failing to warn the independent contractor and its employee regarding health hazards related to asbestos and asbestos-containing products, and its' failure to investigate or test for the health effects of asbestos, was not an affirmative act of negligence and was passive misconduct at most.

The Court also held that the primary employer's actions did not qualify as an extra-hazardous activity because steps could be taken to minimize the risk of injury. Extra-hazardous activity is one in which the risk of harm remains unreasonably high, no matter how carefully it is undertaken, in contrast with activity that is inherently dangerous because of the absence of special precautions. In order for an activity to be taken out of the realm of extra-hazardous, the risk of injury need not be eliminated, just minimized.

B. CALIFORNIA TRIAL COURT REDUCES $200M PUNITIVE DAMAGE AWARD; ORDERS NEW TRIAL ON FAULT

Evans v. A.W. Chesterton Co., et al., No. BC418867 (Calif. Super. Ct., Los Angeles Cty. April 28, 2010)

In a take-home exposure case in which an employee wore asbestos contaminated clothing home, where his plaintiff-wife was exposed to asbestos fibers, a jury awarded plaintiff $200 million in punitive damages and an additional $8.8 million in compensatory damages. Following defendant's motion for judgment notwithstanding the verdict and for a new trial, the judge found

the compensatory damages award not excessive but the $200 million punitive damage award was *constitutionally* excessive, and reduced the punitive damages award to $5,821,015.
The judge also ordered a new trial on fault, throwing out the jury's allocation of liability because the evidence did not support the jury's finding on the issue of comparative fault. The jury failed to allocate fault to named non-parties, which the judge said was against the clear weight of the evidence. Accordingly, the judge ordered a new trial on the issue of fault.

C. PENNSYLVANIA TRIAL COURT AFFIRMS SUMMARY JUDGMENT RULING THAT DEFENDANT CAN NOT BE HELD LIABLE FOR ASBESTOS NOT SUPPLIED BY DEFENDANT

Stralo, et al. v. Yarway Corp., et al., No. 0187 (Pa. Ct. Comm. Pls., Philadelphia Cty. June 11, 2010)

Claims brought on behalf of Ronald Stralo, who served in the U.S. Navy and who suffered from malignant pleural mesothelioma, were dismissed on summary judgment by a Philadelphia trial court in 2008. In a June 11 opinion, the Court affirmed its decision. While in the Navy, Stralo allegedly worked with products manufactured by defendants Yarway Corp. and Crane Co., who sought dismissal of the case on product identification grounds.

The Court found that plaintiffs failed not only to show that the defendants' products contained asbestos, but also that the defendants' products were on the ship plaintiff worked on. Plaintiffs supported their claims with testimony from the decedent's former co-worker, whose knowledge came from other crew members, and who identified products supplied by manufacturers other than the defendants as culprits for the exposure. Plaintiffs also failed to prove that decedent actually came into contact with any of defendants' products.

D. DEFENDANT'S REPLY BRIEF IN COMPONENT PARTS CASE ARGUES DEFENDANT NOT PART OF STREAM OF COMMERCE

O'Neil, et al., v. Crane Co., et al., No S177401 (Calif. Sup. Ct. Sept. 18, 2009)

In claims of negligence, negligent failure to warn, strict liability for failure to warn, and strict liability for design defect, plaintiff argues that her husband was exposed to asbestos while working in boiler and machine rooms on a U.S. Navy ship. Asbestos was found in the ship's insulation and also in packing in pumps and valves on the ship. During trial, the judge granted defendant's motion for nonsuit based upon the component parts doctrine. The Second District reversed, finding that the defendants' valves and pumps were not component parts under the Restatement (Third) of Torts.

In reaching its decision, the Second District Court disagreed with the recent First District Court of Appeal's holding in *Taylor v. Elliot Turbomachinery Co., Inc*. 171 Cal.App.4th 564 (Cal.Ct.App. February 29, 2009). *Taylor* held that the component parts defense was available to a manufacture whose equipment operated as part of a larger system. The Second District opposed this holding and instead found "no relevance to the fact that the injury was caused by the operation of its product in conjunction with a replacement part which is no different than the original."

