Survey of Toxic Tort Law Cases

U.S. Supreme Court Addresses Whether the "Bare-Metal Defense" Applies Under Maritime Law

In *Air & Liquid Systems Corp. v. DeVries*, the United States Supreme Court concluded that in the maritime tort context, a product manufacturer owes a duty to warn when its product requires incorporation of a part, the manufacturer knows, or has reason to know, that the integrated product is likely to be dangerous for its intended uses, and the manufacturer has no reason to believe the product's users will realize that danger.

In *DeVries*, two Navy veterans developed cancer and later died. The veterans' families sued the manufacturers of pumps, blowers, and turbines that were installed on the ships, alleging that the veterans developed cancer due to asbestos exposure from the products. The products required asbestos insulation or asbestos-containing parts to function as intended and released asbestos fibers when used on the ships. The plaintiffs argued that the defendants owed a duty to warn the decedents because a manufacturer has a duty to warn when its product requires the incorporation of a part that the manufacturer knows is likely to make the product dangerous for its intended use. By contrast, the defendants argued that they owed no duty to warn because the Navy, rather than the defendants, incorporated asbestos into the equipment. The defendants typically delivered the products to the Navy without asbestos, in a condition known as "bare-metal." The district court granted the defendants' motion to dismiss, while the Court of Appeals for the Third Circuit vacated and remanded.

The Supreme Court began its analysis by explaining that federal and state courts have not reached a consensus on how to apply the general tort law "duty to warn" principle when a manufacturer's product requires later incorporation of a dangerous part for the product to function as intended. The Court examined three approaches that lower courts have used, ultimately adopting the following approach:

> [F]oreseeability that the product may be used with another product or part that is likely to be dangerous is not enough to trigger a duty to warn. But a manufacturer does have a duty to warn when its product *requires* incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses.

Under this approach, the manufacturer may be liable even when the manufacturer does not itself incorporate the required part into the product.

According to the Court, this approach avoids imposing a duty on product manufacturers to imagine and warn about all the possible uses of their products. However, the Court believed the defendants' "bare-metal defense" went "too far in the other direction." The Court reasoned that while a manufacturer generally owes no duty to control the conduct of a third person as to prevent him from causing physical harm to another, a manufacturer owes a duty to warn when its product is dangerous in and of itself because the manufacturer knows, or has reason to know, that the product is, or is likely to be, dangerous for the use for which it is supplied. Thus, the Court determined that when a manufacturer's product requires the incorporation of a part that the manufacturer knows, or has reason to know, is likely to make the integrated product dangerous for its intended uses, the manufacturer owes a duty to warn.

The Court further noted that the rule it adopted should not impose a significant burden on product manufacturers because the rule applies only when a product *requires* a part for the integrated product to function as intended. Finally, the Court suggested some limitations to its holding, noting the special circumstances posed by maritime law. The Court explained that maritime law has always recognized a "'special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" Because the decedents served in the Navy, the Court concluded that its ruling comported with this principle of maritime law.

Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986 (2019).

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Public and Private Interest Factors Did Not Support Transfer of Venue Under the Doctrine of *Forum Non Conveniens*

In *Alley v. BNSF Railway Company*, the appellate court considered whether the trial court abused its discretion in denying the defendant's motion to transfer venue under the doctrine of *forum non conveniens*. The plaintiff was the wife and executor of the decedent's estate. She filed suit in Cook County Circuit Court against the defendant, alleging the defendant exposed the decedent to asbestos while he was employed by the defendant as a brakeman and locomotive engineer from 1974 to 2014. The defendant sought to have the case transferred to Knox County under the doctrine of *forum non conveniens* based on the theory that Knox County rather than Cook County was the more convenient forum for litigation of plaintiff's claims.

The Illinois Appellate Court First District began by noting that *forum non conveniens* is an equitable doctrine that allows a court to decline jurisdiction when a trial in another forum better serves the ends of justice. The appellate court stated that it is assumed for purposes of *forum non conveniens* that the plaintiff's chosen forum is a proper venue and the burden is on the movant to demonstrate relevant factors favor a transfer of venue. The appellate court observed the Illinois Supreme Court has specified certain private and public interest factors that must be balanced by a court when ruling on a *forum non conveniens* motion and that no single factor is controlling.

Accordingly, the First District held that the trial court did not commit an abuse of discretion in determining that the public and private interest factors did not weigh significantly in favor of transferring the plaintiff's suit to Knox County. The court reasoned the relevant private interest factors (*i.e.*, convenience of the forum for the parties, relative ease of access to evidence, and other practical issues affecting trial) did not favor transfer of the case to Knox County because: (1) the plaintiff's and defendant's potential witnesses were scattered amongst several counties, including the plaintiff's forum; (2) there was no real evidence relevant to the case and worth considering in Knox County; and, (3) there was no major travel hub located in Knox County.

