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ASBESTOSIS & MESOTHELIOMA: OF PRESCRIPTION, CAUSES AND CONFESSIONS

Cichirillo v. Avondale Industries, Inc., 2004-2894 (La. 11/29/05), ___ So.2d ___

Exposure to asbestos is associated with several different nonmalignant and malignant conditions that may arise at different times and not until decades after the exposure. These characteristics have created uncertainty concerning the nature and scope of the cause(s) of action for asbestos related injuries. Under Louisiana law, a cause of action in tort accrues when any damage results from substandard conduct. Significantly, only a single cause of action including all past, present and potential future injuries is created and not separate causes of action for each discernible injury.

For various policy reasons, many foreign courts allow asbestos plaintiffs who have previously sued for a nonmalignant injury a second cause of action for a subsequent asbestos related malignancy even while recognizing the violation of their traditional tort theories. Although there have been several Louisiana decisions that touch on this issue, there has not been an explicit determination.

In determining the substantive law applicable to asbestos claims, the Louisiana Supreme Court has held that the cause of action accrues at the time of the first significant exposure to asbestos. This is because the legally cognizable injury is the embedding of the asbestos fibers in the lung. Under traditional tort theory, any subsequent disease is a manifestation of this injury and included within the scope of a single cause of action.

Asbestos plaintiffs will certainly argue that the Louisiana Supreme Court's recent decision in *Cichirillo v. Avondale Industries* signals the Court's adoption of multiple causes of action for asbestos injuries; however, a careful review refutes any such interpretation. In *Cichirillo*, plaintiff was diagnosed with asbestosis in 1991 and filed suit in Mississippi in 1992. In 1999, while the Mississippi suit was still pending, he was diagnosed with asbestos related mesothelioma and filed suit in Louisiana in 2002. The Louisiana defendants filed exceptions of prescription because the suit had been filed more than one year after diagnosis. The trial court granted the exceptions and dismissed the Louisiana suit as prescribed. Plaintiff appealed contending that the pending Mississippi asbestosis suit created an ongoing interruption of prescription as to the Louisiana mesothelioma claim. The Fourth Circuit Court of Appeal agreed and reversed the judgment maintaining the exceptions.

The Louisiana Supreme Court reinstated the trial court's judgment holding that the Mississippi asbestosis suit did not interrupt prescription on the Louisiana mesothelioma claim. Some plaintiffs may conclude that this result means that the Louisiana Supreme Court recognizes two separate causes of action for asbestosis and mesothelioma; however, this is not supported by the court's rationale. In its opinion, the court repeatedly states that Mississippi law must determine whether the Mississippi suit interrupted prescription of the mesothelioma claim. Analyzing Mississippi law, the court noted Mississippi's "discovery rule"

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which unlike Louisiana's provides that a cause of action does not accrue until a victim knows or should know that he has been injured. Applying this rule, the court concluded that when the Mississippi suit was filed in 1992 plaintiff did not have a cause of action under Mississippi law for mesothelioma subsequently diagnosed in 1999. Therefore, the Mississippi asbestosis suit could not interrupt prescription on a subsequently diagnosed mesothelioma.

Although not addressed by the court, there is an important distinction between Mississippi's "discovery rule" and Louisiana's. As explained by the court, in Mississippi the "discovery rule" delays accrual of the cause of action until the plaintiff knows or should know of his injury. However, in Louisiana, a cause of action accrues when the victim sustains injury whether or not he is aware of it and the "discovery rule" suspends prescription until the victim knows or should know of his injury. As a result of this distinction, it is not possible to predict whether the Louisiana Supreme Court will recognize multiple causes of action for asbestos injuries under Louisiana law; however, the decision may have another, broader implication with regard to judicial confessions.

Prior to the court's decision in *Traina v. Sunshine Plaza*, 2003-1003 (La. 12/3/03), 861 So.2d 156, Louisiana courts had restricted judicial confessions to those allegations admitted by a defendant in its answer. In *Traina*, the Supreme Court returned to the language of Louisiana Civil Code article 1853, rejected these restrictions and held that an allegation in an exception constituted a judicial confession. Subsequently, the courts of appeal have held that allegations in petitions constitute judicial confessions. See *Terrell v. Town of Merryville*, 2004-594 (La.App. 3 Cir. 11/10/04), 886 So.2d 1278, and *Delesdernier v. Louisiana Health Service and Indemnity Company*, 867 So.2d 819, 2003-1135 (La.App. 4 Cir. 2/4/04). Here, the Louisiana Supreme Court appears to have further broadened those statements that constitute judicial confessions.

In *Chichirillo*, plaintiff alleged, albeit inaccurately, that he had filed suit within one year of the diagnosis of mesothelioma. Because the suit was not prescribed on the face of the petition, defendants bore the burden of proving that the suit had been filed more than a year after plaintiff discovered he had mesothelioma. However, the defendants failed to submit any of the records on which they relied into evidence; thus, they were not part of the record before the court. Fortunately, in reviewing the transcript of the arguments before the trial judge, the court noted that during a colloquy with the judge, plaintiff's counsel stated that the diagnosis had been made more than a year before suit was filed. The court held that this statement by counsel during oral argument constituted a judicial confession. Significantly, at the time the statement was made, it was not necessarily even adverse to the plaintiff because plaintiff's argument was not that he had filed suit within a year of diagnosis but that prescription was interrupted by the pending Mississippi suit.

