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2019 MID-YEAR COMPENDIUM

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Asbestos Case Tracker

Mid-Year Compendium

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Goldberg Segalla's *Asbestos Case Tracker* blog is the go-to resource for up-to-date asbestos decisions happening in courts throughout the United States. Ranked on the 2018 *ABA Journal* Web 100 for top legal resources, our blog reports on legislative updates, significant verdicts, and other critical developments in the asbestos area. We provide summaries of and access to decisions, along with insightful commentary from our attorney bloggers and guest authors, in-depth feature articles, links to useful resources, and much more.

We are pleased to provide this compendium of *Asbestos Case Tracker* posts to clients and friends of Goldberg Segalla. Our hope is it acts as a convenient resource for you.

Stay up to date on the ever-evolving realm of asbestos litigation and search or browse by scientific, geographic, procedural law, and substantive law categories at AsbestosCaseTracker.com.

Asbestos Defense Team

Goldberg Segalla's asbestos team has decades of experience in this complex and ever-evolving area of law. We serve as national coordinating, trial, and local counsel for clients in a broad spectrum of industries that have been joined in asbestos litigation — including retailers, rail operators, utility providers, contractors, commercial roofers, distributors, and manufacturers of insulation, appliances, industrial equipment, chemicals, and many other products.

Our team has litigated thousands of cases over the past 30 years, with success in critical jurisdictions including several of the toughest venues, dubbed "judicial hellholes." Our work spans New York and NYCAL, Missouri, Illinois, Maryland, North Carolina, South Carolina, Florida, Pennsylvania, New Jersey, and Connecticut.

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Bankruptcy Decisions

J&J's Emergency Motion for Provisional Transfer Deemed Unwarranted, Denied

(U.S. District Court, D., Delaware, April 9, 2019)

Non-debtors Johnson & Johnson and Johnson & Johnson Consumer Inc. (J&J) filed an emergency motion for provisional transfer, seeking entry of an order directing provisional transfer of approximately 2,400 federal and state personal injury and wrongful death actions, pending the court's decision on J&J's motion to fix venue for claims. The motions relate to the Chapter 11 cases of Imerys Talc America Inc. and certain affiliates (debtors), which were filed on February 13, 2019.

The plaintiffs in the approximately 2,400 federal and state cases claim that exposure to talc — through products like Johnson's baby powder — caused cancer, primarily mesothelioma or ovarian cancer. J&J alleges that debtors supplied cosmetic talc to J&J for use in some J&J products.

The court held that J&J failed to establish that provisional transfer is warranted in this case, and did not meet the criteria for establishing that immediate or *ex parte* relief was appropriate. Therefore, J&J's motions were denied.

Read the case decision here.

Bare Metal/Component Parts Decisions

Verdict on Noneconomic Damages Reversed and Remanded With Finding of Joint/Several Liability Against Pipe Manufacturer

(Court of Appeal, First District, Division 4, California, April 15, 2019)

In an update to *Asbestos Case Tracker*'s previous post, the court reversed and remanded this matter, ordering a new entry of judgment holding the plaintiffs' economic and noneconomic damages jointly and severally liable against CertainTeed Corporation (defendant). At the trial level, a jury previously returned a verdict on economic damages in the amount of $776,201 against the defendant. The verdict also included $9.25 million in noneconomic damages, which was apportioned to the defendant at 62 percent with the remaining to other joint tortfeasors. The defendant moved for judgment notwithstanding the verdict (JNOV) on the plaintiff intentional concealment and misrepresentation claims. The court denied the defendant's motion on intentional concealment and granted the motion as to intentional misrepresentation. The court further granted the plaintiff's motion to amend the judgment to eliminate the defendant's proportionate fault reduction for noneconomic damages. The defendant appealed the amended judgment. Of interest, the defendant attempted to pay the partial judgment of the original judgment pending the appeal. The plaintiff rejected the check.

On appeal, the court dealt with preliminary issues regarding jurisdiction over the judgments and JNOV order before moving to the substantive issues of the appeal. As to concealment, the court pointed out that the elements for fraudulent concealment include:

1. The defendant concealed or suppressed a material fact

2. The defendant was under a duty to disclose the fact to the plaintiff

3. The defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff

4. The plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact

5. As a result of the concealment or suppression of the fact, the plaintiff sustained damage.

The defendant took the position that the evidence was lacking as to these required elements. Specifically, the defendant argued that there was never a transaction between the defendant and the plaintiff. Further, no but-for causation evidence existed. The court noted that the jury instructions and causation theories were agreed upon by the defendant at the trial level. Therefore, it cannot seek reversal on a theory different "from those advanced and tried below." As for intent to deceive, the court concluded there was "substantial evidence" to support the jury's finding. Here, the defendant had known of the link between cancer and asbestos in the 1960s, and its own internal documents showed that low exposure to asbestos could cause mesothelioma in workers. Moreover, the defendant's own salesforce was instructed to not meander in conversation with its customers regarding the hubbub surrounding the emerging questions on health and asbestos exposure. The defendant argued that the plaintiff's team had no evidence that the plaintiff, Mr. Burch relied upon any representation from the defendant. The court disagreed, as the absence of any warnings would allow a jury to conclude he may have acted differently had a concealed danger been known. However, the court's analysis on intentional misrepresentation was far different. The court quickly noted that the plaintiff lacked evidence on this issue because the plaintiff "testified that he does not recall ever seeing the materials containing defendant's misrepresentations, and he cannot rel[y] on what he never saw." The court was equally unpersuaded by the plaintiff's argument that Section 533 of the restatement imports an exception in the plaintiff's favor of misrepresentation to a third party. However, the court pointed out that the plaintiff must still prove the reliance upon the misrepresentation. Accordingly, the JNOV on the plaintiff's misrepresentation claims would not be reversed.

Finally, the court began its analysis of the apportionment of liability on noneconomic damages. According to the court, the courts are split on "whether section 1431.2 requires a judgment of several liability for an intentional tortfeasor for noneconomic damages in direct proportion to the intentional tortfeasor's percentage of fault." As a backdrop to its analysis, the court reminded that the Supreme Court "will soon resolve the split of authority" in its review of the matter. Until then, the court agreed with its decision in the *Thomas* matter and held that Section 1431.2 does not "operate to limit an intentional tortfeasor's liability for noneconomic damages as to the percentage of fault under comparative fault

principles." The decision in *Thomas* included "policy considerations of deference and punishment for intentional torts …" Consequently, the court ordered remand with directions to enter judgment against the defendant jointly and severally liable for both economic and noneconomic damages.

Read the full case decision here.

Damages Decisions

Plaintiff's Future Medical Award Reinstated Against Defendant Stevedore Company Based on Strength of Evidence Presented

(Court of Appeals, Louisiana, Fourth Circuit, May 8, 2019)

The plaintiff, Jerry Craft, filed suit against multiple stevedore companies, alleging that his work as a longshoreman on the New Orleans riverfront from 1953 until 1989 exposed him to asbestos that caused him to develop mesothelioma. Multiple other stevedore companies for which the plaintiff worked settled out of court, were dismissed from the litigation, or did not appear in the litigation at all. The defendant, Ports America Gulfport Inc., pursued litigation and went to trial.

The jury was given a special verdict form, which was comprised of eight interrogatories related to the defendant's liability. The jury found, by a preponderance of the evidence, that the plaintiff was exposed to asbestos while employed by the defendant, that this exposure was a substantial contributing factor to the plaintiff's development of mesothelioma, and that the defendant was negligent by not providing safeguards against such exposure during the plaintiff's employment. The jury awarded the plaintiff the following: $1 million for past and future pain and suffering, $250,000 for past and future medical pain and suffering, $250,000 for past and future physical disability, $100,000 for past and future loss of enjoyment of life, $360,000 for past medical expenses, and $1 million for future medical expenses.

The defendant filed two judgment notwithstanding the verdict (JNOV) motions: The trial court denied their motion as to the jury's negligence finding, but granted as to the jury's award for future medical expenses in the amount of $1 million. Both parties appealed the respective rulings.

The appeals court held that the jury did not abuse its discretion in "only" granting the plaintiff $1.6 million and that in Louisiana "it is a well-established rule that before a court of appeals can disturb an award made by a [fact finder], the record must clearly reveal that the trier of fact abused its discretion in making its award."

In addressing the defendant's JNOV claim related to future medical expenses, the court stated that "Mr. Craft proved, by a preponderance of the evidence, that future medical expenses would be medically necessary." Multiple medical experts testified that the plaintiff would require continuous medical care, including chemotherapy, for the remainder of his life. The appeals court reversed the trial court's decision, and reinstated the jury verdict of $1 million for future medical expenses.

The court, in reviewing the totality of the evidence presented at trial, disagreed with the defendant's assertion that the plaintiff provided insufficient evidence to establish that a legal duty was owed to him. Therefore, the court found no manifest error and denied the defendant's JNOV motion.

Verdict on Noneconomic Damages Reversed and Remanded With Finding of Joint/Several Liability Against Pipe Manufacturer

(Court of Appeal, First District, Division 4, California, April 15, 2019)

In an update to *Asbestos Case Tracker*'s previous post, the court reversed and remanded this matter, ordering a new entry of judgment holding the plaintiffs' economic and noneconomic damages jointly and severally liable against CertainTeed Corporation (defendant). At the trial level, a jury previously returned a verdict on economic damages in the amount of $776,201 against the defendant. The verdict also included $9.25 million in noneconomic damages, which was apportioned to the defendant at 62 percent with the remaining to other joint tortfeasors. The defendant moved for judgment notwithstanding the verdict (JNOV) on the plaintiff intentional concealment and misrepresentation claims. The court denied the defendant's motion on intentional concealment and granted the motion as to intentional misrepresentation. The court further granted the plaintiff's motion to amend the judgment to eliminate the defendant's proportionate fault reduction for noneconomic damages. The defendant appealed the amended judgment. Of interest, the defendant attempted to pay the partial judgment of the original judgment pending the appeal. The plaintiff rejected the check.

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The defendant took the position that the evidence was lacking as to these required elements. Specifically, the defendant argued that there was never a transaction between the defendant and the plaintiff. Further, no but-for causation evidence existed. The court noted that the jury instructions and causation theories were agreed upon by the defendant at the trial level. Therefore, it cannot seek reversal on a theory different "from those advanced and tried below." As for intent to deceive, the court concluded there was "substantial evidence" to support the jury's finding. Here, the defendant had known of the link between cancer and asbestos in the 1960s, and its own internal documents showed that low exposure to asbestos could cause mesothelioma in workers. Moreover, the defendant's own salesforce was instructed to not meander in conversation with its customers regarding the hubbub surrounding the emerging questions on health and asbestos exposure. The defendant argued that the plaintiff's team had no evidence that the plaintiff, Mr. Burch relied upon any representation from the defendant. The court disagreed, as the absence of any warnings would allow a jury to conclude he may have acted differently had a concealed danger been known. However, the court's analysis on intentional misrepresentation was far different. The court quickly noted that the plaintiff lacked evidence on this issue because the plaintiff "testified that he does not recall ever seeing the materials containing defendant's misrepresentations, and he cannot rel[y] on what he never saw." The court was equally unpersuaded by the plaintiff's argument that Section 533 of the restatement imports an exception in the plaintiff's favor of misrepresentation to a third party. However, the court pointed out that the plaintiff must still prove the reliance upon the misrepresentation. Accordingly, the JNOV on the plaintiff's misrepresentation claims would not be reversed.

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Read the full case decision here

Expert Challenges Decisions

Denial of Talc Defendant's Motion for JNOV Reversed on Appeal

(Supreme Court, Appellate Division, First Department, New York, June 20, 2019)

In unanimously reversing an order denying the defendant Whittaker Clark & Daniel's Inc.'s (WCD's) motion for judgment notwithstanding the verdict, today New York's First Department determined that the plaintiff, Claudine DiScala, did not present sufficient evidence to establish a level of exposure that could have caused the decedent, Joan Robusto, mesothelioma. It determined that although there was not a requirement to quantify a mathematically precise exposure level, the plaintiff's causation expert failed to express a legally sufficient opinion because he "merely opined that the decedent's exposure to unspecified 'detectable' or 'significant' levels of asbestos in the talcum product she used, caused her mesothelioma." The plaintiffs had alleged that in the 1960s and 1970s, Robusto was a daily user of Desert Flower Dusting Powder, which contained WCD's talcum powder. A jury awarded the plaintiff $7 million following a six-week trial against WCD in November 2015, marking the first verdict in the state in a case involving allegations of asbestos-contaminated talcum powder in personal hygiene products.

NYCAL Verdict Tossed on Basis That 'a Lot' of Asbestos Exposure Is Insufficient to Establish Causation

(Supreme Court, Appellate Division, First Department, New York, March 28, 2019)

The defendant, Caterpillar Inc. (Caterpillar), appealed a verdict in the aggregate amount of $1.8 million issued by a jury in the New York City Asbestos Litigation (NYCAL) following a trial over which the Honorable Martin Shulman presided. This verdict was unanimously reversed by the First Department, of which one justice is the Honorable Peter Moulton, who previously presided over NYCAL as administrative judge.

The First Department based its reversal on plaintiff Joanne Corazza's failure to establish causation as it related to a Caterpillar product contributing to the asbestos-related disease of the plaintiff's decedent, George Cooney. Specifically, the First Department held that Mr. Cooney's testimony that he was exposed to asbestos from "a lot" of Caterpillar forklift brake work was insufficient to establish the frequency of his exposure, as required under New York law. Consequently, the plaintiff's experts were deprived of a sufficient foundation for their medical opinions that Mr. Cooney's work with Caterpillar forklifts was a substantial case of an alleged asbestos-related disease.

Only the Westlaw citation is currently available at 2019 WL 1387270.

Preclusion of Plaintiff Experts Leads to Defense Win in First Philly Talc Trial

(County Court of Common Pleas, Philadelphia, February 8, 2019)

The plaintiff, Charles Brandt, on behalf of decedent, Sally Brandt, commenced an asbestos-related action against, among other defendants, Colgate-Palmolive Company, alleging that the decedent's use of Colgate's Cashmere Bouquet talcum powder exposed the decedent to asbestos, resulting in her mesothelioma diagnosis.

Following a *Frye* hearing, the Philadelphia County Court of Common Pleas precluded the expert opinions of the plaintiff's geologist and pathologist, finding numerous methodological flaws in their research claiming asbestos was found in Cashmere Bouquet talcum powder. Colgate subsequently filed a motion for summary judgment, arguing that the preclusion of these experts eliminated evidence creating a triable issue of fact as to causation. In opposition, the plaintiff relied on a nontestifying expert's airborne testing results in order to claim the decedent was exposed to fibers at levels "significantly greater than background concentrations." The court initially denied Colgate's motion.

Colgate moved to renew its summary judgment motion following the court's later refusal to consider the plaintiff's expert's airborne concentration opinions "of record," on the basis that there was ultimately no evidence demonstrating the decedent was exposed to airborne concentrations of asbestos from Colgate's talcum powder at sufficient levels to cause the decedent's disease.

The court went on to find that excluding the plaintiff's airborne concentration expert necessarily resulted in excluding the plaintiff's industrial hygienist expert since the airborne findings were the basis of the latter expert's opinion. As a

result, the plaintiff was left with no expert testimony that could create a triable issue of fact as to whether Colgate's talcum powder caused the decedent's disease.

Read the *Forbes* article here.

Exclusion of the Plaintiff's Causation Experts Leads to Grant of Summary Judgment in Merchant Marine Mesothelioma Matter

(U.S. District Court, E.D. Louisiana, February 5, 2019)

The plaintiff filed suit against multiple defendants alleging he developed mesothelioma while working for Radcliff Materials, a predecessor of Dravo Basic Materials Company (DBMC). Prior to filing suit in Louisiana, The plaintiff had filed a product liability suit against several defendants in California including DBMC. The plaintiff dismissed DBMC from the California suit based on jurisdictional issues. The plaintiff worked as an oiler on board a dredge known as the Avocet in 1973 for approximately six weeks. His primary job duties included reading gauges, changing oil filters, and making minor repairs.

The plaintiffs relied upon Drs. Robert Harrison and David Tarin as experts to support their claims against DBMC. Both experts planned to testify that the plaintiff's alleged exposure on board the Avocet was the general and specific cause of the plaintiff's mesothelioma. DBMC moved to preclude their testimony. DBMC also moved for summary judgment.

The court reminded the plaintiff of the standard for admissibility of expert testimony. An expert may provide an opinion when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Specifically, the court in the *Daubert* matter held that scientific testimony must be not only relevant but reliable. The evidence must also fit the facts of the instant case and assist the trier of fact to understand it. As for summary judgment, the court noted that summary judgment is appropriate where there is no genuine issue as to material fact.

Dr. Harrison: The court stated that the plaintiff has the burden to establish general causation in a mesothelioma case. Moreover, the plaintiff must show specific causation that DBMC caused the plaintiff's mesothelioma. DBMC did not seriously contest Dr. Harrison as to the issue that asbestos generally causes mesothelioma but rather challenged him as to specific causation. Here, Dr. Harrison offered a report that stated the plaintiff's mesothelioma was a result of "cumulative exposure to asbestos fibers from 1955 to 1988." Dr. Harrison admitted that he authored the report for the plaintiff's California case and had not reviewed any deposition transcripts for the instant case. Once deposed, Dr. Harrison added to his opinion that each and every exposure increased the plaintiff's risk of developing disease. Relying on a paper from another expert, he then went as far as to opine that the plaintiff's time on board the Avocet was the specific cause of the plaintiff's mesothelioma. The court quickly concluded that Dr. Harrison's testimony was inadmissible under Federal Rule 702 because the plaintiff is required to show specific exposure to asbestos in a toxic tort case with respect to specific causation. Here, Dr. Harrison knew virtually nothing regarding the exposure on board the Avocet. In fact, the information pulled from the plaintiff's California interrogatories was not enough according to the court. The court also noted that the each and every exposure methodology had been rejected in the *Comardelle* matter. Finally, the plaintiff's own lay testimony as to gray dust was not enough to show asbestos on the Avocet, and hence the larger problem with the plaintiff's case, according to the court.

Dr. Tarin-The court quickly concluded that Dr. Tarin's opinion was substantially similar to Dr. Harrison's and should therefore be barred. Dr. Tarin sought to testify a general opinion that "cumulative exposure to all forms of asbestos contributes to the indication and propagation" of disease. Dr. Tarin therefore concluded that this proposition means that all exposures should be considered substantial contributing factors in asbestos malignancy or specific causation. Dr. Tarin testified in his deposition that he had relied upon evidence that was nearly the same as Dr. Harrison's. Finally, Dr. Tarin's opinion that the plaintiff's pathology slides were consistent with a "heightened susceptibility" to asbestos was not enough to remedy the lack of specific causation. Consequently, Dr. Tarin's testimony was excluded.

According to the court, the plaintiff must establish expert testimony as to causation. Therefore, summary judgment was appropriate for DBMC.

Read the full case decision here.

New NYCAL Coordinating Judge Grants First Causation-Based Summary Judgment

(Supreme Court of New York, New York County, January 29, 2019)

New York City Asbestos Litigation Coordinating Judge Manuel J. Mendez has granted a causation-based summary judgment motion to defendant American Biltrite Inc. (ABI). With respect to ABI, the plaintiff, Thomas Mantovi, alleged exposure from the defendants vinyl asbestos floor tile that he encountered as a bystander while performing inspections as an insurance agent from 1967 through 1979. Specifically, he testified that he was exposed to asbestos by breathing in dust during insurance inspections of commercial and residential sites where Amtico asbestos-containing vinyl floor tiles were being cut and laid down, with tools such as box cutters and rotary saws.

As a threshold matter, the plaintiff had argued ABI failed to meet its *prima facie* burden, as it did not submit an affidavit of an individual with personal knowledge. However, Justice Mendez held that a motion for summary judgment can be "decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge." The plaintiff further argued that ABI's experts failed to make a *prima facie* showing that asbestos in its vinyl floor tiles could not have caused the decedent's mesothelioma, but Justice Mendez rejected that contention and found that ABI had met its *prima facie* burden with respect to both general and specific causation.

In support of the general causation portion of its motion, ABI relied on the affidavit and reports of John W. Spencer, CIH, CSP; Marc Plisko, CIH; Dr. Stanley Geyer, M.D.; and Dr. David Weill, M.D. Mr. Spencer and Mr. Plisko submitted evidence of a lack of causal relationship between encapsulated chrysotile asbestos and the decedent's mesothelioma based on a risk and exposure assessment. Justice Mendez specifically credited their reliance on OSHA and the EPA's position on the difference between friable and nonfriable asbestos-containing materials, holding that "ABI's expert reports, which rely on EPA and OSHA reports, and scientific studies' to formulate a conclusion are sufficient to meet the *prima facie* burden for summary judgment on general causation."

