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SURVEY OF LAW 2022

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Survey of Toxic Tort Law Cases

Unlicensed Asbestos Removal Contractor Does Not Get Benefit of Workers' Compensation Act Exclusive Remedy Protections in Tort Lawsuit Brought by Former Employee

In Daniels v. Venta Corp., the appellate court reversed dismissals of causes of action for asbestos exposure based upon the exclusive remedy provided by the Workers' Compensation Act. In 1996, Venta Corporation predecessor American Bare Conductor, Inc. ("ABC") directed its employee Darnell Daniels to remove debris from a building known as a Quonset hut from a premises owned by Sycamore Industrial Park Associates ("SIPA"). SIPA knew that the debris contained asbestos and knew that ABC was not a licensed asbestos removal contractor, yet nevertheless hired ABC for the removal. Daniels was employed by Manpower Group US, Inc. ("Manpower") who placed him in temporary employment with ABC. Unknown to Daniels when he began the work, the debris that he was handling contained asbestos. Twenty-one years later in 2017, Daniels contracted peritoneal mesothelioma, and filed a seven-count lawsuit against defendants alleging it was that exposure to asbestos that caused his terminal disease.

The Circuit Court dismissed with prejudice the negligence and willful and wanton misconduct claims against Venta, the intentional tort claim against Venta, and the premise liability claims against SIPA. The premises liability counts were dismissed by the trial court who determined that there was no duty of reasonable care owed to Daniels. The trial court also dismissed the intentional tort counts finding that they were not sufficiently pleaded. The court then dismissed the claims against Venta finding the claims barred by the exclusive remedy provided by the Workers' Compensation Act finding that Daniels was an employee of ABC as a borrowing employer.

On appeal, the appellate court addressed the exclusivity argument by noting that both the Workers' Compensation Act applied by the trial court and the Workers' Occupational Diseases Act (which the appellate court thought might be more appropriate) required the same analysis. The court noted that an employee can escape the exclusive remedy provisions if the employee establishes that the injury (1) was not accidental, (2) did not arise from his employment, (3) was not received during the course of employment, or (4) was not compensable under the Workers' Compensation Act. The court noted that for a borrowed-employee relationship to exist, the employment must be based upon a valid contract between the parties. A contract that requires illegal action is not a valid contract. Because ABC was not licensed to do the asbestos removal, its directive to Daniels to remove asbestos material violated the Commercial and Public Building Asbestos Abatement Act and was not a valid contract. Accordingly, the exclusive remedy of the Workers' Compensation Act did not bar the tort claims against ABC.

As to the intentional tort allegations, the appellate court noted that ABC had sufficient knowledge that inhaling asbestos would be hazardous, yet directed Daniels to do the work. Thus, the court thought the claim sufficiently pleaded rejecting arguments that the Daniels had to allege that ABC specifically intended him to be fatally injured. Finally, with respect to the premises liability claims, the appellate court determined that Daniels was on SIPA's premises as a business visitor, properly an invitee, for reasons directly related to SIPA's business dealings, thus demonstrating a relationship between SIPA and Daniels where a duty of care could arise. Further, the complaint sufficiently alleged that SIPA was aware of the dangerous condition caused by asbestos on the property, and knew that the asbestos would injure anybody who encountered it. As such, it was foreseeable that Daniels would be injured if SIPA did not inform him of the asbestos, satisfying Section 343 of the Restatement (Second) of Torts. Therefore, the appellate court determined SIPA owed Daniels a duty of care under the circumstances.

Daniels v. Venta Corp., 2022 IL App (2d) 210244.

Illinois District Court Finds Defendant Preserved Jurisdiction Defense After Participating in Pre-Trial Discovery and No Specific Jurisdiction Despite Defendant's Forum State Contacts

In *Lishman v. Air & Liquid Sys. Corp.*, the District Court for the Northern District of Illinois granted defendant Alfa Laval's motion to dismiss for lack of personal jurisdiction. In that case, the plaintiff, a lifelong Illinois resident, alleged that he developed mesothelioma due to asbestos exposure. Regarding Alfa Laval, the plaintiff alleged

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that he was exposed to asbestos through lube oil purifiers manufactured by Alfa Laval's predecessor, Sharples. Plaintiff, however, did not clarify the location of his exposure to the lube oil purifiers until he filed a third amended complaint. In the third amended complaint, the plaintiff alleged that his exposure to the lube oil purifiers occurred outside of Illinois while the plaintiff served in the Navy.

