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APPEALS COURT RULES ON SEVERAL EVIDENTIARY ISSUES IN TALC-ASBESTOS EXPOSURE CASE, ULTIMATELY UPHOLDING \$1.6 MILLION VERDICT

In this case, the Plaintiff, Steven Kaenzig, and his wife sued multiple defendants, including talc supplier Whittaker, Clark & Daniels, Inc., for his contracting mesothelioma as a result of his exposure to the talc on his father's work clothes. The defendant was the primary supplier of talc where plaintiff's father worked. The case was tried and a verdict of \$1.6 million was rendered in favor of the plaintiffs. On appeal, the defendant challenged several pretrial and evidentiary rulings and the denial of its motion for judgment notwithstanding the verdict.

The defendant appealed the denial of its motion to compel the plaintiffs to produce the raw data and reports performed on vintage samples of the talc by plaintiff's non-testifying consulting expert. Pursuant to New Jersey law, discovery of the opinions of an expert who is not expected to testify at trial is only permitted with a showing of exceptional circumstances. In affirming the lower court's decision, the appellate court held: "In the present case, the trial judge correctly found that the defendant failed to establish 'exceptional circumstances' because the samples remained available for testing. The judge ordered plaintiffs to produce the samples, and they complied. Defendant was afforded the opportunity to have its experts test the samples, but chose not to do so. Defendant also failed to demonstrate why it could not procure its own 'vintage' samples for testing, just as plaintiffs did. Further, the record is devoid of evidence to support defendant's argument that the samples were no longer available because they had been 'mishandled, tampered with or altered.'"

The defendant appealed the denial of its motion to preclude the testimony of the plaintiffs' expert in occupational and environmental medicine, Dr. Moline, as an inadmissible "net Opinion." The appellate court agreed with the lower court that Dr. Moline's opinion on causation was not a net opinion, since she relied on the report and test findings of plaintiffs' expert geologist, the testimony of the plaintiff and his father concerning the amount of talc dust in the plant and on the work clothes, the plaintiff's lack of exposure elsewhere, case reports on development of mesothelioma in men who used cosmetic talc, and her extensive knowledge about asbestos in forming her opinion. As stated by the court, "accordingly, the judge did not abuse his discretion in denying defendant's motion to bar Moline's testimony."

On appeal the defendant argued it was denied a fair trial because Dr. Moline made an improper reference to another mesothelioma claim from the same facility where the plaintiff's father worked and the trial judge's inadequate curative instruction. The appellate court denied the issue, finding that defendant failed to establish that it suffered prejudice sufficient to warrant a new trial. The court found that "The judge sustained defendant's objection to Moline's very brief statement about another unnamed mesothelioma case at the facility. The judge then gave the jury a prompt instruction, cautioning them not to consider that information in their deliberations. The jurors are presumed to have followed those cautionary instructions. Further, defendant did not object to the adequacy of the judge's curative instruction, nor move for a mistrial, thereby suggesting that counsel perceived no error in the instruction."

The defendant appealed the lower court's denial of allowing its corporate representative, Theodore Hubbard, from testifying that no employees had filed a workers' compensation claim related to mesothelioma from exposure to the raw talc at defendant's facility. The representative was allowed to testify as to claims filed between 1991 and 2004, when he was in a position to have personal knowledge of claims filed, but not during any other time of his employment when such knowledge would have come from document review.

As held by the appellate court: "defendant failed to establish that the one-page summaries of the workers' compensation claims stored in boxes in a warehouse were prepared in conformity with N.J.R.E. 803(c)(6) because there was no evidence as to who prepared them, when they were prepared, or why they were prepared. Further, even had defendant made the requisite showing under N.J.R.E. 803(c)(6), the exclusion of this testimony was not so prejudicial as to warrant a new trial. First, it appears that Hubbard was not barred from testifying that there were no asbestos-related workers' compensation claims filed between 1991 and 2004, when he had personal knowledge of the claims and when latent cases of mesothelioma might have developed. Moreover, Hubbard admitted that the talc received by defendant's South Plainfield employees was already bagged, and thus, unlike the Shulton employees, the South Plainfield workers were not required to handle loose, raw talc. See, e.g., *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1161 (4th Cir. 1986) ("state of the art as it relates to the health of persons exposed to asbestos products differs considerably for asbestos plant workers dealing with raw asbestos and for persons working in the vicinity of asbestos products.") Therefore this testimony would have had very little probative value."

The defendant argued that the lower court erred in not granting its motion for judgment since plaintiffs failed to prove product defect causation with a failure to warn and medical causation with the plaintiff's development of mesothelioma. On product defect causation, the plaintiffs submitted evidence through their expert geologist that the talc contained asbestos, that the asbestos product was dangerous and thus absent a warning, and that it was undisputed that the plaintiff's father was a foreseeable user of the product who should have been warned. On medical

causation, the plaintiffs provided evidence that defendant was the primary supplier of the talc, the frequent exposure plaintiff had to his father's work clothes, and Dr. Moline's testimony that low-level bystander exposure can cause mesothelioma. The appellate court, viewing the totality of the facts, concluded, "plaintiffs presented sufficient evidence to establish Steven's bystander exposure to defendant's asbestos-contaminated raw talc under the frequency, regularity, and proximity test as established in *Sholtis*, supra, 238 N.J. Super. at 29. Consequently, we find no error in the trial court's denial of defendant's motions for judgment."

The defendant also argued that the lower court committed "plain error" in allowing the plaintiffs to testify about their financial circumstances and disputes with their insurance carrier as such testimony was irrelevant and invited a verdict based on sympathy. The plaintiffs testified, without objection, that the plaintiff had to return to work before he was fully recovered because he was the sole owner of his business and could not pay his bills unless he was working, that he had to borrow money for his surgery since he was fighting with his insurance company, and that the insurance company would not cover his PET scan. The appellate court noted that the defendant's attorney's failure to object at trial to this testimony suggests that he did not perceive the information to be prejudicial and deprived the judge an opportunity to weigh the evidence. Further, without the objection the defendant had to show that the alleged error was a "plain error" that was clearly capable of producing an unjust result. The appellate court found the testimony relevant and admissible as it "explained why Steven returned to work just four months after his surgery and before he had fully recovered. Without this evidence, the jury might have inferred that Steven had fully recovered at that time, and discounted his damages accordingly. The judge also correctly instructed the jury as to the basis for awarding compensatory damages, and specifically instructed that 'sympathy must play no role or part in your thinking.' In the present case, the evidence as to the problems plaintiffs experienced in obtaining coverage from their insurance carrier was relevant as to why Steven had not undergone any further treatment, as the judge properly charged. Moreover, any prejudice to defendant was cured by the trial judge's cautionary instruction regarding coverage of the PET scan."

Read the full decision here.

If you have questions about how this case may impact your business, please contact:

- Joseph J. Welter (716.566.5457; jwelter@goldbergsegalla.com)
- Jason A. Botticelli (716.566.5460; jbotticelli@goldbergsegalla.com)
- Or another member of Goldberg Segalla's Toxic Torts Practice Groups

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