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Cumulative asbestos effect loses out

The Ohio Supreme Court was asked to determine whether under the statutory construction of R.C. 2307.96, a “substantial factor” requirement may be met through a “cumulative-exposure theory,” which posits that every nonminimal exposure to asbestos is a substantial factor in causing mesothelioma.

The case of *Schwartz v. Honeywell International Inc.*, Slip Opinion No. 2018-Ohio-474 (Feb. 8, 2018), was an action to recover for wrongful-death allegedly caused through the decedent's exposure to asbestos.

In support of his claim, the plaintiff asserted a theory of causation based only on cumulative exposure to various asbestos-containing products. The plaintiff proffered expert testimony asserting there is no known threshold of asbestos exposure “at which mesothelioma will not occur.”

The suit alleged that the decedent's exposure to asbestos occurred over 18 years in which her father's work both in — and outside of the home — were contributing factors to her total cumulative dose of asbestos exposure. Specifically, exposure to asbestos from Bendix Brakes was alleged to be the cause of decedent's mesothelioma.

Honeywell International is the successor-in-interest of Bendix Brakes. At the conclusion of the plaintiff's case — and at the close of evidence — Honeywell moved for a directed verdict on grounds that the plaintiff failed to demonstrate the decedent's exposure to Bendix Brakes was a substantial factor causing mesothelioma.

Both motions were denied by the trial court. The jury found Honeywell was 5 percent responsible and judgment was entered for the plaintiff.

Honeywell appealed, citing the same grounds: Insufficient evidence showing exposure to asbestos from Bendix Brakes was a

substantial factor in causing decedent's mesothelioma. In affirming the trial court's rulings, the Court of Appeals found that the plaintiff's expert testimony was based upon reliable scientific evidence. Considering all other evidence, they concluded that reasonable minds could have found for the plaintiff on the issue of causation.

Under R.C. 2307.96, a theory of causation based only on cumulative exposure to various asbestos-containing products is insufficient to demonstrate that exposure to asbestos from a particular defendant's product was a “substantial factor.”

Resolution of the issue turned on the statutory interpretation of R.C. 2307.96. Under the statute, the burden rests with the plaintiff to prove exposure to asbestos “manufactured, supplied, installed or used by the defendant” and that the “exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss.” R.C. 2307.96(B). The trier-of-fact must consider the manner, proximity, frequency and length of the plaintiff's exposure to asbestos.

The “cumulative exposure” theory is incompatible with the plain language of R.C. 2307.96. First, the statute requires an individualized determination for each defendant.

The cumulative-exposure theory examines defendants in the aggregate. It is impossible to reconcile the statutory language requiring an individual finding of substantial causation for each defendant with a theory that says every defendant who contributed to the overall exposure is a substantial cause.

Second, the cumulative-exposure theory conflicts with the statutory requirement that substantial causation be measured based on the manner, proximity, length and duration of the exposure.

The plaintiff's expert asserted



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that all nonminimal exposures count, thereby undercutting the manner, proximity, length and duration of exposure. As such, there are no means to effectively determine whether exposure was sufficient to be found a contributing cause of the disease.

Third, the cumulative-exposure theory does not consider the relationship different exposures may have to the overall dose to which an individual is exposed.

When causation is premised on the total cumulative exposure, a single exposure or set of exposures cannot be considered a “substantial cause” of the disease unless that exposure or set of exposures had a substantial impact on the cumulative exposure.

Finally, the plaintiff's expert testified that only nonminimal exposures are considered causative.

But even minimal exposures contribute to one's cumulative dose. When a theory that starts with the premise that the total cumulative dose causes the dis-

ease, there is no rational reason to exclude even minimal exposures, because they also contribute to the cumulative dose.

Applying R.C. 2307.96's manner, proximity, frequency and length factors to the issue presented, the court concluded the plaintiff failed to carry her burden.

The plaintiff's expert never opined that exposure to Bendix Brakes was a substantial factor and all other evidence was likewise insufficient to establish causation under the statute.

At bottom, the plaintiff failed to show that decedent was exposed to asbestos from Bendix products on a regular basis for a substantial period of time. The court concluded that under the test for causation set forth in R.C. 2307.96, Honeywell's motion for directed verdict should have been granted.

A dissenting justice opined, however, that the evidence presented at trial was sufficient to defeat the motion for directed verdict. The expert testified that there is no known threshold of asbestos “at which mesothelioma will not occur.” Witness testimony averred that decedent was exposed to asbestos dust originating in brakes manufactured by Bendix Corp.

If every exposure to asbestos can independently cause mesothelioma, the dissent said, surely exposures like the ones described by the witnesses in this case could be a substantial factor in causing an individual to later develop the illness.

The dissent declared that the majority was categorically wrong to consider the weight of the evidence, which is the province of the jury.

Based upon testimony presented in the record, the jury could have reasonably decided that the decedent's exposure to asbestos from Bendix was a substantial factor in causing her illness, according to the dissent.