Products Liability Law Daily Wrap Up, WARNINGS ISSUES—ASBESTOS—Del. Super.: Spouse fails to establish maker's duty of care in take-home asbestos case, (Feb. 7, 2017)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

A manufacturer of asbestos paper owed no duty of care to the wife of a worker who brought home asbestos fibers on his work clothes to which his wife was exposed causing her to develop lung cancer, a Delaware superior court ruled. The findings were consistent with two Delaware Supreme Court decisions involving liability in take-home asbestos cases (*Ramsey v. Atlas Turner Ltd.*, February 2, 2017, Medinilla, V.).

The wife, who died of lung cancer, alleged through her estate that Georgia Southern University Advanced Development Center (Herty or manufacturer) negligently failed to warn her of the risks of take-home exposure inherent in its asbestos paper product used at her husband's workplace from 1976 to 1980. Her husband began working at Haveg Industrial Plant (Haveg) in 1968, and from 1973 to 1979, he worked in the company's "Chemtite Department," where he manufactured pipe and pipe fittings using resin-soaked asbestos paper. From 1976 until 1980, Herty manufactured and supplied asbestos paper to the worker's employer. Haveg purchased tons of Herty's asbestos paper during this period; the employer also purchased asbestos paper and asbestos-containing products from other manufacturers while the worker worked in the Chemtite Department.

The wife alleged that her husband's clothes were laden with asbestos dust from Herty's paper product during his work fashioning pipe and pipe fittings. She shook out his work uniform, which allegedly was caked in debris from Herty's product and washed it twice a week. She alleged that her household exposure to asbestos from laundering her husband's clothes was the proximate cause of her lung cancer; and she contended that the paper manufacturer owed her a duty to warn because it was foreseeable that her husband would bring home asbestos debris that adhered to his uniform and unwittingly expose her to the debris when she washed his clothing. She claimed that this failure to warn her of the risk was the proximate cause of her lung cancer.

Motion for summary judgment. The manufacturer moved for summary judgment, arguing that it did not owe the wife a duty of care, and that her allegations were claims of nonfeasance that required her to identify a "special relationship" before liability could attach to its alleged failure to act. Moreover, the manufacturer asserted that the wife could not identify a "special relationship" and that no such relationship existed. The wife countered that her claims were of misfeasance—*i.e.*, affirmative acts of negligent conduct—and that the manufacturer owed her a duty of care to warn her of the risks of take-home asbestos exposure because it knew or should have known that its product would adhere to the clothes of employees and expose household members. She asserted that the issue of duty in this case should be analyzed in the context of traditional product liability and negligence jurisprudence.

Application of *Price* and *Riedel*. The court stated that the central issue on summary judgment was whether Delaware Supreme Court cases, *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011), and *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009), applied to the facts of the case. Both cases dealt with negligence claims against the employer of the plaintiffs' spouse. The paper manufacturer argued that the cases were applicable to a spouse's claim of take-home asbestos exposure against a manufacturer who supplied an asbestos product to the employer of the plaintiff's spouse. The wife, however, disagreed because the paper manufacturer was not her husband's employer.

The state high court in *Price* held that an employer in Delaware does not owe a duty of care to its employee's spouse for failing to act to protect the spouse from an unreasonable risk of harm on its premises. The supreme

court analyzed the case consistent with *Riedel,* finding the plaintiff-spouse alleged claims of nonfeasance and that no special relationship existed between the parties. In both cases, the court held that the employer's failure to warn or to protect the employee's spouse represented nonfeasance, and that the defendant-employers did not "create a new risk of harm" to the plaintiff-spouses (misfeasance). Both decisions, the current court noted, seemed to rest implicitly on the employer's role as a landowner and the employee's status as an invitee onto the employer's property. Thus, the employer's alleged failure to warn or make safe a dangerous condition on its property constituted alleged misfeasance towards its employees. This reasoning did not extend to the imposition of a duty on the employer to the employee's spouse, who did not enter onto the employer's property. As such the employer's alleged "conduct" toward the employee's spouse constituted claims of nonfeasance. Both *Price* and *Riedel* held that the employer did not engage in affirmative conduct that worked positive injury on the spouses of its employees. Instead, the employers failed to act to protect a distant third party who never entered onto their property. Further, in both cases, the state supreme court found that the plaintiff-spouses, on their claims of nonfeasance, failed to show a special relationship between themselves and their husbands' employers. Under *Price*, the current court summarized, the employer owes no duty of care for failing to take steps to protect the employee's spouse from a dangerous condition on its property and transported home unless the plaintiff identifies a special relationship between the parties.

Ruling. According to the court, the wife failed to provide sufficient authority to support her argument that a general duty of care extended to the context of take-home asbestos exposure cases involving manufacturers. The court ruled that the current case fit within the legal parameters and rationale of *Price* and *Riedel*; and that consistent with both of those cases, the wife had alleged claims of nonfeasance. As such, the paper maker did not owe her a general duty of care. The wife's allegations—that the manufacturer chose not to: adequately warn the plaintiff; adequately test, research, and investigate; adequately package, distribute, and use its product; and take adequate steps to remedy its alleged failures—"functionally mirror[ed]" the nonfeasance allegations in the two state supreme court cases.

Because the court found that the wife alleged nonfeasance claims, she had to identify the existence of a special relationship between herself and the paper manufacturer before liability could be imposed for the manufacturer's alleged nonfeasance. However, the wife failed to identify any legally cognizable special relationship between herself and the paper manufacturer. Thus, without sufficient evidence to rebut the manufacturer's argument that no genuine issue of material fact existed on the issue, the court held that the manufacturer met its burden of proving that no duty of care existed between the parties and that it was entitled to summary judgment.

The case is C.A. No. N14C-01-287 ASB.

Attorneys: Thomas Crumplar (Jacobs and Crumplar, P.A.) for Elizabeth Ramsey. Eileen M. Ford (Marks, O'Neill, O'Brien, Doherty & Kelly, PC) for Georgia Southern University Advanced Development Center.

Companies: Georgia Southern University Advanced Development Center

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