In further support of his general causation ruling, Justice Mendez relied on Dr. David Weill's discussion of the minimal threshold level below which there is no excess risk of developing mesothelioma, noting that "Dr. Weill refers to studies of ambient exposure levels in cities in the United States of between 0.02 f/cc and 0.008 f/cc as not being associated with disease." Dr. Weill also supported his opinions concerning the differences in fiber type potency using charts of "Mesothelioma Deaths by Fiber Types" for the years 1983, 1987, 1996, and 2013, which showed that "chrysotile miners had only 2 percent of deaths from mesothelioma in 1983 and 1987 with no deaths in 1996 and 2013." Justice Mendez also credited Dr. Weil's reliance on National Institute for Occupational Safety and Health animal studies showing a lack of pathological response from chrysotile exposures.

In opposition to the general causation challenge, the plaintiff relied on the report of Dr. David Y. Zhang, M.D., Ph.D., and M.P.H., a specialist in pathology and occupational therapy. In his report, Dr. Zhang provided the plaintiff's work history, medical history, radiological findings, histological diagnosis, and pathology reports. Dr. Zhang's report concluded that "… the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his malignant mesothelioma." However, Justice Mendez held that Dr. Zhang's report was insufficient to raise an issue of fact as to general causation because it failed "to make any distinctions between chrysotile fibers and the other asbestos fibers."

With respect to specific causation, ABI argued that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause decedent's mesothelioma. Justice Mendez noted that the New York Court of Appeals has enumerated several ways an expert might demonstrate specific causation, including mathematical modeling and comparison to the exposure levels of subjects of other studies. Justice Mendez found that ABI met its *prima facie* burden on specific causation, in part based on the report by Spencer and Plisko, which estimated the plaintiff's cumulative exposure levels as 0.00079 f/cc-yrs. Their report further noted that such a level "(1) is indistinguishable from most lifetime cumulative exposures to ambient asbestos, (2) [is] well below a working lifetime at the OSHA and WHO permissible exposure limits, and (3) [is] also well below lifetime cumulative exposure at the USEPA clearance limit following an asbestos abatement action."

In opposition to the specific causation challenge, the plaintiff again relied on Dr. Zhang's report. However, Justice Mendez held that it was insufficient to raise an issue of fact. Justice Mendez explained that "[p]laintiff's conclusory argument that Dr. Zhang's trial testimony will rest on an 'overwhelming scientific consensus' is unavailing. Dr. Zhang's report does not rely on comparison to the exposure levels of subjects of other studies, does not provide comparison of the encapsulated chrysotile fibers in ABI's Amtico vinyl asbestos floor tiles to other forms of asbestos fibers, or establish that the plaintiff was exposed to sufficient levels of asbestos from his secondhand exposure to ABI's product, to raise an issue of fact on specific causation."

Read the full case decision here.

Three Experts' Opinions Deemed Reliable and Relevant Under Daubert Standard

(U.S. District Court, E.D. Louisiana, January 7, 2019)

The defendants Ford and Cummins filed motions *in limine* to exclude or limit the expert testimony of the plaintiffs' experts Dr. Brent Staggs, Dr. Murray Finkelstein, and Christopher Depasquale. The plaintiff, Victor Michel, filed suit in state court against multiple defendants, alleging that his exposure to asbestos while working as a mechanic and generator service technician caused him to contract peritoneal mesothelioma.

Under *Daubert*, the district court "is to act as a gatekeeper to ensure that 'any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" The court's gatekeeping function involved a two-part inquiry: (1) determining whether the expert testimony was reliable and (2) determining whether the expert's reasoning or methodology fit the facts of the case and whether it would help the trier of fact understand the evidence.

The court held that all three experts' testimony was reliable and relevant, and therefore denied the defendants' joint motions *in limine* to exclude or limit the testimony of Drs. Staggs and Finkelstein and Depasquale.

Only the Westlaw citation is currently available at 2019 WL 118008.

Maritime/Admiralty Law Decisions

Bare Metal Defense Does Not Apply to Negligence Claims Under Maritime Law

(U.S. Supreme Court, March 19, 2019)

The U.S. Supreme Court held that manufacturers are liable for injuries caused by parts with asbestos that were subsequently added to their products by third parties, affirming the special protections extended to sailors under maritime law. The court reviewed the following question: "Can products-liability defendants be held liable under maritime law for injuries caused by products they did not make, sell, or distribute?"

In a case previously reported by *Asbestos Case Tracker*, the court, in a 6–3 ruling, upheld a Third Circuit decision that a maker of an asbestos-free product can be held liable for injuries caused by asbestos if it could have reasonably known that an asbestos-containing part would be added afterwards by a third party. Under maritime law, a product manufacturer has a duty to warn when its product needs another part that the manufacturer knows is likely to be dangerous and when the manufacturer has no reason to believe that users will know about that danger.

Duty to Warn Recognized in Maritime Tort Context

(U.S. Supreme Court, March 19, 2019)

In a case extensively covered by the *Asbestos Case Tracker* blog, the U.S. Supreme Court examined a multidistrict asbestos product liability action. In the claim, widows of deceased veterans brought negligence and strict liability action against several defendants, including manufacturers of engines and other equipment installed on Navy ships, alleging veterans developed cancer due to exposure to asbestos on board Navy ships. Following remand from the court of appeals, the U.S. District Court for the Eastern District of Pennsylvania granted the manufacturers' motions for summary judgment. The widows appealed to the Court of Appeals for the Third Circuit, which affirmed in part, vacated in part, and remanded. The U.S. Supreme Court granted *certiorari* to respond to the following question: Can products-liability defendants be held liable under maritime law for injuries caused by products they did not make, sell, or distribute?

The court, in an opinion written by Justice Kavanaugh, held that in the maritime tort context, a product manufacturer has a duty to warn when (1) its product requires incorporation of a part, (2) the manufacturer knows or has a reason to know that the integrated product is likely to be dangerous for its intended uses, and (3) the manufacturer has no reason to believe that the product's users will realize that danger.

Summary Judgment Motions Denied for Four Defendants in Two Maritime Cases Filed by Same Plaintiff

(U.S. District Court, E.D. Pennsylvania, February 14, 2019)

Shortly before his death, Obediah Walker Jr. filed an action in Pennsylvania state court alleging he was exposed to asbestos while serving on the *USS Plymouth Rock* while enlisted in the Navy from 1969 to 1971. He served as an electrician on board the Plymouth Rock and was later diagnosed with lung cancer. He was deposed six days after filing suit and was cross-examined by only one defendant before he passed. The defendants Ingersoll-Rand, Warren Pumps, and Blackmer Pumps did not cross-examine Walker. Obediah Walker III later filed a second suit against other defendants, including Viad Corp. Both cases were removed shortly after they were filed.

All four defendants above filed for summary judgment based upon Walker's lack of identification of their products on board the *USS Plymouth Rock*. James Owens, one of Walker's supervisors on the ship, was deposed and testified that Walker would have worked on every part of the ship, and that electricians stood watch in the engine room for four hours at a time. Owens also testified that Walker worked on pumps on the ship.

The plaintiff relied on documents from the *USS LSD* 28 class of ships, of which the *USS Plymouth Rock* was a part. Those documents demonstrated that equipment from all four of the above defendants would have been present on the Plymouth Rock. Although the court precluded Walker's deposition testimony because the defendants did not have an opportunity to cross-examine him, the court found that the other evidence, including manuals relating to each of the defendants' products, was sufficient for a reasonable jury to conclude that the products caused Walker's lung cancer. The court applied maritime law and rejected each defendant's argument that the bare metal defense defeated the plaintiff's claims. The court found that there was sufficient evidence such that a jury could conclude that each defendant

knew its products would contain asbestos, citing the flexible standard adopted by the Third Circuit in *Devries v. Air & Liquid Systems Corp.* Given that, each of the four defendants' motions for summary judgment was denied.

Only the Westlaw citation is currently available at 2019 WL 653216 and 2019 WL 653607.

Exclusion of the Plaintiff's Causation Experts Leads to Grant of Summary Judgment in Merchant Marine Mesothelioma Matter

(U.S. District Court, E.D. Louisiana, February 5, 2019)

The plaintiff filed suit against multiple defendants, alleging he developed mesothelioma while working for Radcliff Materials, a predecessor of Dravo Basic Materials Company (DBMC). Prior to filing suit in Louisiana, The plaintiff had filed a product liability suit against several defendants in California, including DBMC. The plaintiff dismissed DBMC from the California suit based on jurisdictional issues. The plaintiff worked as an oiler on board a dredge known as the Avocet in 1973 for approximately 6 weeks. His primary job duties included reading gauges, changing oil filters and making minor repairs.

The plaintiffs relied upon Drs. Robert Harrison and David Tarin as experts to support their claims against DBMC. Both experts planned to testify that the plaintiff's alleged exposure on board the Avocet was the general and specific cause of the plaintiff's mesothelioma. DBMC moved to preclude their testimony. DBMC also moved for summary judgment.

The court reminded the plaintiff of the standard for admissibility of expert testimony. An expert may provide an opinion when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Specifically, the court in the *Daubert* matter held that scientific testimony must be not only relevant but reliable. The evidence must also fit the facts of the instant case and assist the trier of fact to understand it. As for summary judgment, the court noted that summary judgment is appropriate where there is no genuine issue as to material fact.

Dr. Harrison-The court stated that the plaintiff has the burden to establish general causation in a mesothelioma case. Moreover, the plaintiff must show specific causation that DBMC caused the plaintiff's mesothelioma. DBMC did not seriously contest Dr. Harrison as to the issue that asbestos generally causes mesothelioma but rather challenged him as to specific causation. Here, Dr. Harrison offered a report that stated the plaintiff's mesothelioma was a result of "cumulative exposure to asbestos fibers from 1955 to 1988." Dr. Harrison admitted that he authored the report for the plaintiff's California case and had not reviewed any deposition transcripts for the instant case. Once deposed, Dr. Harrison added to his opinion that each and every exposure increased the plaintiff's risk of developing disease. Relying on a paper from another expert, he then went as far as to opine that the plaintiff's time on board the Avocet was the specific cause of the plaintiff's mesothelioma. The court quickly concluded that Dr. Harrison's testimony was inadmissible under Federal Rule 702 because the plaintiff is required to show specific exposure to asbestos in a toxic tort case with respect to specific causation. Here, Dr. Harrison knew virtually nothing regarding the exposure on board the Avocet. In fact, the information pulled from the plaintiff's California interrogatories was not enough according to the court. The court also noted that the each and every exposure methodology has been rejected in the *Comardelle* matter. Finally, the plaintiff's own lay testimony as to gray dust was not enough to asbestos on the Avocet hence the larger problem with the plaintiff's case according to the court.

Dr. Tarin-The court quickly concluded that Dr. Tarin's opinion was also substantially similar to Dr. Harrison's and should therefore be barred. Dr. Tarin sought to testify that "cumulative exposure to all forms of asbestos contributes to the indication and propagation" of disease or what is a general opinion. Dr. Tarin therefore concluded that this proposition means that all exposures should be considered a substantial contributing factor in asbestos malignancy or specific causation. Dr. Tarin testified in his deposition that he had relied upon evidence that was nearly the same as Dr. Harrison. Finally, Dr. Tarin's opinion that the plaintiff's pathology slides are consistent with a "heightened susceptibility" to asbestos was not enough to remedy the lack of specific causation. Consequently, Dr. Tarin's testimony was excluded.

According to the court, the plaintiff must establish expert testimony as to causation. Therefore, summary judgment was appropriate for DBMC.

Read the full case decision here.

Lack of Detail in Product Identification Leads to Grant of 14 Summary Judgment Motions

(U.S. District Court, D. Delaware, January 23, 2019)

The plaintiff, William Johansen, alleged that he developed mesothelioma from his work with various pumps, valves, and other equipment aboard naval vessels, at shipyards, and at a pulp mill. Fourteen defendants filed summary judgment motions arguing insufficient causation. The parties agreed that maritime law applied to all of the plaintiff's naval/sea-based claims and that Washington law applied to his land-based claims. Under maritime law, a plaintiff must demonstrate exposure to the defendant's product and proof that the product was a substantial factor in causing his injury. Under Washington law, a plaintiff must "establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product," and the plaintiff must identify the particular manufacturer of the product that caused his injury, with courts considering evidence of proximity and frequency.

Although the plaintiff identified products of various defendants, because he failed to sufficiently identify details regarding his work with the products, the court recommended granting the summary judgment motions of the following: Buffalo Pumps (Air & Liquid Systems), Weir/Atwood valves (Atwood & Morrill), Armstrong steam traps, Crosby valves, Vogt valves (Flowserve U.S. Inc.), Chicago pumps (FMC Corporation), Gardner Denver pumps, Jenkins valves, Kunkle valves, Nash pumps, Neles-Jamesbury valves, Red-White valves, and Warren pumps. The court recommended granting Anchor Darling's summary judgment motion, as the plaintiff did not identify any asbestos-containing products attributed to that the defendant.

Only the Westlaw citation is currently available at 2019 WL29115.

Plaintiff's Failure to Establish Basic Product Identification Leads to Recommendation of Summary Judgment for Multiple Defendants

(U.S. District Court, D. Delaware, January 22, 2019)

The plaintiff filed suit against several defendants, alleging that the plaintiff developed lung cancer as a result of his occupational exposure to asbestos while working in the U.S. Navy and during work in the civilian sector. The case was quickly removed to federal court. Specifically, the plaintiff worked as a plumber in New Canaan, Connecticut, from 1962 to 1963. He recalled working with several brands of residential and commercial boilers. The plaintiff believed that he had been exposed to asbestos from the powder associated with the boilers. Later on, the plaintiff joined the U.S. Navy and worked as a pipefitter on board the *USS Valley Forge* from 1963 to 1967. During his military service, the plaintiff testified that he worked around valve-packing and gaskets. Mr. Harding also removed asbestos insulation from pipes leading to and from pumps and boilers. Others working around him removed old bricks. All of the products caused dust to become airborne, according to the plaintiff. Mr. Harding then left the military and worked as an apprentice pipefitter in Stamford, Connecticut, from 1968 to 1970. His work centered around boilers, much like the work he performed in the U.S. Navy. He again encountered asbestos-covered steam lines.

The court began its analysis by stating the standard for summary judgment. According to the court, summary judgment is appropriate when "there is no genuine dispute as to any material fact." The parties agreed that maritime law governed the plaintiff's Navy claims and that Connecticut law governed his land claims. Product identification is crucial to both standards, according to the court. Of the dozen defendants sued by the plaintiff, the magistrate recommended summary judgment for all. Here, the plaintiff's testimony either equivocated on identification of specific defendants, lacked any evidence of substantial factor causation, or failed to identify a specific defendant outright. Consequently, summary judgment was appropriate for the defendants.

Read the full case decision here.

Pleadings Challenge Decisions

Asbestos Multidistrict Litigation Judge Rejects Pre-Daimler Third Circuit Authority Finding Personal Jurisdiction Based on Registration as a Foreign Corporation

(U.S. District Court E.D. of Pennsylvania, June 6, 2019)

In Re Asbestos Products Liability Litigation, Jackie Sullivan, Executrix of the Estate of John L. Sullivan v. A.W. Chesterton, Inc., et al., the asbestos multidistrict litigation court ruled on a motion to dismiss filed by a defendant. The court granted the motion, as it concluded that the court lacked personal jurisdiction over the defendant.

The court analyzed the 2014 *Daimler AG v. Bauman* decision, which brought about a sea change in the jurisprudence of exercising general personal jurisdiction over a foreign corporation. The court reviewed the *Daimler* decision, which held that under the due process clause, subjecting a foreign corporation to general jurisdiction in every state in which it "engages in a substantial, continuous, and systematic course of business" was "unacceptably grasping." Furthermore, under *Daimler*, the exercise of general jurisdiction over a foreign defendant (except in extraordinary circumstances) was limited to instances where the corporation was "at home," namely, the forums in which the foreign corporation is incorporated and where it maintains its principal place of business. As in all states, under Pennsylvania law, foreign corporations wishing to do business in Pennsylvania are required to register with the state. Under pre-*Daimler* Third Circuit authority, such a business registration constituted a sufficient basis for the exercise of general personal jurisdiction over the foreign corporation. The court stated that federal and state courts in Pennsylvania have struggled to divine the applicability of *Daimler* to this registration statute. Therefore, the court held that:

1. The Pennsylvania statutory scheme that requires foreign corporations to register to do business and, therefore, to consent to general personal jurisdiction in Pennsylvania, offends the due process clause and is unconstitutional.

2. The Third Circuit's pre-*Daimler* decision in *Bane v. Netlink, Inc.*, found that, by registering to do business in Pennsylvania, a foreign corporation consents to general personal jurisdiction, is irreconcilable with the teachings of *Daimler*, and can no longer stand.

In this case, the plaintiff, Jackie Sullivan, brought this action against 48 defendants in the Philadelphia Court of Common Pleas in July 2018, alleging that the decedent, John Sullivan, was exposed to asbestos during his naval service from October 1967 through January 1980. The plaintiff alleged that this asbestos exposure caused the decedent to develop lung cancer, which ultimately led to his death. The defendant removed the action in August 2018 pursuant to the Federal Officer Removal Statute. Regarding the defendant, the plaintiff alleged that in 1973, the decedent was assigned to the *USS Blakely* while serving in the Navy as a machinist mate. The plaintiff further contended that an alleged predecessor of the defendant built the U.S.S. Blakey, and designed its ship to contain asbestos and failed to warn regarding the hazards of asbestos. It was undisputed that the decedent's alleged exposure aboard the U.S.S. Blakely did not occur in Pennsylvania. The defendant is incorporated and has its principal place of business in Virginia, and the plaintiff is also a citizen of Virginia.

The court analyzed the plaintiff's argument that the court had general personal jurisdiction over the defendant because the defendant and its alleged predecessors registered to do business in Pennsylvania at various points in time. The court analyzed two Pennsylvania statutes regarding business registration, which when read together, provide that the state will only permit a foreign corporation to "do business" in Pennsylvania if it registers and, thus, subjects itself to general personal jurisdiction. The court held that this scheme has serious due process implications and raised two questions for the court to address:

1. Is the Pennsylvania statutory scheme constitutional after *Daimler*?

2. Must this court follow the Third Circuit's holding in *Bane* that a foreign corporation consents to jurisdiction by registering under the Pennsylvania statutory scheme?

In its analysis, the court assessed whether Pennsylvania's long-arm statute provided for the exercise of long-arm jurisdiction and, if so, whether the exercise of such jurisdiction satisfied the requirements of the due process clause of the United States Constitution. The court addressed the applicability of the long-arm statute, and held that it only needed to analyze whether jurisdiction was proper under the Federal Fourteenth Amendment jurisprudence. The court

considered the jurisprudential history of general personal jurisdiction, with the development of the law from *International Shoe*, *Pennoyer*, and *Helicopteros Nacionales*, landmark cases in federal law holding that a foreign corporation's continuous and systematic general business contacts in a state could allow its courts to exercise general personal jurisdiction over the corporation. In 2011, the Supreme Court retracted from this general jurisdictional analysis based on business contacts. The court held that a foreign corporation is subject to general personal jurisdiction only where it is fairly regarded as being at home. Three years later, in *Daimler*, the Supreme Court held that a corporation is typically at home in its state of incorporation and state in which it has its principal place of business.

In its review of the Pennsylvania statutory scheme, the court addressed the plaintiff's arguments that the defendant consented to general jurisdiction when it registered to do business in Pennsylvania. The court held that such consent is only valid if it is given both knowingly and voluntarily. In its analysis, the court held that the original force behind business registration statutes is now archaic and moot, and was initially intended to create only specific jurisdiction over foreign corporations, not general jurisdiction. The court further held that most courts confronted with the issue had also concluded that these statutes do not imply consent to general jurisdiction. In a Second Circuit decision, the court distinguished Pennsylvania's statutory scheme on the grounds that the statute included clear language regarding consent-based jurisdiction. However, the court concluded that even with the express statutory language conferring jurisdiction upon registration, "[t]he reach of [a state's] coercive power, even when exercised pursuant to a corporation's purported 'consent,' may be limited by the Due Process clause." The court further reviewed a Delaware Supreme Court decision interpreting a state registration statute as conferring general personal jurisdiction over registrants. The court held that:

> If all of our sister states were to exercise general jurisdiction over our many corporate citizens, who often as a practical matter must operate in all fifty states and worldwide to compete, that would be inefficient and reduce legal certainty for businesses. Human experience shows that "grasping" behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good. It is one thing for every state to be able to exercise personal jurisdiction in situations when corporations face causes of action arising out of specific contacts in those states; it is another for every major corporation to be subject to the general jurisdiction of all fifty states.

In its own analysis, the court agreed with previous holdings in the cases that a mandatory statutory regime purporting to confer consent to general jurisdiction in exchange for the ability to legally do business in a state is contrary to the rule in *Daimler*, and therefore can no longer stand.

Read the case decision here.

