Jones Walker E*Zine

Products Liability
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Supreme Court Expands Right To Federal Court In Class Actions

Exxon Mobil Corp. v. Allapattah Services, Inc. , No. 04-70 and
Ortega v. Star-Kist Foods, Inc., No. 04-79, 545 U.S. ___ (2005)

In a landmark ruling on June 23, 2005, the United States Supreme Court adopted a broad interpretation of a federal jurisdictional statute that will expand (and in some jurisdictions, preserve) the right to remove some class actions and other non-class action lawsuits to federal court. Since many consumer class actions concern allegedly defective products, this decision is a significant one for product manufacturers.

For a full report on this decision, follow this link to our sister e-zine on Class Action Defense.

- Madeleine Fischer

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Airport Screening Device That Shocked Security Worker Held Not Defective

Milton v. Rapiscan Security Products,
2005 WL 1400433 (E.D. La. 1/6/05)

Plaintiff, Carrie Milton alleged that while working as a Transportation Security Screener at Louis Armstrong Airport in Kenner, Louisiana, the screening device she worked with shocked her and caused permanent and total injury to her left hand.

She subsequently filed suit against Rapiscan Security Products, the manufacturer of the screener, under the Louisiana Products Liability Act.

The Louisiana Products Liability Act establishes the exclusive theories of liability for manufacturers for damage caused by their products. It provides that a manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders

the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by claimant or another person or entity.

Milton's complaint merely asserted that Rapiscan's product was inherently dangerous and that it was foreseeable that it would harm persons who made customary use of it. Rapiscan moved the court for summary judgment.

Milton did not respond to the Motion for Summary Judgment and did not offer any evidence in support of her claim. Accordingly, Eastern District Judge Vance agreed with Rapiscan and granted its motion for summary judgment.

- Michelle D. Craig

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LA. 4th Circuit Tackles Intentional Tort And Household Exposure In Asbestos Case

Zimko v. American Cyanamid,
2003-0658 (La.App. 4 Cir. 6/8/05), ___ So.2d ___

In a 55-page opinion, a fractured five-judge panel of the Louisiana Fourth Circuit Court of Appeal addressed questions of what constitutes an intentional tort and what proof is required in a household exposure suit in an asbestos case. Judge Patricia Murray wrote the majority opinion, while each of the four other judges dissented in part and concurred in part. The court followed well-settled precedent on the intentional tort issue, but on the novel household exposure issue, the court radically departed from some of the most basic precepts of our legal system: in a civil case, the plaintiff bears the burden of proving his case by a preponderance of the evidence, and such proof must be grounded in record facts – not speculation.

Kenneth Zimko died of mesothelioma. After a bench trial in Civil District Court, District Judge Ethel Simms Julien held two defendants liable and awarded his widow a total of $3,500,000. According to Judge Julien's opinion, Zimko's mesothelioma was attributable to two causes: 1) Kenneth Zimko's childhood exposure to asbestos fibers brought home on the clothing of his father, a worker at an American Cyanamid plant in New Jersey; and 2) Kenneth Zimko's adult exposure to friable asbestos insulation while working at Tate & Lyle's Domino Sugar Refinery in Arabi, Louisiana between 1977 and 1990. Judge Julien found that both defendants were at fault. American Cyanamid was held liable for negligence, and Tate & Lyle (Zimko's employer) was held liable for intentional tort.

Intentional tort. The Fourth Circuit reversed Judge Julien on this point, holding that, although Tate & Lyle may have been grossly negligent, there was insufficient evidence to support the conclusion that it had committed an intentional tort. The majority on this issue consisted of Judges Murray, Kirby and Tobias.

Under Louisiana law, an employee is limited to recovering workers' compensation benefits when he is injured on the job. In return for the certainty of a limited recovery, the employee gives up the ability to sue his employer in negligence with its possibility of wide-open damage recovery. An exception to this rule is that if the employer has committed an *intentional* tort, the employee is not limited to workers' compensation, but may sue his employer in tort.