The First District further concluded the relevant public interest factors (*i.e.*, deciding controversies locally, burden and expense on a forum with minimal connection to a case, and administrative considerations) did not favor transferring the case to Knox County since Cook County residents had an interest in ensuring safe conduct by the defendant within Cook County when the defendant conducted regular business there. The appellate court also determined administrative considerations did not weigh in favor of transferring the plaintiff's suit to Knox County, as Cook County typically resolved cases by jury verdict quicker than Knox County. Consequently, the First District held the trial court did not abuse its discretion in denying defendant's motion to transfer venue.

Alley v. BNSF Ry. Co., 2019 IL App (1st) 182509-U.

Denying Motion Based on *Forum Non Conveniens* Because of the Presence of an Alleged Co-Conspirator in a Later Dismissed Conspiracy Count is Not an Abuse of Discretion

In *Ross v. R.J. Reynolds Tobacco Co*., the Illinois Appellate Court Fourth District upheld an order from the Circuit Court of McLean County denying a motion to transfer based on the doctrine of *forum non conveniens* in a case alleging asbestos exposure that occurred in Vermilion County. The defendants, Hobart Brothers and Lincoln Electric, argued transfer was appropriate because: (1) none of the parties resided in McLean County; (2) the alleged asbestos exposure occurred only in Vermilion County; and (3) the plaintiff never received medical treatment in McLean County. Thus, the defendants argued McLean County lacked a strong interest in the case and should not have to bear the burden of imposing jury duty on its residents and holding an expensive trial. The plaintiff countered that the defendants failed to demonstrate either that McLean County was, in fact, an inconvenient forum or that another forum would actually be more convenient for all parties.

The trial court denied the defendants' motion, concluding that public interest factors favored McLean County as a forum based on the conspiracy count in the plaintiff's Complaint involving Owens-Illinois Corning (O-I), a defendant headquartered in McLean County, alleging O-I was involved in a conspiracy to hide the health effects of asbestos. Hobart and Lincoln were not named in the conspiracy count. Subsequent to the trial court's denial of the Motion to Transfer and prior to the Fourth District's disposition, all of the parties except O-I had been dismissed from the conspiracy count.

The defendants obtained leave to appeal the trial court's order under Illinois Supreme Court Rule 306 for interlocutory orders. The Appellate Court found the trial court was not required to have considered the merits of the conspiracy count against O-I at the time it ruled on the defendants' *forum non conveniens* motion. According to the Fourth District, the trial court's ruling, at the time it was

made, reasonably relied on the reference to O-I in the conspiracy count. Thus, the Fourth District found the trial court did not abuse its discretion in denying the defendants' motion, concluding the defendants failed to meet their burden before the trial court of demonstrating public and/or private factors favored transfer to a more convenient forum.

Ross v. R.J. Reynolds Tobacco Co., 2018 IL App (4th) 160925-U.

Medical Testing and Monitoring Itself a Recoverable Injury at Tort; Tort Immunity Act Does Not Cover City's Partial Replacement of Water Lines and Failure to Advise Residents of Lead Exposure

In *Berry, v. City of Chicago*, the Illinois Appellate Court First District reversed the Cook County Circuit Court's dismissal of the plaintiffs' class-action complaint, alleging negligence and inverse condemnation against the City of Chicago stemming from lead-contaminated drinking water. The plaintiffs alleged the City not only failed to sufficiently initiate measures to reduce the presence of lead, but also failed to warn residents of lead exposure and further exacerbated lead corrosion of pipe and lead exposure to the plaintiffs' water supply by partially replacing lead water service lines with copper pipe. The plaintiffs' complaint sought the establishment of a trust for medical monitoring for class-members and damages to fully replace lead water service lines to the class-members' homes. The trial court granted the City's motion to dismiss, which argued the plaintiffs failed to show physical injuries or damages caused by the City's water service lines and that the City's decision to replace water pipes is entitled to immunity under the Tort Immunity Act (745 ILCS 10/2-201).

On appeal, the First District found the plaintiffs had sufficiently alleged damages to a reasonable degree of certainty. The plaintiffs were only required to "establish a present injury in which they suffer damages" and were not required to show "a present physical harm or ailment." Rather, where a plaintiff has to undergo medical testing or monitoring as a result of a breach of duty by defendant, such medical testing or monitoring itself is sufficiently considered an injury in tort law. The First District further noted the plaintiffs were not speculating as to possible injury, but sufficiently alleged facts that included scientific data of injuries resulting from lead exposure and lead exposure testing to support requesting the City pay damages for medical testing and monitoring.

The First District also rejected the City's tort immunity argument, finding:

> While the decision to replace lead water pipes may be viewed as a policy determination, plaintiffs here do not challenge the City's decision to modernize their water system. Instead, plaintiffs take issue with how the City conducted the replacement project after the decision was made to modernize and with how residents were advised to treat their water afterwards.