In response to the third amended complaint, Alfa Laval filed an answer, which included an affirmative defense based on lack of jurisdiction. Four months later, Alfa Laval filed a motion to dismiss for lack of jurisdiction. In the interim, Alfa Laval participated in status reports, responded to discovery requests, and filed Rule 26(a)(1) disclosures. Subsequently, Alfa Laval initiated the scheduling of its Rule 30(b)(6) deposition and attended Rule 30(b)(6) depositions of co-defendants.

In response to Alfa Laval's motion to dismiss, the plaintiff argued that Alfa Laval waived its jurisdiction defense by failing to raise the defense at an earlier point in the litigation. Relying on Seventh Circuit precedence, the court explained that for a defendant to waive a personal jurisdiction defense, a defendant must give a plaintiff a reasonable expectation that it will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking. *Mobile Anesthesiologists Chic., LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010). A plaintiff may demonstrate a reasonable expectation through: 1) the defendant's untimeliness in asserting the affirmative defense of jurisdiction; and 2) defendant's involvement in the case.

The plaintiff argued that Alfa Laval's untimeliness in filing its motion to dismiss and involvement in the litigation both weighed in favor of finding waiver. Alfa Laval countered by arguing that it did not become aware of its personal jurisdiction defense until the plaintiff filed the third amended complaint. Moreover, Alfa Laval indicated that it timely raised its personal jurisdiction defense through an affirmative defense contained in its answer. The court determined that Alfa Laval did not learn that the plaintiff's alleged exposure to the lube oil purifiers occurred outside of Illinois until the plaintiff filed the third amended complaint. In response to that complaint, Alfa Laval timely filed an answer, asserting a defense based on lack of jurisdiction. Thus, the court believed that Alfa Laval's delay in asserting its jurisdiction defense was excusable. The court further concluded that Alfa Laval preserved its defense despite waiting four months after its answer to file a motion to dismiss. The court reasoned that Alfa Laval did not actively participate in the litigation during the four months, but rather, engaged in preliminary pre-trial litigation. The court specifically noted that it made no substantive rulings during the four-month period.

As to the substance of Alfa Laval's jurisdiction defense, despite his exposure to the lube oil purifiers occurring outside of Illinois, the plaintiff argued that Alfa Laval, through Sharples, maintained contacts with Illinois and his injuries arose out of those contacts. According to the plaintiff, Sharples possessed manufacturing plants in Illinois and maintained a sales office in Illinois. However, the plants did not manufacture the lube oil purifiers at issue, and the sales office did not sell those purifiers. Thus, the court found no connection between Sharples' Illinois contacts and the plaintiff's injury.

The plaintiff argued that Sharples' Illinois contacts were sufficient to establish specific jurisdiction based on the United States Supreme Court opinion, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021). While the Supreme Court determined in *Ford* that a plaintiff need not show a "strict causal relationship" between a defendant's in-state activity and the litigation, the District Court believed *Ford* was factually distinct. Specifically, in *Ford*, specific jurisdiction existed because the plaintiffs' injuries occurred in the forum states, where Ford had extensively marketed, sold, and supported repairs of the same model vehicles involved in the plaintiffs' accidents. The District Court instead relied on *Bristol-Myers Squibb Co. v. Superior Ct. of Ca.*, 137 S. Ct. 1773 (2017). In *Bristol-Myers Squibb*, the Supreme Court found no specific jurisdiction because the offending product did not malfunction in the forum state, and the plaintiffs did not suffer injuries from the product in the forum state. *Id.* Given the similarities to *Bristol-Myers Squibb*, the District Court determined that the plaintiff failed to show an affiliation between Illinois and the underlying controversy.

Lishman v. Air & Liquid Sys. Corp., No. 21-cv-001570, 2022 U.S. Dist. LEXIS 66120 (N.D. Ill. April 11, 2022).

One Pair of Counterfeit Shorts Could Be Sufficient to Confer Specific Personal Jurisdiction

Plaintiff professional and collegiate sports associations filed an action under the Lanham Act, 15 U.S.C. sec. 1051, *et seq*., against defendant, a Chinese-based retailer, alleging that the defendant infringed on NBA trademarks by selling counterfeit products in its online store. The Seventh Circuit affirmed personal jurisdiction over the Chinese-based retailers. The defendant Chinese-based retailer alleged that it's only connection with Illinois was its sale of a pair of shorts to an investigator for plaintiff. The products at issue were available for sale in Illinois to other customers, in addition to the investigator.

