Jones Walker E*Zine

Products Liability
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Louisiana Fourth Circuit Eases Summary Judgment Burden For Asbestos Defendants

Booth v. ACandS.,
2003-C-0511 (La.App. 4 Cir. 8/13/03), ___ So. 2d ___.

This decision from the Louisiana Fourth Circuit Court of Appeal eases the summary judgment burden for an asbestos defendant. Plaintiffs asserted wrongful death and survival actions against numerous defendants related to the alleged occupational asbestos exposure of their decedent, Joe Booth. Plaintiffs claimed that Booth's alleged asbestos disease was caused by his exposure to, *inter alia,* asbestos tape manufactured by Defendant 3M Company (formerly, Minnesota Mining & Manufacturing Co.) during his employment at Avondale Shipyards. 3M sought summary judgment, claiming that plaintiffs' evidence was insufficient to maintain their claim against 3M. Plaintiffs offered a 1967 "material requisition" form indicating that Minnesota Mining tape was delivered to an Avondale subcontractor (Hopeman Brothers) for an Avondale job. The trial court denied summary judgment, and the Fourth Circuit reversed.

On appeal, the Fourth Circuit addressed the summary judgment analysis into material questions: (1) Whether there is a genuine issue of fact that 3M or its predecessor manufactured, sold, and/or distributed asbestos tape used at Avondale; and (2) Whether plaintiffs have sufficient evidence that Booth, more probably than not, was exposed to the 3M asbestos tape referenced in the form. The court held that the material requisition form, by itself, was sufficient to create a genuine issue of fact as to whether 3M asbestos tape was used by Hopeman Brothers while performing work at Avondale. The court reviewed deposition testimony indicating that Booth may have worked around Hopeman Brothers while working as an Avondale pipe insulator in 1969. The court held, however, that this evidence was insufficient to maintain plaintiffs' claim that Booth was *exposed* to that 3M asbestos tape referenced in the material requisition form.

> Construing all factual inferences reasonably drawn from the evidence in plaintiffs' favor, and resolving all doubt in their favor, the evidence does not show that plaintiffs can meet their burden of proving that it was more probable than not that decedent Joe Booth was exposed to any 3M/Minnesota Mining asbestos tape or cloth requisitioned, ordered and/or purchased by Hopeman Brothers during the brief period in 1969 when he worked at Avondale as a pipe insulator. Accordingly, there is no genuine issue of material fact, and 3M is entitled to judgment as a matter of law.

The evidentiary holdings of *Booth* are important, because they make it easier for asbestos defendants to obtain summary judgment when plaintiffs can only offer evidence that a plaintiff/decedent may have been exposed to that defendant's asbestos product.

- *Judith V. Windhorst*

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Fifth Circuit Upholds "Sophisticated User" Defense in Warning/Design/Manufacture Case

Jones v. Flowserve FCD Corp.,
2003 WL 22002606 (5th Cir. 8/21/03)

Keith Jones worked at a Lake Charles chemical plant owned by PPG Industries, Inc. In 1998 he opened a valve on a tank containing hot brine. The stainless steel bolting securing the valve failed due to the effects of stress corrosion cracking (SCC), and Mr. Jones was sprayed with the brine and injured. The valve, a Durco T-41, was manufactured by Duriron between 1977 and 1983 and sold to PPG for use in its Lake Charles plant during this time period. PPG's Natrium, Virginia plant, however, had since 1969, rejected the use of stainless steel bolting. In 1984, the chemical process industry recognized the risk of SCC in stainless steel bolting used in high-chloride environments and changed the industry standard from recommending stainless steel bolting to recommending carbon steel bolting.

Mr. Jones filed suit against Duriron, now known as Flowserve, claiming that the valve was defectively designed and manufactured and that Duriron failed to warn PPG of the dangers of using the stainless steel bolting in a high chloride environment. Duriron moved for summary judgment and to strike an affidavit in opposition to summary judgment submitted by Mr. Jones's expert, Dr. Morse. The District Court for the Western District of Louisiana granted Duriron's motions.

