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Asbestos Defendants Gain Summary Judgment In Mesothelioma Case

Vodanovich v. A. P. Green Industries, Inc.,
2003-1079 (La.App. 4 Cir. 3/3/04) ___ So.2d ___

In *Vodanovich v. A. P. Green Industries, Inc.,* 2003-1079 (La.App. 4 Cir. 3/3/04), the Fourth Circuit Court of Appeal affirmed the granting of a summary judgment in favor of two defendants in an asbestos case. On first review, the decision appears to be a straightforward granting of a summary judgment when plaintiff failed to produce any evidence establishing the existence of a material issue of fact. However, the rarity of such dismissals in asbestos litigation demands further analysis.

Plaintiff was a longshoreman who unloaded asbestos cargo at various wharves along the Mississippi. The two defendants that sought summary judgment were companies that performed ship maintenance and repair. Plaintiff alleged that these defendants had performed repair operations on ships he loaded or unloaded, and these operations caused him to be exposed to asbestos. However, in opposition to the motions for summary judgment, plaintiff was unable to identify either defendant as having actually performed repair operations on any ship on which he worked.

Because plaintiff was unable to produce any evidence that defendants' operations had ever exposed him to asbestos, it should not be remarkable that the motions for summary judgment were granted. However, the operations of the two defendants were extensive and plaintiff was a longshoreman for 38 years. It would not be unreasonable to assume that the defendants' operations had exposed the plaintiff to asbestos at some time. Moreover, plaintiff contracted mesothelioma, a disease associated with relatively low exposures to asbestos. In prior cases, courts have often inferred the existence of the necessary exposure to defeat a motion for summary judgment.

The *Vodanovich* Court pointed out that an asbestos plaintiff bears the burden of proving that 1) he was exposed to asbestos from a defendant's product or operations, and 2) that the exposure caused his injury. In response to a motion for summary judgment asserting the lack of evidentiary support for an essential element of the plaintiff's cause of action, plaintiff is required to demonstrate that he can satisfy his burden of proof at trial. The Court appears to reject inferences of exposure or causation as "mere possibility" or "unsupported probability" insufficient to oppose a summary judgment.

- *William L. Schuette*

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Asbestos Wrongful Death Action Governed by Law in Effect at Time of Death

Roberts v. Owens-Corning Fiberglas Corp.,
2004 WL 691576 2003-0248 (La. App. 1 Cir. 4/2/04) ___ So. 2d ___.

This decision from the Louisiana First Circuit Court of Appeal clarifies the law governing wrongful death cases arising from asbestos exposure. Plaintiffs asserted survival and wrongful death actions against numerous asbestos manufacturers and premises owners, alleging that their decedent's mesothelioma resulted from his occupational exposure as a pipefitter at the Baton Rouge Exxon refinery and other facilities during the period 1950s, 1960s, and 1970s. Plaintiffs settled with all but one premises owner defendant (Exxon), the 18th Judicial District Court entered judgement on a jury verdict against Exxon and on the jury's apportionment of fault among nineteen defendants. After granting several judgments notwithstanding the verdict, the trial court increased the premises owner's degree of fault. Exxon appealed.

The appeal addressed many issues, but the most important ruling related to what principles of comparative fault and solidary liability should apply to plaintiffs' wrongful death action. Roberts died in 1995. At that time, Louisiana Civil Code article 2324B provided, in pertinent part, that "liability for damages caused by two or more persons shall be solidary only to the extent necessary for persons suffering injury, death, or loss to recover fifty percent of his recoverable damages." Plaintiffs argued that Exxon's solidary liability should be 50%. The appellate court, however, disagreed and held that Exxon was entitled to a credit for the percentages of comparative fault attributable to the settling defendants. In doing so, the court relied on the Supreme Court of Louisiana's decision in *Taylor v. U.S. Fidelity & Guar. Ins. Co.,* 630 So.2d 237, (La. 1993), to prevent plaintiffs from collecting more than 100% of their damages. "[A] plaintiff's settlement with one solidary obligor reduces his recovery by the percentage of the proportionate fault of the released obligor." *Taylor,* 630 So.2d at 239. The proportionate fault of the liable settling tortfeasors was, collectively, 79%, and Exxon's liability was set at 12.5% This left 8.5% of the fault unattributed, for which the court found Exxon was solidarily liable. As a result, Exxon was held liable for a total of 21% of plaintiffs' wrongful death damages.