Lack of Specific Personal Jurisdiction Leads to Dismissal of Alleged Successor to Joiner Contractor

(U.S. District Court D. New Jersey, June 5, 2019)

The plaintiff filed suit against multiple defendants alleging her decedent developed mesothelioma from exposure to asbestos-containing products used or installed by the defendants, including RBC Sonic. It was alleged that Robert Fish was exposed to asbestos panels installed by a joiner contractor while working at the New York Shipbuilding and Drydock located in New Jersey in 1960. Sonic Industries Inc. (Sonic) moved to dismiss the complaint for lack of specific personal jurisdiction.

The court stated that a plaintiff must "present a *prima facie* case for the exercise of personal jurisdiction by establishing with reasonable particularity sufficient contacts between the defendant and the forum state." Here, it was undisputed that Sonic was not formed until 1966. Sonic was incorporated in California and held a principal place of business in Connecticut. The court took issue with the allegations that Sonic was "otherwise liable" for the plaintiff's injuries without more detail. The plaintiff argued that Sonic was liable "as successor to the joiner contractor" that hung the asbestos panels. The plaintiff also took the position that the defendant had the burden to "provide the basis for its claim that it is not the putative successor to the joiner contractor." The court disagreed and noted that the plaintiff failed to offer anything to illustrate a "continuation" of the joiner contractor to Sonic in order to impute liability. In fact, the court also noted that the plaintiff had not pled "a single fact relevant to the imputation issue." The motion to dismiss for lack of personal jurisdiction was granted.

Read the case decision here.

Specific Jurisdiction Established Under 'Stream of Commerce Plus' Theory

(U.S. Northern District of California, May 16, 2019)

The plaintiff, Thomas Toy, alleged that his mesothelioma diagnosis was a result of asbestos exposure incurred in multiple Navy shipyards from a variety of products throughout his machinist career. He claimed he was exposed to friction products in his role as a mechanic for the Army while he was stationed in Germany, Korea, and U.S. locations, and while working with construction products he used during home renovations. The defendant, Viking Pump Inc., moved to dismiss pursuant to Federal Rule 12(b)(6), arguing that the plaintiff failed to establish personal jurisdiction in his complaint, and submitted an affidavit alleging that Viking, a publicly traded company, was incorporated and established in Delaware and Iowa, respectively, and had manufacturing facilities in Canada, Ireland, and the United Kingdom.

The court first concluded that no general jurisdiction could be established given that Viking, a Delaware corporation, kept its principal place of business in Iowa. The court went on to conclude, however, that it had specific jurisdiction over Viking under the "stream of commerce plus" theory, even though Viking had no manufacturing facilities in the places in which the plaintiff alleged exposure while in the military. The plaintiff could rely on the allegations in his complaint that:

1. Viking was a supplier of asbestos-containing pumps.

2. Viking regularly conducted business in California, since Viking submitted no evidence that it supplied its products to the Navy "somewhere outside of California."

In sum, although the plaintiff's allegations were "meager," Viking's motion did not contradict the plaintiff's allegations. As a result, the Northern District of California denied Viking's motion to dismiss on personal jurisdiction grounds.

Read the case decision here.

Forum Non Conveniens Stay Upheld

(Court of Appeal, Second District, Division 4, California, April 30, 2019)

Wisconsin resident Charlene Rickert filed a wrongful death suit in the Superior Court of Los Angeles, and alleged that American Honda; Yamaha Motor Corporation, USA; and Kawasaki Motors Corporation, USA (respondents), among others, contributed to the mesothelioma death of Wisconsin resident Gary Staszewski, through his use of the respondents' brakes, clutches, and gaskets. All of the relevant work and medical treatment occurred in Wisconsin, and all witnesses necessary to prove exposure and damages remained in Wisconsin. While the respondents maintained corporate headquarters in California, no specific witnesses within those headquarters were identified or had their residences disclosed. The respondents filed a *forum non conveniens* motion; the trial court granted, and stayed the case. Rickert appealed.

The appellate panel noted that its review was based on an abuse of discretion standard, and affirmed the trial court's order. The panel noted that there was no requirement for the respondents to demonstrate that the current forum was "seriously inconvenient," given that the trial court merely stayed the case instead of dismissing it. The panel further noted that there was no dispute that Wisconsin was a suitable alternative forum, leaving the trial court the discretion to weigh the private interests of the parties and the public interests of keeping the case in California, which the panel did not question.

The case summary is provided with permission of Westlaw here.

Auto Trade Association Successfully Challenges Plaintiff's Claims of Specific Personal Jurisdiction

(U.S. District Court, N.D. California, April 29, 2019)

The plaintiff, Thomas Toy, filed suit against several defendants, including the National Automotive Parts Association (NAPA), alleging that he developed mesothelioma from the use of its asbestos-containing products while maintaining vehicles. NAPA moved to dismiss the matter for lack of personal jurisdiction. The plaintiff opposed the motion, arguing that the court had specific jurisdiction under the "stream of commerce theory" or NAPA's "efforts to serve directly or

indirectly the market for asbestos containing products in this State." Both parties agreed that the court did not have general jurisdiction over NAPA.

According to the court, specific jurisdiction exists when 1) the defendant has performed some act or consummated some transaction with the forum by which it purposefully availed itself of the privilege of conducting business in California; 2) the plaintiff's claims arise out of or result from the defendant's forum-related activities; and 3) the exercise of jurisdiction is reasonable. The court quickly concluded that it did not have specific jurisdiction over NAPA. Here, NAPA submitted an affidavit that "NAPA is a Michigan not-for-profit membership corporation" and it "does not own or operate a wholesale or retail business and does not distribute or sell parts." The affidavit went on to explain that its members are allowed to use its NAPA logo but that it "did not manufacture, design, distribute, supply, or sell automotive parts into the stream of commerce." The plaintiffs did not contest the facts in the affidavit. Therefore, the motion to dismiss was granted, as the court "may not assume the truth of the allegations in a pleading which are contradicted by affidavit."

Read the case decision here.

Orders Dismissing Merchant Mariners' Claims for Lack of Personal Jurisdiction Reversed After Finding of Waiver

(United States Court of Appeals, Third Circuit, April 9, 2019)

The appeals for this matter stem from the dismissal of claims filed in the Northern District of Ohio. In 1989, several shipowner defendants moved to dismiss a multitude of merchant mariner claims suits for lack of personal jurisdiction. In sum, the defendants argued that the merchant mariners' claims for nationwide jurisdiction were invalid. The court found a lack of personal jurisdiction but denied the motions to dismiss and indicated that the court would transfer the cases to the Eastern District of Pennsylvania for the consolidated multidistrict litigation (MDL). The defendants requested time to contemplate waiving the personal jurisdiction argument to potentially litigate the claims in Ohio. The court ordered the defendants to file answers within a specified time frame should they wish to waive personal jurisdiction. The defendants did so, but noted a protest and continued to assert the personal jurisdiction defense in their answers. In 1991, the cases were transferred to the MDL, as authority over those cases was conferred upon the MDL. Several of the cases were reactivated and memorandums were issued as to the personal jurisdiction issue. Those memorandums noted that the defendants had not waived personal jurisdiction. Several of the plaintiffs appealed.

The court noted its authority to dismiss for lack of jurisdiction under FRCP 12. However, the court quickly noted that a defendant's actions may be construed as a waiver of personal jurisdiction. The court then analyzed whether the MDL abused its discretion when it "concluded that the ship owners had not implicitly waived their personal jurisdiction defenses in Ohio." The court stated that 1) the defendants introduced the idea of waiver by asking for additional time to consult on litigating in Ohio; 2) the shipowner defendants were against the idea of transfer out of Ohio; 3) the defendants indeed filed answers in Ohio; and 4) the defendants did not diligently pursue the defense of personal jurisdiction when they acquiesced in the litigation that was continuing in Ohio. The court concluded that the defendants waived the defense of personal jurisdiction by affirmative conduct and by failure to pursue the defense. As for the MDL, the court found that it applied the incorrect legal standard when it found that the defendants had retained the defense simply by inserting it in their answers. Although retaining the defense in the answer may normally assert and preserve the defense, the procedural history was anything but normal according to the court. Relying on the decision from the *Parker* case, it had no choice but to create a split among circuits when a compelling basis exists. Accordingly, the court reversed the judgment, dismissing the merchant mariners' complaints, as the defendants waived and forfeited their personal jurisdiction defense. The decision was followed by a lengthy dissent, which pointed out the MDL had in fact relied upon the correct legal standard.

Read the full case decision here.

Workers' Compensation Exclusivity Provision Leads to Dismissal of Construction Worker's Complaint

(U.S. District Court, Western District of Wisconsin, March 31, 2019)

Plaintiff Johnson Carter filed suit against Henry Carlson's Construction Company (HCCC), alleging he suffered "a variety of severe medical symptoms" after exposure to asbestos while working for HCCC as a temporary construction worker. Specifically, he claimed that he was exposed to asbestos during a demolition of a hospital in the late 1980s. He could not recall the name of the temporary agency or hospital, but stated that he was provided a dust mask for the tear-out work. HCCC moved to dismiss the complaint, arguing that workers' compensation provides an exclusive remedy for the

plaintiff's claim. The plaintiff opposed and took the position that he was not an employee of HCCC and that HCCC's actions rose to the level of an intentional tort.

The court began its analysis and stated that a complaint "must contain factual matter, accepted as true, to state a claim to relief that is plausible on its face." As for whether South Dakota or Wisconsin law applied, the court quickly found that Carter was an employee of HCCC for purposes of workers' compensation, as one lent or contracted by another for employment fits the meaning of the statute regardless of which state law applied. Here, the plaintiff conceded that his amended complaint did not allege an intentional tort. However, according to the plaintiff, the opposition suggested that HCCC had "full knowledge of the danger" and "was aware of the asbestos because the foreman brought" him a mask and said that asbestos was in the building. The court noted that an intentional harm by the employer to an employee negates the exclusivity provision of the workers' compensation statute. However, the plaintiff did not plead facts sufficient to conclude intent on the part of the defendant. On the contrary, the fact that the defendant provided masks shows the opposite. Accordingly, the motion to dismiss was granted.

Read the full decision here.

Denial of Motion to Add Additional Defendants Found to Be Dispensable Upheld

(U.S. District Court, D. Colorado, March 19, 2019)

The plaintiffs filed suit against several defendants, alleging exposure to asbestos caused their development of mesothelioma. As for the plaintiff Mestas, he alleged exposure to asbestos from the work clothes worn by his father from 1953 to 1974. He also alleged direct exposure to asbestos while working on personal vehicles from 1968 to 1992. The plaintiff Muse sought damages for loss of consortium. General Electric removed the case based on diversity. The plaintiffs sought leave to file an amended complaint arguing that they needed to add four additional defendants, and sought remand. John Crane Inc. (JCI) also moved to dismiss the complaint for failure to state a claim for relief.

As for the motion to amend, the court noted that the additional parties should be joined if they are "indispensable" under Rule 19 and may be added by discretion under Rule 20. Here, the court quickly concluded that the parties were not necessary under Rule 19 because the parties not currently in the suit have no bearing on the plaintiffs' case against those in the instant suit. Moreover, the plaintiffs could still pursue those absent parties in future litigation. As for discretionary joinder under Rule 20, the court found that the plaintiffs had not put forth a showing of good faith. Specifically, the court noted that the plaintiffs sought remand when they filed their first amended complaint. The court called this a "plausible inference of forum shopping" and noted that only the defendants brought up the issue of remand to the court. Accordingly, the court denied the motion for leave.

As for JCI's motion to dismiss, the magistrate found that although Colorado law had not laid out a theory of take-home exposure, it was plausible that the court would find the defendants owed the plaintiffs a duty. Accordingly, the magistrate found that issues of foreseeability of harm were more appropriate for summary judgment, and therefore recommended that the motion to dismiss be denied. JCI argued that the magistrate "relied too much" on foreseeability as to whether the claims could be valid under Colorado law. The court disagreed, and specifically pointed out that asbestos has been "universally recognized" as a carcinogen. Moreover, several jurisdictions have recognized take-home asbestos claims vis-à-vis a theory of negligence. Accordingly, the defendant's objections were overruled.

Balance of Justice a Factor in Court's Granting of Motion for Leave to Add Gasket Defendant

(U.S. District Court, W.D., Washington at Tacoma, March 11, 2019)

The plaintiff filed suit against numerous defendants, alleging his decedent was exposed to asbestos for which the defendants were liable. The plaintiff sought leave of court to amend the pleadings three times. The instant request to add the defendant DCo LLC was made after the case was removed. The plaintiff contends that not adding DCo LLC was an oversight until a family friend testified that he believed that the plaintiff had a box of Victor gaskets in his garage. The plaintiff also believed that counsel for DCo LLC had been on a telephonic deposition. DCo LLC opposed the request to amend the pleadings for lack of good cause. The court stated that the factors in considering amendment of pleadings included:

1. Bad faith

2. Undue delay

3. Prejudice to the opposing party

4. Futility of amendment

5. Whether previous amendments have been made.

Here, there was nothing illustrating bad faith on the part of the plaintiff. DCo LLC may be “inconvenienced” but certainly not prejudiced. Moreover, trial was more than half a year away. Consequently, the motion for leave to amend was granted.

Multiple Actions Dismissed Against Brake Manufacturer Due to Forum Non Conveniens

(Superior Court of New Jersey, Appellate Division, March 5, 2019)

Multiple deceased plaintiffs brought actions against Honeywell alleging they contracted mesothelioma as a result of exposure to asbestos from Bendix brakes while working as mechanics in the United Kingdom. The plaintiffs filed in New Jersey despite the alleged exposure oversees. Honeywell moved for dismissal based on the doctrine of *forum non conveniens* after discovery was conducted. Judge Cantor granted dismissal in the majority of the cases and Judge Viscomi also granted dismissal in the remaining case. The plaintiffs appealed, arguing abuse of discretion.

The court began its analysis and stated that *forum non conveniens* may be invoked when the forum is inappropriate for the plaintiff. The burden falls upon the defendant to establish that the doctrine should be applied. Specifically, the doctrine balances public and private factors to determine if the forum is appropriate. However, the initial question is whether an alternate forum exists. Public interest factors include:

1. The administrative difficulties that follow from having litigation “pile up in congested centers” rather than being handled at its origin

2. The imposition of jury duty on members of a community having no relation to the litigation

3. The local interest in the subject matter such that affected members of the community may wish to view the trial

4. The local interest in having localized controversies decided at home.

Private interest factors, on the other hand, include:

1. The relative ease of access to sources of proof

2. The availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses

3. Whether a view of the premises is appropriate to the action

4. All other practical problems that make trial of the case “easy, expeditious and inexpensive, including the enforceability of the ultimate judgment.”

Judge Cantor pointed out that the United Kingdom is the “proper alternative” forum because the plaintiffs resided in the United Kingdom. Further, they had the right to maintain suit in the United Kingdom. Judge Viscomi stated in her opinion that the United Kingdom is the proper alternative forum because “the United Kingdom processes workplace asbestos litigation against claimants’ employers.” As for applying the public interest factors, the judges noted that there was no local interest in hearing the matter, the witnesses were overseas, and the actual products at issue were manufactured in Europe.

The court quickly concluded that there was no abuse of discretion at the trial level. In particular, the court noted that the plaintiffs had not established that their claims could not be brought against Honeywell in the United Kingdom. In fact, Honeywell’s expert indicated that filing claims “against such a plaintiff[‘s] employer is more common than filing against the product manufacturer.” The court was persuaded that the case was “localized” in the United Kingdom. Accordingly, there was no abuse of discretion.

Only the Westlaw citation is currently available at 2019 WL 1040674.

Talc Meso Case Remanded After Fraudulent Joinder Theory Fails

(U.S. District Court, S.D. New York, February 26, 2019)

The plaintiff, Laura Shanahan, sued Kolmar Laboratories Inc. (Kolmar), Johnson & Johnson (J&J), and seven other defendants in state court in New York, alleging that her use of their asbestos-containing talc products led to the development of mesothelioma. While the plaintiff and Kolmar were both residents of New York, J&J nonetheless removed the matter to federal court and invoked the doctrine of fraudulent joinder to establish diversity jurisdiction. J&J argued that the plaintiff failed to plead specific facts showing what role Kolmar had in producing the talcum powder to which the plaintiff was allegedly exposed. J&J further claimed that Kolmar was immune from liability in New York as a "contract manufacturer" of J&J's products. Under New York law, a "contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary [contractor] of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury." The plaintiff moved to remand the matter to state court.

The court granted the plaintiff's motion to remand. While the court conceded that the plaintiff's pleadings may have been insufficient to meet federal standards, the plaintiff's pleadings adequately gave the plaintiff a possibility of success against Kolmar in state court, the proper analysis at this stage. The court further agreed with the plaintiff that Kolmar had failed to raise a contract-specifications affirmative defense in its responsive pleading, and that unresolved factual questions existed as to whether Kolmar had manufactured talc products to someone else's plans and specifications. The court denied the plaintiff's request for attorneys' fees, finding that J&J did not lack an objectively reasonable basis for removal given the circumstances.

Only the Westlaw citation is currently available at 2019 WL 935164.

Lack of Personal Jurisdiction Leads to Dismissal for Talc Defendants in Meso Matter

(U.S. District Court, N.D. Alabama, Southern Division, February 25, 2019)

The plaintiff, Billie Smith, filed suit against the defendants, alleging she developed mesothelioma from the use of talcum powder on herself and son from the 1950s through 2015. The defendants included Cyprus Amax Minerals Company (Amax), Cyprus Mines Corporation (Cyprus), Imerys Talc America Inc. (Imerys), and Johnson & Johnson (J&J). The defendants moved for dismissal based on lack of jurisdiction.

In addition to allegations of negligence, wantonness, and breach of warranty, the plaintiff claimed that the Imerys defendants (Amax, Cyprus, and Imerys) owned and operated a talc mine in Alpine, Alabama, from 1979 to 2000. Imerys was registered with the State of Alabama to do business, but was a Delaware corporation with its principal place of business in California. J&J was a New Jersey corporation and contracted with Cyprus to make cosmetic grade talc from the Windsor mine until 2003. J&J took the position that its separate entity JJCI exclusively sold baby powder after 1979 in Alabama.

The court started its analysis with an overview on personal jurisdiction. General and specific jurisdiction are recognized modes of jurisdiction according to the Supreme Court. A three-part test to determine specific jurisdiction includes 1) that the plaintiff's claims must arise out of the defendant's contacts with the forum state, 2) that the nonresident defendant must purposefully avail itself to the forum state, and 3) that the defendant may still assert unfairness under "fair play and substantial" justice should the first two prongs be established. The court quickly found that the plaintiff had not established the first prong. Here, Imerys submitted an affidavit from its engineer that Imerys never directly sold talc to J&J and never mined talc in Alabama. The plaintiff unsuccessfully attempted to retrace Imerys' talc operations to establish the first prong. The court was also not persuaded by the argument that Imerys consented to jurisdiction by registering for business in Alabama because that argument is reserved for general jurisdiction arguments. Here, the plaintiff had already conceded that there is no general jurisdiction. As for J&J, the plaintiff argued that it is subject to specific jurisdiction because of its involvement with baby powder after 1979 and because JJCI's contacts with Alabama should be imputed to J&J through piercing of the corporate veil. J&J sought a defense by asserting Alabama-specific rules of accrual in response. The court determined that post-1979 conduct relating to J&J's baby powder does not create personal jurisdiction. The plaintiff continued her argument that J&J's involvement with talc after 1979 should establish specific jurisdiction. However, the court pointed out that none of the arguments evidenced any J&J conduct within Alabama. The plaintiff also argued that the court should pierce the corporate veil to establish personal jurisdiction of J&J for JJCI's activity within Alabama. The court refused to do so

because it found J&J and JJCI sufficiently maintained separate corporate entities. Essentially, J&J did not have complete control and domination over JJCI or misuse any control to cause harm. Here, J&J utilized another affidavit establishing that and J&J and JJCI were separate legal entities. The plaintiff countered with testimony from a prior talc case whereby a representative stated that JJCI had "a leadership team, not a sort of independent board." According to the court, these "semantics" did not change the true separation of the corporate entities. In fact, JJCI has been a separate corporate entity since 1979, according to the court. Finally, the plaintiff submitted several exhibits to illustrate that J&J and JJCI had a common branding or marketing scheme. The court was equally unpersuaded, as prior precedent has clearly established that such a scheme is not a basis for corporate veil piercing. Consequently, the motions to dismiss were granted.

Personal Jurisdiction Motion by Telecom Employer and Auto Company Denied; Case Dismissed Due to Pleading Deficiencies

(U.S. District Court for the Middle District of Pennsylvania, February 20, 2019)

Yesterday, a federal judge disagreed with the defendants, Ford Motor Company and AT&T, that the court lacked jurisdiction over the companies, but determined that plaintiff Rhonda J. Gorton's pleadings were deficient nonetheless. Ms. Gorton sued Ford, AT&T, and several other parties, alleging that they exposed her late husband, Thomas Gorton, to asbestos, causing his mesothelioma. The court found that Gorton's amended complaint set forth only conclusory allegations against Ford, and lacked any facts that demonstrated potential liability. It further determined that the allegations of the amended complaint were "insufficient for the court to discern any plausible claim against AT&T Corp. based upon AT&T Communications, Inc. employing Mr. Gorton at the time he was allegedly exposed to asbestos." Gorton was granted leave to file a second amended complaint within 14 days.