Finally, the First District found the plaintiffs alleged a prescribed method of how the City should have advised its residents about lead exposure in water, which did not involve the exercise of judgment or discretion. Rather, the court construed the plaintiffs' allegations as akin to an "execution of a set task," falling outside the protections of the Tort Immunity Act.

Berry v. City of Chicago, 2019 IL App (1st) 180871.

Trial Court Did Not Err in Considering Work at Different Locations as Part of the Same Series of Transactions for Purposes of a Motion Based on *Forum Non Conveniens*

In *Brown v. BNSF Railway Co.*, the Illinois Appellate Court First District affirmed the Cook County Circuit Court's decision to deny the defendant's motion to sever and transfer to Knox County based on *forum non conveniens*. The plaintiffs Dalton Brown and Michael Gross had worked for BNSF in yards and shops in different locations from each other and had developed asbestosis. Mr. Brown worked for BNSF in Cook County, whereas Mr. Gross worked for BNSF in Knox County and West Burlington, Iowa.

The defendant argued that plaintiffs' counsel improperly joined Mr. Gross as co-plaintiffs because the plaintiffs' work did not arise out of the same transactions or same series of transactions since neither worked in the same locations, on the same equipment, or with the same individuals. The defendant asserted the public and private interest factors under the doctrine of *forum non conveniens* strongly favored transfer of Mr. Gross's case to Knox County because Mr. Gross held no connection to Cook County and the scene,

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evidence, and potential fact witnesses were located in Knox County. The defendant further claimed that Mr. Gross's trial could be held efficiently in Knox County, whose docket was much lighter than that of Cook County.

Plaintiffs' counsel countered with various arguments, including that the actions shared common questions of law and that and the cost of severed trials in Knox and Cook Counties would be more than having a single trial for both plaintiffs in Cook County. The trial court, in its ruling, agreed with the plaintiffs, finding that the overlapping similarities and time periods of the plaintiffs' work at BNSF was sufficient to infer that their injuries resulted from the same series of transactions. The trial court noted that counsel for both parties were based in Cook County and would presumably exchange and review discovery and evidence in Cook County. The trial court found the defendant could make sufficient use of modern technology and discovery procedures to present evidence that was physically located in Knox County. The defendant was granted leave to file an interlocutory appeal from the trial court's order under Illinois Supreme Court Rule 306.

On appeal, the First District found the trial court did not abuse its discretion in finding that the plaintiffs' injuries arose from the same series of transactions. The record showed the plaintiffs, while working at different locations for BNSF, changed brake shoes, worked on or around derailments and diesel cranes, and worked in car shops and roundhouses, all of which the First District found sufficient for showing the plaintiffs' injuries resulted from the same series of transactions. Moreover, the plaintiffs' claims shared a common question of law or fact in that both alleged BNSF owed both of them a duty to provide respiratory protection.

The First District further found the defendant failed to sufficiently show inconvenience, including the identity of potential witnesses, whether any witnesses would need to be presented live at trial, the location of witnesses, and whether the witnesses would be willing to testify without compulsion. The First District also agreed with the trial court's assessment on inconvenience in that all discovery for an action in Knox County would need to be tendered to the parties' attorneys in Cook County. Finally, according to the First District, since the defendant conducted business in and employed residents of Cook County, jurors in Cook County had an interest in the plaintiffs' claims and would not be burdened by jury duty.

Brown v. BNSF Ry. Co., 2018 IL App (1st) 173184-U.

First District Finds Defendant Not Subject to Personal Jurisdiction in Asbestos Matter

In *Campbell v. Acme Insulations, Inc.*, the First District Court of Appeals determined that General Electric (GE) was not subject to general or specific personal jurisdiction. In this case, the plaintiff filed suit against GE and other defendants, alleging he developed mesothelioma due to asbestos exposure caused by products manufactured, sold, distributed, or installed by GE and others. GE moved to dismiss, arguing that it was not subject to personal jurisdiction. The plaintiff claimed that GE was subject to personal jurisdiction based upon "jurisdiction by necessity" because he was exposed to asbestos in multiple states, thus there was no single forum in which he could sue every defendant. The plaintiff further argued that GE consented to jurisdiction by doing business and maintaining a registered agent in Illinois. Finally, the plaintiff argued that GE was subject to specific jurisdiction because he was exposed to asbestos from GE products in Illinois. The circuit court denied GE's motion to dismiss.

On appeal, the First District determined that GE was not subject to general jurisdiction because it was not "at home" in Illinois. The court explained that under *Daimler AG v. Bauman*, 571 U.S. 117 (2014) and its progeny, a defendant is not subject to general jurisdiction unless its affiliations with the forum state are so continuous and systematic as to render it "at home" in the forum state. Although GE had been licensed to conduct business in Illinois since 1897; employed 3,000 employees at 30 facilities it owned, leased, or operated in Illinois; and based up to 6 business units in Illinois, the court found these contacts were insufficient to render GE at home in Illinois. GE was not incorporated and did not maintain its principal place of business in Illinois. Moreover, GE's Illinois operations constituted only "a relatively small portion" of its overall worldwide operations.