The Fifth Circuit Court of Appeal first affirmed the District Court's decision to strike Dr. Morse's affidavit because three of the four alternative designs described in Dr. Morse's affidavit had not been disclosed to Duriron during discovery. The Fifth Circuit also noted that it was harmless error to strike that portion of the affidavit describing the fourth alternate design that was disclosed to Duriron during discovery (namely, that carbon was superior to stainless steel) because Mr. Jones failed to show that the benefits of carbon steel alternate outweighed the benefits of stainless steel, as required by the LPLA.

The Fifth Circuit also agreed with the District Court's conclusion that Duriron was not liable on the failure to warn claim because PPG was a "sophisticated user," and already knew, or should have known, of the dangers associated with the use of stainless steel bolting in a high-chloride environment. The Court observed that, as required by the Fifth Circuit's decision in *Swopes v. Columbian Chems. Co.,* 281 F.3d 185 (5th Cir. 2002), Duriron supported its "sophisticated user" defense with evidence beyond PPG's extensive familiarity with the stainless steel bolting in its chemical processing. The court found PPG's rejection of stainless steel bolting at its Virginia plant prior to 1984 especially significant evidence that PPG knew or should have known of the dangers in using stainless steel bolting when it purchased the Durco T-41 for its Lake Charles plant. Equally persuasive was evidence that PPG produced a Teflon coating intended for use on austenitic stainless steel and carbon steel to protect against SCC. The Fifth Circuit also found persuasive testimony showing that the Lake Charles plant had experienced SCC in stainless steel bolting only six months prior to the Jones incident.

Finally, the Fifth Circuit rejected Mr. Jones' contention that language in *Swopes* suggested that a user must have known of the defect at the time it purchased the product for the "sophisticated user" defense to apply. Instead, the Court held that, at most, *Swopes* requires that PPG have had actual or constructive knowledge of the danger at the time Duriron changed its standard bolting in 1984. But as PPG had knowledge before 1984, *Swopes* was inapplicable to Mr. Jones's case.

- *Diana A. Cross*

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U.S. 9th Cir. Says Overbroad Subpoena For E-Mail

Violates Federal Computer Protection Laws

Theofel v. Farey Jones,
341 F.3d 978 (9th Cir. 8/28/03)

Farey-Jones, embroiled in commercial litigation with two officers of Integrated Capital Associates (ICA), instructed his attorney to issue a subpoena to ICA's Internet Service Provider requesting "'all copies of e-mails sent or received by anyone' at ICA, with no limitation as to time or scope." The ISP provided Farey-Jones with a sample of 339 e-mails from ICA officers and employees, most of which were unrelated to the litigation and many of which were privileged or personal. When the ICA officials found out about the disclosures, they sought discovery sanctions, which were granted by the magistrate who found that the subpoena was "massively overbroad," "patently unlawful," and "transparently and egregiously" violated the Federal Rules of Civil Procedure.

The officers and other ICA employees whose e-mails were disclosed sued Farey-Jones and his attorney under several federal statutes, including the Stored Communications Act and the Computer Fraud and Abuse Act. The trial judge dismissed the suit, but the Ninth Circuit, reinstated the claim under the Stored Communications Act and ordered that the plaintiffs be allowed to amend their claim under the Computer Fraud and Abuse Act.

The Stored Communications Act provides a cause of action against anyone who "intentionally accesses without authorization" an electronic communications service, and thereby gains access to stored electronic communications. The Computer Fraud and Abuse Act provides a cause of action against anyone who "intentionally accesses a computer without authorization … and thereby obtains ... information from any protected computer." The Ninth Circuit held that Farey-Jones and his attorney obtained the e-mails without authorization because they used a subpoena that "transparently and egregiously violated the Federal rules" to convince the ISP to turn over the messages. Notably, the court rejected the argument that the access was "authorized" because the ISP could have objected to the subpoena but failed to do so.

Plaintiffs also asserted a claim under the Wiretap Act, which authorizes suit against anyone who "intentionally intercepts ... any wire, oral, or electric communication." 18 U.S.C. 2511(1)(a). As that Act only prohibits "acquisition contemporaneous with transmission," the Ninth Circuit affirmed the dismissal of that claim.

- *Robert Louis Walsh*

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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:

Leon Gary, Jr.
Jones Walker
Four United Plaza
8555 United Plaza Boulevard
Baton Rouge, LA 70809-7000
ph. 225.248.2024
fax 225.248.3324
email lgary@joneswalker.com

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