In this suit, Kenneth Zimko's widow sued Kenneth's prior employer, Tate & Lyle, and convinced the trial judge that Tate & Lyle's conduct was an intentional tort. Reversing this holding, the Fourth Circuit stressed the very narrow circumstances under which the intentional tort exception may be applied.

The facts of Zimko's adult exposure, as found by the trial court, were these: Zimko was an office worker at Tate & Lyle's Domino Sugar Refinery. At times, especially during bad weather, he would walk through the first floor of the boiler house where pipes were covered with openly deteriorating

asbestos insulation. The Fourth Circuit did not dispute the trial court's findings that Tate & Lyle knew of the presence of loose asbestos and knew of the danger, but failed to institute any program to eliminate the problem or to warn its employees.

The Fourth Circuit began its analysis with the definition of an intentional act in the 1981 Louisiana Supreme Court case of *Bazley v. Tortorich*. In committing an intentional act "the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result." More recently, the Louisiana Supreme Court expounded upon this definition stating that the term "substantially certain to follow" requires more than a reasonable probability that an injury will occur – the injury must be "inevitable" or "incapable of failing."

The Fourth Circuit stated that, while a case by case analysis is required, Louisiana courts have almost universally found that the following four dangerous workplace situations do not constitute intentional acts:

- Failure to provide a safe place to work;
- Poorly designed machinery, failure to follow OSHA safety provisions;
- Failure to provide requested safety equipment;
- Failure to correct unsafe working conditions.

In order to prove an intentional act arising from a dangerous workplace situation, the employee has a "most difficult [burden] to say that anyone with the employer *would allow the dangerous situation to arise out of a desire to harm the employees*."

The Fourth Circuit concluded, "That Tate & Lyle was negligent, and perhaps even grossly negligent, in failing to more aggressively address the hazards presented by the asbestos insulation in its refinery is insufficient to satisfy the strict standard of establishing an intentional act." There was no evidence that Tate & Lyle management intended to injure Kenneth Zimko; to the contrary, there was evidence that Tate & Lyle management exposed themselves voluntarily to the same conditions, thereby supporting the inference of an absence of intent to injure anyone. Therefore, the Fourth Circuit reversed the trial court's finding of liability on the part of Tate & Lyle.

There were two dissents from this decision. Judge McKay thought the trial court's finding of intentional conduct should be affirmed because, according to the testimony of one of plaintiff's experts, it is one hundred percent certain that a person occupationally exposed to asbestos above background levels will suffer lung damage, although not necessarily mesothelioma. Therefore he felt the "substantially certain to follow" test was met. Judge Belsome also thought that the trial court got it right, although he took a different tack. Judge Belsome characterized Tate & Lyle's conduct as gross negligence and "criminal neglect," but felt that when the consequences of indifference are "so severe" (*i.e.*, an incurable disease such as mesothelioma), such negligence should equate to "civil intentional misconduct."

The majority position on intentional tort continues the strong precedent set by the Louisiana Supreme Court on the issue. The two dissents, however, indicate a growing restlessness with these constraints by certain judges on the Fourth Circuit. In another recent case, Judge Cannizzarro took the highly unusual step of suggesting that the Louisiana legislature change the law: "If the Workers' Compensation Act is to be liberally construed in favor of protecting the injured worker, perhaps the legislature should revisit the issue of broadening the exception to the exclusivity provision to include any injury caused by the gross negligence of the employer and/or supervising employee." *Bergeron v. Murphy Oil, U.S.A., Inc.*, 2005-0271 (La.App. 4 Cir. 4/28/05), 2005 WL 1398719. Such sentiments fail to recognize that the Workers' Compensation Act as currently written *does* protect employees, because they are guaranteed a recovery when they are injured at work regardless of whether their employer was actually at fault in any way. The associated protection of employers from unlimited tort liability to their employees, allows them to remain in business and fund workers' compensation insurance for the benefit of all Louisiana workers.

Household exposure. This case represents the first significant Louisiana appellate decision to deal with an asbestos injury caused by household exposure. "Household exposure" means the exposure family members experience when a worker brings asbestos fibers into the home on his work clothing. These types of cases are becoming increasingly prevalent, and raise new legal issues for the courts.

