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Illinois Stops Civil Conspiracy Claims In Asbestos Litigation

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Hinshaw Alert

In *Gillenwater v. Honeywell International, et al.*, 2013 WL 5273355 (Ill.App. 4 Dist.) (Sept. 18, 2013), the Illinois Appellate Court for the Fourth District affirmed the Circuit Court of McLean County, granting Defendant's motions for judgment notwithstanding the verdict on the Plaintiff's conspiracy claims and granting Defendant's motion for summary judgment on the loss of consortium claim.

The Plaintiff, Charles Gillenwater, suffered from mesothelioma, which he contracted by inhaling airborne fibers from asbestos-containing products. He brought a personal injury action against Defendants, Honeywell International, Inc. (Honeywell); Owens-Illinois, Inc. (Owens-Illinois); and Pneumo Abex, LLC (Abex), all manufacturers of asbestos-containing products. He alleged that these companies had been in a civil conspiracy with one another to conceal the respiratory dangers of asbestos, and as an alternate theory, he alleged that Owens-Illinois entered into the same conspiracy with a nonparty, Owens-Corning Fiberglas Corporation (Owens-Corning), the manufacturer of Kaylo, an asbestos-containing insulation to which he was exposed during his career as a pipefitter.

Mr. Gillenwater testified that he became a pipefitter in 1972 and continued until 2007 or 2008. Both testified that the insulation used by the thermal insulation contractor, Sprinkmann, was usually an "Owens-Corning" brand. Bill Tay, the other pipefitter, testified that no one knew that the insulation contained asbestos. The trial court entered summary judgment in Defendant's favor on the loss of consortium claim. The case went to trial on the other claims and the jury returned a verdict in Plaintiff's favor. The jury awarded Mr. Gillenwater $9.6 million in compensatory damages and in punitive damages, $20 million against Honeywell, $40 million against Owens-Illinois, and $20 Million against Apex.

However, the Defendants filed motions for judgment notwithstanding the verdict, and the trial court granted these motions as to Honeywell, Owens-Illinois, and Abex. Mr. Gillenwater appealed the trial court's grant of the motions for judgment notwithstanding the verdict and Mrs. Gillenwater appealed the trial court's grant of summary judgment on her loss of consortium claim.

The court began its analysis on the conspiracy claims by identifying the active wrongdoer as Owens-Corning under section 388 of the *Restatement (Second) of Torts*. This section defines an "active wrongdoer" as "[o]ne who supplies directly or through a third person a chattel for another to use is subject to

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liability . . . if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." *Restatement (Second) of Torts* §388 (1965). The court found that Owens-Corning supplied Sprinkmann a chattel to use, namely, Kaylo; it was reasonably foreseeable to Owens-Corning that pipefitter employees would be near the insulation and be endangered by the probable use; Owens-Corning knew of the danger that asbestos could injure the lungs over time because of employee complaints of itchy skin due to fiberglass and medical articles from Owens-Illinois that indicated that asbestos was potentially deadly to breathe; Owens-Corning sold Kaylo anyway; and Owens-Corning should have known that its effects were not widely known because of its widespread use. The court found that Defendants, Owens-Illinois, Honeywell, and Abex, were not active wrongdoers because none of their products were a proximate cause of harm to Mr. Gillenwater. Next, the court identified precise wrongdoing of the active wrongdoer, Owens-Corning, as supplying a "defective product," which it defined as a product "when sold, it is unreasonably dangerous because it lacks an adequate warning of its inherent dangers." Citing *Hammond v. North American Asbestos Corp*., 105 Ill.App.3d 1033, 1037 (1982).

Plaintiffs argued that although they had no direct evidence to show that Defendants "planned, assisted, or encouraged" the active wrongdoer, Owens-Corning, to distribute Kaylo without adequate warning, they presented enough circumstantial evidence to show this.

The court followed the clear and convincing evidence standard to determine whether a conspiracy was proven from the circumstantial evidence presented by the Plaintiffs. Looking to *McClure v. Owens-Corning Fiberglas corp.*, 298 Ill.App.3d 591 (1998), the court analyzed whether the circumstantial evidence reasonably tended to exclude the possibility that Owens-Corning and Owens-Illinois acted independently in their parallel conduct. The court reasoned that since consciously parallel behavior is susceptible to a non-conspiratorial explanation, consciously parallel behavior is valid circumstantial evidence of a conspiracy, but it is not, by itself clear and convincing evidence of a conspiracy. *Id.* at 140. The court explained that the innocent-exception rule from *McClure* applied to this case because Owens-Corning could have seen Defendants distributing their own asbestos-containing products without a warning label, and Owens-Corning, on its own, without any advice or encouragement from them, could have decided to follow their example because it wanted to make money. Thus, the court reasoned that there needed to be a valid "plus factor," a factor over and above parallel conduct, that could be indicative of a conspiracy. Citing *Petruzzi' IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc*., 998 F.2d 1224, 1232 (3d Cir. 1993); *McClure*, 188 Ill.2d at 135-36.

