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La. Supreme Court Applies Comparative Negligence In Asbestos Wrongful Death Case

Landry v. Avondale Industries, Inc.,
2004-3432 (La. 7/2/04), ___ So.2d ___, 2004 WL 1504463

Generally ignored and unsupervised by the courts of appeal and the Louisiana Supreme Court, asbestos cases have produced a mass of often inconsistent, legally insupportable and pro-plaintiff trial court rulings resulting in unwritten asbestos law that sometimes bears little resemblance to traditional law and procedure. However, the Supreme Court's interest in *Landry v. Avondale Industries, Inc.* may indicate a desire to create some order by defining the legal characteristics of the cause(s) of action for asbestos-related injuries.

As previously reported, in *Landry v. Avondale Industries, Inc.,* 2003-0719 (La. 12/3/03), 864 So.2d 117 *(Landry I),* the Court held that the cause of action for loss of consortium could not be applied retroactively to impose liability on a defendant whose conduct occurred prior to September 10, 1982 (the effective date of Act 202 allowing recovery for loss of consortium). (*See* LOUISIANA SUPREME COURT FURTHER EXPLAINS RETROACTIVE APPLICATION OF LAWS IN ASBESTOS CASES, January 2004, Vol. 36.) Subsequently, in the noted case, *Landry v. Avondale Industries, Inc.,* 2004-3432 (La. 7/2/04) *(Landry II),* the Court accepted a defense writ application to resolve an issue concerning the substantive law to be applied to asbestos-related wrongful death claims.

In its first significant foray into asbestos litigation, the Louisiana Supreme Court held in *Cole v. Celotex Corporation,* 599 So.2d 1058 (La. 1992), that the current comparative fault system could not be applied to asbestos cases in which the significant asbestos exposures occurred prior to August 1, 1980 (the effective date of Act 431 eliminating contributory negligence and adopting comparative negligence). Act 431 contained unique language excluding its application to claims arising from *events* occurring prior to its effective date. The *Cole* Court reasoned that with regard to long latency occupational diseases the relevant events were the exposures to the disease producing agent. Subsequently, in *Austin v. Abney Mills,* 824 So.2d 1137 (La. 2002), co-employee defendants asserted tort immunity as a defense to a claim for plaintiff's asbestos-related mesothelioma. Prior to 1976, Louisiana Revised Statute 23:1032 provided immunity for the employer but not co-employees. However, the defendants argued that plaintiff's cause of action arose either at the time his mesothelioma was contracted (contraction theory) or when it first manifested itself (manifestation theory), and under either theory plaintiff's cause of action accrued after 1976. The Court rejected both the contraction and manifestation theories as unworkable and held that all causes of action for asbestos injuries accrue at the time of the exposure to asbestos. Because plaintiff's exposure predated 1976, the co-employees were not immune from a tort suit.

In *Landry II,* defendant filed a motion for summary judgment seeking application of comparative fault to a wrongful death action. Decedent died in 2002 and defendant argued that with regard to a wrongful death action the relevant event was the death itself. Therefore, the language of Act 202

prohibiting its application to claims arising from events prior to its 1982 effective date was not applicable. Plaintiffs argued that under *Cole* the relevant event for all asbestos claims was the exposure to asbestos which occurred prior to 1982. Recognizing that a wrongful death claim is independent of the decedent's claim, the Court rejected plaintiff's argument and held that with regard to a wrongful death claim the relevant event is the death itself.

Significant confusion exists concerning when causes of action for asbestos injuries actually arise. The *Cole* Court specifically based its decision on the "unique language of Act 431" rather than a holding that the cause of action accrued at the time of the exposure to asbestos. The holding in *Austin* appeared to clarify that the cause of action for asbestos-related mesothelioma accrued at the time of the exposure; however, many still argue that this holding only applies to the issue of co-employee tort immunity. Although possibly dicta, the *Landry II* decision contains language further confirming that all asbestos-related causes of action arise at the time of exposure to asbestos.

In footnote 5, the Court reiterated that *Austin* held the *significant tortious exposure theory* determines the accrual of a cause of action for a long-latency occupational disease. Even more significant is the Court's description of these exposures:

> These "exposures" we recognized in our recent decision in *Austin v. Abney Mills, Inc.* [citation omitted] are not merely causative, but in fact include a corresponding measure of injury or damage. [citation omitted]

Incurring a legally cognizable injury is the final element necessary for the accrual of a cause of action. The Court appears to be strongly indicating that the legally cognizable injury is the exposure, defined as the inhalation of asbestos fibers, alone. Therefore, the cause(s) of action for all asbestos-related injuries are complete at the time of the exposure and the substantive law in effect at that time governs. Although such a theory harmonizes existing jurisprudence, its logical extension would have a profound impact on asbestos litigation.

For example, prescription begins to run at the moment the cause of action accrues and if suit is not filed within a year of that date it is plaintiff's burden to prove that it has been interrupted or suspended. Generally, plaintiffs claim that prescription is suspended by operation of *contra non valentem* because they were not aware they had been injured. However, prescription begins to run once the plaintiff is aware that he has sustained even the slightest injury, and the fact that further injuries may develop in the future does not continue to suspend prescription. Most plaintiffs were exposed to asbestos in the 1960s and 1970s and should be required to show that they were reasonably ignorant of their injury during the intervening 30 to 40 years during which substantial information concerning the hazards of asbestos was disseminated by the government, employers, health personnel, broadcast media and asbestos plaintiff attorneys.