Here the trial court concluded that one of the two causes of Kenneth Zimko's mesothelioma was household exposure at his childhood home in New Jersey. During the first 18 years of his life when Kenneth lived in this house, Kenneth's father worked in an American Cyanamid Plant in Bound Brook, New Jersey. Before Kenneth died, Kenneth testified in a deposition that he recalled that his father held several different positions at American Cyanamid including machinist, mechanic, millwright, union worker and boiler house supervisor. Kenneth never went inside the American Cyanamid plant and did not know whether his father changed clothes before he came home from work. At trial, no one testified to any specific information about conditions at the American Cyanamid plant.

American Cyanamid did not have a living witness to testify about conditions at the New Jersey plant during the 1940s and 1950s when Kenneth Zimko's father worked there. American Cyanamid did introduce a document which showed that the policy at the plant was to provide work clothes for employees, which clothes were left at the plant at the end of the worker's shift to be laundered.

The majority on the household exposure issue consisted of Judge Murray, Judge McKay, and Judge Belsome. They affirmed the trial court's decision that American Cyanamid was negligent and the finding that American Cyanamid's negligence was a cause in fact of Kenneth Zimko's mesothelioma.

The Fourth Circuit began with an accurate listing of five elements which must be proved in any negligence case: 1) duty; 2) breach of duty; 3) cause in fact; 4) legal cause; and 5) damages. From there, however, the Fourth Circuit radically departed from basic negligence principles.

Addressing the first element of duty, the court recognized that whether a premises owner owes a duty to family member of an employee was a novel issue in Louisiana and that there was a "lack of Louisiana cases on point." Nonetheless, the court facilely dismissed the notion that the existence of a duty presented a serious issue. The court held that American Cyanamid had a "general duty to act reasonably in view of the foreseeable risks of danger to household members of its employees resulting from exposure to asbestos fibers carried home on its employee's clothing, person or personal effects." The court relied heavily upon a recent case from New York State (*In re New York City Asbestos Litigation*). In that case the New York court reasoned that "[a]ssuming the [employer] knew or should have known of the dangers of secondary exposure, it is hardly a quantum leap to extend the duty of care owed to employees to members of the employee's household who predictably come into routine contact with the employee's clothing." The New York court also turned the employer's attempts at containment of asbestos back against the employer, stating that the employer's provision of laundry services for its employees' dirty work clothes "created a strong inference of its awareness of the risk that its employees would bring home asbestos-contaminated clothing." The Fourth Circuit adopted the New York case's reasoning in its entirety stating that the same inference applied to American Cyanamid, given that American Cyanamid also had a laundering policy.

Perhaps most startling was the Fourth Circuit's complete omission of any discussion of the second element of a negligence case: breach of duty. Negligence differs from strict liability. In a negligence case, a person's conduct is judged based upon the knowledge available at the time of the conduct. Even assuming that American Cyanamid's laundering program corroborated that American Cyanamid knew that hazardous materials might be carried home from the workplace, where was the testimony that American Cyanamid should have known, according to information available more than 50 years ago, that these good faith measures would not adequately protect family members? To the contrary, to this author it appears that American Cyanamid's industrial hygiene program was well ahead of its time. However, the Fourth Circuit entirely skipped the second element – breach of duty – and simply moved on to the third element: cause in fact.

Louisiana courts have imposed a "substantial factor" test to determine whether exposure to a particular asbestos-containing product was a cause-in-fact of a plaintiff's asbestos-related disease. The majority held that the same test applied to a premises owner defendant, *i.e.*, the exposure has to be a substantial contributing factor to the plaintiff's disease.

To give the majority its due, they did not shrink from pointing out the paucity of any factual evidence that Kenneth Zimko's father was exposed to asbestos-containing products at the American Cyanamid plant, or that his exposure was sufficient to carry home fibers and to create a level of fibers substantially in excess of background in the Zimko home such that Kenneth Zimko inhaled the fibers and contracted mesothelioma as a result.