The Seventh Circuit focused on whether the Illinois court had specific personal jurisdiction over the defendant Chinese-based retailers. The federal requirements for establishing specific personal jurisdiction mirror the Illinois requirements. To establish specific jurisdiction over a non-resident defendant, the defendants must have done the following:

1) Purposefully directed themselves of the privilege of conducting business in the forum; and
2) The alleged injury must arise out of or relate to th defendants' forum-related activities; and
3) The exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice

The court concluded that the three factors had been met. While the mere availability of a retailer's website in the forum is insufficient to confer jurisdiction, the court found that the retailer's readiness to do business with the forum and knowingly doing business and shipping products to the forum *that were the subject of the lawsuit* was a crucial factor. The defendant established an online store, structured its sales activity to invite sales from Illinois residents, asserted a willingness to ship goods to Illinois, and established the capacity to do so. The defendant retailer's shipment of the shorts at issue to Illinois met the first prong that defendant purposefully avail itself of the forum of conducting business in the forum.

The second prong of the specific jurisdiction test was met because the defendant's sale to Illinois involved the shorts were the basis of plaintiff's claim, meeting the requirement that the defendant's sale of goods in the forum state include the infringing product. Defendant's listing of the product and its sale of the product in Illinois were directly related to the basis of the suit.

Finally, the court held that the third principle was met and it would not offend traditional notions of fair play and substantial justice by asserting jurisdiction over Chinese retailer. The court reasoned that there is no unfairness in making a seller defendant defend a lawsuit in a state where it structured its business to easily serve the state's consumers (following *Curry v. Revolution Laboratories*, 949 F.3d 385, 402 (7th Cir. 2020)). Defendant did not set forth an unusual burden in defending the matter in Illinois.

A defendant's connection with Illinois must meet the three-prong test to confer jurisdiction. In this case, the Seventh Circuit held that the defendant availed itself to the Illinois market by offering and shipping a product to the forum. As a result of its purposeful direction and relatedness of the sale to the suit, defendant is subject to jurisdiction in the state of Illinois.

NBA Properties, Incorporated, et al. v. Hanwjh, 46 F.4th 614 (7th Cir. 2022).

Southern District Court Finds Plaintiff Fails to Sufficiently Allege Facts Establishing Specific Jurisdiction

In *Romig v. MW Custom Papers, LLC*, the District Court for the Southern District of Illinois granted a defendant's motion to dismiss for lack of jurisdiction in an asbestos lawsuit. In that case, the plaintiff, a resident of Ohio, alleged that she was exposed to asbestos through automotive repair work performed by her father in Ohio and through her and her husband's work at a factory located in Illinois. In response to the complaint, the defendant Honeywell International moved to dismiss for lack of jurisdiction. The plaintiff failed to respond to the motion, leaving the court to evaluate the sufficiency of the plaintiff's complaint allegations.

The court noted that the plaintiff's complaint was devoid of any allegation that her injuries arose out of or relate to Honeywell's contacts with Illinois. Specifically, the plaintiff did not allege that she worked with or around any products or equipment attributable to Honeywell while she or her husband worked at the Illinois factory or resided in Illinois. Consequently, the court found that it lacked specific personal jurisdiction over the plaintiff's claims against Honeywell.

Additionally, Honeywell is neither incorporated in Illinois, nor does it maintain its principal place of business in Illinois. Its affiliations with Illinois are not continuous and systematic, and the court found that it lacked general jurisdiction over plaintiff's claims.

Romig v. MW Custom Papers, LLC, No. 22-cv-1101-SMY, 2022 U.S. Dist. LEXIS 129915 (S.D. Ill. July 21, 2022).

Central District Strikes Plaintiff's Causation Expert, Resulting in Summary Judgment for Defendant

In *Sherman v. BNSF Ry. Co.*, the plaintiff alleged that she worked for the defendant at its Galesburg, Illinois railyard from 1957 to 2001. According to the plaintiff, during her employment with BNSF, she was exposed to various toxic substances and carcinogens, including asbestos, coal dust residue, solvent fumes, oil mist, diesel exhaust, benzene, and brake dust. She alleged that she developed rectal cancer due to her exposure to those substances.

The plaintiff disclosed Dr. Mark Levin, a board-certified physician with specialties in internal medicine, oncology, and board-eligible in hematology, as an expert on medical causation. In a report, Dr. Levin opined that the plaintiff's exposure to asbestos and diesel

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exhaust while employed by BNSF contributed to the development of her rectal cancer. During his deposition, Dr. Levin testified that he "explored the literature," reviewed a report from plaintiff's industrial hygiene expert, and relied upon his "understanding based on education, training, and experience" to address whether asbestos causes rectal cancer. He further indicated that he typically performed a Google search regarding asbestos, diesel exhaust, and rectal cancer to begin his investigation.