The court also found that GE had not consented to the court's jurisdiction by maintaining a registered agent in Illinois, filing unrelated lawsuits in Illinois, or defending lawsuits in Illinois without contesting jurisdiction. The court also rejected the plaintiff's jurisdiction by necessity argument. According to the court, the plaintiff cited no controlling authority to support this theory of jurisdiction. Absent such authority, the court declined to adopt the plaintiff's theory.

As to specific jurisdiction, in his complaint, the plaintiff failed to allege any exposure to GE products in Illinois. The plaintiff claimed that he testified in his discovery deposition to working with GE furnaces. During his discovery deposition, the plaintiff initially testified that he did not recall the manufacturers of any products he encountered in Illinois. He later testified that electric furnaces he

encountered in Illinois were manufactured by GE, although admitting that there were no tags or writing on the furnaces suggesting they were, in fact, manufactured by GE. During his evidence deposition, however, plaintiff testified that he could not "really say" who manufactured the furnaces he encountered in Illinois.

According to the court, Supreme Court Rule 191, which allows for the use of a discovery deposition for any purpose for which an affidavit may be used, affidavits submitted in connection with a motion to contest jurisdiction must be made on the personal knowledge of the affiant. In reviewing the plaintiff's discovery and evidence deposition, the court determined that the plaintiff could not competently testify that the furnaces he encountered were manufactured by GE. Thus, the court concluded that the plaintiff failed to present evidentiary material supporting his claim that he was exposed to asbestos by GE in Illinois. Accordingly, the court found GE was not subject to specific jurisdiction.

Campbell v. Acme Insulations, Inc., 2018 IL App (1st) 173051.

In Rule 23 Order, Fifth District Rejects Plaintiff's Personal Jurisdiction Theory in Asbestos Matter

In *Jeffs v. Ford Motor Co.*, the plaintiff filed suit against Ford Motor Company (Ford) and other defendants, alleging that her deceased husband developed mesothelioma due to asbestos exposure. Regarding Ford, the plaintiff alleged the decedent was exposed to asbestos while working at a Ford plant in Michigan. The circuit court denied Ford's motion to dismiss for lack of personal jurisdiction, finding that Ford consented to jurisdiction because it was authorized, licensed, and doing business in Illinois since 1922; had 156 dealerships in Illinois; sold 102,000 vehicles in Illinois in 2014; owned property in Illinois; and, employed 5,500 people in Illinois.

In a Rule 23 Order, the Illinois Appellate Court Fifth District reversed and remanded the circuit court's decision. The court began by examining whether Ford consented to jurisdiction by registering to do business in Illinois. While the *Jeffs* appeal was pending, the Illinois Supreme Court issued an opinion in *Aspen American Insurance Co. v. Interstate Warehousing, Inc.,* 2017 IL 121281. In that case, the Illinois Supreme Court concluded that a defendant does not consent to general jurisdiction by registering to do business in Illinois. According to the court, the Illinois Business Corporation Act, which governs the registration of foreign corporations, does not require foreign corporations to consent to general jurisdiction as a condition of doing business. Based upon the *Aspen* opinion, the Fifth District found that Ford did not consent to jurisdiction by registering to do business in Illinois.

The court next examined whether the exercise of jurisdiction over Ford would comport with due process principles. For this analysis, the court relied on *Daimler AG v. Bauman*, 571 U.S. 117 (2014) and its progeny. Specifically, the court determined that the plaintiff was required to show that Ford's affiliations with Illinois were so continuous and systematic so as to render Ford essentially "at home" in Illinois. The court acknowledged that Ford conducted "substantial business" in Illinois. The court noted, however, that this is not the proper standard to warrant the exercise of general jurisdiction. Ford was not incorporated, nor did it maintain its principal place of business, in Illinois. Moreover, Ford conducted substantial business in many states other than Illinois. The court believed that subjecting Ford to jurisdiction in Illinois would render it essentially at home in all of the other states in which it conducted substantial business. Thus, the court concluded that Ford was not subject to general jurisdiction.

Jeffs v. Ford Motor Co., 2018 IL App (5th) 150529-U.

Plaintiff Cannot Disclaim All Claims Arising Under Federal Law to Avoid Federal Removal; Defendant's Federal Officer Jurisdiction Need Only Be "Colorable" for Removal

In *Reinbold v. Advanced Auto Parts, Inc.*, the District Court, Southern District of Illinois, denied the plaintiff's motion to remand, finding the plaintiff did not include a disclaimer in her complaint sufficient to defeat federal subject matter jurisdiction pursuant to 28 U.S.C. § 1442. In this case, the plaintiff alleged that her deceased husband was exposed to asbestos while working at a Naval shipyard from 1967 to 1979. The disclaimer in the plaintiff's complaint stated, "Every claim arising under the constitution, treaties, or laws of the United States is expressly disclaimed (including any claim arising from an act or omission on a federal enclave, or any federal office of the U.S. or agency or person acting under him occurring under color of such office). No claim of admiralty or maritime is raised . . . ." The defendant removed the case, asserting federal subject matter pursuant to 28 U.S.C. § 1442, the federal officer removal statute.