In their recently filed reply brief, defendant Crane Co. asks the Supreme Court to reverse, arguing that because they did not market or sell the asbestos containing products, they should not be held liable. Crane argues that the plaintiff's interpretation of the stream of commerce doctrine is misunderstood. Crane's brief states, "The label attached to the defendant, whether 'manufacturer,' 'supplier,' 'retailer,' etc., does *not* determine whether it is within the stream of commerce. Even 'passive' retailers or distributors in the chain of distribution of a product are considered to be within the stream of commerce. Conversely, courts have held that manufacturers are not part of the stream of commerce when they are outside the chain of distribution for the product that actually caused the injury."

Additionally, Crane argues that plaintiff misunderstands the concept of foreseeability, and that foreseeability is only applicable after a defendant is determined to be in the stream of commerce. Only then may a defendant be held liable if injury occurs during foreseeable use of its product.

Rockwell Automation, Invensys PLC, the Civil Justice Association of California, and Ingersoll Rand Co. filed an *amicus curiae* brief in support of the defendant, while the International Association of Heat and Frost Insulators and Allied Workers filed a brief in support of the plaintiffs.

E. NEW JERSEY COURT FINDS SEPARATE DUTY OWED TO EMPLOYEE IN TAKE HOME EXPOSURE CASE

Anderson v. A.J. Friedman Supply, No. A-5892-07T1, (N.J. Super. Ct. App. Div. Aug. 20, 2010)

Plaintiffs Bonnie and John Anderson, husband and wife, allege that Bonnie contracted mesothelioma from one or both exposures to asbestos at the Linden Bayway Refinery owned by defendant Exxon Mobil Corporation ("Exxon"). The first was bystander exposure from laundering John's asbestos-laden work clothes during his employment with Exxon, and the second was direct exposure during Bonnie's employment with Exxon. Plaintiffs prevailed on their claim that Bonnie's bystander exposure was a substantial factor in her contraction of mesothelioma.

At trial, the judge found that Exxon had a "dual persona" in regards to the Corporation's relationship to Bonnie as employee and bystander. More specifically, Exxon legally had "a duty

to the spouse," because once Exxon had a duty to John as an employee to exercise reasonable care and provide a safe workplace, that same duty was extended to his spouse "as a matter of law." A jury found in favor of plaintiffs, finding Bonnie's bystander exposure was a substantial contributing factor to her injuries.

The Appeals Court affirmed, stating, "The dual persona doctrine would apply in situations when the employer has undertaken a completely separate and independent role with respect to the employee." Further, the Appeals Court citied Larson's Workers' Compensation Law, Vol. 6, § § 113.01[4], p. 113-10.], which states, "It is not enough that the second persona impose additional duties. They must be totally separate from and unrelated to those of the employment."

F. CALIFORNIA COURT AFFIRMS FAULT IN FAILURE TO WARN CASE, VACATES JUDGMENT

Russell, et.al., v. Ford Motor Co., et al., No. B213596 (Calif. Ct. App., 2nd Dist., Div. 8 July 30, 2010)

Plaintiffs John and Esther Russell filed suit against Ford Motor Co. ("Ford") claiming Mr. Russell was exposed to asbestos in brake products sold and distributed by Ford. Russell alleged that Ford failed to warn that the asbestos in its brakes was hazardous. The jury found by special verdict that Ford failed to warn of potential risks, allocated 10 percent of the total fault to Ford, and entered final judgment of $1,493,333 with an offset of $111,300 for out-of-court settlements with other defendants.

Following trial, Ford filed several post-trial motions, including an argument that the trial court erred when it conducted an in camera review of the out of court settlements without also allowing Ford's counsel an opportunity to view them. The Appeals Court agreed, citing the court's analysis in *Jones v. John Crane, Inc*. which states, "The settling parties are required to furnish to the court and to all parties an evidentiary showing of a rational basis for the allocations made and the credits proposed. They must also show that they reached these allocations and credit proposals in an atmosphere of appropriate adverseness so that the presumption may be applied that a reasonable valuation was reached." (*Jones*, 132 Cal.App.4th 990, 1010 (Cal. Ct. App. 2005)).

