HINSHAW

Alerts

Defendants Chalk up Another Victory on Take-Home Asbestos Exposure in Illinois

August 2, 2011
Hinshaw Alert

In business, investing, and apparently in secondary exposure take-home asbestos cases, timing is everything, especially in Illinois. This point was recently made clear by the Fourth District, Illinois Appellate Court in *Holmes v. Pneumo Abex, LLC, et. al.,* No. 4-10-0462 (4th Dist. 2011).

The Fourth District held in *Holmes* that several asbestos defendants owed no duty to a decedent via her husband's exposure to asbestos at his workplace prior to 1965. The decedent, a housewife, was allegedly exposed to asbestos from her husband's clothing upon his return home from work at his employer's factory between 1962 and 1963. The decedent regularly washed her husband's clothing when he returned from the factory. As such, she alleged that she was exposed to asbestos fibers and eventually developed mesothelioma when she was 93 years old. Ultimately, she died of that disease in April 2006.

The decedent's estate proceeded to trial against several asbestos defendants under a civil conspiracy count. The estate claimed that several of the defendants owed the decedent a duty of care in relation to her exposure to the asbestos fibers her husband allegedly brought home. Defendants contended they owed her no such duty under Illinois law. In Illinois, a duty will be imposed upon a party pursuant to *Marshall v. Burger King,* 222 Ill. 2d 422 (2006). Under *Marshall*, a court considers the following factors in imposing a duty: (1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of burden of guarding against the injury; and (4) the consequences of placing a burden on the party.

The *Holmes* court determined that defendants did not owe decedent a duty in relation to her exposure because there was a lack of foreseeability as to her injuries. The court noted that the first studies regarding secondhand, take-home asbestos exposure risks were not done until around 1965. Accordingly, because the decedent's husband worked for the employer from 1962 to 1963, it was not reasonably foreseeable at the time that a worker could work with or around asbestos-containing products at his workplace and arrive at home with sufficient levels of asbestos fibers on his person or clothing to create a reasonably foreseeable risk of exposure to a family member or other nearby person. The court concluded that the remaining defendants did not owe a duty of care to the decedent and dismissed the claims of civil conspiracy against them.

Attorneys

Craig T. Liljestrand

Service Areas

Complex Tort & General Casualty

The *Holmes* court largely followed *Nelson v. Aurora Equipment Co.,* 391 Ill. App. 3d 1036 (2009), where the Second District, Illinois Appellate Court determined that a premises-owning defendant in an asbestos case did not owe a duty to a plaintiff who had no contact with the premises but was exposed to asbestos fibers that were carried home on contaminated clothing. The *Nelson* court concluded that no duty existed because there was no relationship between plaintiff and defendant's premises. However, neither the reasonable foreseeability of exposure, nor the time of exposure were examined in that opinion, and a premises liability suit necessarily turns on direct exposure to a physical area. Accordingly, while the holding in *Nelson* was certainly relevant and on point in *Holmes*, it could be distinguishable from the facts and circumstances in the latter case.

In contrast to *Holmes* and *Nelson*, the Fifth District, Illinois Appellate Court determined in *Simpkins v. CSX Corp.,* 401 Ill. App. 3d 1109 (2010), that an employer owed a duty to an employee's immediate family members who made take-home asbestos exposure claims. As such, a split in the Illinois Appellate Districts has developed as to whether any duty is owed to a subject of the take-home asbestos exposure. Nonetheless, the turning point of analysis in *Holmes* appears to be the time of exposure for the subject of the take-home asbestos exposure. It seems that any exposure occurring before 1965 will not be considered reasonably foreseeable under *Holmes*.

In light of *Holmes*, courts will have to now consider whether 1965 is a bright line for considering the foreseeability of risk to a subject of take-home asbestos exposure or whether there is some room for defendants to expand the analysis beyond that date. Also unclear is whether courts seeking to apply *Holmes*will consider every exposure occurring on or after January 1, 1966 as reasonably foreseeable, and so find a duty as to defendants in those cases. All that can be reasonably anticipated is that this issue of time of exposure for take-home exposures is far from a closed matter. Fortunately, it is drifting in favor of defendants. This issue is currently under consideration by the Illinois Supreme Court.

For more information, please contact Craig T. Liljestrand or your regular Hinshaw attorney.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.