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Florida Trial Court Erred in Not Allowing Evidence of Plaintiff's Asbestos Exposure in Tobacco Case

Hinshaw Alert | 2 min read
Jul 17, 2012

The Florida First District Court of Appeal recently reversed and remanded a tobacco case for a new trial opining that the trial court improperly disallowed evidence of asbestos exposure. *R.J. Reynolds Tobacco Company v. Mack,* 2012 WL 2122305 (June 13, 2012). The case involved a long-time smoker whose estate sued defendant tobacco company for allegedly causing the decedent's laryngeal cancer and chronic obstructive pulmonary disease (COPD). Prior to trial, the estate filed motions *in limine* that sought to preclude testimony that the decedent's illnesses were caused by asbestos exposure while working as an aircraft mechanic or as an automobile mechanic and to preclude any reference to the decedent's family history of cancer. The trial judge granted the motions subject to a proffer by the tobacco company to establish that the "'fact exists' and that the 'evidence supports the conclusion' [that the tobacco company] intends to draw from the existence of the fact."

At trial, the estate's expert testified that the decedent's illnesses were more likely than not caused by his heavy smoking of the tobacco company's product. In response, the tobacco company proffered deposition transcripts, affidavits and articles to suggest alternative causation of the decedent's illnesses. First, they showed the decedent's exposure to asbestos while working with and around asbestos-containing products. Second, they provided industrial hygiene evidence reflecting the decedent's exposure to occupational chemicals and toxins for 22 to 38 years. Third, they provided expert testimony in support that the industrial hygiene evidence gave a sufficient basis to find that the decedent's occupational exposures increased his risk for laryngeal cancer. Fourth, they provided evidence that the decedent's extensive family history of cancers increased his risk for laryngeal cancer. And lastly, they produced evidence that asbestos exposure increased the decedent's risk for laryngeal cancer.

During the proffer, the tobacco company also had a medical expert testify as to the decedent's strong family history of cancer and his significant asbestos exposure. Although the expert was unable to testify within a reasonable degree of medical certainty as to the cause of the decedent's cancer, he was able to testify that the decedent's family history and asbestos exposure played a larger role in causing the decedent's cancer than his smoking (which had ceased 16 years prior to the decedent's laryngeal cancer diagnosis). The trial court only

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allowed the expert to testify about the general causes of laryngeal cancer. As such, no evidence was introduced regarding the decedent's occupational exposures and family history. The jury ultimately found in favor of the estate.

The appellate court found that the trial court unacceptably shifted the estate's burden of proof to the tobacco company. This is the first tobacco case in Florida where a court has excluded evidence of any occupational exposures to asbestos. We anticipate that the courts will allow such exposure evidence in future tobacco cases.

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

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