RHODE ISLAND LAWYERS WEEKLY

Asbestos defendant wins summary judgment motion

Attorney calls decision 'rare'

By: Reni Gertner April 3, 2014

A supplier of asbestos-containing brakes has won a contested motion for summary judgment — the first such victory in Rhode Island in at least a decade, according to the attorney who represented the defendant.

The plaintiff claimed that her husband, Laverne E. Hostetter, died of malignant pleural mesothelioma due to exposure to asbestos when he was a heavy equipment mechanic.

Hostetter's deposition testimony suggested that he breathed in asbestos while replacing brakes and using compressed air to clean out brake drums, in addition to working near others who worked on the brakes.

However, he was unable to state with certainty that he ever came into contact with asbestos-containing products produced by the defendant, ArvinMeritor, as opposed to other manufacturers' asbestos-containing products.

The plaintiffs sued several defendants including ArvinMeritor, the successor company to Rockwell, one of four suppliers of front and rear air brakes for Ford trucks during the 1970s, and one of at least two suppliers of brake parts for Mack during the same timeframe.

The defendant moved for summary judgment.

The plaintiffs contested the motion, arguing that a factfinder could reasonably infer it was more likely than not that Hostetter worked with and around the defendant's asbestos-containing products during his years as a mechanic.

But Superior Court Presiding Judge Alice B. Gibney, who handles all asbestos cases in the state, disagreed.

"Accepting the facts presented in Plaintiff's evidence as true, this Court is unable to infer 'to the exclusion of other reasonable inferences' that Hostetter came into contact with Defendant's asbestos-containing products. … [I]n order to survive Defendant's summary judgment motion, Plaintiff's circumstantial evidence "'must establish that it is reasonably probable, not merely possible, that the [D]efendant was the source of the offending product,'"" Gibney wrote.

Here, the plaintiffs' evidence "establishes only that Defendant was one of four brake suppliers for the Ford trucks on which Hostetter worked and one of at least two suppliers for the Mack trucks. … The facts in evidence, therefore, establish only that it is 'merely possible that [D]efendant was the source' of the product that caused Hostetter's mesothelioma."

Anthony J. Sbarra Jr., counsel for defendant ArvinMeritor, spoke in detail about the case with reporter Reni Gertner. Sbarra practices at Hermes, Netburn, O'Connor & Spearing, which has offices in Boston and Providence.

Click here to view the full-text opinion of the case.

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Q. What's noteworthy about this case?

A. This is the first asbestos case in which a contested motion for summary judgment filed by a defendant has been allowed by Judge Gibney in at least 10 years, and probably more than that. … None of the asbestos lawyers I have spoken with can remember a time when Judge Gibney has granted such a motion.

Q. What about the suit led to the unique result?

A. The bottom line is we had the facts and the law on our side. In most asbestos cases, the primary element the plaintiff needs to establish is product identification. When a plaintiff sues a product manufacturer in Rhode Island, the plaintiff has to prove that the defendant made, sold or distributed the actual product that hurt the plaintiff. In this case, the plaintiff worked with trucks manufactured by two different companies for 10 years. The plaintiff was asked what types of brakes he worked with. He said he worked with, or around other people who worked with, Mack and Ford trucks. When he was asked what types of brakes he was using when he was working with the Mack trucks, his answer was Mack brakes. When asked the same question about Ford, his answer was Ford brakes. He never said the word Rockwell and never claimed during his deposition that he worked with Rockwell products. We said he had not proven or even alleged that he worked with Rockwell brakes, so we moved for summary judgment.

Q. Is the fact pattern different from the other asbestos cases that have been filed in Rhode Island over the past decade?

A. Yes, and here is why: Many motions are filed claiming the plaintiff failed to identify the defendant's product. And many times those motions are filed and plaintiffs don't oppose them. They say, "You're right, my client didn't say your product's name." This was different because the plaintiffs opposed the summary judgment motion, and the basis for their opposition was, "We agree with you that he never said the word Rockwell. However, we know through other sources that Rockwell was a supplier of brake parts to Ford and to Mack."

Q. How did that argument fare in court?

A. Plaintiffs' local counsel did a great job arguing that there was evidence that Rockwell was a supplier to Mack and to Ford. They put forth a whole bunch of exhibits that showed that during some periods of time Rockwell supplied brakes to Mack and Ford. And they said given that evidence, it's more likely than not that Hostetter worked with Rockwell brakes.

Q. How did you respond?

A. We said we agree that Rockwell was a supplier of brake parts to Mack and to Ford. There were other suppliers, a lot of competitors out there that were selling brakes. We said that absent a direct product identification, with Hostetter saying he worked with Rockwell brakes, the plaintiffs needed to show not that Rockwell was a supplier but that Rockwell was the only supplier to Mack and Ford.

Q. Why?

A. The reason for that is because they needed to show that the trucks that this guy worked on had Rockwell parts in them and they couldn't show that. We argued that there was a huge difference between the supplier and a supplier. And what we said to the court was that the plaintiffs were building a circumstantial case against Rockwell, but as a matter of evidence, in order to do that, they had to use a "pyramid of inferences." And the first inference they had to draw was that these trucks had Rockwell brakes in them.

Q. What is a pyramid of inferences?

A. There is a Rhode Island case, Mead v. Papa Razzi, which talks about how you can permissibly build a pyramid of inferences. What it says in a nutshell is that the first inference you're asking the jury to make has to be susceptible to only one conclusion, and that if you have an inference that can go either way, then you can't build the pyramid.

Q. How is that relevant here?

A. We said that while it might be easy to infer that Rockwell brakes were in these trucks, it was just as reasonable to infer that they were not. Judge Gibney agreed, because of Mead and because of the evidentiary prohibition against letting juries guess. If it were reasonable to infer that Rockwell made the brakes and just as reasonable to infer someone else did, then the jury is guessing one way or the other. And then when the first inference falls apart, the whole pyramid falls apart like a house of cards.

Q. Was there any point in the case when you thought you might not win?

A. I was concerned because some of the exhibits that the plaintiffs introduced were advertisements, obviously designed to do what ads are designed to do. They exaggerated things and said seven out of 10 trucks on the road had Rockwell in them and that Rockwell was a big player in the truck brake market. I was concerned the plaintiffs would [convince the court that it was therefore] more likely than not [that Rockwell brakes caused Hostetter's illness]. But while we were waiting for the decision, we kept on trying to see how the judge could deny [our motion] and couldn't come up with a way that she could. I kept going back and thinking I don't see how she is going to find against me here when you really pay attention to the law. Plaintiffs' local counsel did a very good job, making this a difficult case.

Q. What can other lawyers learn from the case?

A. In this case, there was this "market-share liability issue" and this "pyramiding of inferences" issue. I treated both of them as equally important, and Judge Gibney clearly focused on [the inferences issue]. My takeaway from this was if you have two arguments and you can't decide which is more important, you had better make both of them. It was an eye-opener for me.

Tagged with: ASBESTOS

Issue: APRIL 7 2014 ISSUE

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