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## Ruling gives asbestos plaintiffs opening to present their arguments

The Delaware Supreme Court recently redefined the scope of manufacturer liability in take-home asbestos exposure cases by deciding an employee's spouse, harmed by take-home asbestos exposure, may sue the asbestos product manufacturer if it failed to provide warnings to the spouse's employer.

In *Ramsey v. Georgia Southern University Advanced Development Center*, No. 305, 2017, 2018 Del. LEXIS 302, (June 27, 2018), the estate of Dorothy Ramsey alleged that for half of the 24 years her husband spent working at Haveg Industries, he regularly handled asbestos products that generated asbestos dust that settled on his work clothes.

Dorothy Ramsey did her family's laundry throughout this period and regularly washed her husband's asbestos-covered work clothes. Before her 2015 death from lung cancer, Ramsey filed suit against her husband's employer and two manufacturers alleging the manufacturers failed to provide adequate packaging in the distribution and use of asbestos to minimize the escape of asbestos fibers. Further, they failed to take adequate measures to remedy their failures.

The manufacturers moved for summary judgment relying on previous rulings from the court on cases with similar facts: *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) and *Price v. E.I. DuPont de Nemours & Co.*, 26 A3d 162 (Del. 2011).

The *Ramsey* court's analysis began by examining the misfeasance/nonfeasance reasoning underpinning the decisions in *Riedel* and *Price*, noting that *Price* found the facts of *Riedel* unmistakably explained a claim establishing nonfeasance — not misfeasance.

However, the *Riedel* court concluded that nonfeasance is a vastly different theory of negligence than misfeasance, and because the plaintiff pleaded the former at trial, she was procedurally barred from pursuing the latter for the first time on appeal.

In *Riedel*, the plaintiff alleged "negligence as a failure either to prevent Mr. Riedel from taking

asbestos home, or to warn the Riedels of the dangers associated with Mr. Riedel wearing his work clothes home from the workplace." The *Price* majority found that the plaintiff's allegations in *Riedel* created a reasonable inference that the defendant negligently failed to either prevent the plaintiff from taking asbestos home or warn of the dangers of wearing work clothes home.

That failure to act — according to the *Riedel* court — and cited favorably by *Price* — was pure nonfeasance. Lastly, the *Price* majority concluded that "nonfeasance and misfeasance describe substantively different conduct" such that one cannot constitute the other.

Therefore, the *Price* court — relying on *Riedel* — concluded that the defendant's failure to prevent or warn did not rise to the level of misconduct necessary for a claim of misfeasance.

The *Ramsey* court focused on the dissent in *Price* that argued *Riedel* "never decided whether [Lillian] Riedel's claim was properly characterized as nonfea-

sance"; rather, the *Price* majority reasoned from the application of a procedural rule "into a decision on the very issue *Riedel* did not consider — whether a so-called 'take-home' asbestos claim is properly characterized as a claim of misfeasance or nonfeasance."

The *Price* dissent next analyzed misfeasance/nonfeasance, using examples from the Restatement and Prosser and Keeton's treatise to establish an applicable framework.

Under that framework, the dissent in *Price* asserted that nonfeasance exists when a person is imperiled through no fault of another, and absent a special relationship, the law does not create a duty to act on a risk of harm a person did not create. On the oth-

### TOXIC TORT TALK



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er hand, the dissent continued, misfeasance results when an affirmative act creates a new risk of harm.

The *Price* dissent applied its analysis to the undecided issue before it and concluded the release of asbestos in the workplace

sons like her against an event, serious asbestos-related harm, i.e., asbestos-related lung cancer, that a reasonably prudent [manufacturer] would protect against?"

The court overruled *Riedel* and *Price* and held that Dorothy Ramsey was a plaintiff foreseeably affected by the manufacturers' actions and should be entitled to recover, but the court circumscribed its holding to limit manufacturer's liability.

The court observed that employers have a common-law duty to provide a safe working environment for their employees and that it is impractical for a manufacturer to warn employees where there is no relationship.

Therefore, the court concluded, a manufacturer must exercise a reasonable duty of care. A manufacturer exercises this duty by "providing adequate warnings and safe laundering instructions to the employer so it could provide this information to its employees in a manner tailored to their work circumstances and exposure to asbestos products."

The court emphasized that the manufacturer's duty is "dependent on whether or not the manufacturer had knowledge of the hazards associated with the product," and where knowledge exists, "liability is only imposed where the manufacturer had no reason to think that the users of its products would recognize the danger and it fails to exercise reasonable care in warning users of the product's dangerous nature."

Additionally, the court applied Delaware's "sophisticated purchaser" defense to further cabin manufacturer liability by allowing for reliance on the employer/purchaser's duty to protect its own employees from harm when the employer/purchaser possess equal knowledge of the products dangers.

Therefore, the court concluded, the risk of harm from take-home asbestos exposure when laundering asbestos-covered clothing is reasonably foreseeable, and a plaintiff in Dorothy Ramsey's position has a viable claim when a manufacturer fails to warn and provide safe laundering instruction to an employer, exposing its employees to the asbestos product.

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