Nonetheless, the Fourth Circuit found that the opinions of two of plaintiff's experts, Dr. Roggli (an expert in mesothelioma) and Frank Parker (an expert in industrial hygiene), supplied the "missing link" to prove causation – even though their opinions were based on general historical data rather than

information specific to the American Cyanamid plant or to Kenneth Zimko's father.

Dr. Roggli, whose qualifications were not challenged by American Cyanamid, testified there were five criteria that must be met before establishing a causal link between mesothelioma and a particular asbestos exposure. These include: (i) the product must contain 1% asbestos; (ii) some of the asbestos fibers must be five microns or greater in length; (iii) the use of the product must produce dust levels substantially above background; (iv) the dust must be in the breathing zone of the patient and (v) the duration of exposure must be several weeks to a couple of months.

Knowing that Kenneth Zimko's father worked around boilers, Dr. Roggli assumed without knowing, that the insulation on the American Cyanamid boiler was of a type that would be 1% asbestos and have fibers of five microns in length. Historically, the levels of fibers in the lungs of workers who *themselves* develop mesothelioma indicates an above background level of exposure. The length of exposure would be determined by the length of time the family member lived in the worker's household. It must be noted that of these factors, Dr. Roggli had confirmation as to only one – that Kenneth Zimko lived in his father's home for 18 years. As to each other factor, Dr. Roggli made assumptions that were not born out by any facts proved at trial. Indeed Dr. Roggli acknowledged that his conclusion was based *solely on historical data and not on any facts related to the actual American Cyanamid site or Zimko's father's exposure there*. Dr. Roggli did not even take the time to review the father's personnel file from American Cyanamid. The only concrete information he had was Kenneth Zimko's testimony that the father held certain job positions at American Cyanamid.

Dr. Roggli's assumptions did not stop there. He went on to say that the fiber type of asbestos a boiler house worker would typically have encountered in the 1940s and 1950s was amosite, "the worst kind." Because the background level of amosite fibers in the general population is zero, any amount – presumably even one fiber – would be above background. Dr. Roggli stated that his opinion would not be influenced by any information as to where in the house the laundry was done or the house ventilation scheme. He also stated that even if Kenneth's father left his work clothes at American Cyanamid, it would not change his opinion. The latter measure might reduce levels of asbestos in the home, but would not reduce levels to below background (background being zero).

Frank Parker, plaintiff's industrial hygienist, testified similarly, but with even less authority. Parker never visited the American Cyanamid plant and didn't review Kenneth's father's personnel file. His opinion was summarized as being that in the 1940s and 1950s, "the typical power plant had exposure to asbestos and a typical operator would come in contact with it." Parker also opined that American Cyanamid's laundering program did not provide for a thorough decontamination process. Such a decontamination process would require separation of contaminated clothing from uncontaminated clothing and showering of the worker.

American Cyanamid argued logically that expert assumptions could not substitute for facts showing that Kenneth Zimko was actually exposed to asbestos from American Cyanamid's plant. The Fourth Circuit majority conceded that an expert's testimony to a hypothetical question based on unproven facts has no probative value, but stated that this general rule had an exception, namely, that an expert may base his opinion on facts or data not admissible into evidence if the facts are of a type reasonably relied upon by experts in the particular field.

The Fourth Circuit found that Dr. Roggli's reliance on his professional knowledge and experience fell within the exception for two reasons: first, Dr. Roggli testified that he regularly relied on historical data in his research; second, given that American Cyanamid could not produce a witness to testify as to the conditions at its plant in the 1940s and 1950s, historical data was the only available evidence. The court held that in absence of testimony that American Cyanamid's plant differed from the industry norm, Dr. Roggli's knowledge of general industry practices and conditions was "compelling" evidence upon which he could rely in rendering his opinion as to the cause of Kenneth Zimko's mesothelioma. Perhaps by design, perhaps by oversight, the Fourth Circuit rendered no similar analysis regarding the even more flimsy opinion of the industrial hygienist, Frank Parker. (Parker's opinion has been rejected as "unreliable" by a Texas appellate court in a diesel exhaust exposure case. *Missouri Pacific R. Co. v. Navarro*, 90 S.W.3d 747 (Tex.App.-San Antonio 6/26/02). Further, the trial judge in this case, Judge Ethel Simms Julien, affirmed by the Fourth Circuit, rejected his opinion in favor of that of the defense expert in another mesothelioma case. In that case, the defense expert commented, in part, that Parker was wrong because he based his opinion concerning alleged negligent handling of asbestos on "current knowledge and technology that was not available at the time [plaintiff] was injured." *Faulkner v. The McCarty Corp.*, 2002-1337 (La.App. 4 Cir. 6/11/03), 853 So.2d 24, 28.)