Trial Postponed in Mesothelioma Case to Allow Discovery on Premises and Employer Liability Claims

(U.S. District Court, E.D. Louisiana, February 20, 2019)

The plaintiff, Victor Michel, alleged that he developed peritoneal mesothelioma from exposure to asbestos in his work as a mechanic performing work on engines and brakes. Ford Motor Company is the only remaining defendant in this matter. The court ruled on motions by the plaintiff and Ford, and ultimately continued the trial. After learning that Ford may have owned the dealership at which the plaintiff worked, the plaintiff moved the court to amend its complaint to add premises claims, employer liability claims, and wrongful death claims, which Ford opposed, and survival claims, which Ford did not contest.

Ford argued that the plaintiff's wrongful death claims are barred by the Louisiana Workers Compensation Act, an argument hinging on whether or not Michel was a statutory employee of Ford. Because the court could not definitively say that Michel was a statutory employee, it granted leave to amend to add wrongful death claims. Ford further argued that it would be prejudiced by the addition of premises and employer liability claims, as it did not prepare to defend such claims throughout the case, which was on the eve of trial. The court allowed the amendment, and held that any prejudice to Ford would be cured by a continuance of the trial, and a modification of the scheduling order to allow further discovery on the matter. However, the court declined to reopen discovery on strict liability claims, noting that Ford had been on notice of these claims since the plaintiff filed his original complaint.

Prior to the trial continuance, Ford had moved to quash a subpoena for witness Matthew Fyie and to strike the plaintiff's untimely objections to Ford's counter designations of Michel's testimony. The plaintiff moved the court for leave to designate deposition testimony of Matthew Fyie. The court agreed with Ford that Fyie was outside of the court's subpoena power, as he lived more than 100 miles from the location of the trial. The court further granted the plaintiff's motion for leave to designate Fyie's testimony, given its ruling on the motion to quash, and the lack of prejudice to Ford due to the trial continuance. Finally, while noting the plaintiff's repeated disregard for deadlines in the matter, the court granted Ford's motion to strike the plaintiff's objections, finding that Ford was prejudiced because the plaintiff had more time to object to Ford's testimony than Ford had to object to the plaintiff's.

Only the Westlaw citation is currently available at 2019 WL 718731.

Plaintiff's Motion for Entry of Final Judgment Denied in Wake of Appeal

(U.S. District Court, W.D. Washington, January 8, 2019)

In the ongoing Leslie Jack litigation previously reported by *Asbestos Case Tracker*, the plaintiff's Motion for Entry of Final Judgment in favor of Union Pacific Railroad (Union) was denied. The plaintiff moved for entry after Union's motion for summary judgment was granted by the court and after a mistrial against remaining defendants DCo and Ford was declared. The plaintiff argued that entry of final judgment would lead to judicial economy predicated on the theory that if the plaintiff prevailed on his appeal against Union, then his claims could be tried against all three defendants. That possibility couldn't happen without enter of final judgment, hence the motion.

The court noted its authority to enter judgment against "as to one or more" defendants in multiparty litigation. The test for applying its power to enter judgment includes a determination 1) that the judgment is final and 2) whether there is just reason for delay. The court concluded that the plaintiff provided nothing showing a reason for entry of final judgment. The court was particularly troubled that "questions on Union Pacific's summary judgment motion do not negate the substantial common ground between the plaintiff's claims against Union Pacific and their claims against the remaining defendants." Therefore, the court found a risk of violating traditional notions against "piecemeal appeals of claims with overlapping legal and factual bases." Moreover, the court was not persuaded by the argument concerning judicial economy because it assumed that the appeal of Union's summary judgment would occur prior to the plaintiff's second trial on his negligence claims against the DCo and Ford. Consequently, the motion was denied.

Read the case decision here.

Remand/Removal Decisions

Johnson & Johnson's Motion to Stay Denied

(U.S. District Court for the Middle District of Florida, June 7, 2019)

The plaintiff, Patricia Matthey, filed suit against Johnson & Johnson (J&J), Imerys Talc America Inc. (Imerys), and Publix Super Markets in Florida State Court, alleging that asbestos in J&J baby powder caused her to develop ovarian cancer. Imerys was dismissed due to a lack of personal jurisdiction and subsequently declared bankruptcy. As it did in thousands of other cases, J&J removed the matter to federal court based on federal court jurisdiction over pending bankruptcy actions. J&J filed a motion to stay while its motion to fix venue in the District Court of Delaware is pending.

The Middle District of Florida denied the motion to stay based on the significant prejudice it would cause the plaintiff, particularly given her poor health and the possibility that she will not live to see her day in court if the case is stayed. The case had a trial date of April 2020 while it was pending in state court, and the district court noted it would be difficult for those deadlines to be met if the case were stayed and then remanded. Additionally, J&J noted that even if the case is remanded, the Delaware District Court will still be able to transfer the case to that court if it decides that is the proper venue. Finally, J&J will not be precluded from pursuing an indemnity claim against Imerys if the instant matter proceeds in state court. For all of these reasons, the court denied the motion to stay.

Read the case decision here.

Motion to Remand or Sever Claims Ruled Premature

(U.S. District Court for the Eastern District of Louisiana, May 31, 2019)

In March 2017, the plaintiffs filed a lawsuit alleging that decedent Wayne Knight, who developed mesothelioma as a result of exposure to asbestos while employed by Avondale Shipyard from 1967 to 1982. Avondale removed the case in October 2018, pursuant to the federal officer removal statute. The plaintiffs then filed a motion to sever claims and remand.

Pursuant to the federal officer removal statute, removal is proper if a defendant can establish four elements:

1. That it is a person within the meaning of the statute

2. That it has a colorable federal defense

3. That it acted pursuant to a federal officer's directions

4. That a causal nexus exists between its actions under color of federal office and the plaintiff's claims

Avondale argued that the removal was proper, as all four elements had been met, and furthermore, that the court had no legal basis to sever the claims. The plaintiffs argued that removal was improper because the statute was inapplicable to state law claims, and that their claims sounded solely in negligence, not strict liability. The court found that the plaintiffs' pleadings did not indicate they were not pursuing strict liability claims. The court found it premature on the present record to find a basis for severance or remand, and dismissed the plaintiffs' motion without prejudice.

Outcome of Instant Matter Would Not Impact Nonparty Talc Supplier's Pending Bankruptcy Estate, Remand Ordered

(United States District Court, W.D. Pennsylvania, May 30, 2019)

The defendant Johnson & Johnson (J&J), in a topic that has been extensively covered by *Asbestos Case Tracker*, indicated in its notice of removal that this case is one of many in the United States that involve claims concerning personal injuries and deaths allegedly caused by J&J's cosmetic talc. J&J's motion further indicates that the "sole supplier" of the talc that the defendant used in its product filed for bankruptcy under Chapter 11.

The plaintiffs' complaint is similar to those filed by many others. J&J "would like to consolidate the instant matter with the claims brought by thousands of plaintiffs across the country who allege similar personal injury and wrongful death claims."

The court stated that "this matter in controversy here does not lead this court to conclude that the outcome of the instant matter would have an effect on the Imerys bankruptcy estate. … The outcome of the instant case will not bind Imerys or its affiliates, and because Imerys is not a party here, therefore, *res judiciata* and collateral estoppel will not apply to bind Imerys." The court concurred with the plaintiffs' argument and remanded the matter to the Court of Common Pleas of Allegheny County, Pennsylvania.

Asbestos Talc Cases Remanded to State Courts Despite Pending Bankruptcy of Talc Supplier

(United States District Court, C.D. California, May 21, 2019)

On Tuesday, a federal court in California ordered that a group of asbestos talc personal injury cases must be remanded to state court on equitable grounds. Defendant Johnson & Johnson (J&J) had removed these actions to federal court in April on the basis of the pending bankruptcy of its sole talc supplier, Imerys Talc America Inc., claiming that J&J's supply agreements with Imerys contained contractual indemnifications and other liability-sharing provisions, and that they were "related" to Imerys' bankruptcy proceedings in federal court in Delaware.

In issuing its order to remand, the court reasoned that the plaintiffs' claims included injuries sounding entirely in state tort law. The court further determined that the plaintiffs' rights to jury trials would be substantially prejudiced if the actions were not remanded, and they chastised J&J for a two-month delay in removing the actions to federal court. Finally, they reasoned that if J&J is entitled to contribution or indemnity from Imerys, it can separately bring those claims against Imerys' estates in bankruptcy court, and it will suffer no serious prejudice by doing so.

This case summary is provided with permission from Westlaw here.

Turbine Manufacturer's Removal Deemed Timely Due to Plaintiffs' Vague Initial Pleadings and Answers to Interrogatories

(United States District Court, D. Maryland, April 12, 2019)

The plaintiff filed suit in the Circuit Court for Baltimore City on April 4, 2018, against Westinghouse and 30 other defendants. In the original complaint, the plaintiff provided no time frame during which the plaintiff's decedent, Vincent James Barrett, may have been exposed to asbestos, nor did it provide any specifics as to which he was exposed to or identify ships on which he may have worked.

On December 18, 2018, Westinghouse removed the case to the District Court of Maryland "within thirty days of receiving information in discovery that led it to conclude it was entitled to claim the federal officer defense." The plaintiff contended that Westinghouse did not remove the case in a timely manner, and further asserted that Westinghouse was not entitled to the federal officer defense.

The court held that Westinghouse had "plausibly established its turbines and related products were supplied to the Coast Guard for certain classes of ships in compliance with applicable military specifications, that those specifications required the use of asbestos in the equipment, and that the Coast Guard was fully aware of asbestos-related hazards." Once Westinghouse was told that the plaintiff's decedent worked on these classes of ships, thereby establishing a causal connection between his mesothelioma and Westinghouse's conduct, Westinghouse could plausibly assert a colorable federal officer defense justifying the removal to federal court.

The court further held that the plaintiff did not make the grounds for removal apparent in the initial pleadings or its answers to master Interrogatories, and therefore the removal was timely based on when Westinghouse was provided with specific information related to potential Westinghouse exposure.

Read the full decision here.

Fifth Circuit Affirms Remand of Shipyard Case

(U.S. Court of Appeals for the Fifth Circuit, March 11, 2019)

The plaintiff, James Latiolas, filed suit in Louisiana State Court alleging asbestos exposure while working at the Avondale shipyard. The plaintiff only asserted a negligence claim against Avondale and Avondale removed the case on the basis of the federal officer defense. The plaintiff filed a motion to remand, which was granted. On appeal, the fifth circuit affirmed.

The evidence previously gathered in other cases demonstrated that Avondale built and refurbished naval vessels based on the Navy's specifications and under Navy supervision. However, a former Navy ship inspector testified that he and his colleagues never monitored or enforced safety regulations at Avondale, and that job safety was the responsibility of Avondale.

Avondale raised three issues on appeal: 1) Since 2011, the removal statute has required only that a federal directive "relates to" the plaintiff's injuries, not that it has a causal relationship to the injuries; 2) Avondale has satisfied the causal nexus requirement by showing that its relationship with the plaintiff derived solely from its work for the federal government; and 3) prior precedent of the Fifth Circuit should be avoided.

The court agreed with Avondale on the first two points, but found itself inextricably bound by prior decisions of the Fifth Circuit in the *Legendre* and *Bartel* cases. The court disagreed with Avondale that the latter case did not meaningfully consider the 2011 amendment to the federal officer removal statute. However, the court noted that the *Bartel* decision should be reconsidered *en banc* "in order to align our precedent with the statute's evolution." Because *Bartel*'s causal nexus standard did not give effect to the words "relating to," the Fifth Circuit could not find a causal nexus under the facts regarding the Avondale shipyard, described above. Accordingly, the granting of the plaintiff's motion to remand was affirmed.

Only the Westlaw citation is currently available at 2019 WL 1107063.

Motion to Remand Denied Due to Evidence Presented by Defendants

(U.S. District Court for the Northern District of California, March 11, 2019)

On November 7, 2018, the plaintiffs filed an amended complaint in state court alleging that the decedent, Ronald Viale, was exposed to asbestos when he was employed by the U.S. Navy as a steamfitter/firefighter from 1968 to 1970, and that he developed mesothelioma as a result of said exposure. On January 3, 2019, Foster Wheeler removed the matter under the federal officer defense. The removing defendants produced declarations provided by witnesses demonstrating that the Navy issued specifications regarding the form and content of all warnings, that those specifications did not require warnings about asbestos hazards, and that the Navy knew at least as much about asbestos hazards as did its contractors. Additionally, evidence was presented by the removing defendants that the equipment it provided to the Navy complied with the Navy's specifications. Finally, removing the defendants showed a causal nexus between the plaintiffs' claims and the acts they took pursuant to a federal officer's direction. Accordingly, the plaintiffs' motion to remand was denied.

Only the Westlaw citation is currently available at 2019 WL 1114873.

Defendant Pump and Compressor Manufacturer's Removal Deemed Untimely

(U.S. District Court, N.D. California, February 25, 2019)

Plaintiffs Michael Roy Harris and Elsie Harris sued multiple parties, including Ingersoll-Rand Company (IR), alleging that Michael developed mesothelioma due to asbestos exposure resulting from his work at two U.S. Navy shipyards and while serving in the Navy. The plaintiffs initially filed suit in the Superior Court of California, County of Alameda, on May 25, 2018. Just over six months later, on December 17, 2018, IR removed the case to the Northern District of California. The plaintiffs filed the instant motion to remand.

The plaintiffs' complaint alleged that Harris was exposed to asbestos as a fireman/boiler tender on the *USS Mispillion* from 1966 to 1968, as a sheet metal worker/pipefitter at Hunters Point Naval Shipyard in 1966 and 1968 through 1973,

and as a shipfitter/pipefitter/pipefitter foreman from 1973 through 1995. IR answered the plaintiffs' complaint and asserted the "Government Contractor Defense." On June 28, IR responded to the plaintiffs' first set of interrogatories, admitting that it manufactured "pumps and compressors, some of which, during limited periods of time, may have had internal part(s) such as gaskets or seal packing materials, manufactured by third parties that contained encapsulated asbestos fibers."

The plaintiffs' discovery responses served on July 28, 2018, indicated that Harris was allegedly exposed to pipe covering block, cement, cloth, packing, and gaskets at Hunters Point and Mare Island Naval Shipyards. The plaintiffs' counsel stated in an email on September 12 that "[T]ypically for Harris, it will be pumps; but we are still trying to determine which ships he worked on." On November 16, the plaintiffs responded to IR's special interrogatories, explicitly stating that Harris worked with or around IR pumps and compressors over the course of his Navy career and as a shipfitter, sheet metal worker, and pipefitter at Hunters Point and Mare Island Naval Shipyards.

In reviewing the instant motion for remand, the court determined that "the cumulative effect of the plaintiffs' papers through September 12 provided notice" and based on the information, IR could have ascertained that a causal nexus existed between its actions taken at the direction of a federal officer, namely developing and manufacturing pumps used on U.S. Navy vessels, including the USS Mispillion, as well as in U.S. Navy shipyards, and the plaintiffs' claims of asbestos exposure working aboard those vessels and within those shipyards. Therefore, IR could have determined, at least as early as September 12, that the instant case was removable to federal court pursuant to federal officer jurisdiction.

The court held that IR's motion was untimely, and granted the plaintiffs' motion to remand.

Only the Westlaw citation is currently available 2019 WL 913619.

In Talc Case, Motion to Dismiss Denied Based on Business Registration; Case Not Remanded to State Court

(U.S. District Court E.D. Pennsylvania, January 16, 2019)

The plaintiffs filed suit in the Philadelphia Court of Common Pleas against Imerys and Johnson & Johnson (J&J), alleging that the use of cosmetic talcum powder by plaintiff Carrie Youse caused her to develop mesothelioma. Imerys filed a notice of removal, including within the notice J&J's consent. Soon thereafter, Imerys filed a motion to dismiss for lack of jurisdiction, which was rendered moot by the plaintiffs filing an amended complaint. In the amended complaint, the plaintiffs added a claim against Walmart. The plaintiffs subsequently moved to remand, and all three of the defendants responded in opposition.

J&J answered the amended complaint, including within it affirmative defenses and cross claims against co-defendants. Walmart filed two answers, one responding to the plaintiffs' amended complaint, including within it crossclaims against co-defendants, and one in response to J&J's crossclaims. Imerys did not answer the amended complaint, but filed a motion to dismiss for lack of jurisdiction. The plaintiffs filed a response to Imery's motion.

The plaintiffs contend that Walmart is a citizen of Pennsylvania, and that complete diversity does not exist. In opposition, Walmart argued that it is a Delaware corporation with its principal place of business in Arkansas, and therefore all parties are diverse. Walmart further argued that each of the five Walmart operating entities neither is incorporated in nor has a principal place of business in Pennsylvania. Additionally, the plaintiffs provided no evidence that Walmart is a Pennsylvania corporation. The court agreed with Walmart, and denied the motion to remand.

Imerys, in its motion to dismiss for lack of personal jurisdiction, argued that its only contact with the state is through its business registration, which it asserted is not a sufficient basis for personal jurisdiction under controlling precedent. In *Bane v. Netlink, Inc.*, Judge Sloviter held that business registration under 42 PA. STAT. AND CONS. STAT. ANN. Section 5301 was a sufficient basis for Pennsylvania courts exercising personal jurisdiction over a company. Imerys countered, arguing that "after Daimler, corporations cannot be subject to personal jurisdiction merely because they do business in the forum state."

The court held that "other judges in this district have found that under Section 5301, business registration constitutes consent to jurisdiction in Pennsylvania, even after *Daimler*." The court noted that "because the Supreme Court has not addressed the viability of consent post-*Daimler*, courts in this district have continued to apply the precedent established

by the Third Circuit in *Bane* to hold that registration to do business in Pennsylvania constitutes consent to jurisdiction."

Motion to Remand Turbine Manufacturer's Removal Denied Due to Statements in Settlement Demand Letter

(United States District Court for the District of Rhode Island, January 9, 2019)

The plaintiff filed suit on behalf of her husband, Michael Mannix, alleging that his death was caused by exposure to asbestos. She sued CBS, among other defendants, related to his work on ships in the Navy. After years of discovery, the plaintiff's counsel sent CBS a settlement demand letter in which it was stated that the decedent was exposed to asbestos from CBS turbines on the *USS Saratoga*. CBS promptly removed the case on October 9, 2018, alleging that the statement provided a basis for removal for the first time.

On November 8, 2018, the plaintiff moved to remand, arguing that the removal was untimely because more than 30 days had passed since CBS received the complaint. The plaintiff argued that CBS should have known of its manufacture of turbines on the USS Saratoga. However, the court ruled that it could only consider the contents of the plaintiff's papers, and not what CBS knew, in deciding the motion to remand. The court found that neither the complaint nor the plaintiff's subsequent discovery responses indicated what types of CBS products decedent came in contact with during his Navy tenure. The court also found that the settlement letter was the first document to connect specific CBS products with decedent's exposure, and therefore provided the first basis for removal under the federal officer doctrine. Therefore, removal was timely and the motion to remand was denied.

Only the Westlaw citation is currently available at 2019 WL 145547.

Louisiana Case Remanded Due to Lack of Causal Nexus Between Defendants' Actions Under Color of Federal Office and Plaintiff's Negligence Claims

(United States District Court, E.D. Louisiana, January 7, 2019)

The plaintiff, Callen Dempster, filed suit against multiple defendants, alleging that he was exposed to asbestos and asbestos-containing products while employed by Avondale Industries Inc. (Avondale) from 1962 to 1994. The plaintiff originally filed suit in the Civil District Court for the Parish of Orleans, Louisiana, on March 14, 2018. On June 21, 2018, the defendants Huntington Ingalls Incorporated, Albert Bossier Jr., J. Melton Garret, and Lamorak Insurance Company (the Avondale Interests) removed the case to the Eastern District under the Federal Officer Removal Statute.

The plaintiff filed the instant motion to remand, arguing the following:

1. Avondale Interests' removal was untimely

2. There was no evidence that the plaintiff was exposed to asbestos on a federal vessel

3. The Fifth Circuit consistently held that negligence claims did not warrant federal officer removal

4. Avondale Interests were not "acting under" the direction of a federal officer

5. Avondale Interests did not establish a colorable federal contractor defense

6. Avondale Interests' Longshore and Harbor Workers' Compensation Act (LHWCA) defense did not provide an independent basis for removal, and regardless, the LHWCA supplemented, rather than supplanted, state law remedies.

