

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

12-6-2012

Summary of Holcomb v. Georgia Pacific, 128 Nev. Adv. Op. 56`

Miriam C. Meyer
Nevada Law Journal

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the **Torts Commons**

Recommended Citation

Meyer, Miriam C., "Summary of Holcomb v. Georgia Pacific, 128 Nev. Adv. Op. 56`" (2012). *Nevada Supreme Court Summaries*. 142.

<https://scholars.law.unlv.edu/nvscs/142>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

TORTS ACTION – CAUSATION STANDARD IN ASBESTOS-INDUCED
MESOTHELIOMA

Summary

An appeal from a district court's grant of summary judgment for manufacturers of asbestos-containing products.

Disposition/Outcome

The Court adopted the test set forth in *Lohrmann v. Pittsburgh Corning Corp.*,² as used in cases where a plaintiff's mesothelioma is alleged to have been caused by exposure to products containing asbestos. Under the *Lohrmann* test, a plaintiff must prove exposure to the defendant's product "on a regular basis over some extended period of time" and "in proximity to where the plaintiff actually worked" to warrant a reasonable inference that the exposure caused the mesothelioma.

Factual and Procedural History

Randy Holcomb (Holcomb) and his wife, appellant Tamara Holcomb, filed a complaint against manufacturers of asbestos-containing products, Kelly-Moore, Kaiser Gypsum, and Georgia Pacific, and against Union Carbide, a seller and supplier and of asbestos to these manufacturers, based on Holcomb's contraction of mesothelioma. They alleged that the mesothelioma was caused by exposure to asbestos contained in those parties' products, which Holcomb used for several years while working as a construction laborer. Before his death, Holcomb testified that he used the manufacturing brands' products on a regular occasion over several years. According to Holcomb, using these products created multiple occurrences of dusty, asbestos-laden conditions at each job site. The appellants presented causation evidence from a pathologist concluding that Holcomb's mesothelioma was attributable to asbestos. Holcomb did not remember using any particular product on any particular job or at any particular time. However, Holcomb had specific memories of using all of the named product brands on a regular basis. A second expert opinion explained that Holcomb's mesothelioma was caused by exposure to asbestos in the manufacturers' joint-compound and in other manufacturers' automotive-friction products.

As relevant to this appeal, the district court granted summary judgment to the defendants, concluding there was insufficient evidence of exposure to allow a jury to find that the defendants' products were substantial factors in causing Holcomb's mesothelioma.

¹ By Miriam C. Meyer

² 782 F.2d 1156 (4th Cir. 1986).

Discussion

Chief Justice Cherry wrote the unanimous opinion for the Court sitting en banc. The Court reviews a district court's grant of summary judgment de novo.³ The appellants argued that the district court erred in granting summary judgment because appellants' expert opined that even low exposures are sufficient to cause mesothelioma. Appellants further contend that they established a threshold amount of exposure by asserting that Holcomb was exposed to asbestos in respondents' products, and they therefore presented a triable issue of material fact. Respondents contend that summary judgment was proper because appellants were not able to demonstrate a minimum level of exposure to asbestos in any particular product.

The Causation Standard in Asbestos-Induced Mesothelioma Cases

Regardless of the cause of action, medical causation and causation through sufficient exposure are necessary elements in proving appellants' case.⁴ While medical causation is not at issue, the Court mandated appellants to demonstrate that a particular defendant sufficiently exposed Holcomb to asbestos in order to establish adequate causation to hold that defendant liable. To balance the interests of deserving plaintiffs, who are typically unable to prove details of how much exposure they received from any particular defendant's products, with the interests of non-responsible defendants, courts use different causation standards.⁵ The Court considered the causation standards used in three preeminent asbestos litigation cases, first, the "exposure-to-risk" test of *Rutherford v. Owens-Illinois, Inc.*;⁶ second, the "defendant-specific-dosage-plus-substantial-factor" test in *Borg-Warner Corp. v. Flores*;⁷ and, third, the "frequency, regularity, proximity" test set forth in *Lohrmann v. Pittsburgh Corning Corp.*⁸

Under the *Rutherford* test, plaintiffs may prove causation in asbestos-related cancer cases by showing that exposure to the defendant's product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff inhaled, and thus to the risk of developing asbestos-related cancer.⁹ The Court rejected this test because it treats every non-negligible exposure to risk as a factual cause and therefore does not afford enough protection to non-responsible defendants.¹⁰

Under the *Flores* test, the Texas Supreme Court relied on *Rutherford*, but required plaintiffs to present not only evidence of regular exposure but also specific evidence relating to the approximate dose of each defendant's product to which the plaintiff was exposed, and evidence that the dose was a substantial factor in causing the asbestos-related disease.¹¹ The Court rejected this test because it severely burdens a plaintiff to prove these particularities of

³ *Francis v. Wynn Las Vegas*, 127 Nev. __, __, 262 P.3d 705, 714 (2011).