Accordingly, the Appellate Court held that the evidence supporting a contested post-trial calculation of an offset may not be reviewed in camera, and the non-settling defendant is entitled to review evidence sufficient to support the calculation to confront plaintiff's evidence and oppose it.

G. OHIO COURT AFFIRMS CASE DISMISSAL FOR LACK OF PRODUCT IDENTIFICATION

Cantrell, et al., v. Adience Inc., et al., No. 93944 (Ohio Ct. App., 8th Dist., Cuyahoga Cty. August 5, 2010)

Appellants Alice and Bernard Cantrell appealed the judgment of an Ohio Common Pleas Court that granted summary judgment in favor of appellee, Borg-Warner Corporation. The complaint asserted numerous claims arising from Alice's alleged exposure to asbestos and during her employment with General Motors ("GM"). Appellants claim that Borg-Warner was the manufacturer of asbestos-containing clutch plates supplied to GM. Borg-Warner filed a motion for summary judgment, claiming there was no evidence of the presence of Borg-Warner products in the GM plant during Alice's employment, no evidence that Alice was exposed to asbestos from a Borg-Warner supplied or manufactured product, and no evidence that any such product was a substantial factor in causing Alice's alleged mesothelioma.

In granting Borg-Warner's motion for summary judgment, the trial court found Appellants failed to present sufficient evidence to establish that Alice was actually exposed to a Borg-Warner asbestos-containing product during the course of her employment and that, without such evidence, Appellants could not establish causation.

On Appeal, Appellants argued that Borg-Warner supplied products to GM over a lengthy period of time during Alice's employment and that Evid.R. 406 could be used to infer that the conduct of Borg-Warner in supplying products to GM was in conformity with Borg-Warner's routine practice. Further, Appellants alleged this routine practice of Borg-Warner established that Borg-Warner supplied asbestos containing products to GM during the time of Alice's employment.

The Appeals Court disagreed, finding that the Cantrells' use of Evid.R. 406 was not appropriate because there was no regular and routine response to a specific situation on a particular occasion as contemplated by the rule. On the contrary, the court found that Borg-Warner products were supplied as part of a contractual business relationship and not as routine practice. Accordingly, appellants could not prove that Borg-Warner's product was a substantial factor in causing Alice's injuries, and the Appeals Court affirmed the dismissal of the case.

H. WRONGFUL DEATH SUIT REMAINS IN FEDERAL COURT DUE TO FEDERAL CONTRACTOR DEFENSE

Olschewske et al. v. Asbestos Defendants (B-P), No. C 10-1729 PJH, 2010 WL 3184317 (N.D. Cal. Aug. 11, 2010)

A federal court denied Plaintiffs' motion for an order remanding their case to the State Superior Court of California. Plaintiffs, the heirs of Thomas Olschewske, brought an action against

Rockwell Automation, Inc. ("Rockwell") alleging injuries resulting from Olschewske's alleged exposure to asbestos. Rockwell removed the case, asserting federal officer jurisdiction under 28 U.S.C. § 1442(a)(1). Rockwell contends that plaintiffs' claims against Rockwell are based on Olschewske's exposure to equipment allegedly supplied by the U.S. Navy-products that Rockwell claims would have been designed and manufactured in accordance with specifications provided by the U.S. Government, and designed and built under the direction and control of the U.S. Government and its officers.

Plaintiffs argued that to remove the case, Rockwell must prove that the federal contractor defense applies. In denying Plaintiffs' motion, the U.S. District Court found that removal under the federal officer removal statute allows removal on the basis of a federal defense that need only be "colorable and not clearly sustainable," and that Rockwell had met this burden.

Plaintiffs also argued that Rockwell could not show a causal nexus between plaintiffs' claims and Rockwell's products because none of the military specifications provided by Rockwell required that the products or equipment include asbestos. However, Rockwell was able to produce a Navy specification which said asbestos products "may be utilized." The court also found other references in the specifications that were sufficient for purposes of the motion to show that the Navy required the use of asbestos as an insulating material.

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.