Ultimately, the court found that removal pursuant to the Federal Officer Removal Statute was improper. In order to show that removal was proper, the defendants must show that (1) they were "person[s]" within the meaning of the statute; (2) they acted pursuant to a federal officer's directions, and a causal nexus existed between their actions under color of federal office and the plaintiff's claims; and (3) they have a colorable federal defense to the plaintiff's claims. The court held that defendants "have not shown the necessary causal nexus between Avondale Interests' or the plaintiffs actions under color of federal office and the plaintiff's negligence claim exists."

The court remanded the action back to state court.

Only the Westlaw citation is currently available at 2019 WL 117657.

Statute of Limitations Decisions

Several Claims in Consolidated Action Dismissed Based Upon Statute of Limitations

(U.S. District Court District of Montana, March 22, 2019)

Following W.R. Grace's filing for bankruptcy in April 2001, a series of cases were filed against Maryland Casualty, which was the company's primary general liability insurer from 1962 to 1973. Specifically, the 29 plaintiffs in this matter filed a lawsuit relating to their diagnosis of asbestosis in the District Court of Montana in November 2001. The plaintiffs originally named the State of Montana only. Maryland Casualty was named in March 2002. Additionally, seven of the 29 plaintiffs had previously filed suit against Maryland Casualty in June 2001. All cases against Maryland Casualty were stayed during the resolution of W.R. Grace's bankruptcy. In January 2002, the Delaware Bankruptcy Court entered a preliminary injunction order, which tolled the statute of limitations for claims against Maryland Casualty until the bankruptcy stay was lifted, which eventually occurred in February 2014.

The court applied Montana's three-year statute of limitations for the negligence and bad faith claims asserted against Maryland Casualty. The court stated that those claims accrued on the date the plaintiff was diagnosed with asbestosis, while for those plaintiffs who had passed, the wrongful death claims accrued on the date of death. Maryland Casualty argued in its motion to dismiss that 13 plaintiffs' claims accrued before January 22, 1999, and should therefore be dismissed because the statute of limitations for those claims expired before they were tolled by the January 2002 bankruptcy court order. The district court equitably tolled those claims because they had been filed in a timely manner in Baltimore, which constituted notice to Maryland Casualty.

The plaintiffs filed a seventh amended complaint approximately four months after the stay was lifted in 2014. The court found that for all but seven of the plaintiffs, the complaint was filed in a timely manner because the statute of limitations had been tolled while the preliminary injunction was in place. The court therefore dismissed the claims of seven of the plaintiffs and allowed the rest to proceed.

Only the Westlaw citation is currently available at 2019 WL 1317459.

Statute of Repose Decisions

Statute of Repose Applied and Summary Judgment Granted

(U.S. District Court for the District of Massachusetts, May 14, 2019)

On March 30, 2018, the U.S. District Court for the District of Massachusetts held that Massachusetts' statute of repose did not apply to asbestos exposure claims, and denied the motion for summary judgment of General Electric (GE). The question was without controlling precedent, and was therefore certified to the Massachusetts Supreme Judicial Court. On March 1, 2019, the court ruled that the statute of repose "completely eliminates all tort claims arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property after the established time period has run" even if the cause of action arises from a disease with an extended latency period.

Based on that ruling, the plaintiffs conceded that GE's motion for summary judgment was warranted on four counts. However, the plaintiffs argued that the breach of implied warranty of merchantability claim was still valid due to GE's alleged selling and supplying of a defective product, namely the insulation on the turbines. The court relied on its prior holding that the insulation was an integral component of the turbines and found that GE's role as a supplier of the insulation was merely "incidental." The court leaned on prior precedent and held that plaintiffs cannot "recast their negligence claim in the form of a warranty claim." Accordingly, the motion was granted on all counts and GE was dismissed from the matter.

Read the full case decision here.

Washington's Statute of Repose Determined to Not Apply to Premises Owners

(Court of Appeals of Washington, Division 1, May 13, 2019)

For approximately seven months in 1971, Gary Cameron worked as a boilermaker at the Centralia Steam Plant in Washington State during its construction, which was completed in 1972. Asbestos-containing thermal insulation was used in building the plant, and Cameron's estate alleged that his fatal mesothelioma was caused in part by exposures during his time at Centralia. They sued appellee PacifiCorp, which was among those responsible for constructing the plant, and which maintained an ownership interest until 2000, bringing claims against them as both a builder and a premises owner.

PacifiCorp moved for a dismissal under statute of repose, which the trial court granted. The Cameron estate appealed. In 1967 Washington's legislature enacted its first statute of repose, which was amended in 1986 and again in 2004. The appellate court determined that the 1967 version of the statute applied, as construction of the Centralia plant was substantially completed in 1972. They further determined that later amendments to the statute of repose did not apply retroactively.

The appellate court agreed with the trial court that the 1967 statute barred claims arising out of PacifiCorp's construction activities. However, they determined that the 1967 statute of repose did not protect premises owners who were sued in their capacity as owners. They noted that the record showed that PacifiCorp was not solely an uninvolved premises owner, but that they also performed engineering and construction observation services during the construction of the plant. The court declined to review Cameron's claims that the Washington legislature did not intend for the statute of repose to apply to latent occupational diseases such as mesothelioma.

The case summary is provided with permission from Westlaw here.

Massachusetts Statute of Repose Bars Construction-Related Asbestos Claims

(Supreme Judicial Court of Massachusetts, March 1, 2019)

In *Stearns v. Metropolitan Life Insurance Company*, the Massachusetts Supreme Court addressed whether the six-year statute of repose for claims against those involved the design, planning, construction, or general administration of improvements to real property applies to asbestos personal injury claims, which would typically arise after the statute would bar their assertion. The statute at issue, Mass. Gen. Laws. c. 260 Section 2B, provides in relevant part that:

> Action[s] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property ... shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner**.**

In opposition to a summary judgment motion seeking to bar the plaintiff's asbestos-related claims, the plaintiff asserted two implicit exceptions to the application of the statute of repose, arguing that claims arising from diseases with long latency or, alternatively, claims that a defendant "had knowing control of the instrumentality of injury at the time of exposure" were outside of the intent of the statute. The Supreme Court rejected both of the plaintiff's arguments, reasoning that the language of the statute was "unequivocal."

Read the full decision here.

Summary Judgment Decisions

Court of Appeals of New York Rejects Argument That Coke Ovens Are Not Products for Purposes of Strict Liability

(Court of Appeals of New York, June 11, 2019)

The plaintiff, Donald Terwilliger, brought an asbestos suit against multiple defendants. The complaint included a count that Honeywell, as successor in interest to the Wilputte Coke Oven Division of the Allied Chemical Corporation (Honeywell), was strictly liable for emissions coming from its coke ovens at Bethlehem Steel's Lackawanna Plant in New York. Specifically, Terwilliger alleged that he was exposed to the coke oven emissions while working as a lid man from 1966 to 1993. He passed away from lung cancer in 2012.

At the trial level, the court denied Honeywell's motion for summary judgment after it argued that the coke ovens were not "products." Therefore, it was not subject to strict liability since its contract with Bethlehem Steel was one sounded in services rather than goods or products. The trial court found that "the coke ovens are more like machines or equipment than a building." However, on appeal, the trial court was reversed. The appellate division found "that service predominated the transaction herein and that it was a contract for the rendition of services, i.e., a work, labor and materials contract, rather than a contract for the sale of a product." The appellate division also noted that the coke oven was akin to a permanent fixture to real property. The plaintiff appealed.

On appeal, the court stated that a product is defective when:

1. It contains a manufacturing flaw

2. It is defectively designed

3. It is not accompanied by adequate warnings for its use

The court noted the presupposition that exists as to whether something is a product for strict liability purposes. Physical characteristics are less important than the potential dangers imposed by the subject, according to the court. Often weaved into the product analysis is whether a manufacturer owes a duty to warn, including where foreseeability of harm should have been known. Failure to warn is sounded in tort rather than contract. The court, therefore, analyzed whether the coke ovens were products within a "broad context."

Applying the summary judgment standard, the court found that Honeywell had not met its burden to show that the coke ovens were not products. The fact that the defendant had exerted control over the way in which the ovens were built was a factor in the court's decision. Additionally, the defendant benefitted financially, not just from the installation of the ovens, but also from the production process, according to the court. Moreover, the defendant was in the "best position" to "assess the safety of the coke ovens."

The court rejected Honeywell's argument that it should use a bright line test to prove that the ovens are not products. Honeywell argued that because the ovens are built into the large structures, and fixtures are real property, the ovens are not products in the context of strict liability. The court disagreed and noted that the authority the defendant cited was related to a tax issue, rather than the issue of strict liability. Consequently, the appellate division was reversed and summary judgment was denied. A strong dissent hammering the sheer size of the coke ovens was issued by two judges.

Read the case decision here.

Shipyard Defendant Obtains Summary Judgment as to Whether Certain Prior Asbestosis Releases Apply to Future Mesothelioma Claim

(U.S. District Court, E.D. Louisiana, June 10, 2019)

The family of Joseph Savoie Jr. filed suit against multiple defendants alleging he passed away from mesothelioma as a result of exposure to asbestos while working at Avondale Shipyards from 1948 to 1995. Savoie was originally diagnosed with asbestosis in 1990 and settled with several defendants. Years later, he developed mesothelioma. Avondale sought summary judgment on the issue of whether the plaintiff released his future claim for mesothelioma with respect to eight entities with which he previously settled in his asbestosis action. Avondale's reasoning for this motion was to use the releases as share credits against any potential judgment against it in Savoie's subsequent mesothelioma case. The plaintiff opposed the motion and argued that "Avondale had not shown that the release documents constitute enforceable settlements and even if the releases are enforceable in a general sense, they did not compromise Savoie's future claim for mesothelioma."

The court reminded the plaintiff of the standard for summary judgment and stated that summary judgment is appropriate when there is no genuine dispute as to any material fact. The court began analyzing prior cases regarding settlements and concluded that the release of future claims is generally determined by the intent of the parties and where the parties fully understand the rights being released. Relying on the *Brown* decision, the court noted that intent of the parties is generally found within the four corners of the document itself. Other decisions also discussed the release of future claims. In the *Hymel* matter, the release itself listed cancer and mesothelioma as being contemplated diseases released at the time of contract execution. The court turned to the eight releases and granted summary judgment to five of those releases that clearly contemplated the release of cancer and mesothelioma or a cancer related to mesothelioma. Settlements that released diseases that the plaintiff "now has or ever had" did not contemplate future claims even where mesothelioma was listed in the release, according to the court. Consequently, summary judgment was denied to three releases. The court noted that Avondale would be permitted to list the settlements on the verdict form provided Avondale proved at trial that the released parties were liable for Savoie's mesothelioma.

Read the case decision here.

Summary Judgment Granted Based on Prior Order

(U.S. District Court, W.D. Washington, June 10, 2019)

The plaintiff, Sherri Deem, filed suit on behalf of herself and the estate of her husband, Thomas Deem, alleging that his exposure to asbestos as a machinist at the Puget Sound Naval Yard caused him to develop mesothelioma. Thomas Deem passed away on July 2, 2015, and Sherri Deem filed suit on November 20, 2017, against certain defendants, not including Cleaver-Brooks, and filed a nearly identical suit on June 28, 2018, against 23 other companies, including Cleaver-Brooks. The cases were consolidated for the purposes of discovery and for pretrial matters through summary judgment.

On April 25, 2019, the court granted summary judgment for defendants FMC and McNally on the plaintiff's claims to the extent that they were brought under Washington law. Cleaver-Brooks filed a summary judgment motion on that day, arguing the same statute of limitations defense. The plaintiff responded, and Cleaver-Brooks subsequently replied.

The court held that Cleaver-Brooks was "similarly situated to the defendants granted summary judgment in the April 25, 2019, order, and having already declined to reconsider its decision, the court grants summary judgment for Cleaver-Brooks to the extent that Sherri Deem's claims arise under Washington law for the reasons set forth in its previous decisions."

Read the case decision here.

Steam Trap Defendant's Motion for Summary Judgment and Motion to Exclude Evidence Denied

(U.S. District Court, W.D. Washington, June 7, 2019)

Reported on *Asbestos Case Tracker* on May 22 and May 28, 2019, in *Varney v. Air & Liquid Systems Corporation, et al.,* the court ruled on several of the defendants' motions for summary judgment. The plaintiff, Donald Varney, filed suit against numerous defendants, alleging that exposure to asbestos while working as a marine machinist at multiple shipyards in Washington, as well as personal and secondary exposure from automotive work, caused his mesothelioma. The complaint was removed to federal court. The court addressed the plaintiff's interrogatory responses, specifically the responses that addressed each job site or ship from which he alleged asbestos exposure. In the interrogatory

response, Varney stated that he believed his attorneys had information suggesting that he was exposed to the defendants' products during his time working as a marine machinist at Puget Sound Naval Shipyard from 1957 to 1962 and from 1968 to 1972, as well as his time at Hunter's Point Naval Shipyard from approximately 1965 to 1968. The interrogatory listed several ships, and then continued on to say that "Varney was exposed to asbestos-containing materials associated with … steam traps manufactured by the defendant."

Varney passed away from mesothelioma before being deposed. One day prior to his death, he signed an affidavit purportedly identifying several asbestos-containing materials that he worked with and that were manufactured by various defendants, including steam traps manufactured by Armstrong (defendant). Dr. John Maddox, the plaintiff's causation expert, reviewed Varney's medical records and affidavit, and opined that Varney's malignant pleural mesothelioma was caused by his cumulative exposures to a variety of components. Numerous defendants raised issues regarding the admissibility of the affidavit and Dr. Maddox's opinion in their motions for summary judgment. The court invited additional briefing regarding the admissibility of the affidavit and Dr. Maddox's opinion, and determined that an evidentiary hearing was necessary. After a mini-trial lasting more than two days, the court held that the affidavit and opinion were inadmissible as evidence in regard to summary judgment motions and at trial.

In Varney's motion for summary judgment, they moved for a dismissal with prejudice, contending that there was no admissible evidence that Varney was ever exposed to an asbestos-containing product made, sold, or supplied by the defendant, or for which the defendant was liable. The defendant further argued that there was no admissible evidence that Varney was ever exposed to asbestos fibers associated with any of the defendant's products in sufficient quantity to be a substantial factor in causation of his disease as required by Washington law. The plaintiff filed a response in opposition to the defendant's motion, and attached a signed declaration from Ralph Sanders, a co-worker of Varney's from Puget Sound Naval Shipyard from 1957 to 1961. He stated that he was in the same apprenticeship class as Varney, and that he recalled working aboard two ships with Varney, and stated that he worked with the defendant's steam traps. The plaintiff also provided deposition testimony of the defendant's corporate representative regarding the sale of asbestos-containing gaskets for its steam traps into 1988, but that asbestos-containing steam traps could have remained in the market until 2003. The defendant replied, and also moved to exclude the co-worker declaration, the prior corporate representation deposition, and Dr. Maddox's report.

The court reviewed the evidence presented under Washington product liability law, and concluded that it was reasonable for a fact finder to infer that Varney was exposed to the defendant's asbestos-containing product, and that it caused Varney's mesothelioma and death. The court held that the plaintiff's evidence demonstrated that genuine issues of material fact remained for resolution at trial. The court further concluded that even without the declaration of Varney and Dr. Maddox's report, the plaintiff provided a minimally sufficient showing from which a reasonable fact finder could conclude that the defendant manufactured products that exposed Varney to asbestos. The court also concluded that it had considered the *Lockwood* factors in determining that there was sufficient and substantial evidence for a reasonable jury to find that causation had been established. Therefore, the court denied the defendant's motion for summary judgment.

With regard to the defendant's motion to exclude inadmissible evidence, the court stated that it had already ruled regarding the inadmissibility of Varney's affidavit and Dr. Maddox's opinion at summary judgment and trial. However, the court held that the co-worker affidavit was admissible for purposes of summary judgment, as evidence submitted in connection with summary judgment does not have to be produced in a form that would be admissible at trial in order to avoid summary judgment. The court held that Rule 26 did not support the defendant's argument that the affidavit was untimely, despite the fact that it was filed after the close of discovery. The court held that it would consider a motion for additional discovery based upon the co-worker affidavit, but ultimately denied the defendant's motion to exclude the declaration.

Read the case decision here.

Additional Defendants' Motions for Summary Judgment Granted Where Plaintiff's Affidavit and Related Expert Testimony Ruled Inadmissible

(U.S. District Court, W.D. Washington at Tacoma, May 22, 2019)

As reported on *Asbestos Case Tracker* on May 6, 2019, in *Varney v. Air & Liquid Systems Corporation, et al.*, the court ruled on several defendants' motions for summary judgment. The plaintiff, Donald Varney, filed suit against numerous defendants, alleging that exposure to asbestos while working as a marine machinist at multiple shipyards in Washington caused his mesothelioma. The complaint was removed to federal court. One day before he passed away, the plaintiff signed an affidavit stating that he worked with various defendants' products or products supplied by the defendants, including Ingersoll-Rand. The affidavit did not include any identification of products manufactured by Air & Liquid

Systems Corporation (A&L) or Velan. The plaintiff was not deposed before he passed away. The plaintiff's expert, Dr. John Maddox, relied on the affidavit in opining that the plaintiff's mesothelioma was caused by his asbestos exposure.

Following summary judgment motions filed by numerous defendants, the court held a two-day mini-trial to determine the admissibility of the affidavit and Dr. Maddox's opinion. The court held that the affidavit and the opinion were inadmissible. The defendants argued that the plaintiff had no evidence of exposure to asbestos from their products. The court applied the standard set forth in *Lockwood v. AC & S, Inc.*, 109 Wn. 2d 235, 245–47 (1987), and agreed with the defendants' positions, ruling that there was insufficient evidence for a jury to find that causation has been established. Summary judgment was therefore entered in favor of Ingersoll-Rand, A&L, and Velan.

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Court Reverses Grant of Summary Judgment for Two Fire Door Manufacturers

(Superior Court of Pennsylvania, May 22, 2019)

In *Lamson v. Georgia-Pacific LLC f/k/a Georgia Pacific Corporation, Individually and as Successor-in-Interest to Bestwall Gypsum Company, et al.*, the Superior Court of Pennsylvania reviewed the plaintiff's (appellant) appeal from an order granting summary judgment to two defendants (appellees) in the case. The trial court had concluded that the appellant failed to demonstrate that he was exposed to asbestos from fire doors manufactured by the appellees. The superior court held that the appellant submitted sufficient evidence to create a genuine issue of material on that question, and thereafter reversed the grant of summary judgment.

The appellant in this case worked as a carpenter at DuPont in Gibbstown, New Jersey, from 1962 to 1967 and at the Philadelphia Navy Yard from 1967 to 1971. He became an inspector at the Navy Yard in 1971 and then a general foreman in 1981, a position he retired from in 1994. The appellant alleged that he regularly installed and repaired fire doors during his employment as a carpenter at DuPont and the Navy Yard. He testified that he worked with thousands of fire doors in his career, and testified that he "constantly" repaired them because they were old and coming apart. In addition, the appellant installed and removed the doors with a saw. He described his work with fire doors as being dusty, particularly when he used a saw to trim the doors, drilled through the fire doors to install wooden pieces, or sanded the fire doors with a sanding block or power sander. In addition to the appellant's testimony, a co-worker from the Navy Yard testified that the fire doors they encountered were thick doors insulated with asbestos to prevent fire from moving from one room to the next.

One of the defendant's interrogatory responses admitted that some of their fire doors contained asbestos. The other defendant submitted an affidavit from the general foreman of the company's mineral core manufacturing operation from 1971 to 1976 and superintendent of the area where fire doors were manufactured from 1976 to 1979, which concluded that the company manufactured both asbestos-containing and non-asbestos-containing fire doors.

Dr. Finkelstein prepared a report in this case based on the testimony of the appellant and his co-worker. Dr. Finkelstein opined that the appellant experienced regular and proximate exposures to visible dust from the appellees' asbestos-containing fire doors, and these exposures were a substantial contributing cause of his mesothelioma. The appellant filed suit and, following discovery, the trial court granted the two defendants' motions for summary judgment. The appellant filed an appeal following the conclusion of the proceedings against other defendants. Without requesting a Pa. R.A.P. 1925(b) statement of issues raised on appeal, the trial court filed an opinion explaining its grounds for granting summary judgment to the appellees.

In its review of the trial court's grant of summary judgment, the superior court focused on the standards required for grants of summary judgment in asbestos actions, including the frequency, regularity, and proximity standard espoused in *Gregg v. VJ Auto Parts, Inc.*, 943 A.2d 216, 225 (Pa. 2007). In its review of the evidence, viewed in the light most favorable to the appellant, the court held that the testimony of the appellant and the co-worker demonstrated that the two fire door defendants supplied fire doors to DuPont and the Navy Yard, and that the appellant repaired and/or installed those fire doors as a carpenter at both locations. Despite the inability of the appellant and the co-worker to specify the number of fire doors worked on or the length of time spent by the appellant working on the doors, the court held that such omissions went to the weight and credibility of the testimony.

