An Asbestos Indecision From the Illinois Supreme Court

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04/19/2012

A recent opinion by the Illinois Supreme Court has failed to resolve a split among the Illinois district courts regarding whether "take home" asbestos exposure claims are recognized causes of action in Illinois. In the case of *Simpkins v. CSX Transportation, Inc.*, the Illinois Supreme Court was expected to answer the substantive question of whether companies owe a duty of care to persons who are exposed to asbestos, not as employees, contractors or even visitors at a workplace, but as a result of second-hand asbestos exposure from such employees and contractors. Instead, the Illinois Supreme Court resolved very little.

The *Simpkins* case presents a classic example of a "take home" asbestos exposure. Annette Simpkins alleged that her husband, Robert, brought home asbestos fibers on his body and work clothes during their marriage, that she was exposed to those fibers, and that that exposure was the cause of her mesothelioma cancer. The complaint alleged that her husband's employers, including defendant CSX, were liable under theories of strict liability, negligence, and willful and wanton misconduct for this second-hand exposure. Defendant CSX filed a motion to dismiss, arguing that it owes no duty to third-party non-employees who come into contact with its employees' asbestos-tainted work clothing at locations away from the workplace. The circuit court granted the motion to dismiss that allowed the plaintiff an interrogatory appeal on the "take home" exposure issue.

The Illinois Fifth District Appellate Court held that the complaint alleged facts sufficient to establish the stated cause of action and establish a duty of care owed by CSX to plaintiff Annette Simpkins. The appellate court noted that the complaint set forth sufficient allegations that the risk of harm to Annette Simpkins from second-hand exposure to asbestos was reasonably foreseeable. Therefore, CSX owed a legal duty of care to her, requiring denial of the motion to dismiss.

Contrary to the Fifth District Appellate Court's holding in the *Simpkins* case, the Illinois Fourth District Appellate Court has previously held, in *In re Estate of Holmes*, that a defendant owed no duty of care to third-party non-employees in household or "take home" asbestos exposure cases. Resolving this split among the appellate courts was, as Illinois Supreme Court Justice Charles E. Freeman explained in his dissenting opinion, "the reason we granted leave to appeal."

In its consideration of the case, the Illinois Supreme Court limited its review to the question of whether the plaintiff's complaint was sufficient to establish a duty for the purposes of the negligence action. CSX argued that it had no direct relationship to Annette Simpkins and therefore owed her no duty and could not be liable for her injury. Annette was not CSX's employee, never visited the premises and was not, according to CSX, a vicarious beneficiary of any duty CSX owed to her husband. CSX contended that Illinois law requires a "direct relationship" between the parties in order for a duty to be imposed. The plaintiff countered that there is a duty because her injury was reasonably probable and foreseeable.

The Supreme Court explained that the duty analysis begins with the question of whether the defendant contributed to a risk of harm to the particular plaintiff. In making that determination, courts weigh four factors: 1) the reasonable foreseeability of injury; 2) the likelihood of injury; 3) the magnitude of the burden of guarding against the injury; and 4) the consequences of placing that burden on the defendant. In this specific case, the Supreme Court stated that the foreseeability issue depended on when CSX actually knew about the nature of potential harms from asbestos during the time of Ronald Simpkins' employment.

In reviewing the allegations of the complaint, the Supreme Court agreed with the defendant that they were conclusory. The Supreme Court further determined that, without more detailed pleading, it could not determine if a duty of care ran from CSX to Annette Simpkins. Accordingly, they remanded the cause of action to the circuit court to allow the plaintiff leave to amend the complaint. In other words, the Supreme Court punted and failed to decide the central question before it.

Writing in dissent, Justice Freeman details the specific allegations set forth in the complaint and states that "it's difficult to understand what more facts need be alleged here" in order for the Supreme Court to decide the issue before it. Justice Freeman also stresses that creation of a duty turns not only on foreseeability, but in large part on public policy considerations. He reviews caselaw across the United States, a majority of which finds that no duty exists for "take home" asbestos exposure.

In *Norfolk and Western Railway Company v. Ayers*, the United States Supreme Court said that this country is experiencing "an asbestos/litigation crisis" resulting in "an elephantine mass of asbestos cases lodged in state and federal courts." A Michigan court has found that imposing liability in "take home" situations would be "extraordinarily onerous and unworkable" and lead to potentially unlimited liability. In *In re Certified Question*, the Michigan Supreme Court noted that liability could be extended to family members, renters, houseguests, carpool members, bus drivers and other persons a worker comes in contact with while wearing dirty work clothes. Similar fears of unlimited liability have echoed across the country in many courts. For these reasons, Justice Freeman (joined by Justice Anne M. Burke) strongly disagreed with the Illinois Supreme Court's refusal to directly resolve for Illinois litigants the duty of care debate in "take home" asbestos exposure cases.