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The Southern District found the plaintiff's disclaimer was an attempt to circumvent federal subject matter jurisdiction, stating:

> The disclaimer is circular, and does not apply to claims based on all exposure on Navy jobsites, but only those exposures which, in Plaintiff's estimation, occurred as a result of Crane's (or other defendants') operation within the bounds of the federal officer removal statute.

According to the Southern District, a disclaimer may not apply only to federal claims or otherwise preclude a defendant from making a federal government contractor defense. The court explained that a valid disclaimer sufficient to grant a motion to remand "explicitly renounce[s] claims of a specific nature, and [are] not merely an attempt to circumvent federal jurisdiction."

The plaintiff also argued the defendant's supporting affidavits and exhibits in its motion for removal did not sufficiently give rise to a federal government contractor defense. The court disagreed, finding the defendant did provide sufficient evidence to infer it was acting under a federal officer in providing products to the Navy. The court clarified that the Defendant was only required to prove it could provide a "colorable" government contractor defense and found the defendant's defense to be plausible.

Reinbold v. Advanced Auto Parts, Inc., No. 18-CV-605-SMY-DGW, 2018 WL 3036026 (S.D. Ill. Sept. 6, 2018).

District Court Declines to Dismiss FELA Action Arising from Asbestos and Benzene Exposure Due to Statute of Limitations

In *Romcoe v. Illinois Central Railroad Co.*, the plaintiff sued under FELA, alleging that her deceased husband developed cancer and died due to asbestos and benzene exposure he experienced while working for the defendants. The plaintiff filed the complaint on November 24, 2017, one day shy of three years from her husband's death and over four years from the date he was diagnosed with cancer. The defendants moved to dismiss, arguing that the plaintiff's deadline to file suit was September 24, 2016; three years from the date of her husband's diagnosis. Under FELA, a suit must be commenced within three years from the day the cause of action accrued. 45 U.S.C. § 56. In response, the plaintiff argued that her cause of action did not accrue until March 1, 2016, when she viewed a television advertisement for legal services for railroad workers suffering from cancer due to their work environments. According to the plaintiff, until she saw the commercial, she had no reason to believe her husband's work environment caused his cancer because he had other medical conditions linked to cancer, including GERD and Barrett's esophagus, and he was a former smoker.

The District Court noted that in FELA actions, the accrual of a statute of limitations is defined in two parts: notice of injury and notice of cause. The parties did not dispute that the decedent had notice of his injury on the date he was diagnosed with cancer. As to the notice of cause, that element examines what a plaintiff knew, or should have known, of the cause of his injury.

The defendants argued that the decedent and the plaintiff should have known, from the time the decedent was diagnosed with cancer, that his employment could have been a cause of decedent's cancer. According to the court, however, for a case to be dismissed based on a statute of limitations defense, the complaint "must make it clear that a claim 'is indisputably time-barred.'" The court did not believe the plaintiff's complaint met that "high bar." Rather, the plaintiff did not allege that she or the decedent believed his employment to be a cause of his cancer at the time he was diagnosed. Further, the plaintiff alleged no facts regarding steps she or the decedent may have taken during the period he was ill to investigate the cause of his cancer. The complaint also contained no information to suggest the decedent was ill but ignored his condition instead of going to the doctor. In fact, the court inferred that the decedent did go to the doctor based on the allegation that the decedent believed some other medical condition may have caused his cancer. As to whether the decedent's belief was reasonable, the court noted that this issue was not proper at the dismissal stage. Similarly, the court explained that whether a reasonable person would have known about his exposure to various chemicals while working for the defendants was an inappropriate inquiry for a motion to dismiss.

Additionally, the court rejected the theory that the statute of limitations was cut short by the decedent's death. According to the court, when an employee dies as a result of a workplace accident, the fact that the employee was unaware that employer negligence was the cause of injury does not defeat a representative's wrongful death claim under FELA. The court further rejected the argument that the plaintiff failed to reasonably investigate the decedent's cause of death and file suit within three years of his diagnosis. As with the defendant's earlier arguments regarding the reasonableness of the decedent's conduct, the court believed this theory was inappropriate to consider at the pleadings stage.

Romcoe v. Ill. Cent. R.R. Co., No. 17-C-8517, 2019 WL 4261203 (N.D. Ill. Sept. 9, 2019).

