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Illinois Appellate Court Finds a Duty is Owed by Employer in Take-Home Asbestos Exposure Cases

June 21, 2010
Hinshaw Alert

The Illinois Appellate Court, Fifth District, recently rendered a surprising decision, in which it found that a duty is owed by an employer to protect the family of its employee from the dangers of asbestos brought home on the employee's work clothes. *Simpkins v. CSX Corporation,* et al., No. 5-07-0346 (June 10, 2010) (Simpkins Decision).(To view the Simpkins Decision, click on **Download PDF**.) According to the Complaint, which was filed in the Circuit Court of Madison County (Illinois), Ronald Simpkins was exposed to asbestos when he worked as a steelworker, welder, railroad fireman and laborer for defendant B&O Railroad from 1958 - 1964. Annette Simpkins, his wife, developed mesothelioma cancer as a result of washing her husband's work clothes. She died in April 2007.

B&O Railroad moved to dismiss under Section 2-615 of the Illinois Code of Civil Procedure on the ground that an employer has no duty to warn or protect its employee's family members from the dangers of asbestos brought home on the work clothes of the employee. When confronted with a Section 2-615 motion, a court cannot consider affidavits or any other supporting material. Instead, the court must look solely at the pleadings at issue. B&O Railroad argued that no Illinois court has ever held that an employer owed a duty to its employee's family members from take-home asbestos exposure. Plaintiff contended that it was clearly foreseeable that an employee's spouse would handle his work clothes covered with asbestos. Further, plaintiff noted that requesting the court to recognize a duty where no case is directly on point is not the same as asking the court to create a new cause of action.

Pursuant to Illinois law, whether a duty exists depends on whether there is a *relationship* among the parties so that the law imposes upon the defendant an obligation to act in a reasonable manner. According to the court, a "relationship" need not equate to a contractual, familial or other special relationship. Four key factors determine whether such a duty exists: (1) the foreseeability of the harm; (2) the likelihood of the injury; (3) the magnitude of the burden involved in guarding against the harm; and (4) the consequences of placing on the defendant the duty to protect against the harm. The appellate court found two out-of-state cases,*Satterfield vs. Breeding Insulation Co.,* 266 S.W.3d 347 (Tenn. 2008) and *Olivo vs. Owens-Illinois, Inc.,* 186 N.J. 394, 895 A.2d 1143 (N. J. 2006), helpful in analyzing the issue.

In *Satterfield,* a 25-year old woman developed mesothelioma cancer after being

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exposed to asbestos from her father's work clothes. The Tennessee Supreme Court stated "that to find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure – assuming the exposure is both foreseeable and preventable without undue burden – merely because the others do not have any particular relationship with the employer would defy logic and lead to grossly unfair results." Similarly, the *Olivo* court found that when considering the foreseeability of the harm, "it requires no leap of imagination to presume that during the decades of the 1940's, 50's, 60's 70's and early 1980's . . . Anthony's soiled work clothing had to be laundered and his employer should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks."

The *Simpkins* court next addressed the four Illinois duty factors. Initially noting that while foreseeability is an important factor, it is not the only one involved, the court easily found that it was foreseeable that Annette Simpkins would have laundered her husband's work clothes which were covered with asbestos. Next, the court found that the likelihood of developing mesothelioma cancer from anything other than incidental exposure was not remote. Third, the burden of guarding against take-home asbestos exposure was not unduly burdensome when compared to the nature of the risk to be protected against. Finally, the scope of potential liability to employers will be limited by the foreseeability of the harm. As an example of this, the court agreed with the *Olivo* court, which had stated, "it is not necessarily foreseeable that any person who shares a cab with the asbestos worker would inhale asbestos dust and develop mesothelioma." It should be noted that the defendant in *Simpkins* attempted to argue that the harm from take-home asbestos was not foreseeable until the Occupational Safety and Health Administration (OSHA) introduced regulations to prevent take-home exposure in 1972. Because it could not look beyond the pleadings, the court could not consider those fact-specific arguments made by defendant.

The *Simkins* court concluded that Annette Simpkins was entitled to the exercise of care (i.e. duty) from her husband's employer. "We decide today only that employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure. Should the proper case arise, we can consider whether the duty extends to others who regularly come into contact with employees who are exposed to asbestos-containing products." The court made clear that its decision only focused on the issue of duty, not on the subjects of breach or proximate cause. Those factual matters are for the jury to still decide.

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

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