The court ruled out both Honeywell and Abex as ever interacting with Owens-Corning in a way to plan, assist, or encourage Owens-Corning's marketing of Kaylo without a warning label. However, Plaintiff presented three instances of circumstantial evidence to serve as "plus factors" in order to prove that Owens-Illinois "planned, assisted, or encouraged" Owens-Corning: (1) Owens-Illinois and Owens-Corning had shared directors on their boards between 1938 and 1948; (2) Owens-Illinois owned stock in Owens Corning in 1959; and (3) Owens-Illinois and Owens-Corning had a distributorship agreement from 1953 to 1958, where Owens-Illinois manufactured Kaylo and Owens-Corning sold or marketed it.

The court held that having shared directors was not a valid "plus factor" because it did not "reasonably tend to exclude the possibility that each acted independently in their parallel conduct," and Owens-Corning was not in the asbestos business during the time when it shared directors with Owens-Illinois. In addition, the court held that owning stock in a company in 1959 revealed no information on the relationship the two companies had in the 1970's, when Mr. Gillenwater was exposed to Kaylo.

On the other hand, the court held that the distributorship agreement between the two companies amounted to Owens-Illinois' encouragement of Owens-Corning to sell Kaylo and keep quiet about the danger of Kaylo because such silence was essential to the marketing and selling of Kaylo. The court determined that both companies knew about the respiratory threat posed by asbestos given that the study done by Saranac Laboratory had discovered that prolonged exposure to Kaylo dust caused asbestosis in the lungs of guinea pigs, and that a medical doctor concluded that "Kaylo on inhalation [was] capable of producing asbestosis and [had to] be regarded as a potentially hazardous material." *Gillenwater*, 2013 WL 5273355 at *14.

However, the court determined that the conspiracy ended in 1958, at the end of the distributorship agreement, when Owens-Illinois sold its Kaylo division to Owens-Corning. In this case, the court reasoned that the object of the conspiracy was accomplished in 1958 and thereafter, there was no evidence for supposing that Owens-Illinois cared whether Owens-Corning sold any more Kaylo.

In addition, the court reasoned that by selling the Kaylo division to Owens-Corning in 1958, Owens-Illinois took an "affirmative action inconsistent with the object of the conspiracy" because it would be impossible for Owens-Corning to continue selling Kaylo manufactured by Owens-Illinois. Citing *U.S. v. U.S. Gypsum Co*., 438 U.S. 422, 464-65 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment"). Analogizing to *U.S. v. Steele*, 685 F.2d 793 (3d Cir. 1982), the court held that Owens-Illinois' silence, even after selling the Kaylo division, did not affect Owens-Illinois' withdrawal from the conspiracy. In *Steele*, the court held that the defendant in that case affirmatively communicated to his co-conspirators that he no longer wished to participate in the conspiracy to bribe an official, and that even though the defendant did not confess to the authorities, "confessing was only one way, not the exclusive way, of withdrawing from a conspiracy." *Id*. at 803-804. The court in *Gillenwater* further held that Owens-Illinois was not liable for the Kaylo that Owens-Corning continued to sell after 1958 because Owens-Illinois was not the manufacturer, and upon selling the division to Owens-Corning, lost its power to "stop the assembly line."

Accordingly, the court held that looking at all the evidence in light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, the evidence overwhelmingly favored Defendants that no verdict against them could ever stand.

In addition, the court rejected the Plaintiff's attempted distinction between parallel conduct and "individual conduct." Plaintiffs argued that unless various manufacturers behaved identically, right down to the specific facts, such instances were individual conduct rather than parallel conduct and thus qualified as "additional evidence" over and above parallel conduct. The court held that even though the conduct of each Defendant was factually different in its particulars, the conduct of the Defendants was parallel in that it generally could be described as the same.

Accordingly, the Appellate Court affirmed the trial court's judgment.

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

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