First District Appellate Court Upholds $4.6 Million Verdict in Asbestos Lawsuit

In late 2019, the Illinois Appellate Court First District affirmed and upheld a $4.6 million verdict in *Daniels v. John Crane, Inc.*, 2019 IL App (1st) 190170. In that case, the decedent's estate filed suit alleging that the decedent developed pleural mesothelioma due to asbestos exposure. The decedent worked as a union pipefitter from 1957 to 1985. Prior to his death, the decedent testified to significant asbestos exposure from valves and gaskets, including gaskets manufactured by John Crane.

At trial, plaintiff's expert, Dr. Jerrold Abraham, testified that the decedent's asbestos exposure through his work with John Crane products was a substantial contributing factor of his mesothelioma. Dr. Abraham did not quantify the decedent's exposure through John Crane products, and he testified that exposure to all types of asbestos fibers can cause mesothelioma. Moreover, according to Dr. Abraham, while mesothelioma is a dose-response disease—meaning the more exposure an individual has, the more likely they are to contract the disease—once someone sustains an asbestos-related disease, it does not matter whether they have had a high or low exposure to asbestos. Dr. Abraham conceded that the all of the decedent's exposures, including through friable insulation, were substantial contributing factors. Essentially, Dr. Abraham opined that if the decedent was exposed to asbestos through John Crane products, such exposure was a substantial factor to the development of his illness, regardless of the dose of the exposure or the dose of the decedent's exposures through other sources.

Plaintiff also presented William Ewing, a certified industrial hygienist. Ewing testified that the decedent was exposed to asbestos by using picks, chisels, and hammers to remove John Crane packing, and by using brushes and sanders to dislodge or reshape John Crane gaskets. Ewing quantified the duration of the decedent's exposure (1957 to 1985) and his alleged dosage amount (.05 to 1 fibers per cubic centimeter when removing and installing gaskets; .05 to 2 fibers per cubic centimeter when removing packing).

Plaintiff presented the standard Illinois Pattern Jury Instruction for proximate causation. John Crane objected and presented its own instruction regarding proximate cause. John Crane argued that the jury instruction should have included language requiring the jury to find that John Crane's products were a "substantial factor" in the development of the decedent's illness. John Crane further submitted an instruction defining substantial factor as if, absent John Crane's conduct, the injury would not have occurred. John Crane also submitted a "state of the art" instruction, which would have required the plaintiff to prove that John Crane and those in the asbestos products manufacturing injury knew of the alleged dangerous nature of John Crane's packing and gaskets. John Crane argued that such knowledge was required to establish a duty to warn. The trial court rejected these instructions submitted by John Crane. A Cook County jury found for the plaintiff and entered a $6 million verdict. The trial court reduced the verdict to $4.8 million to account for pre-trial settlements.

> The appellate court seemed to take the position that the frequency, regularity, proximity test is relevant when the court is making a legal determination on whether or not the plaintiff has met her burden of proof in an asbestos case, but the jury should not be given instructions using this language because it suggests that the plaintiff must quantify her exposure levels.

In its post-trial motions, John Crane argued that Dr. Abraham should not have been allowed to testify because he essentially testified that the decedent's cumulative dose (or "each and every exposure") to all asbestos products caused his injuries. In other words, Dr. Abraham failed to differentiate the decedent's exposure through John Crane products from his exposure through other sources. In addition to arguing that the court erred in rejecting the previously discussed jury instructions, John Crane also argued that the trial court erred by failing to properly analyze settlements the plaintiff entered into with certain defendants. The trial court denied John Crane's motion.

On appeal, the First District first determined that the trial court properly allowed Dr. Abraham to testify. The court reasoned that Dr. Abraham did not testify that even a "*de minimis*" exposure to asbestos can cause illness. Rather, the court characterized Dr. Abraham's testimony as emphasizing the importance of understanding the dose of asbestos fibers to which a person was exposed when determining causation. Moreover, the court believed the plaintiff established

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the decedent's exposure through William Ewing's testimony, who quantified the decedent's exposure range and opined that the dosage level exceeded the background rate of asbestos exposure one would experience from the ambient environment. Overall, the court concluded that Dr. Abraham's testimony provided the background knowledge the jury required to interpret Ewing's opinions regarding the dose of the decedent's asbestos exposure.

John Crane also argued that the trial court erred in excluding proposed jury instructions that included language regarding Illinois' substantial factor causation test. John Crane argued that the jury should have been instructed on the Illinois frequency, regularity, and proximity causation standard used in asbestos cases. The court found that the pattern instructions on causation (which do not use the terms substantial factor or frequency, regularity, proximity) sufficiently instructed the jury. The court also determined that using these terms in instructions would have improperly suggested that the plaintiff had to prove a specific dosage amount, when, under Illinois law, a plaintiff need only prove that exposure by a defendant was legally significant. The appellate court seemed to take the position that the frequency, regularity, proximity test is relevant when the court is making a legal determination on whether or not the plaintiff has met her burden of proof in an asbestos case, but the jury should not be given instructions using this language because it suggests that the plaintiff must quantify her exposure levels.