The court also reviewed the decision of *Krauss v. Trane U.S. Inc.*, 104 A.3d 556 (Pa. Super. 2014), a case heavily relied upon by the two defendants to say that the appellant failed to furnish sufficient evidence on the asbestos content of the fire doors at issue. In its review, the court differentiated the present case from *Krauss* in multiple respects, including the positive identification of dust from the work performed by the appellant in the present case. Furthermore, unlike Krauss, the appellant relied on admissions from the two fire door defendants that their fire doors contained asbestos, as opposed

to reliance upon lay witness testimony for such conclusions. The court held that the appellant did not need to demonstrate that every fire door contained asbestos in order to survive summary judgment, and as a victim of mesothelioma, only needed to present evidence that asbestos was present in some fire doors manufactured by the appellees. The court further rejected the appellees' argument that the work performed by the appellant did not generate asbestos-laden dust, as the appellant testified about drilling and sawing into the fire doors. The court held that such activities penetrated the asbestos core of the fire doors, which generated dust containing asbestos particles.

The case summary is provided with permission from Westlaw here.

Fire-Door Manufacturer's Affidavit Based Only on Personal Knowledge Not Enough to Overcome Plaintiff's Decedent's Testimony About Exposure to Their Product

(Supreme Court, Appellate Division, First Department, New York, May 16, 2019)

The defendant Algoma Hardwoods Inc. filed a motion for summary judgment in the instant matter, contending via an affidavit signed by its principal that it did not sell or distribute asbestos-core fire doors in the New York metropolitan area where the plaintiff's decedent worked during the relevant time period and therefore he could not have been exposed to their product. The affidavit was based on the principal's personal knowledge, but was unaccompanied by documentation such as sales records substantiating the averments.

The lower court denied Algoma's motion, stating that the plaintiff's decedent's testimony describing his work cutting and drilling fire-door product bearing the name Algoma during the relevant period, coupled with New York City Board of Standards meeting minutes discussing approvals of fire doors, created issues of triable fact.

The Appellate Division agreed that the evidence created triable issues of fact, and that it was up to the trier to determine the weight accorded to each side. The denial was upheld.

Read the case decision here.

Court Recommends Granting Five Defendants' Motions for Summary Judgment Based on Lack of Substantial Factor Causation

(United States District Court, D. Delaware, May 15, 2019)

The plaintiff, Richard Rogers, filed suit against multiple defendants in the Superior Court of Delaware, alleging that his exposure to asbestos caused him to develop mesothelioma; he asserted claims for negligence, punitive damages, and conspiracy. The defendant, Foster Wheeler, removed the case to the district court pursuant to the federal officer removal statute.

Rogers was deposed in April 2018, and the plaintiff offered no other fact or product identification witnesses. Warren Pumps, General Electric, Air & Liquid, Wagner, and Asbestos Corp. subsequently filed individual motions for summary judgment.

Each of the five defendants argued that the plaintiff did not establish that its respective product(s) were a substantial factor in causing his mesothelioma based on lack of identification or frequency of usage.

The court agreed, and in doing so, rendered the punitive damages and conspiracy claims moot. The court recommended granting all five defendants' motions for summary judgment. The parties have 14 days to file and serve written objections pursuant to Fed. R. Civ. P. 72(b)(2).

Read the case decision here.

Plaintiff's Failure to Establish Causation Against Pump Defendant Leads to Grant of Summary Judgment

(U.D. District Court Washington W.D., May 14, 2019)

The plaintiffs filed suit against several defendants, alleging their decedent, Mr. Klopman-Baerselman, developed mesothelioma as a result of exposure to asbestos for which the defendants were liable. The case was removed to federal court.

Viking Pump (Viking) moved for summary judgment, arguing that the plaintiff could not establish the necessary element of causation. Specifically, Viking argued that the plaintiff had no evidence that he was exposed to a Viking product, and therefore he could not prove that Viking's products were a substantial factor in causing his mesothelioma. Noting that the plaintiff did not respond to the motion, the court agreed and entered summary judgment in favor of Viking.

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Sale Transaction Documents Obviate Need for Policy Interpretation

(Oregon Court of Appeals, May 8, 2019)

The plaintiff, Allianz Global Risks US Ins. Co., defended and indemnified its insured, Daimler Trucks North America LLC, as successor to Freightliner, in three CERCLA cases and more than 1,500 asbestos personal injury cases. It then brought suit seeking contribution against several insurance companies that had issued insurance policies to Con-way Inc., the former parent company of Freightliner, for policy years that were implicated in the underlying asbestos actions. The trial court ruled in favor of the defendants on several policy interpretation issues, and the plaintiff appealed.

Con-way, which intervened in the case, filed a separate appeal arguing that the trial court never should have reached the policy interpretation issues, but that a directed verdict should have been granted. Con-way contended that, when it sold Freightliner to Daimler, Daimler did not assume Freightliner's contingent liabilities. As a result, Daimler's insurers — including Allianz — had no right to sue the Freightliner insurers, whose policies were implicated in the underlying asbestos actions. The court agreed with Con-way.

The general rule of successor liability is that when one entity purchases all of another entity's assets, it does not succeed to the seller's liabilities. There are four well-recognized exceptions to the general rule, one of which is for express assumption of liability. Allianz had relied on the express assumption exception to the general rule, but based on its analysis of the transaction documents, the court held that Daimler had not assumed Freightliner's liabilities. When Con-way sold Freightliner to Daimler, it cancelled the certificates of insurance it had purchased on Freightliner's behalf and transferred to Freightliner cash reserves set aside for payment of known and unknown claims. Freightliner then sold all of its assets to Daimler. Daimler assumed Freightliner's liabilities, with the exception of contingent liabilities, which were specifically excluded in a separate transaction letter executed contemporaneously with the sale documents.

Daimler did not assume Freightliner's contingent liabilities, and therefore Allianz could not seek contribution from Freightliner's historical liability insurers.

Read the case decision here.

Summary Judgment Granted for Multiple Defendants in W.D. Washington When Plaintiff's Affidavit Ruled Inadmissible

(U.S. District Court for the District of Washington, May 6, 2019)

The plaintiff, Donald Varney, filed suit against numerous defendants, alleging that exposure to asbestos while working as a marine machinist at shipyards in Washington caused his mesothelioma. The complaint was removed to federal court. One day before he passed, the plaintiff signed an affidavit stating that he worked with various defendants' products or products supplied by the defendants, including those of defendants Crosby Valves, Goodyear Tire and Rubber, Foster Wheeler, Air and Liquid Systems, Weir Valves, and John Crane Inc. The plaintiff was not deposed before he passed. The plaintiff's expert, Dr. John Maddox, relied on the affidavit in opining that the plaintiff's mesothelioma was caused by his asbestos exposure.

Following summary judgment motions filed by numerous defendants, the court held a two-day mini-trial to determine the admissibility of the affidavit and Dr. Maddox's opinion. The court held that the affidavit and therefore the opinion were inadmissible. Accordingly, the defendants argued that the plaintiff had no evidence of exposure to asbestos from their products. The court applied the *Lockwood* standard and agreed with the defendants' positions, ruling that there was insufficient evidence for a jury to find that causation has been established. Summary judgment was therefore

entered in favor of Crosby Valves, Goodyear Tire and Rubber, Foster Wheeler, Air and Liquid Systems, Weir Valves, and John Crane Inc.

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Boiler Manufacturer's Affirmative Defenses of Sophisticated User and Superseding Cause Dismissed on Summary Judgment

(U.S. District Court, D. Maryland, April 29, 2019)

The plaintiff brought suit against several defendants including Foster Wheeler alleging her decedent, Mr. Morris, developed and passed from mesothelioma as a result of his occupational exposure to asbestos while working at Bethlehem Steel Sparrows Point Shipyard from 1948 to the 1970. Foster Wheeler asserted various defenses in its amended answer including the defenses of sophisticated user and superseding cause. The plaintiff moved for summary judgment on those two defenses.

The court started its analysis by noting the standard for summary judgment. Summary judgment is appropriate when there is no genuine dispute as to any material fact. The sophisticated user defense "insulates suppliers of dangerous or defective products from liability for failing to provide a warning to users of the product if the supplier reasonably relied on an intermediary to provide a warning." Maryland law "focuses on the conduct of the *supplier* of the dangerous product, not the conduct of the intermediary." The fact that the intermediary comprehended the risk is not enough to "absolve" the supplier's duty to warn. According to the court, the analysis is fact heavy. Foster Wheeler argued that Bethlehem Steel knew of exposure to asbestos. However, the court pointed out that Foster Wheeler did not establish that it "was aware of Bethlehem Steel's *knowledge* of asbestos related health risks, or that it was reasonable for Foster Wheeler to rely on Bethlehem Steel to warn its employees about these health risks." Although Foster Wheeler put forth evidence of Bethlehem Steel's knowledge of the dangers of exposure to asbestos, it did not illustrate Bethlehem Steel's *knowledge* of the risks. The court also noted that Foster Wheeler's argument missed the point of the inquiry into reasonableness. For the sophisticated user defense, a defendant must illustrate that it "reasonably relied" upon the intermediary to warn its employees. Consequently, the court granted the plaintiff's motion as to the sophisticated user defense.

As for the superseding cause defense, the test reviews the intermediary's conduct rather than the supplier's. In other words, "a superseding cause is an act of a third person or other force by which its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Here, Foster Wheeler argued that Bethlehem Steel knew about the risks of asbestos exposure as early as the 1940s. Bethlehem Steel's failure to warn its employees was a superseding cause according to Foster Wheeler. The court disagreed and stated that the evidence showed a possibility of the risks associated with exposure to asbestos. Moreover, the evidence illustrated that Foster Wheeler representatives were on-site while Mr. Morris was working without a respirator, yet took no action. Accordingly, the court concluded that Foster Wheeler had not established evidence to assert the defense of superseding cause.

Read the case decision here.

Union Carbide Obtains Summary Judgment Due to Speculative Evidence

(Superior Court of Delaware, April 24, 2019)

The plaintiff, Jane Rowland, alleged she developed mesothelioma from washing her husband's clothes. Her husband performed home remodeling projects in Ohio in the 1970s using Georgia-Pacific joint compound. The plaintiff alleged that Union Carbide was responsible for her injuries because it supplied asbestos to Georgia-Pacific for use in its joint compound. Specifically, Union Carbide supplied Calidria asbestos to Georgia-Pacific.

The plaintiff argued in opposition to Union Carbide's Motion for summary judgment that there was evidence that Georgia-Pacific's Chicago plant distributed to the Midwest, including Ohio. Second, the plaintiff argued that Georgia-Pacific formula cards demonstrated that several joint compound mixtures contained Calidria asbestos supplied by Union Carbide. In response, Union Carbide offered evidence that there were seven available joint compound formulas during the relevant time frame, and only two contained the Calidria asbestos. There was also evidence that Georgia-Pacific obtained the majority of its asbestos from another supplier.

The court found that the plaintiff could not satisfy her affirmative duty to offer evidence that creates a reasonable basis for establishing that products her husband worked with actually contained asbestos from Union Carbide. As such, a

reasonable jury could not find in favor of the plaintiff absent pure speculation, and summary judgment was entered in favor of Union Carbide.

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Railroad Defendant's Motion for Summary Judgment Based on Standing Denied

(United States District Court, D. Nebraska, April 19, 2019)

In *Bettisworth v. BNSF Railway Company,* the court denied a defendant's motion for summary judgment, which argued that the plaintiff was not the properly appointed representative for his late wife's estate. The plaintiff's wife was employed by the defendant from 1979 to 2012 as a laborer/hostler at the defendant's yard in Alliance, Nebraska. During her employment, she was exposed to various toxic and carcinogenic substances, including various solvents, diesel fuel, benzene, creosote, silica dust, and asbestos insulation. The plaintiff alleged that the cumulative effect of this exposure resulted in his wife developing lung cancer. The plaintiff's wife passed away on December 31, 2014, and on December 26, 2017, the plaintiff filed suit claiming to be the personal representative of his late wife's estate. The complaint was premised upon the defendant's negligence. In responding to the defendant's requests for admissions during discovery, the plaintiff admitted that he had not been appointed as the personal representative of his wife's estate at the time the action was commenced. The defendant thereafter moved for summary judgment, arguing that by the plaintiff's own admission, he did not have standing to bring the action.

The court held that the defendant's motion did not allege that the plaintiff failed to meet the necessary elements for standing, but instead argued that the plaintiff was not a proper party or did not have the capacity to sue on his late wife's behalf, as a result of not being appointed personal representative for her estate. The court considered the defendant's motion for summary judgment on standing to actually constitute an objection that the plaintiff was not the real party in interest. The court analyzed a section of the Federal Employer's Liability Act (FELA) regarding railroad liability in cases involving employees' deaths resulting from the railroad's negligence, and held that the plaintiff's admission that he was not his late wife's personal representative was also an admission that he was not the real party in interest in the matter.

However, the court denied the defendant's motion. The court held that it may not dismiss the plaintiff's complaint until after an objection and a reasonable time has been allowed for the real party to be substituted. The defendant argued that this was not the first time the plaintiff's counsel failed to bring a FELA action in the name of the real party in interest. However, the court held that Fed. R. Civ. P. 17(a)(3) precludes dismissal until after an objection and a reasonable time for substitution has been allowed. Therefore, the court granted the plaintiff's request for 90 days from the date of the court's order to obtain appointment as the personal representative for his late wife's estate, and thereafter seek leave to file an amended complaint.

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Court Partially Grants Two Defendants' Motions for Summary Judgment Based on Expiration of Statute of Limitations Under Washington Law

(U.S. District Court of Washington W.D., April 18, 2019)

In *Deem v. Air & Liquid Systems Corporation, et al.*, the United States District Court for the Western District of Washington ruled on two defendants' motions for summary judgment. This case involved Thomas A. Deem (Mr. Deem), who worked at Puget Sound Naval Shipyard from 1974 to 1981 as an apprentice and journeyman, and alleged asbestos exposure from 1974 through 1979. Mr. Deem was diagnosed with mesothelioma in February 2015, and died in July 2015.

In November 2017, Mr. Deem's wife (the plaintiff) filed a complaint for personal injury and wrongful death against several defendants. In June 2018, she filed a separate action for wrongful death only against other defendants. The initial complaint was titled "Complaint for Personal Injury and Wrongful Death," and the subsequent complaint was titled "Complaint for Wrongful Death." However, both complaints contained the same product liability claims against the defendants, and neither complaint specified whether the decedent's wife brought her claims pursuant to Washington law only, or also pursuant to maritime law. The cases were consolidated for purposes of discovery and for pretrial

matters through summary judgment. The two defendants who filed the motions for summary judgment were sued in the June 2018 action only.

The defendants argued that when Mr. Deem died in July 2015, he did not have a valid cause of action against the defendants, as those entities had not been named. Therefore, the claims against them were preserved for statute of limitations purposes in the plaintiff's personal injury lawsuit. The court analyzed Washington law regarding the overlap of claim accrual and statutes of limitations for personal injury and wrongful death claims in Washington. The court opined regarding a Washington Supreme Court decision that analyzed Washington's Wrongful Death Act. In that case, the court held that a wrongful death action accrues at the time the decedent's personal representative discovered, or should have discovered, the cause of action.

The plaintiff argued that because wrongful death actions in Washington accrue at the time of death, her suit was timely. The court referenced another Washington State Supreme Court decision, which held that when there is no "subsisting cause of action in the deceased" at the time of death, no wrongful death action is available. The defendants argued that when the decedent passed away in July 2015, he did not have a valid subsisting cause of action against the defendants because claims against them had not been filed, and thus were not preserved for statute of limitations purposes. The court disagreed with the defendants' argument in this regard, but also held that the claims against the defendants bringing the motion were not filed until June 2018. The court referenced that the action was brought more than three years after Mr. Deem's personal injury claims accrued, but less than three years after his death.

The court held that under Washington law, it is acceptable to disallow a wrongful death claim by a personal representative whose decedent allowed the statute of limitations to run out. The court held that in the present case, the statute of limitations on Mr. Deem's personal injury claims ran for another two and a half years after his death. Therefore, the court granted the defendants' motions for summary judgment to the extent that the plaintiff's claims arose under Washington law.

Read the case decision here.

Plaintiff's Failure to Establish Work Site Control Leads to Grant of Summary Judgment in Premises Liability Case

(Superior Court of Delaware, April 18, 2019)

The plaintiff, Werner Rath, brought suit against several premises defendants including Delmarva Power and Light, Four Star Oil and Gas Company, Texaco Inc., and Sunoco (defendants) alleging exposure to asbestos while working for Catalytic at work sites owned by the defendants. Specifically, Mr. Rath alleged exposure to asbestos from other trades working around him while he built and dismantled scaffolding at the different sites. The other trades were also employed by Catalytic. Relying on several precedent cases, the defendants moved for summary judgment, arguing they owed no duty of care to the employee of a contractor, as the defendants were landowners. Relying on the same cases, the plaintiff opposed summary judgment and took the position that he should be considered a plaintiff for whom a duty of care is owed under certain exceptions.

The court started its analysis with the rule for summary judgment. According to the court, summary judgment is appropriate when there are no genuine issues as to any material fact. As for landowner liability, the court noted that generally "neither an owner nor general contractor has a duty to protect an independent contractor's employee from hazards created by the doing of the contract or the conditions of the premises of the manner in which the work is performed." However, a series of cases and the restatement of torts provided exceptions in some instances. Specifically, the court held in the *Helm* matter that the plaintiffs in landowner liability claims fell into two groups, A and B. Group A plaintiffs included employees of independent contractors who did not work "directly with asbestos" but claimed exposure from those working around them with asbestos-containing products. Group B plaintiffs were directly exposed by their own work. Certain prior decisions focused only on Group B plaintiffs. However, the plaintiff asserted that he was a Group A plaintiff under the *Helm* matter. Therefore, the landowner defendants should be liable to him under "provisions found in the various sections of the restatement." Further, the plaintiff took the position that the defendants should be liable based on the prior decision in *Rabar*.

The court quickly disagreed with both arguments. As for *Rabar*, the court noted that that decision was not based on an asbestos case and rather dealt with a matter where the landowner had assumed the role of general contractor. Further, issues as to who controlled the work site were present. *Helm*, which was an asbestos matter, presented three exceptions to the general rule. Liability could be imposed to landowners where the defendant "1) exercises active control over the manner and method of the independent contractor's work, 2) voluntarily assumes responsibility for safety, or 3) maintains possessory control over the work area during the work." The court determined that liability would not be

imposed on the defendants even if Rath successfully invoked the restatement because the plaintiff had previously failed to respond to that argument and has since waived it. Secondly, nothing suggested that the landowners controlled the manner or method of the plaintiff's work. On the contrary, Catalytic "hired, paid, and supervised" the plaintiff. Moreover, Catalytic ran the safety meetings. Accordingly, summary judgment was entered in favor of the defendants.

Read the full case decision here.

Summary Judgment Granted in Secondary Exposure Case

(U.S. District Court, E.D. Louisiana., April 18, 2019)

The plaintiffs, the children of Theresa Rodrigue (Ms. Rodrigue), allege their mother was secondarily exposed to asbestos contained in products manufactured by multiple product manufacturers (defendants) when Ms. Rodrigue washed the clothing of her brother, a rigger in a shipyard. The court granted the defendants summary judgment on the basis that the evidence in the record was insufficient with respect to an essential element of the plaintiffs' claims. Consequently, since no genuine factual dispute existed, summary judgment was proper.

Read the full case decision here.

Supplemental Depositions From Unrelated Actions Insufficient as Only Evidence of Exposure

(Supreme Court of New York, April 12, 2019)

The plaintiff, John Spicijaric (decedent), was diagnosed with lung cancer in June 2014, and died one week later. Prior to his lung cancer diagnosis, the decedent was also diagnosed with asbestosis. The decedent was deposed in his asbestosis case in 1985, but was never deposed in the present action. The decedent was a member of the Local 12 Asbestos Workers Union, and remained a member through the early 1990s. The defendant, Electrolux Home Products (Electrolux), moved for summary judgment, claiming that the plaintiff failed to identify its products as a source of the decedent's asbestos exposure. Additionally, Electrolux argued that supplemental depositions offered by the plaintiff did not properly establish that the decedent was exposed to asbestos from its products sufficient to survive the motion for summary judgment. Electrolux argued that the plaintiff failed to show that Electrolux products were the cause of and/or a contributing factor to the decedent's asbestos exposure, because the decedent offered no testimony identifying its products as a specific source of such exposure. Furthermore, Electrolux argued that the plaintiff's "supplemental" testimony from unrelated cases could not be used as the sole basis for the court's summary judgment determination.

The plaintiff argued that it had submitted sufficient evidence to supplement the decedent's deposition and therefore established that the decedent was exposed to asbestos from Electrolux products. Electrolux argued that the supplemental depositions were not admissible under CPLR 3117(c) because they were taken in prior, unrelated cases, and were not between the same parties as in the plaintiff's case.