⁴ *See, e.g., Klasch v. Walgreen Co.*, 127 Nev. __, __, 264 P.3d 1155, 1158 (2011).

⁵ *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 55 (2008).

⁶ 941 P.2d 1203, 1206 (Cal. 1997).

⁷ 232 S.W.3d 765, 773 (Tex. 2007).

⁸ , 782 F.2d at 1163..

⁹ *Rutherford*, 941 P.2d at 1219.

¹⁰ *See* Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*, 74 BROOK. L. REV. 1011, 1029 (2009).

¹¹ *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771-74 (Tex. 2007).

exposure.

The Court followed the majority of federal courts and adopted the *Lohrmann* “frequency, regularity, proximity” test, as applied in mesothelioma cases,¹² to determine whether a defendant’s product was a substantial factor in causing the plaintiffs mesothelioma.¹³ The focus of this test is to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs’ injuries.¹⁴ When a plaintiff alleges multiple sources of exposure to asbestos, the plaintiff must prove exposure to a “specific product” attributable to the defendant, “on a regular basis over some extended period of time” and “in proximity to where the plaintiff actually worked,” such that it is more than a casual contact and probable, or reasonable to infer, that the exposure to the defendant’s products caused plaintiffs injuries.¹⁵ At the summary judgment stage, under this test, courts must assess whether considering the evidence concerning frequency, regularity, and proximity of a plaintiff’s exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant’s product and the asserted injury.¹⁶

Sufficiency of the Evidence Relating to Holcomb’s Mesothelioma

In this case, because there is more than one manufacturer of asbestos-containing products, appellants were required to prove that exposure to the products made or sold by that particular defendant was a substantial factor in causing the injury.¹⁷ Although every exposure to asbestos contributes to mesothelioma and even brief exposure can cause mesothelioma, appellants had to show more than any exposure.¹⁸

Appellants argued that Holcomb’s testimony demonstrated triable issues of fact that he inhaled dust from the products manufactured by respondents and that this exposure was more than minimal because Holcomb recalled specify job sites, purchased the products, or remembered logos and lettering. Respondents asserted that Holcomb’s testimony was too generalized to demonstrate a reasonable inference that those products caused his mesothelioma because Holcomb could not recall details on the products’ labels, packaging, or markings and could not recall how often he used any particular product.

The Court rejected the respondents’ arguments because Holcomb’s testimony and other evidence provide the basis for a reasonable inference that Holcomb’s mesothelioma was caused by exposure to each of the respondents’ products. Holcomb testified that he used the Kelly-Moore, Kaiser Gypsum, and Georgia Pacific products, there was evidence that all products contained asbestos during the years when Holcomb used them, and respondents did not provide

¹² See *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 217 (Pa. 2007).

¹³ Charles T. Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 AM. J. TRIAL ADVOC. 571, 572 (2008).

¹⁴ David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008).

¹⁵ *Lohrmann*, 782 F.2d at 1162-63.

¹⁶ *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 225 (Pa. 2007).

¹⁷ See *County of Clark v. Upchurch*, 114 Nev. 749, 759, 961 P.2d 754, 760-61 (1998).

¹⁸ See *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 531 (Ga. Ct. App. 1997); *McAskill v. American Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009); *Held v. Avondale Industries, Inc.*, 672 So. 2d 1106, 1109 (La. Ct. App. 1996).

evidence that the product was not available in Holcomb's location. Holcomb asserted direct exposure to asbestos contained in the products, and Holcomb's use of the products may amount to regular and proximate exposure over an extended period sufficient to cause mesothelioma. While Holcomb could not identify the particular packaging, logos, or names of some of the products, and he could not identify specific locations and jobs on which he used the products 40 years ago, that level of identification is not required. Therefore, Holcomb met the burden to show an inference of probable exposure to the defendants' asbestos products and a jury could reasonably infer that the products were a substantial factor in the development of Holcomb's mesothelioma.¹⁹

The Court affirmed summary judgment as to Union Carbide albeit on different grounds. The manufacturing companies used numerous suppliers of asbestos and without knowing the specific products that Holcomb used at a time, appellants could not show that Union Carbide's asbestos was in the products used. Appellants further failed to provide other admissible evidence.²⁰

Conclusion

Based on the adoption and application of the *Lohrmann* test, the Court concluded that appellants raised inferences of probable exposure to Kelly-Moore, Kaiser Gypsum, and Georgia Pacific's products sufficient to defeat summary judgment as to those respondents, but not as to Union Carbide.

¹⁹ *Tragarz v. Keene Corp.*, 980 F.2d 411, 418 (7th Cir. 1992).

²⁰ *See, e.g., School Dist. No. 1J v. ACandS Inc.*, 767 F. Supp. 1051, 1056 (D. Or. 1991) (granting summary judgment for the defendant where plaintiff identified an asbestos-containing product manufactured by the defendant and one other company because there was no evidence that it was the defendant's products that were installed and not the products of the other manufacturer).