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Newsletters

Products Liability Bulletin - August 2010

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Kelly Formet v. The Lloyd Termite Control Co., No. G042436 (Fourth District, Div. Three June 10, 2010)

Sandra Caskey inherited a residential property owned by her mother for more than 40 years. She retained defendant Lloyd Termite, a licensed pest inspection company, to perform a Wood Destroying Pests and Organisms Report. The resulting report noted termite damage to the main house and the support posts on the stair landing of a connected apartment. Lloyd Termite recommend that Caskey fumigate the property for the dry wood termites and have a licensed contractor make the necessary structural repairs caused by the termite damage. Caskey paid Lloyd Termite for its fumigation services, but did not hire anyone to make the structural repairs.

Caskey sold a portion of the property. Plaintiff, a guest visiting the new owner, leaned against the balcony railing, fell 10 feet to the ground and was consequently injured. Lloyd Termite had not noted in the termite report any damage to the specific balcony railing that gave way. Plaintiff sued Lloyd Termite, among others. In plaintiff's negligence action, he alleged that defendant should have discovered and reported the dry rot damage in the railing.

The trial court granted Lloyd Termite's motion for summary judgment on the ground that the company had no duty to plaintiff. The appellate court affirmed. The court relied on *Bily v. Arthur Young & Co.,* 3 Cal. 4th 370 (1992), in which the court there held that a provider of information in a commercial context is not liable to third parties who are neither the beneficiaries of, nor parties to, the contract.

Bily involved investors in a computer company, who sued defendant accounting firm for an allegedly negligent audit of the company on which they had based their decision to invest in the company. In denying that the accounting company owed a duty to plaintiffs, the *Bily* court held that liability should be narrowed for suppliers of information in commercial transactions. The Formet court held that while *Bily* involved the liability of accountants to third parties, its reasoning applied equally to home inspection companies.

In *FSR Brokerage, Inc. v. Superior Court,* 35 Cal. App. 4th 69 (1995), the reasoning of *Bily* was extended beyond economic injury to include personal

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injury. The court in *FSR Brokerage* held that a realtor owed no duty to injured guests to disclose that a collapsed balcony was not built to code. In upholding the trial court's grant of summary judgment, the *Formet* court also relied on *Coldwell Banker Residential Brokerage Co., Inc. v. Superior Court,* 117 Cal. App. 4th 158, 166 (2004), in which the court held that a real estate broker owed no duty to the son of a property buyer for an alleged failure to disclose the presence of toxic mold.

The *Formet* the court stated that it could not guess the intentions of the parties as to whether Lloyd Termite's inspection was used primarily for an economic evaluation of the property, to determine its sales value, or as a safety inspection. Instead, the court found that when the premises owner inherited the property, she retained defendant pest control company, which determined the need for and performed a fumigation. The court held that because a pest inspection report and termite fumigation are commercial transactions, the duty owed should be limited to the intended beneficiary, the property owner, and not a third party such as plaintiff.

The *Formet* court examined the nexus between Lloyd Termite's conduct and plaintiff's fall. The court held that defendant's statutory duty was to discover and disclose dry rot damage. Even if Lloyd Termite was negligent in carrying out its inspection, the court held that Lloyd Termite's alleged negligent inspection was not directly connected to the injury suffered. Lloyd Termite had observed damage in the patio area where plaintiff fell and recommended that Caskey hire a licensed contractor to make the necessary repairs. The court found that Lloyd Termite did not exercise direct control, especially in view of the fact that it was not hired to repair the structural damage caused by the dry rot disclosed in its pest control report. Thus, the court held that while there was a connection between Lloyd Termite's conduct and plaintiff's injury, it was an attenuated one.

The court found no support for plaintiff's argument that moral blame rested with Lloyd Termite for his injuries. The court stated that the only factor for moral blame plaintiff may have established — constructive knowledge for the consequences — would suggest that any negligently performed property inspection with a safety component would entail moral culpability, which proposition the court refused to support.