The court held that deposition testimony from unrelated cases may be used to identify a defendant's product "in use at the relevant work site at the relevant time," so long as it did not become the sole basis for the court's summary judgment determination. Here, the supplemental deposition testimony was the only basis for opposing the motion for summary judgment. Thus, the motion for summary judgment was granted.

The case summary is provided with permission of Westlaw here.

Summary Judgment Granted to Floor Tile Defendant in Esophageal Cancer Case Due to Insufficient Causation Evidence

(Supreme Court of New York, April 12, 2019)

The plaintiff was diagnosed with esophageal cancer in October 2013 and filed suit in 2014. The plaintiff identified 10 projects where he worked with vinyl asbestos floor tile. In addition to the tile of defendant American Biltrite (ABI), the plaintiff identified seven other brands of tiles he used throughout his career. The plaintiff could not state which specific tiles were used on any of the 10 jobs he described. With regard to ABI, the plaintiff testified that he used their brand of tiles on "a lot of jobs," and recalled details regarding the packaging of the tiles as well as enclosed installation manuals and brochures. ABI moved for summary judgment, which the court granted.

ABI argued that the plaintiff failed to proffer any expert opinion or other evidence establishing general and specific causation that ABI's vinyl asbestos floor tiles caused his esophageal cancer. Although the plaintiff produced the expert report and affidavit of Dr. Brent C. Staggs, ABI stated it had only received an expert report from Dr. Fabio Giron, which contained the unsupported conclusion that "asbestos exposure is considered a risk factor for the development of esophageal cancer as well as exposure to tobacco smoke." ABI's expert witnesses offered their own opinions, establishing the lack of causation in the plaintiffs' case.

The court analyzed the reports of both the plaintiff's and ABI's experts, and determined that there were credibility issues related to the expert opinions regarding general causation. However, the court focused on the defendant's special causation arguments, specifically that ABI argued its floor tiles did not produce breathable dust at a level sufficient to cause the plaintiff's esophageal cancer. The court found that Dr. Staggs' report and affidavit did not distinguish exposure to ABI's vinyl asbestos floor tiles from any of the other exposures identified by the plaintiff, including the seven other brands of vinyl asbestos floor tiles he identified. The court also held that Dr. Staggs failed to quantify the plaintiff's exposure to the defendant's products, did not rely on comparisons to the exposure levels in other studies, and failed to compare the encapsulated chrysotile fibers in ABI's asbestos floor tiles to other forms of asbestos fibers. The court held that the report and affidavit failed to raise an issue of fact on specific causation.

The court also found that the plaintiff's reliance on Dr. Staggs' report, the plaintiff's deposition, and precedent from multiple jurisdictions were insufficient to raise an issue of fact on specific causation. The plaintiff's conclusory argument that Dr. Staggs' trial testimony would rest on an "overwhelming scientific consensus" did not raise an issue of fact. Thus, for those reasons and others, the court granted ABI's motion for summary judgment.

The case summary is provided with permission of Westlaw here.

Summary Judgment Granted for Muffler Manufacturer Where Inference of Exposure Not Permitted

(Superior Court of Delaware, April 10, 2019)

The plaintiff, Jimmy Crawford, sued Tenneco Automotive Operating Company Inc. (Tenneco), among other defendants, alleging that his lung cancer was caused by asbestos present in Walker automotive mufflers. Prior to his death, the plaintiff testified that he worked at two automotive stations from 1963 to 1965, where he worked with Walker mufflers. He believed he was exposed to asbestos from the mufflers because he was told by his father that the mufflers contained asbestos due to their high heat application. Tenneco moved for summary judgment, arguing that since not all Walker mufflers during the relevant time period contained asbestos, the plaintiff could not satisfy his burden under Delaware law, specifically the *Stigliano* decision.

That case held that when the record reveals that a defendant manufactured both asbestos-containing and non-asbestos-containing versions of a product during the relevant time period, the court could not draw the inference of exposure in the absence of evidence directly or circumstantially linking the plaintiff to the asbestos-containing product. The plaintiff argued that Tenneco's discovery responses from this lawsuit, which stated that "some" Walker mufflers contained asbestos, directly contradicted Tenneco's prior responses in another litigation that made no such limiting statement. The court nevertheless found that Tenneco established it manufactured mufflers that did and did not contain asbestos. Since the plaintiff was unable to identify the Walker mufflers other than to say he worked on them, the plaintiff's evidence was found insufficient to overcome *Stigliano*. Accordingly, summary judgment was entered in favor of Tenneco.

Read the full case decision here.

Estate's Claims of Exposure From Steam Pipes That Were Not Connected to a Locomotive Survive Pre-emption Challenge

(U.S. District Court for the Eastern District of Pennsylvania, April 5, 2019)

The plaintiff's decedent worked in Texas as an electrician from 1945 until 1989, and alleged exposure to asbestos from insulation that was incorporated into passenger railcars manufactured by the defendants from 1945 until the mid to late 1970s. Specifically, the plaintiff alleged that asbestos exposure from pipe insulation and "arc chute" insulation in the passenger cars manufactured by the defendants was a cause of the decedent's mesothelioma and subsequent death. The railroad manufacturing defendants moved for summary judgment under the theory that the plaintiff's claims were pre-empted by both the Locomotive Inspection Act (LIA) and the Safety Appliance Act (SAA). Judge Eduardo Robreno held that some of the plaintiff's claims fell outside the jurisdiction of the LIA, and therefore were sufficient to withstand a pre-emption-based summary judgment motion. *See Hassell v Budd Co.*, 2:09-CV-90863-ER, (ED Pa Apr. 5, 2019).

The court concluded that none of the plaintiff's claims were pre-empted by the SAA, as it only pertained to specifically required safety equipment such as hand brakes and power brakes. With respect to pre-emption under the LIA, Judge Robreno held that exposure from the insulated steam lines that were a part of the passenger cars, but which ultimately connected to the locomotive's steam engine, were properly pre-empted because under the LIA they would be considered "locomotive equipment," which includes "locomotives, their tender, and all parts and appurtenances thereto." Similarly, exposure claims concerning insulation lining the arc chutes that the decedent had encountered were also pre-empted since they were a part of the braking system. However, the plaintiff's claims arising from the decedent's exposure to insulated pipes running through the passenger compartments, which were connected to a steam generator car, were not pre-empted by the LIA. The court held that the pipes connected to the steam-generating car were used for heating the passenger compartments and, since they were not directly connected to the locomotive engine, were not "locomotive equipment" subject to pre-emption.

Only the Westlaw citation is currently available at 2019 WL 1497068.

Meteorologist's Opinion Insufficient to Support Environmental Claim to Asbestos; Summary Judgment Granted Superior Court of Delaware

(Superior Court of Delaware, April 5, 2019)

In *Werner Rath v. 3M Company, et al.*, the court ruled on a motion for summary judgment by a defendant, Oyj Partek Ab (Partek). The plaintiff alleged occupational exposure to asbestos while working as a union carpenter at a number of industrial sites in Delaware and New Jersey. One week before the plaintiff's deposition was scheduled to take place, the plaintiff's counsel filed a motion for leave to amend to file an amended complaint joining additional defendants, including Partek. Partek was one nonexclusive supplier of asbestos used at one of the plants (subject plant) where the plaintiff alleged exposure from December 1964 through May 1975. The plaintiff also alleged environmental exposure, in that the plaintiff was exposed to asbestos fibers environmentally while living at his home between 1962 and 1973. His home address was in close proximity to the subject plant, being three-quarters of a mile away from the plant.

The plaintiff filed a witness and exhibit list, listing various witnesses, including a meteorologist to provide wind estimations related to the environmental claim. The meteorologist issued a report in the case regarding the average wind conditions in the vicinity of the subject plant from September 1964 through January 1972 to estimate the exposure that the plaintiff had to asbestos from the subject plant during that time period. The analysis took into consideration data that suggested that the wind would have blown from the subject plant toward the plaintiff's residence an average of 810 to 875 hours per year, or approximately 10 percent of the time.

When analyzing the meteorologist's opinions, the court held that it did not suggest that any asbestos from the subject plant traveled to the plaintiff's house to support the environmental exposure claim. The determination was limited to opine the direction in which the wind generally blew, and was based on the meteorologist's understanding, but not his opinion, that asbestos was used extensively at the subject plant. The court specifically held that in order to support the environmental exposure claim, the plaintiff must establish that he was exposed to asbestos at his home. The meteorologist's finding that wind would have blown from the subject plant toward the plaintiff's home approximately 10 percent of the time did not establish that any asbestos product, let alone the products associated with the defendant, was released in the wind.

Under Delaware law, the court held that the plaintiff failed to establish product nexus and to provide evidence that created a general issue of material fact of whether the plaintiff was exposed to asbestos from an asbestos-containing product associated with Partek. Furthermore, the court held that reliance on the meteorologist's report required impermissible speculation. Since the plaintiff failed to present evidence from which a jury could reasonably infer, without undue speculation, that the plaintiff was exposed to asbestos-containing products produced by Partek, summary judgment was appropriate.

Only the Westlaw citation is currently available at 2019 WL 1504397.

Date of First Purchase Creates Material Fact Dispute, Automotive Supplier's Motion for Summary Judgment Denied

(U.S. District Court, W.D. Washington, March 13, 2019)

The plaintiff, Eric Klopman-Baerselman, originally filed suit in state court on behalf of the plaintiff's decedent, Rudie Klopman-Baerselman, alleging that his exposure to asbestos-containing products manufactured, sold, or distributed by the defendants substantially contributed to his mesothelioma. The defendants subsequently removed the case to federal

court. The allegations against the defendant, O'Reilly Automotive Stores Inc. (O'Reilly), are that the plaintiff's decedent was exposed to asbestos-containing brakes, clutches, and gaskets purchased at Schuck's, an entity under the O'Reilly umbrella.

O'Reilly moved for summary judgment, arguing that as a "mere product seller, it is immune from liability under RCW 7.72.040." A key component of the Tort Reform Act, which includes RCW 7.72.040, is that it applies to claims arising on or after July 26, 1981. O'Reilly contends that the store in question in Camas, Washington, did not open until 1999 and therefore falls under the act. The plaintiff, in his answers to interrogatories and deposition testimony, offered evidence that the plaintiff's decedent may have purchased asbestos-containing brakes, clutches, and gaskets from a Shuck's "in and around Camas, Washington" as early as 1980.

The court held that this created a genuine issue of material fact "requiring a jury to resolve differing versions of the truth." The court denied O'Reilly's motion.

Only the Westlaw citation is currently available at 2019 WL 1199448.

Summary Judgment Denied to Asbestos Clothing Manufacturer Based on Plaintiff's Contradictory Affidavit

(U.S. District Court, N.D. Ohio, Eastern Division, March 12, 2019)

The plaintiff, Donald MacLachlan, brought suit against several defendants including American Optical (AO), alleging he developed mesothelioma as a result of exposure to asbestos while working at the Weirton Steel plant from 1971 to 2008. He was deposed in 2015 and also alleged exposure to steam turbines manufactured by General Electric. As for AO, the plaintiff testified that he wore asbestos-containing thermal gloves and coats manufactured by that defendant beginning in 1979 while working as a cast house helper. The plaintiff was adamant that the coat and mittens contained asbestos. Further, the plaintiff stated that he recalled seeing AO in large block letters "on the back of the coat up there on the collar." He received a new coat every few years while working at Weirton. AO moved for summary judgment, arguing that it made asbestos-containing clothing but nothing related to the plaintiff's description. AO's president compared the product line and stated that AO did not place its logo on the outside of the clothing. The plaintiff submitted an affidavit stating that he testified to the best of his ability and is now able to identify the clothing he wore.

The court reminded the standard for summary judgment and stated that summary judgment is appropriate when there is no genuine issue of material fact in dispute. Specifically, AO contends that the plaintiff failed to "present evidence of exposure" to AO's products. Further, AO argues that the plaintiff's affidavit should be struck as a sham since it contradicted his original testimony. The court noted that the plaintiff testified he was positive he wore AO's coat and mittens. The court also pointed out that AO conceded it made asbestos-containing protective clothing. As for the affidavit, the court agreed that it "materially altered" his original testimony. However, that fact did not necessarily require that the court strike the affidavit. Here, the plaintiff was suffering from mesothelioma and was shown a catalog that he did not have at the time of his original testimony, according to the court. The contradiction was therefore explainable. In sum, the plaintiff's suit had sufficient evidence to survive summary judgment according to the court.

Lack of Evidence Against Premises Defendants Leads to Grant of Summary Judgment in Mesothelioma Case

(U.S. District Court, M.D. North Carolina, March 11, 2019)

The plaintiff filed suit against multiple defendants including Farmers Chemical and Storage (Farmers) and Schlage alleging he developed mesothelioma from his occupational exposure to asbestos. Specifically, he claimed he was exposed to asbestos while working as a plumber and pipefitter from 1965 to 1982 for the local union. Farmers and Schlage moved for summary judgment.

The court began its analysis and stated that summary judgment is warranted: "The movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Farmers argued that it was entitled to summary judgment because it did not control the plaintiff's work site at the Farmers Chemical Plant in Tunis, North Carolina. Instead, DM Weatherly Company was in charge, according to the defendant. The plaintiff opposed by taking the position that he was exposed at the Famers Chemical Site and that Farmers had failed to show it was not in control of that site. The court noted that the plaintiff's argument misplaced his own burden. Relying on the *Cray* matter, the court stated that the burden shifts once the absence of evidence is established. Specifically, in a negligence case for premises liability the plaintiff is required to show control over where the injured

party worked. Here, the plaintiff failed to show Farmers had such control. Consequently, judgment was appropriate for Farmers.

Schlage also moved for summary judgment, claiming the plaintiff lacked evidence against it. First, Schlage argued that the plaintiff lacked evidence showing that the plaintiff was exposed to asbestos during the construction of the Schlage lock facility near Rocky Mount, North Carolina. The plaintiff countered and stated that he previously testified as to breathing dust from cut pipe insulation while working at the Schlage facility. However, the court noted that is not enough under the *Lohrmann* standard to satisfy the specific product exposure test. Accordingly, the plaintiff failed to submit any evidence that would permit a jury to find the plaintiff satisfied his burden. Moreover, the record was absent evidence showing that Schlage controlled the work site. Accordingly, Schlage's motion for summary judgment was granted.

Summary Judgment Motions Denied for Four Defendants in Two Maritime Cases Filed by Same Plaintiff

(U.S. District Court for the Eastern District of Pennsylvania, February 14, 2019)

Shortly before his death, Obediah Walker Jr. filed an action in Pennsylvania state court alleging he was exposed to asbestos while serving on the *USS Plymouth Rock* while enlisted in the Navy from 1969 to 1971. He served as an electrician on board the Plymouth Rock and was later diagnosed with lung cancer. He was deposed six days after filing suit and was cross-examined by only one defendant before he passed. The defendants Ingersoll-Rand, Warren Pumps, and Blackmer Pumps did not cross-examine Walker. Obediah Walker III later filed a second suit against other defendants, including Viad Corp. Both cases were removed shortly after they were filed.

All four defendants above filed for summary judgment based upon Walker's lack of identification of their products on board the *USS Plymouth Rock*. James Owens, one of Walker's supervisors on the ship, was deposed and testified that Walker would have worked on every part of the ship, and that electricians stood watch in the engine room for four hours at a time. Owens also testified that Walker worked on pumps on the ship.

The plaintiff relied on documents from the *USS LSD* 28 class of ships, of which the *USS Plymouth Rock* was a part. Those documents demonstrated that equipment from all four of the above defendants would have been present on the Plymouth Rock. Although the court precluded Walker's deposition testimony because the defendants did not have an opportunity to cross-examine him, the court found that the other evidence, including manuals relating to each of the defendants' products, was sufficient for a reasonable jury to conclude that the products caused Walker's lung cancer. The court applied maritime law and rejected each defendant's argument that the bare metal defense defeated the plaintiff's claims. The court found that there was sufficient evidence such that a jury could conclude that each defendant knew its products would contain asbestos, citing the flexible standard adopted by the Third Circuit in *Devries v. Air & Liquid Systems Corp.* Given that, each of the four defendants' motions for summary judgment was denied.

Only the Westlaw citation is currently available at 2019 WL 653216 and 2019 WL 653607.

Failure to Establish Admissible Exposure Evidence Leads to Summary Judgment for Railroad Defendant

(Court of Appeals of Tennessee, February 12, 2019)

The plaintiff filed suit against Norfolk Southern Railroad Company (Norfolk) under the Federal Employer's Liability Act (FELA), alleging he developed lung cancer as a result of occupational exposure to asbestos. Specifically, the plaintiff worked as a brakeman, trainman, and locomotive engineer from 1965 to 1999. The plaintiff passed from lung cancer in 2003, and his wife was substituted as the plaintiff. Of interest, the plaintiff's decedent smoked beginning at age 13 and smoked up to one pack of cigarettes per day at times until 2000. Norfolk moved to exclude the plaintiff's expert, Dr. Arthur Frank, and also moved for summary judgment. The trial court found Dr. Frank's testimony failed to "satisfy Tennessee's Standards for Admissibility of Expert Opinion Testimony." Accordingly, Dr. Frank was excluded as an expert. Lay witnesses were also excluded for lacking personal knowledge of asbestos in the plaintiff's workplace. Norfolk's motion for summary judgment was then granted. The plaintiff appealed.

The court began its review of summary judgment and reminded that "summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." The standard for appeal is *de novo* according to the court. As for the FELA claim, the court noted that the jury's hearing of the plaintiff's experts was within the purview of the jury. However, that did not necessarily mean that the trial

court erred in its decision to bar Dr. Frank. Relying on the *Payne* decision, the court stated that the plaintiff failed to establish basic exposure evidence to asbestos at Norfolk since lay testimony had been excluded by the trial court. Moreover, the lay witnesses in the instant matter lacked personal knowledge concerning asbestos in the plaintiff's workplace. The court stated that "without some evidence of asbestos exposure in Norfolk's workplace, the plaintiff cannot tie the medical and historical evidence regarding the carcinogenic risk from asbestos." In sum, the plaintiff missed this threshold requirement. Consequently, the court affirmed the trial court's decision and remanded for costs.

Only the WestLaw citation is currently available at 2019 WL 549939.

Summary Judgment Granted for Crane Co. in Maritime Action

(U.S. District Court for the Northern District of Ohio, Western Division, February 12, 2019)

The plaintiff sued Crane Co. and other defendants based upon his alleged exposure to asbestos while serving in the Navy from 1960 to 1967. Crane filed for summary judgment on the plaintiff's maritime law strict liability negligence claims. The court applied the Lindstrom standard. Despite the plaintiff's urging, the court did not adopt a fact-specific standard with regard to the bare metal defense, instead applying the Sixth Circuit's bright line rule.

The court found that the plaintiff failed to put forth any evidence of his exposure to a Crane product amounting to more than a "metaphysical doubt." The court referred to a citation from *Lindstrom* noting that the mere presence of a defendant's product at a work site is insufficient. Furthermore, the plaintiff failed to demonstrate substantial factor causation. Given the lack of evidence of any exposure, let alone substantial exposure, summary judgment was entered in favor of Crane.

Only the WestLaw citation is currently available at 2019 WL 551321.

Preclusion of Plaintiff Experts Leads to Defense Win in First Philly Talc Trial

(Philadelphia County Court of Common Pleas, February 8, 2019)

The plaintiff Charles Brandt (plaintiff), on behalf of the decedent Sally Brandt (decedent), commenced an asbestos-related action against, among other defendants, Colgate-Palmolive Company (Colgate), alleging that the decedent's use of Colgate's Cashmere Bouquet talcum powder exposed the decedent to asbestos, resulting in her mesothelioma diagnosis.

Following a *Frye* hearing, the Philadelphia County Court of Common Pleas precluded the expert opinions of the plaintiff's geologist and pathologist, finding numerous methodological flaws in their research claiming asbestos was found in Cashmere Bouquet talcum powder. Colgate subsequently filed a motion for summary judgment, arguing that the preclusion of these experts eliminated evidence creating a triable issue of fact as to causation. In opposition, the plaintiff relied on a non-testifying expert's airborne testing results in order to claim the decedent was exposed to fibers at levels "significantly greater than background concentrations." The court initially denied Colgate's motion.

Colgate moved to renew its summary judgment motion following the court's later refusal to consider the plaintiff's expert's airborne concentration opinions "of record," on the basis there was ultimately no evidence demonstrating the decedent was exposed to airborne concentrations of asbestos from Colgate's talcum powder at sufficient levels to cause the decedent's disease.

The court went on to find that excluding the plaintiff's airborne concentration expert necessarily resulted in excluding the plaintiff's industrial hygienist expert since the airborne findings were the basis of the latter expert's opinion. As a result, the plaintiff was left with no expert testimony that could create a triable issue of fact as to whether Colgate's talcum powder caused the decedent's disease.

Read the Forbes article here.