Also, it is not uncommon for plaintiffs to obtain judgment for a nonmalignant asbestos injury and later sue for a subsequent asbestos-related malignancy. This practice now raises significant issues concerning improper splitting of causes of action or potential waiver of causes of action under Louisiana Code of Civil Procedure article 425. Some of the results may well appear to be harsh and it will be interesting to see whether the Louisiana Supreme Court continues to apply its definition of asbestos causes of action impartially or whether it will fall back on "asbestos law."

- *William L. Schuette*

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One Plaintiff's Delay In Prosecution Results In Dismissal Of Part Of Suit

Moll v. Brown & Root, Inc.,
2004 WL 1586555 (E.D.La. 7/15/04)

While working on an industrial furnace in Union Carbide's petrochemical plant, plaintiff Mark Moll was struck in the face by a piece of a muffler when it disconnected from a pipe containing pressurized steam.

The muffler was specified by ABB Lummus Global, Inc. and Combustion Engineering, Inc. (collectively, "Lummus"); was designed and fabricated by Fluor Daniel, Inc. and Beaird Industries, Inc.; and was installed by the general contractor, H.B. Zachry Company. Plaintiff and his wife, Beverly Moll, sued each of these companies.

Defendants removed the matter to Federal Court where defendant Lummus moved for summary judgment on grounds that Louisiana's ten-year peremptive period for actions involving the design and/or construction of immovables had expired. Then-sitting Judge Clement eventually granted the motion and granted a similar motion dismissing Zachry on the same grounds. The plaintiffs, along with defendants, Beaird and Fluor Daniel, appealed. The Fifth Circuit affirmed the district court's decision on July 24, 2000.

Nearly three years after the Fifth Circuit's decision, in July 2003, plaintiffs moved to reopen the case. Defendants, Beaird and Fluor Daniel, opposed the motion to reopen on grounds that the court should dismiss the matter for plaintiffs' failure to prosecute. The Eastern District initially denied the motions. However, defendants reurged their motions to dismiss.

Judge Engelhardt determined that this case presented a clear record of delay on the part of both plaintiffs. Additionally, the court found that the plaintiffs' delay in prosecuting the case contributed to Union Carbide's loss of the physical evidence related to the plaintiff's accident, and ultimately resulted in prejudice to the defendants.

However, because Judge Engelhardt determined that Mark Moll could not be held responsible for the actions or inactions of his attorney, he did not hold him personally responsible for the delay or for the spoliation of evidence. Accordingly, he did not discipline him with the most severe penalty, a dismissal of his case. Instead, he allowed Mr. Moll's case to proceed, but cautioned him that any future delays would subject him to a dismissal of his case.

The court, however, found Beverly Moll personally responsible for the delay in the prosecution of her claims. She had not answered any discovery requests and had not been re-deposed since the case was re-opened. Moreover, no one had been able to locate her, and her counsel admitted that he had no information concerning her current location or even her new name following her re-marriage. The court determined that Mrs. Moll's lack of communication with her attorney demonstrated responsibility on her part for failing to prosecute the matter. Finding her conduct egregious, the court dismissed her case with prejudice.

- *Michelle D. Craig*

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Walker Manufacturer Loses Summary Judgment Motion In Federal Court

Bremer v. Egan Healthcare Corp.,
2004 WL 1396314 (E.D. La. 6/21/04)

Following arthoscopic knee surgery, Plaintiff's treating physician prescribed the use of a walker, manufactured by defendant Invacare Corp. Plaintiff alleged that the metal cross bar of the walker cracked, causing it to collapse; and, as a result, plaintiff fell and reopened her surgical wound.

Plaintiff filed suit against Invacare and the distributor of the walker, Egan Healthcare Corp., claiming that the walker was defective in construction and/or that the defendants failed to properly warn her regarding the use of the walker. Invacare moved for summary judgment arguing that plaintiff did

not have sufficient evidence to sustain her burden of proof under the Louisiana Products Liability Act ("LPLA"), La. R.S. 9:2800.54, that the product was unreasonably dangerous.

The court stated that "to avoid summary judgment on the claim of defective construction, the plaintiff must present competent evidence . . . that the product deviated in a material way from the manufacturer's specifications or from otherwise identical products manufactured by the same company at the same time that the product left the manufacturer's hands."

Plaintiff argued that the statement by Invacare's expert that he had never seen a walker fail as plaintiff's did, combined with the testing that Invacare subjects all of its walkers to prior to distribution, supported her contention that her particular walker was defective and did not meet Invacare's standards. In addition, plaintiff's expert witness testified that, in her opinion, the walker: 1) failed to meet Invacare's construction standards or contained a design defect; and 2) had "strange" welds where the crossbars met its supports.

Regarding plaintiff's failure to warn claim, given that the walker was prescribed by a physician, the "learned intermediary doctrine" applied. Therefore, had there been a clear, accurate and unambiguous warning, the adequacy of the warning would have been a question of law. However, the court held that there was no clear, accurate or unambiguous warning because Invacare had not provided a warning suggesting that the walker could fail during normal use.

For these reasons, Judge Porteous denied the motion for summary judgment.

- *Meredith Prechter Young* back to top

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