Judge Kirby, joined by Judge Tobias, dissented from the majority's analysis on the causation issue. Judge Kirby reminded us of what should be the unwavering rule: A plaintiff in an asbestos case

must show by a preponderance of the evidence that he was exposed to asbestos from the defendant's site or product, *and* that his injury was substantially caused by that exposure. When there are multiple defendants, there may be more than one "cause in fact" of the plaintiff's injury, but the plaintiff's burden of proof "is not relaxed or reduced because of the degree of difficulty" of proving the contribution of each defendant to the injury.

Judge Kirby pointed out that the entirety of plaintiff's case against American Cyanamid consisted of three witnesses: Kenneth Zimko (by deposition), and the two experts, Dr. Roggli and Frank Parker.

Kenneth Zimko's entire testimony on the subject consisted of the answers to two questions. These answers established only the positions held by his father at American Cyanamid. Zimko did not recall whether his father was provided a change of clothes before he came home from work.

Dr. Roggli's opinion that Kenneth Zimko was substantially exposed to asbestos while living in the same home with his father rested on two assumptions: 1) Kenneth Zimko and his father lived in the same fairly small house for Zimko's 18 year childhood; 2) Zimko's father was "essentially a boiler house worker at the American Cyanamid plant in the 1940's and 1950's." Dr. Roggli testified that historically boiler workers and millwrights are occupations that have resulted in asbestos exposure sufficient to cause mesothelioma *in the worker*. Historical studies also show that household members of boiler workers in the 1940s, 1950s and 1960s have excess amounts of asbestos in their lungs. He had no information regarding the American Cyanamid plant and did not review the father's employment records. He admitted that his opinion was based on historical data and not on facts related to the actual American Cyanamid site or on facts related to the father's actual exposure.

Plaintiff's industrial hygienist, Frank Parker, testified that in his opinion the Zimko home had levels of asbestos significantly above background levels. This opinion, too, was not based on case-specific information. Parker had not visited the American Cyanamid plant and did not review Zimko's father's personnel file. Rather, Parker said that in the 1940s and 1950s, "the typical power plant had exposure to asbestos and a typical operator would come in contact with it." Further: "a boiler operator under this scenario and what I understand, it's more likely than not he brought fibers home."

Judge Kirby concluded that the opinions of Dr. Roggli and Frank Parker were based on speculation and conjecture, rather than on facts supported by the record. He sensibly pointed out:

> Based on my review of the evidence presented, I conclude that plaintiff did not carry her burden of proving that Kenneth Zimko was exposed to asbestos brought home during his childhood from American Cyanamid by his father, and that this asbestos exposure was a cause of his contraction of mesothelioma. In her original appellate brief, plaintiff stated that on the issue of the alleged childhood asbestos exposure, 'Cyanamid essentially folded its arms and told Plaintiffs to prove it.' *That statement seems to ignore the fact that the plaintiff in a civil case has the burden of proof.* American Cyanamid was not required to present evidence to refute plaintiff's claims against it because plaintiff failed to present a *prima facie* case on the issue of causation based on childhood exposure.

This case illustrates the old saw that "bad facts make bad law." Mesothelioma is indeed a terrible disease. It is a disease without a cure, which most experts attribute to asbestos exposure. The average life span after diagnosis is merely nine months and the disease process is insidious and painful. Experimental treatments, which normally serve only to extend the life span by months rather than to cure the disease, are extreme and in themselves can be painful. As a practical matter, defendants, recognizing the sympathy factor and the potential for high awards, usually settle these cases if at all possible. A defendant who goes to trial on a mesothelioma case either has a very strong defense (as did American Cyanamid in this case) or is facing an unreasonable settlement demand that it just can't in good conscience pay. Undoubtedly, many of the original 19 defendants in this case settled before trial.