As to John Crane's proposed "state of the art" jury instruction, John Crane argued that the jury should have been instructed that the plaintiff was required to prove either that John Crane specifically knew of the hazards of asbestos or, if not, that members of John Crane's industry had such knowledge. The court rejected this argument because there was evidence in the case that John Crane itself had knowledge regarding the dangers of asbestos when the decedent used its products. Moreover, the court believed that John Crane's proposed instruction would have required the jury to find both that John Crane and those in its industry knew of the dangerous nature of John Crane's products. According to the court, industry knowledge can be used to support a failure to warn claim, but it is not necessary evidence. Rather, the defendant's knowledge is at issue in such a claim.

Finally, the court rejected John Crane's argument that certain settled defendants should have appeared on the jury form and that the court should have compelled the plaintiff to disclose the amounts of certain pre-trial settlements. The court reasoned that it is well settled Illinois law that a party defendant cannot include former co-defendants or non-parties on the verdict form. As to the settlement amount issue, John Crane argued that the trial court erred in finding that the plaintiff reached good faith settlements with certain defendants without requiring the parties to disclose the settlement amounts. In rejecting this argument, the court determined that the trial court had sufficient evidence—including the plaintiff's theory of liability, that the plaintiff sought in excess of $50,000, and that John Crane was asserting a sole proximate cause defense—to make its good faith findings.

Daniels v. John Crane, Inc., 2019 IL App (1st) 190170.

Illinois Supreme Court Reverses and Remands Fifth District's Decision in *Jones v. Pneumo Abex LLC*

In 2018, the Illinois Appellate Court Fifth District determined that plaintiffs Johns and Deborah Jones presented sufficient evidence to avoid summary judgment on their conspiracy claims against Pneumo Abex LLC and Owens-Illinois. On December 19, 2019, however, the Illinois Supreme Court reversed and remanded to the Fifth District.

The Illinois Supreme Court began its analysis by noting that conspiracy claims against Pneumo Abex and Owens-Illinois had often failed at the summary judgment stage. When such claims were allowed to proceed to trial and resulted in verdicts for the plaintiffs, reviewing courts had consistently determined that the companies could not be liable for civil conspiracy as a matter law. The supreme court believed that the appellate court failed to assess whether any factual differences existed between those prior decisions and the facts at issue in this case. Rather, the Fifth District "summarily distinguished" the prior decisions on the sole ground that the civil conspiracy claims against Pneumo Abex and Owens-Illinois were decided in the context of motions for judgment notwithstanding the verdict, rather than at the summary judgment stage.

According to the court, the circumstances in *Jones* were unique in that the issues related to plaintiffs' conspiracy claims had been exhaustively litigated in "scores" of prior lawsuits spanning more than two decades. Accordingly, the court reasoned that there was no practical difference between the standard for summary judgment and that governing directed verdicts. Thus, if all of the evidence, when viewed most favorably to the plaintiffs, so overwhelmingly favored the defendants that no contrary verdict based on the evidence could ever stand, then summary judgment would be appropriate, as would judgment notwithstanding the verdict.

Consequently, the supreme court concluded that the appellate court "clearly erred" in failing to follow or distinguish prior decisions

analyzing conspiracy claims against Pneumo Abex and Owens-Illinois on the grounds that the standard governing the defendants' motions in *Jones* was for summary judgment. The supreme court explained that, to hold otherwise, would be "nonsensical," given that all relevant evidence was already before the court. According to the court, allowing further proceedings to take place would serve no purpose because the trial court would be required to direct a verdict on the evidence presented.

Ultimately, the court determined that the Fifth District failed to conduct a proper review. Thus, the court remanded the case to the appellate court and instructed it to conduct a proper review before remanding the case to the circuit court. The supreme court acknowledged that it was expressing no view on the merits of the appeal, but it indicated that history and precedent posed a "steep hill" for the plaintiffs to climb.

Jones v. Pneumo Abex LLC, 2019 IL 12389.

Third District Court of Appeals Determines Pneumo Abex is Not Subject to Conspiracy Claim in Asbestos Matter

In contrast to the holding of the Illinois Appellate Court for the Fifth District, the Illinois Appellate Court Third District, in an unpublished opinion, decided *Johnson v. Pneumo Abex LLC*, 2018 IL App (3d) 160406-U. In *Johnson*, the plaintiff was also diagnosed with an asbestos-related disease and made a similar civil conspiracy claim against Pneumo Abex ("Abex"), Owens-Illinois ("Owens"), Metropolitan Life Insurance Company (Metropolitan) and Honeywell International, Inc. At the trial court level, Abex and Owens filed motions for summary judgment and prevailed. Plaintiffs in response appealed, and the Third District disagreed.