BNSF filed a motion to bar Dr. Levin. BNSF challenged both the general and specific causation opinions offered by Dr. Levin. BNSF characterized Dr. Levin's methodology as unreliable because he did not retain a list of what he viewed and what information he considered. Additionally, Dr. Levin had no record of what Google search he performed, what search terms he used, which sites he reviewed, which articles he reviewed, and what information he considered and discarded. In response, the plaintiff argued that Dr. Levin's causation opinions were reliable because Dr. Levin drew from his extensive knowledge, training, and experience as a medical oncologist, he reviewed "the available literature," and he reviewed publications of authoritative bodies.

The District Court examined the admissibility of Dr. Levin's opinions pursuant to Federal Rule of Evidence 702 and the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In doing so, the court determined that Dr. Levin's methodology (*i.e.*, his Google search) "seriously lack[ed] indicia of reliability." Dr. Levin did not retain, nor could he recall, any studies that resulted from his search that would have been negative or not supported a connection between rectal cancer and asbestos or diesel exhaust. Additionally, Dr. Levin did not prepare a list of every document he reviewed, or a list of documents that were specifically negative. Dr. Levin also did not maintain a record of the particulars of his Google searches, including the date(s) on which he performed the searches. Based on this lack of information, the court determined that it would have been essentially impossible for defense counsel to cross-examine Dr. Levin at trial. The court noted that it was "abundantly clear" from Dr. Levin's deposition testimony that he expected the parties to accept that the plaintiff's work exposure to asbestos and diesel exhaust caused her rectal cancer because Dr. Levin said it did. As the court explained, neither his say so, nor his knowledge, training, and experience, was enough to eliminate the shortcoming that the full extent of the data he reviewed was unknown.

The court next examined the reliance sources cited by Dr. Levin in his report. According to the court, those sources did not speak in definite terms. Rather, one source stated that studies have "suggested" that workplace asbestos exposure "may" be linked to rectal cancer, but the source noted that the link "is not as clear as it is for other cancers." A study relied upon by Dr. Levin regarding asbestos exposure stated that it "did not provide any clear evidence of an association with rectal cancer." One study showed a small increase for rectal cancer after workplace diesel exhaust exposure, but noted that the "finding could be due to chance." Similarly, another study suggested that sustained high-level exposures to diesel exhaust "may" increase the risk of rectal cancer, but the authors cautioned that the finding "should be viewed with caution" as the finding may have been due to chance. According to the court, the reservations contained in Dr. Levin's reliance sources underscored the need for him to provide a more robust explanation regarding the information he considered and accepted or rejected. The court reasoned that without such an explanation, it could not determine whether Dr. Levin's opinions were based upon more than his mere say so.

Plaintiff attempted to bolster the reliance sources by citing to portions of Dr. Levin's deposition testimony. Specifically, Dr. Levin testified that "associated with" and "caused" are basically equivalent and that medical literature typically speaks in terms of association as opposed to causation due to the high level of proof and certainty required to use the term "caused." The court, however, explained that Dr. Levin's testimony actually magnified the shortcomings in his report. As the court explained, Dr. Levin definitively opined in his report that the plaintiff's occupational exposures to asbestos and diesel exhaust were contributing factors in the development of her rectal cancer. Thus, it was incumbent upon Dr. Levin to present a methodology showing that he considered a high level of proof. Having failed to do so, the court determined that Dr. Levin's general and specific causation opinions were not reliable.

While Dr. Levin's flawed methodology was enough to exclude his opinions, the court also determined that Dr. Levin failed to grasp the basic facts of the case. For example, Dr. Levin incorrectly identified the dates on which the plaintiff worked for the defendant, mistakenly indicated that she was married, erroneously testified regarding the length of time she performed certain job duties for defendant, and twice referred to the defendant as "BSNF." The court explained that his misstatements only "further detracted from the representation that Dr. Levin [was] a qualified witness."

Finally, the court granted BNSF's motion for summary judgment. According to the court, proving causation was an essential element of the plaintiff's claim. Plaintiff's only evidence of causation was Dr. Levin's stricken opinions. Consequently, the plaintiff could not prove causation, entitling BNSF to summary judgment.

Sherman v. BNSF Ry. Co., No. 1:17-cv-001192-JEH, 2022 U.S. Dist. LEXIS 7561 (C.D. Ill. Jan. 14, 2022).

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