Courts are charged with applying the law fairly and without regard to sympathy in *all* cases, not just those in which injuries are mild or moderate. In this case the Fourth Circuit did not apply the burden of proof to the plaintiff. It affirmed a judgment against American Cyanamid based on speculation of experts who had no facts about American Cyanamid or about Kenneth Zimko's father,

other than that Zimko's father occupied certain positions at the American Cyanamid plant during certain time periods.

The Fourth Circuit majority essentially accepted the assumption that the average boiler worker during the time period in question was bringing home asbestos on his clothing and shifted the burden to American Cyanamid to prove that this was not so in Kenneth Zimko's father's case. However, until the Fourth Circuit's opinion in this case, it was well settled that a plaintiff cannot prove individual causation based on the exposure of someone else to a particular emission. (*Cf. Ford v. Murphy Oil U.S.A., Inc.*, 1996-2913 (La. 9/9/97), 703 So.2d 542, 549.) Further, proof of general causation, *i.e.* proof that a substance can cause a particular disease under the right circumstances, cannot substitute for proof of specific causation, *i.e.*, proof that the substance (here American Cyanamid's asbestos as opposed to anyone else's) caused the plaintiff's disease.

The majority appeared to be influenced by the fact that American Cyanamid produced no live witnesses to testify concerning conditions at its plant in the 1940s and 1950s. However, it is certainly understandable that with a current median life expectancy of 77.6 years, people who were in the adult work force in the 1940s and 1950s are either dead or very elderly and that, with the passage of such a great amount of time, living knowledgeable witnesses are difficult to locate. Since the inception of our legal system, the burden has been on the plaintiff to prove his civil case, not upon the defendant to prove that it is not at fault. As Judge Kirby pointed out in a footnote in his dissent, evidence at trial indicated that Kenneth Zimko's mother, and his aunt on his father's side, were still living at the time of trial. Yet plaintiff failed to call these witnesses who could have offered testimony concerning Zimko's father, the state of his work clothes and the Zimko home; nor did plaintiff offer any explanation for the absence of these witnesses from trial. Since plaintiff had the burden of proof, it would have been more appropriate to ask why these witnesses were not called by the plaintiff, rather than why the defendant had no living fact witnesses.

Two other aspects of the opinion on the American Cyanamid side of the case are extremely troubling. First, as discussed above, the court brushed aside too quickly the question of whether a premises owner owes a duty to family members of its employees. There is a split on this issue in other jurisdictions. The court did not fully consider the policy implications of extending the duty this far. Further, in broadly pronouncing a "general duty to act reasonably in view of the foreseeable risks of danger to household members of its employees" the court avoided explaining exactly what "foreseeability" was in this context, and whether different rules might apply to products manufacturer or contractor defendants.

Second, entirely absent from each of the five judge's opinions was a discussion of whether the industrial hygiene program that American Cyanamid actually had in place was "reasonable" based on the knowledge generally available to industry *at that time*. *I.e.*, while the court found a theoretical duty of a premises owner to its employees' family members, and while the court also found that asbestos brought home by Kenneth Zimko's father caused Zimko's mesothelioma, the court skipped over the intermediate question of whether American Cyanamid *breached* the duty. The breach element in a negligence case cannot be assumed merely by showing duty and causation. The plaintiff still must prove that the defendant's conduct was unreasonable under the facts and circumstances existing at the time of its actions. To skip the breach element turns a negligence case into a strict liability case, in which the defendant is held liable for the consequences of his actions regardless of the amount of care he exercised. While Louisiana law did, in the past, hold premises owners strictly liable for certain types of defects in their property (not transient conditions such as exposure to dust), that law would seem inapplicable here, and in any event the majority opinion specifically stated it was deciding the case against American Cyanamid on the basis of negligence and not strict liability.

We will continue to follow these emerging issues in this e-zine and will report on the sequelae of this disturbing case in future issues.

- Madeleine Fischer

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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