In holding that statements by counsel during oral argument may constitute judicial confessions, even when not adverse to their position at the time, the court imposes a properly exacting standard on counsel for truthfulness and accuracy in all representations to the court.

—William L. Schuette

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MANUFACTURER OF BICYCLE COMPONENT WINS SUMMARY JUDGMENT

Prothro v. Wal-Mart Stores, Inc., 2005 WL 3263165 (W.D.La. 11/30/05)

In this product liability action, the court granted a component part manufacturer's unopposed motion for summary judgment. The plaintiff, whose son was injured while riding a bicycle, alleged that the defendant SRAM was liable under the Louisiana Products Liability Act as the manufacturer of the bicycle's rear derailleur, the gear changing mechanism which included the handlebar shifter, the derailleur near the rear tire and a cable connecting the two. Apparently, the wire cable running from the handle bar to the rear derailleur was routed along the top tube of the bicycle and was not covered in plastic in certain locations. The plaintiff alleged that the routing of the exposed wire along the top tube was an unreasonable dangerous design (La.R.S. § 9:2800.56), and that SRAM failed to warn of the danger posed by the exposed derailleur cable (La.R.S. § 9:2800.57).

The plaintiff's failure to file an opposition did not necessarily mean that the motion had to be granted. As noted by the trial judge, a movant, even when unopposed, must establish the absence of a genuine issue of material fact in order to have its summary judgment granted. However, the plaintiff's failure to file an opposition and statement of contested material facts did require the trial judge, pursuant to Local Rule 56.2W, to deem the movant's statement of uncontested material facts admitted.

Those admitted material facts proved that SRAM was not responsible for the design that placed exposed wire cable on the bicycle's top tube. For that reason, the court granted summary judgment on the defective design claim. Regarding the claim that SRAM was liable for failing to warn about the danger posed by the exposed derailleur cable, the court dismissed that claim because it was "undisputed that the rear derailleur cable left SRAM's control prior to being installed with three sections exposed, the characteristic which plaintiff alleges caused her son's injuries."

This case illustrates the proposition that a component part manufacturer's liability should be limited to dangers arising from the component itself, rather than dangers arising from other aspects of the product into which it is subsequently incorporated.

—[Robert L. Walsh](#)

NINTENDO DIDN'T CAUSE CHILD'S EPILEPSY, BUT FINED FOR DISCOVERY ABUSE

Roccaforte v. Nintendo Of America, Inc., 2005-0239(La.App. 5 Cir. 11/29/05), ___ So. 2d ___

After their son developed epilepsy, Gerald and Sally Roccaforte sued Nintendo of America, Inc., the manufacturer of Nintendo video games, under the Louisiana Products Liability Act. They alleged that their son developed this condition as a result of playing the video games.

During the seven-day trial, Nintendo belatedly produced hundreds of pages of documents that plaintiffs argued should have been produced in response to a pretrial order compelling the production of documents. Plaintiffs sought and obtained a contempt ruling and an order for monetary sanctions against Nintendo, but the ruling did not specify an amount.

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The jury returned a verdict in favor of Nintendo. Although it found that Nintendo did not provide an adequate warning of the seizure risk from playing video games, it concluded that the products were not unreasonably dangerous in design, and that the failure to provide adequate warning was not the proximate cause of the child's injuries. Consequently, the trial court dismissed the claims.

The plaintiffs appealed contending that Nintendo's failure to respond fully to discovery orders damaged their case. The Louisiana Fifth Circuit agreed and vacated the jury verdict, reversed the trial court's denial of the plaintiffs' motion for new trial, upheld the trial court's grant of sanctions against the defendant, and ordered the trial court to impose a specific amount of monetary sanctions.

On remand in April 2004, the trial court ordered the defendant to pay \$181,620.86, comprised of \$31,620.80 for the plaintiffs' costs and expenses and \$150,000.00 in attorney's fees.

Nintendo appealed the trial court's ruling and asserted that the April 2004 judgment should be set aside. Nintendo argued that the judgment substantively amended the prior judgment by awarding trial-related costs and fees, rather than costs and fees related to the motion to compel and the motion for contempt. Further, Nintendo asserted that the award of \$150,000.00 in attorney's fees had no evidentiary basis and should be vacated.

In response, the plaintiffs argued that Nintendo's behavior during the trial resulted in a miscarriage of justice throughout discovery and throughout the trial. They maintained that the plaintiffs' expenses, costs, and attorneys' fees for the entire proceeding should be assessed against Nintendo.

Under Louisiana Code of Civil Procedure article 1471, if a party fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just, and require the party to pay reasonable expenses, including attorney's fees, caused by the failure.

The Fifth Circuit felt that the trial judge was in the best position to observe and evaluate the work performed by plaintiffs' counsel in regards to the attorney's fee. Upon review of the record, the Fifth Circuit determined that many of the costs and expenses incurred by the plaintiffs during the ten years of litigation were reasonably attributable to Nintendo's discovery violations.

Accordingly, the Fifth circuit held that the trial judge neither went beyond the scope of the first ruling's judgment, nor abused its discretion in the ruling on remand. Accordingly, it affirmed the judgment, awarded plaintiffs an additional \$5,000.00 in attorney's fees for the appeal, and assessed the cost of the appeal against Nintendo of America, Inc.

—*Michelle D. Craig*

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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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