In balancing the benefits with the burden of extending the duty of a licensed pest control company to third parties, the court held "Common sense suggests that additional liability imposed upon licensed pest control inspectors would ultimately drive up the costs to homeowners for an inspection."
The appellate court affirmed judgment for Lloyd Termite with recovery of its costs on appeal.

For more information, please contact your regular Hinshaw attorney.

Ohio Supreme Court Bars All Tort Liability Against Ohio Premises Owners Where the Asbestos Exposure Did Not Occur at the Owner's Property

[The following article first appeared in the June 29, 2010, issue of Hinshaw's "Toxic Tort Alert."]

The Ohio Supreme Court recently held that a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property, unless the exposure actually occurred at the owner's property. *Boley v. Goodyear Tire & Rubber Co.,* Slip Opinion No. 2010-Ohio-2550 (June 10, 2010). As a result, essentially all take-home/household asbestos exposure cases will be barred from proceeding against premises owner defendants in Ohio.

Plaintiff alleged that Mary Adams was exposed to asbestos when she laundered her husband's work clothes inside the family home. As a result of Ms. Adams' exposure to asbestos dust, she developed mesothelioma cancer. Ms. Adams' husband, Clayton, worked as a pipefitter for the Goodyear Tire & Rubber Co. (Goodyear) at its St. Marys,

Ohio, facility from 1973 to 1983. His occupational exposure to asbestos at Goodyear caused him to bring asbestos dust home with him on his work clothes.

Goodyear moved for summary judgment based on Ohio Revised Code Section 2307.941(A)(1), arguing that a plain

reading of the statute mandates that premises owners are “not liable for any injury to any individual resulting from asbestos exposure unless the individual’s alleged exposure occurred while the individual was at the premises owner’s property.” Plaintiff argued that Section 2307.941(A)(1) did not apply to her claim because it pertained only to asbestos exposure occurring on the premises owner’s property, and Ms. Adams’ exposure to asbestos took place at home rather than on Goodyear’s property. Plaintiff also argued that Section 2307.941(A)(1) did not apply to “take-home” asbestos exposure. The trial court granted summary judgment in favor of Goodyear. The Ohio appellate court affirmed.

On appeal, the Ohio Supreme Court was asked to consider whether Section 2307.941(A)(1) applied to all claims by individuals seeking to recover from premises owners for asbestos exposure originating from asbestos on the owner’s property. The Court looked to the legislative intent of Section 2307.941(A)(1), and stated, “when its meaning is clear and unambiguous, we apply the statute as written.” The Court determined that the legislative intent behind Section 2307.941 (A) was clear in that it barred tort liability for asbestos claims developed from exposure that did not occur at the premises owner’s property. The term “asbestos claim” as used in the statute is defined as “any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos.” The Court consequently found that the Ohio General Assembly clearly intended to limit the liability of a premises owner to instances where the exposure occurred only at its property. As such, because Ms. Adams’ exposure to asbestos did not occur at Goodyear’s property, Ohio law precluded any liability in tort against Goodyear.

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

Illinois Court Reviews Legal Framework for Analyzing Products Liability Cases

The Illinois Appellate Court recently revisited and expounded upon the differences between the two types of products liability claims — strict liability and negligence — and reiterated that the concept of fault provides the key distinction between them. *Salerno v. Innovative Surveillance Tech., Inc.,* No. 1-09-1402, 2010 WL 2675003 (Ill. App. Ct. 1st Dist. June 30, 2010). The case arose out of injuries sustained by plaintiff after he struck his head on a periscope mounted on the ceiling of a surveillance van that his employer had procured from defendant. The court set forth the three different theories of liability under which a strict products liability claim can proceed under Illinois law — design defect, manufacturing defect and failure to warn — and also set forth the standards for establishing a strict products liability claim under each. It also reiterated the Illinois Supreme Court's prior rejection of the argument that a product's open and obvious risk of harm is an absolute defense to a strict liability claim based on the defective design theory, and noted that this is only one factor that should be considered in a risk-utility analysis.

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