In fact, the court essentially concluded that under the decision in *Rodarmel v. Pneumo Abex LLC*, 2011 IL App (4th) 100463, Abex cannot be liable for a conspiracy charge because the evidence presented in that case showed there was no conspiracy. Absent any additional proof, the *Rodarmel* decision serves as a well-established law to be used when deciding a motion for summary judgment in a civil conspiracy claim against Abex. Plaintiffs contended that they provided additional evidence, such as an expert report of Dr. Arthur Frank, who opined that Gardner's study would have been significant scientific evidence on the issue of whether there was a relationship between asbestos and cancer. However, the appellate court maintained his opinion was not sufficient to preclude summary judgment and stated:

> Engaging in a conspiracy requires that the defendant knowingly participate in a scheme to commit an unlawful act or a lawful act in an unlawful manner. Unless Abex knew that the tumorous mice were scientific evidence that asbestos caused cancer when it entered into the agreement with the other asbestos-producing companies to remove any mention of the 11-mice study from the Saranac article, they did not commit conspiracy. The fact that an expert testified 70 years later that a study was "significant" does not change what Abex knew in 1943, which was that the study's own author did not recommend publishing the 11-mice study without further experimentation and study.

Similarly, the court upheld summary disposition as to Owens-Illinois because it has been previously established that the conspiracy between Owens and Owens Corning Fiberglas to create and sell a dangerous product without adequately warning employees and consumers concluded in 1958, which had occurred before the alleged exposure in this case. Therefore, the *Gillenwater* opinion is still a good law and must be followed.

Subsequent to this ruling, plaintiffs filed an appeal to the Illinois Supreme Court, however, the petition for leave to appeal was denied.

Johnson v. Pneumo Abex LLC, 2018 IL App (3d) 160406-U.

Fourth District Appellate Court Reverses Circuit Court of McLean County in Asbestos Lawsuit

Recently, the Illinois Appellate Court Fourth District issued an opinion reversing the Circuit Court of McLean County in an asbestos lawsuit. In *Krumwiede v. Tremoco, Inc.*, 2020 IL App (4th) 180434, the court determined that the plaintiffs failed to establish at trial that the decedent's work with the defendant's products was a substantial factor in the cause of the decedent's illness. This is yet another instance in which the Fourth District has reversed the Circuit Court of McLean County in an asbestos lawsuit. The opinion should give defendants wary of trying an asbestos lawsuit in McLean County optimism about the potential for appellate relief.

In *Krumwiede*, the plaintiffs alleged that the decedent was exposed, in part, through his work with Tremco caulk and tape. The decedent worked as a window glazier from the mid-1950's to the early 1990's. At trial, two of the decedent's former co-workers testified that they and the decedent used Tremco caulk and glaze

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in their roles as glaziers. The witnesses, however, could not recall seeing dust emanate from the Tremco products or anything on the products' packaging indicating that they contained asbestos.

Plaintiff's medical expert, Dr. Arthur Frank, testified that a person's cumulative dose to asbestos contributes to the development of mesothelioma. In elaborating on this opinion, Dr. Frank testified that there is no scientific way to determine what exposure to asbestos caused a person's illness, but rather, a person's total exposure is considered the cause of the illness. Dr. Michael Graham, a pathologist, testified for Tremco, opining that there were amosite asbestos fibers found in the decedent's lung tissue, but that those fibers had nothing to do with the decedent's work with Tremco products, as those products only contained chrysotile asbestos fibers. Dr. William Longo also testified for Tremco. He explained that he previously tested the Tremco products and found no detectable asbestos fibers, which was because the products were thermoplastic materials. Dr. Longo admitted, however, that he could not rule out that Tremoco products released respirable asbestos fibers. Ultimately, the jury returned a verdict for the plaintiffs.

The appellate court concluded that the plaintiffs failed to establish that the decedent's work with Tremco products was a substantial factor in the cause of his mesothelioma. According to the court, simply working around Tremco products did not establish that the decedent had frequent, regular, and proximate contact with respirable asbestos fibers from the products. The court believed that there was an absence of evidence explaining under what circumstances Tremco's products released respirable asbestos fibers. In other words, just because the products were capable of releasing asbestos fibers did not mean they actually did so when the decedent worked with the products. The court also determined that the plaintiff failed to present evidence showing that Tremco's products released more than a *de minimis* amount of asbestos fibers when the decedent encountered the products. And while the court found that Dr. Frank's "cumulative exposure" testimony was proper under Illinois law, the court concluded that his testimony did nothing to aid the plaintiffs in meeting the substantial factor test under Illinois law because he did not opine that exposure from Tremco products was a substantial factor in bringing about the decedent's illness.

Overall, this opinion should be viewed as a positive development for defendants in asbestos litigation. Specifically, defendants should consider relying on this opinion to argue that a plaintiff cannot satisfy his or her burden of proving causation simply by establishing that a defendant's products can release asbestos fibers.

Krumwiede v. Tremoco, Inc., 2020 IL App (4th) 180434.

About the Authors

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