Other holdings of note include the following -- rejection of plaintiffs' theories for "work around" asbestos liability and of Exxon's public policy defense to liability. The court refused to impose fault on two companies who allegedly used asbestos in boilers and turbines where the evidence proved, at best, that Roberts "worked around" those products. The court also rejected Exxon's argument that plaintiffs' unfair attempts to shift liability away from manufacturers due to bankruptcies were barred by public policy.

- *Judith V. Windhorst* back to top

Anesthetic Machine's Potential for Carbon Monoxide Poisoning Ends in Manufact'r Liability

Marks v. Ohmeda, Inc.,
2004 WL 626211, 2003-1446 (La. App. 3 Cir. 3/31/04)

Plaintiff Celia Ann Marks sued defendant Ohmeda, Inc. for severe neurological injuries she sustained as a result of carbon monoxide poisoning, which occurred during surgery for an abdominal hysterectomy. Ohmeda manufactured both the anesthetic and the anesthesia machine used during the

operation. Plaintiffs brought the suit against Ohmeda under the Louisiana Products Liability Act ("LPLA"). Finding in favor of the plaintiffs, the trial court awarded Celia $9,365,602 in damages and Colleen, her daughter, $350,000 in damages for loss of consortium. The Third Circuit Court of Appeals affirmed.

The LPLA provides, among other things, that a manufacturer is liable for injuries caused by a product if that product is unreasonably dangerous due to a lack of adequate warning. The defendant's liability under the LPLA for warning claims is determined using a duty-risk, or negligence, analysis.

The trial court first considered the actual cause of Celia's brain damage. After reviewing the testimony of numerous experts, the trial judge, unpersuaded by Ohmeda that a stroke was the causal factor, concluded that carbon monoxide poisoning resulted in the injuries. It was also clear that Ohmeda's machine and anesthetic were the sole source of the carbon monoxide. Celia was not suffering from poisoning upon entering the hospital and only presented such symptoms following her surgery. There was also no evidence of poisoning in pre-op, recovery, or post-op. The court concluded, therefore, she must have sustained carbon monoxide poisoning during surgery. The only source of carbon monoxide in the operating room came from an improper mixture of Ohmeda's anesthesia and its filtering/absorbing agent.

The LPLA places a duty on a manufacturer to use reasonable care to provide an adequate warning of a product's dangerous characteristics. Ohmeda breached this duty because it did not directly notify the users of its machines of the possible production of carbon monoxide during administration of anesthesia. This duty is non-delegable, therefore, any articles published in the medical community by others regarding this same concern were not sufficient to provide adequate warning. Additionally, though the machine's indicators warned of the absorbing agent's levels of carbon dioxide, there was no way to detect the absorption of carbon monoxide.

The duty to warn of potential carbon monoxide poisoning clearly extended to Celia because Ohmeda knew that the machine would be used to administer anesthesia to patients. Thus, Ohmeda had a duty to insure that the machine performed correctly and safely. Upon the discovery of the potential for carbon monoxide poisoning, Ohmeda had a duty to warn the machine's users of this risk. Ohmeda, however, never sent a letter or warning sticker to the hospitals or medical professionals who used its product. Furthermore, though Ohmeda's representatives regularly called on both the hospital and its medical professionals, they never informed them of the machine's potential for producing carbon monoxide.

The "learned intermediary" defense also was found not to apply. Under this doctrine, a doctor acts as an informed intermediary between Ohmeda and the patient. If Ohmeda had informed either Celia's anesthesiologist or her nurse anesthetist of the potential for carbon monoxide poisoning, it would have fulfilled its duty to warn. Ohmeda, however, neglected to warn these "learned intermediaries." Therefore, the defense failed.

- *Sarah B. Belter*

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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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