Trial Court Did Not Abuse Discretion in Granting Plaintiff's Motion to Dismiss Without Prejudice Prior to Ruling on Defendant's Summary Judgment

(Court of Appeal of Louisiana, Fourth Circuit, February 6, 2019)

The plaintiff, James Sizemore, filed suit in Louisiana State Court against multiple defendants, alleging that his diagnosis of mesothelioma was caused by exposure to asbestos while working as a welder, pipefitter, and boilermaker at numerous industrial facilities. The plaintiff's alleged exposure to certain defendants' products occurred exclusively in South Carolina, and those defendants moved for dismissal for lack of personal jurisdiction or *forum non conveniens*. In response, the plaintiff dismissed those defendants and filed a companion suit in South Carolina. Viking Pumps did not move to dismiss based on either of those grounds, and subsequently filed a motion for summary judgment based on lack of product identification in July 2017, and renewed the motion in September 2017 and April 2018.

On April 17, 2018, the plaintiff's counsel emailed Viking's counsel a proposed joint motion to dismiss without prejudice. Viking's counsel contended that, without giving notice prior to the proposed joint motion, the plaintiff added Viking to the South Carolina suit a week prior. In response, Viking requested that its motion be granted and that the plaintiff's claims be dismissed with prejudice. The plaintiff's reply included a rule to show cause, and the hearing date was set for July 6, 2018, the same date as the hearing for the motion for summary judgment.

The trial court granted the motion to dismiss without prejudice, and denied Viking's motion for summary judgment as moot. Viking appealed, and contended that the plaintiff's motion to dismiss should not have been granted for two reasons: 1) the motion was untimely filed, given the court's scheduling order; and 2) the purpose of the motion was to transfer the plaintiff's claims against Viking to the South Carolina case and to avoid a hearing on Viking's pending summary judgment motion.

The appeals court held that the trial court had the discretion to grant the motion absent evidence that Viking would have been deprived a just defense or would have lost substantive rights, and Viking presented no such evidence. The court further held that the discovery Viking has already done can be used in the South Carolina case, and therefore "cannot conclude that the trial court abused its wide discretion in granting the motion to dismiss without prejudice."

Only the Westlaw citation is currently available at 2019 WL 469520.

Exclusion of the Plaintiff's Causation Experts Leads to Grant of Summary Judgment in Merchant Marine Mesothelioma Matter

(U.S. District Court, E.D. Louisiana, February 5, 2019)

The plaintiff filed suit against multiple defendants alleging he developed mesothelioma while working for Radcliff Materials, a predecessor of Dravo Basic Materials Company (DBMC). Prior to filing suit in Louisiana, The plaintiff had filed a product liability suit against several defendants in California including DBMC. The plaintiff dismissed DBMC from the California suit based on jurisdictional issues. The plaintiff worked as an oiler on board a dredge known as the Avocet in 1973 for approximately 6 weeks. His primary job duties included reading gauges, changing oil filters and making minor repairs.

The plaintiffs relied upon Drs. Robert Harrison and David Tarin as experts to support their claims against DBMC. Both experts planned to testify that the plaintiff's alleged exposure on board the Avocet was the general and specific cause of the plaintiff's mesothelioma. DBMC moved to preclude their testimony. DBMC also moved for summary judgment.

The court reminded the plaintiff of the standard for admissibility of expert testimony. An expert may provide an opinion when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Specifically, the court in the *Daubert* matter held that scientific testimony must be not only relevant but reliable. The evidence must also fit the facts of the instant case and help the trier of fact to understand it. As for summary judgment, the court noted that summary judgment is appropriate where there is no genuine issue as to material fact.

Dr. Harrison-The court stated that the plaintiff has the burden to establish general causation in a mesothelioma case. Moreover, the plaintiff must show specific causation that DBMC caused the plaintiff's mesothelioma. DBMC did not seriously contest Dr. Harrison as to the issue that asbestos generally causes mesothelioma but rather challenged him as to specific causation. Here, Dr. Harrison offered a report that stated the plaintiff's mesothelioma was a result of "cumulative exposure to asbestos fibers from 1955 to 1988." Dr. Harrison admitted that he authored the report for the plaintiff's California case and had not reviewed any deposition transcripts for the instant case. Once deposed, Dr. Harrison added to his opinion that each and every exposure increased the plaintiff's risk of developing disease. Relying on a paper from another expert, he then went as far as to opine that the plaintiff's time on board the Avocet was the specific cause of the plaintiff's mesothelioma. The court quickly concluded that Dr. Harrison's testimony was inadmissible under Federal Rule 702 because the plaintiff is required to show specific exposure to asbestos in a toxic tort case with respect to specific causation. Here, Dr. Harrison knew virtually nothing regarding the exposure on board

the Avocet. In fact, the information pulled from the plaintiff's California interrogatories was not enough according to the court. The court also noted that the each and every exposure methodology has been rejected in the *Comardelle* matter. Finally, the plaintiff's own lay testimony as to grey dust was not enough to asbestos on the Avocet hence the larger problem with the plaintiff's case according to the court.

Dr. Tarin-The court quickly concluded that Dr. Tarin's opinion was also substantially similar to Dr. Harrison's and should therefore be barred. Dr. Tarin sought to testify that "cumulative exposure to all forms of asbestos contributes to the indication and propagation" of disease or what is a general opinion. Dr. Tarin therefore concluded that this proposition means that all exposures should be considered a substantial contributing factor in asbestos malignancy or specific causation. Dr. Tarin testified in his deposition that he had relied upon evidence that was nearly the same as Dr. Harrison. Finally, Dr. Tarin's opinion that the plaintiff's pathology slides are consistent with a "heightened susceptibility" to asbestos was not enough to remedy the lack of specific causation. Consequently, Dr. Tarin's testimony was excluded.

According to the court, the plaintiff must establish expert testimony as to causation. Therefore, summary judgment was appropriate for DBMC.

Read the full case decision here.

New NYCAL Coordinating Judge Grants First Causation-Based Summary Judgment

(Supreme Court of New York, New York County, January 29, 2019)

New York City Asbestos Litigation Coordinating Judge Manuel J. Mendez has granted a causation based summary Judgment motion to defendant American Biltrite Inc. (ABI). With respect to ABI, the plaintiff, Thomas Mantovi, alleged exposure from Amtico from vinyl asbestos floor tile that he encountered as a bystander while performing inspections as an insurance agent from 1967 through 1979. Specifically, he testified that he was exposed to asbestos by breathing in dust during insurance inspections of commercial and residential sites where Amtico asbestos containing vinyl floor tiles were being cut and laid down, with tools such as box cutters and rotary saws.

As a threshold matter, the plaintiff had argued ABI failed to meet its *prima facie* burden, as it did not submit an affidavit of an individual with personal knowledge. However, Justice Mendez held that a motion for summary judgment can be "decided on the merits when an attorney's affirmation is used for the submission of documentary evidence in admissible form and annexes proof from an individual with personal knowledge." The plaintiff further argued that ABI's experts failed to make a *prima facie* showing that asbestos in its vinyl floor tiles could not have caused the decedent's mesothelioma, but Justice Mendez rejected that contention and found that ABI had met its *prima facie* burden with respect to both general and specific causation.

In support of the general causation portion of its motion, ABI relied on the affidavit and reports of, John W. Spencer, CIH, CSP; Marc Plisko CIH, Dr. Stanley Geyer, M.D., and Dr. David Weill, M.D.. Mr. Spencer and Mr. Plisko's submitted evidence of a lack of causal relationship between encapsulated chrysotile asbestos and the decedent's mesothelioma based on a risk and exposure assessment. Justice Mendez specifically credited their reliance on OSHA and the EPA's position on the difference between friable and non-friable asbestos containing materials, holding that "ABI's expert reports, which rely on EPA and OSHA reports, and scientific studies to formulate a conclusion are sufficient to meet the *prima facie* burden for summary judgment on general causation."

In further support of his general causation ruling, Justice Mendez relied on Dr. David Weill's discussion of the minimal threshold level below which there is no excess risk of developing mesothelioma, noting that "Dr. Weill refers to studies of ambient exposure levels in cities in the United States of between 0.02 f/cc and 0.008 f/cc as not being associated with disease." Dr. Weill also supported his opinions concerning the differences in fiber type potency, with charts of "Mesothelioma Deaths by Fiber Types" for the years 1983, 1987, 1996 and 2013, which showed that "chrysotile miners had only 2% deaths from mesothelioma in 1983 and 1987 with no deaths in 1996 and 2013." Justice Mendez also credited Dr. Weil's reliance on National Institute for Occupational Safety and Health animal studies showing a lack of pathological response from chrysotile exposures.

In opposition to the general causation challenge, the plaintiff relied on the report of Dr. David Y. Zhang, M.D., Ph.D. and M.P.H., a specialist in pathology and occupational therapy. In his report, Dr. Zhang provided the plaintiff's work history, medical history, radiological findings, histological diagnosis and pathology reports. Dr. Zhang's report concluded that "... the cumulative exposure to each company's asbestos containing products significantly contributed to the development of his malignant mesothelioma." However, Justice Mendez held that Dr. Zhang's report was insufficient to raise an issue of fact as to general causation because it failed "to make any distinctions between chrysotile fibers and the other asbestos fibers."

With respect to specific causation, ABI argued that its Amtico floor tiles did not produce breathable dust to a level sufficient to cause decedent's mesothelioma. Justice Mendez noted that the New York Court of Appeals has enumerated several ways an expert might demonstrate specific causation, including mathematical modeling and comparison to the exposure levels of subjects of other studies. Justice Mendez found that ABI met its *prima facie* burden on specific causation, in part based on the report by Mr. Spencer and Mr. Plisko, which estimated the plaintiff's cumulative exposure levels as 0.00079 f/cc-yrs. Their report further noted that such a level was "(1) is indistinguishable from most lifetime cumulative exposures to ambient asbestos, (2) well below a working lifetime at the OSHA and WHO permissible exposure limits, and (3) also well below lifetime cumulative exposure at the USEPA clearance limit following an asbestos abatement action."

In opposition to the specific causation challenge plaintiff again relied on Dr. Zhang's report. However, Justice Mendez held that it was insufficient to raise an issue of fact. Justice Mendez explained that "[p]laintiff's conclusory argument that Dr. Zhang's trial testimony will rest on an 'overwhelming scientific consensus,' is unavailing. Dr. Zhang's report does not rely on comparison to the exposure levels of subjects of other studies, does not provide comparison of the encapsulated chrysotile fibers in ABI's Amtico vinyl asbestos floor tiles to other forms of asbestos fibers, or establish that the plaintiff was exposed to sufficient levels of asbestos from his second hand exposure to ABI's product, to raise an issue of fact on specific causation."

Read the full case decision here.

Brake Manufacturer Granted Summary Judgment on Basis of De Minimis Exposure

(U.S. District Court, D. Delaware, January 25, 2019)

The plaintiff, Elizabeth Alice Dove, alleges that her father, Gus Dove (Mr. Dove), developed lung cancer and other asbestos-related diseases because of his exposure to a variety of asbestos-containing products manufactured, sold, or supplied by the defendants — among them, Honeywell — during the course of Mr. Dove's career and through shade-tree mechanic work. Honeywell successfully moved for summary judgment under Rule 56(a) on multiple grounds, the primary one involving insufficient product identification under Delaware's "Product Nexus Standard."

Mr. Dove gave discovery deposition testimony in this matter that he had undertaken shade-tree mechanic work — including brake work using Bendix brakes (for which Honeywell possessed alleged liability) from 1954 to 1956 — while staying at multiple Air Force bases during the 1950s. He did a yearlong stint in Turkey from 1963 through 1964, and afterward stayed in various U.S. bases, undertaking aircraft maintenance and administrative work until his retirement in 1995. At his subsequent video *de bene esse* deposition taken in this matter, Mr. Dove greatly diminished the frequency with which he had testified to using Bendix brakes during his earlier discovery deposition.

Delaware law requires that a plaintiff asserting a claim for asbestos-related injuries introduce evidence meeting the Product Nexus Standard. Specifically, a plaintiff must show that "the asbestos product was used in an area where the plaintiff frequented, walked by, or worked adjacent to, with the result that fibers emanating from the use of the product would have been present in the area where the plaintiff worked." Moreover, the standard "requires plaintiff to show some evidence of both daily and continuous proximity to the defendant's product for more than a *de minimis* period of time."

The District of Delaware framed the issue for summary judgment as whether Mr. Dove's alleged exposure to Bendix brakes during his shade-tree work on 10 occasions, as testified to during his video deposition testimony, is sufficient to create a factual issue as to Honeywell's negligence and be the proximate cause of Mr. Dove's injuries. Honeywell's motion was premised on the proposition that Mr. Dove's work with Bendix brakes during two years of an extensive career that allegedly exposed Mr. Dove to other asbestos-containing products was *de minimis*, and thereby failed the Product Nexus Standard.

Finding that Mr. Dove's exposure did not meet the presence and proximity requirements under the Product Nexus Standard, the court granted summary judgment on Honeywell's negligence claim. The court also granted summary judgment on strict liability, conspiracy, and punitive damages.

Lack of Detail in Product Identification Leads to Grant of 14 Summary Judgment Motions

(U.S. District Court, D. Delaware, January 23, 2019)

The plaintiff, William Johansen, alleged that he developed mesothelioma from his work with various pumps, valves, and other equipment aboard naval vessels, at shipyards, and at a pulp mill. Fourteen defendants filed summary judgment motions arguing insufficient causation. The parties agreed that maritime law applied to all of the plaintiff's naval/sea-based claims and that Washington law applied to his land-based claims. Under maritime law, a plaintiff must demonstrate exposure to the defendant's product and proof that the product was a substantial factor in causing his injury. Under Washington law, a plaintiff must "establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product," and the plaintiff must identify the particular manufacturer of the product that caused his injury, with courts considering evidence of proximity and frequency.

Although the plaintiff identified products of various defendants, because he failed to sufficiently identify details regarding his work with the products, the court recommended granting the summary judgment motions of the following: Buffalo Pumps (Air & Liquid Systems), Weir/Atwood valves (Atwood & Morrill), Armstrong steam traps, Crosby valves, Vogt valves (Flowserve U.S. Inc.), Chicago pumps (FMC Corporation), Gardner Denver pumps, Jenkins valves, Kunkle valves, Nash pumps, Neles-Jamesbury valves, Red-White valves, and Warren pumps. The court recommended granting Anchor Darling's summary judgment motion, as the plaintiff did not identify any asbestos-containing products attributed to that the defendant.

Only the Westlaw citation is currently available at 2019 WL29115.

Pump Defendants Granted Summary Judgment in Maritime Asbestos Claim

(U.S. District Court, D. Delaware, January 18, 2019)

The plaintiffs initially filed suit in the Superior Court of Delaware on November 2, 2016, against various defendants, asserting claims arising out of an alleged exposure to asbestos suffered by the plaintiff, Earl Janis Jr. (Janis). The case was removed to federal court on February 16, 2017, pursuant to the federal officer removal statute under U.S.C. §§ 1442(a)(1). On June 4, 2018, three similarly situated defendants (manufacturers of pumps located on naval ships) filed summary judgment motions that are at issue in this decision.

The plaintiffs generally allege that Janis developed lung cancer through his exposure to asbestos-containing materials during his service in the United States Navy as a machinist mate between 1971 and 1975. More specifically, Janis was responsible for installing, repairing, and maintaining valves and pumps aboard various naval vessels. This work included the removal, scraping, and cleaning of gaskets on the repair of these valves and pumps. Janis testified that removing gaskets and creating new gaskets out of the provided gasket material "dispersed products into the air, producing visible particles that he inhaled" [citation omitted]. More generally, Janis's testimony establishes that he generally worked on pumps manufactured by varied manufacturers hundreds of times during his naval service spanning 1971 to 1975.

Both parties agreed that maritime law applied to this naval/sea-based asbestos claim. Here, in order to establish causation in an asbestos claim under maritime law, a plaintiff must show, for each defendant, "that (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005). In meeting this standard, the plaintiff may rely upon direct evidence (such as deposition testimony) and/or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. However, under *Lindstrom*, "'minimal exposure' to a defendant's product is insufficient [to establish causation]. Likewise, a mere showing that defendant's product was present somewhere at the plaintiff's place of work is insufficient." Rather, the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than just conjectural. *Lindstrom*, 424 f.3D at 492.

In each of the motions, the defendants argue that the plaintiff failed to establish that the defendant's products were a substantial factor in causing Janis's injuries. Here, the plaintiff had primarily relied upon two pieces of evidence: (a) ship records showing the defendants' products were aboard *some* of the various naval vessels that Janis served and (b) Janis's deposition testimony that he generally recalled working with the defendant's products. The defendants argued that Janis was unable to provide any details as to the mechanisms the pumps were used for; the composition of the insulation or gaskets within the pumps and whether they contained asbestos; the number of times he worked with any specific pump manufacturer; and the specific naval vessel on which he worked with any specific pump manufacturer.

In light of the above, the court found the general testimony of Janis as to the pumps he worked on without any real specificity failed to create a genuine issue of material fact as to whether the defendant's products were a substantial factor in causing Janis's injuries. As such, defendants' motions for summary judgment were granted.

Only the Westlaw citation is currently available at 2019 WL 264890.

Defendants' Joint Motion for Summary Judgment Failed Due to Unresolved Issues of Material Fact

(U.S. District Court, E.D. Louisiana, January 7, 2019)

The plaintiff, Victor Michel, filed suit in state court against multiple defendants, alleging that his exposure to asbestos while working as a mechanic and generator service technician caused him to contract peritoneal mesothelioma. The defendants removed the action to the Eastern District of Louisiana, and Ford and Cummins Inc. filed a joint motion for summary judgment, arguing that the plaintiff could not show that their products substantially contributed to Michel's mesothelioma. The plaintiff opposed the motion.

The defendants argued jointly that they were entitled to summary judgment because the plaintiff could not meet his burden of providing that their products caused Michel's mesothelioma, if the court granted the defendants' motions *in limine* seeking to exclude the plaintiff's experts Dr. Brody, Dr. Castleman, Dr. Staggs, Dr. Finkelstein, and Mr. DePasquale. "But, as explained in the order denying the motions against Dr. Staggs, Dr. Finkelstein, and DePasquale, the court finds their causation opinions admissible. These experts will testify that the asbestos in defendants' products can cause peritoneal mesothelioma generally, and that Michel's disease was caused by his exposure to defendants' products" as mentioned in a previous article.

Additionally, the court's review of the record in connection with the motions *in limine* "reveals that Michel's employment history, medical history, and his testimony regarding the types of tasks he performed at work provide a reliable factual basis for the expert opinions and create a disputed issue of material fact as to whether Michel was exposed to asbestos from defendants' products that substantially contributed to his mesothelioma."

Therefore, the court denied the joint motion.

Only the Westlaw citation is currently available at 2019 WL 118007.

Verdict Reduction Decisions

Jury Verdict Upheld Against Boiler Defendant

(Court of Appeal of Louisiana, Second Circuit, May 22, 2019)

Lynda Berry alleged that she was exposed to asbestos through the electrical work of her husband, William, at a Louisiana paper mill, causing her peritoneal mesothelioma. William Berry testified that he was present when defendant Foster Wheeler removed and replaced asbestos insulation materials on their boilers, which were installed in the paper mill. The matter was tried before a jury, who determined that Foster Wheeler was liable for the plaintiff's injuries, and assessed a final award of $2.25 million against them.

Foster Wheeler appealed, and raised five assignments of error, all of which the appellate panel disagreed with, affirming the judgment. First, the panel determined that there was no abuse of discretion in the jury's failure to find settling parties liable for the plaintiff's injuries. They reasoned that Foster Wheeler bore the burden of proving the fault of settled parties, and that most evidence of alternate exposures had come from the plaintiff's experts and evidence, not from Foster Wheeler's defense. Second, the panel determined that the trial court did not err in refusing to allow Foster Wheeler to present evidence of union knowledge of the hazards of asbestos, as the jury had been presented with sufficient alternative information from which they could come to that conclusion.

Next, the panel declined to find an abuse of discretion in the trial court's decision to not allocate a virile share for another defendant who settled during trial. They reasoned that the settlement had no impact on Foster Wheeler's ability to prove the negligence of the settling defendant, and that the jury had been presented with adequate information from which they could have determined that the settling defendant was also liable for the plaintiff's injuries. In addition, the panel determined that there was no abuse of discretion in the jury's award of future medical expenses, and that an appellate court could only reverse this finding if it was clearly wrong. Despite the plaintiff's testimony that she may not have future surgical procedures for her illness, the panel determined that there was no manifest error in the jury's finding that future medical expenses would likely be incurred. Finally, the appellate panel found no error in the trial court's decision to deny Foster Wheeler's motion for a directed verdict given Louisiana's 10-year peremption statute. They concluded that although Foster Wheeler completed construction of the boilers at issue in 1965, they returned to the mill semiannually for maintenance work, and the plaintiff's suit was filed within 10 years of the last work that Foster Wheeler did that exposed the Berry couple to asbestos.

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