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RAWLE'S REPORTS

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PENNSYLVANIA ASBESTOS LITIGATION

Superior Court Reinstates Jury's Verdict In Favor of Defendants

Carl D. Buchholz, III

In *Webber v. Honeywell International, Inc., et al.,* the Pennsylvania Superior Court recently reversed two orders of the trial court which attempted to vacate a jury's verdict in favor of the three asbestos defendants: Ford Motor Company, Pneumo Abex, and Honeywell International. Honeywell was represented at trial by Rawle & Henderson partner Scott Griffith. After a contentious, 16-day trial in which defendants filed several motions for mistrial based upon the appearance of impropriety by the rulings of the trial judge, the jury returned a special verdict form which found asbestos exposure was a factual cause of plaintiff George Webber's peritoneal mesothelioma, that Webber was exposed to asbestos from products of the three defendants, and that the products of all three defendants were "defective." However, the jury also found that the exposure to the asbestos contained in the defendants' products was not a factual cause of Webber's peritoneal mesothelioma.

Plaintiffs filed timely post-trial motions seeking a new trial based on an alleged error by the trial court in allowing an alternate juror to serve as a member of the deliberating jury and on the ground that the jury's verdict was inconsistent.

The trial court failed to rule on the plaintiffs' post-trial motions within the 120 days required by the Pennsylvania Rules of Civil Procedure. Accordingly, on the 121st day after the plaintiffs' post-trial motions had been filed, the defendants filed a Praecipe of Entry of Judgment in favor of the defendants with the Prothonotary pursuant to Rule 227.4 of the Pennsylvania Rules of Civil Procedure, which the Prothonotary proceeded to enter. The following day, the trial court, *sua sponte*, filed orders purportedly quashing the entry of judgment and granting a mistrial. The three defendants appealed the trial court's two orders to the Pennsylvania Superior Court.

Carl D. Buchholz, III, Chair of Rawle & Henderson's Appellate Section, represented defendant Honeywell in the appeal. At oral argument before a three-judge panel of the Superior Court, counsel for Ford argued first regarding the alleged error of the trial court in attempting to strike the entry of judgment. Ford's counsel cited the Superior Court panel to a number of prior Superior Court cases which held that once entry of judgment is entered by the Prothonotary pursuant to Rule 227.4, the trial court has no further jurisdiction or authority over the case, and jurisdiction over the case resides solely in the Superior Court. Plaintiffs' counsel argued that the 120-day requirement had not expired when the entry of judgment was entered by the Prothonotary because the trial judge had been "decommissioned" for 31 days during that time.

Carl Buchholz argued regarding the alleged error of the trial court in granting a mistrial four months after the jury had rendered its verdict. As to plaintiffs' argument that the defendants' appeal of this issue was premature since an appellate court has no authority to review a mistrial granted by the trial court, Carl cited the panel to prior Pennsylvania Supreme Court and Superior Court decisions which held that a "mistrial" granted by a trial court after the jury has announced its verdict is in fact an award of a "new trial", which is immediately appealable to the Superior Court.

The defense also addressed the grounds cited by plaintiffs in their post-trial motions for a new trial: the trial court's alleged error in allowing the alternate juror to deliberate in the verdict and the grounds that the verdict was inconsistent. Carl argued that a review of the trial transcript showed that plaintiffs' counsel never objected to the alternate juror participating in the jury deliberations and verdict until after the verdict was announced. Further, with regard to plaintiffs' allegation that a new trial was warranted because the jury's verdict was inconsistent, Carl noted that there was evidence presented at trial by defendants that the chryostile asbestos in defendants' products does not cause peritoneal mesothelioma, that the development of peritoneal mesothelioma required more significant and substantial exposure than Webber had to any of the particular defendants' products, and that there were questions of fact for the jury as to whether plaintiffs' evidence established that Webber had the required "regular, frequent and in close proximity" exposure to any of the three defendants' products.

On April 16, 2013, the Superior Court panel filed its opinion. The panel reversed the trial court's two orders purportedly quashing the entry of judgment and granting a mistrial, and reinstated the jury's verdict in favor of the three defendants. In its opinion, the Superior Court panel flatly rejected plaintiffs' counsel's argument that the 120-day period for the trial court to rule on post-trial motions had not expired at the time the judgment was entered since the trial court was not commissioned for 31 days during that period, and affirmed that the trial court had no jurisdiction over the case once the judgment was entered by the Prothonotary.

The Superior Court panel also addressed the granting of a mistrial by the trial court. The panel agreed with the defense argument that the trial court had no authority to grant a mistrial four months after the jury's verdict had been rendered. Further, in reviewing the granting of a "mistrial" as the granting of a "new trial", the panel found that there was no basis in fact or law for the trial court to award a new trial. As to plaintiffs' claim that the trial court erred in permitting the alternate juror to participate in the jury deliberations and verdict, the panel noted that plaintiffs' counsel never objected to the alternate juror and specifically observed that plaintiffs' counsel's "failure to act is fatal to the plaintiffs' challenge to the jury's compensation and decision."

The panel also rejected plaintiffs' argument that the jury's verdict of no liability on the part of the defendants was

"inconsistent" because the jury found that all of the defendants' products contained asbestos, that Webber had exposure to all three defendants' products, and that Webber's peritoneal mesothelioma was caused by asbestos exposure. In rejecting this argument, the panel specifically referenced the testimony of defendants' liability expert that the chrysotile asbestos contained in defendants' products is not a cause of peritoneal mesothelioma and observed that plaintiffs' own liability expert admitted that chrysotile asbestos fibers are less potent than amphipole asbestos fibers and are typically found in the pleura as opposed to the peritoneal. Thus, the Superior Court found there was nothing inconsistent with the jury's answers to the four interrogatory questions or the jury's finding of no liability.

George Webber and Tina Webber, H/W, Appellees,v. Ford Motor Company, Pneumo Abex, LLC, Successor in Interest to Abex Corporation, and Honeywell International, Inc., as Successor in Interest to Bendix Corporation, Appellants. Consolidated Appeals Nos. 1960 EDA 2012 and 1961 EDA 2012. Superior Court of PA. Filed: April 16, 2013

Carl D. Buchholz, III, is Chair of the Maritime, Insurance Coverage and Appellate Sections. His federal appellate practice includes an argument before the United States Supreme Court, as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes seven arguments before the Pennsylvania Supreme Court, as well as numerous arguments before the Pennsylvania Superior Court and Commonwealth Court. In 2006, the Pennsylvania Supreme Court appointed Carl to the Disciplinary Board of the Supreme Court of Pennsylvania. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. He graduated from Muhlenberg College and Villanova Law School where he was a member of the *Villanova Law Review* and graduated with honors.

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PENNSYLVANIA ASBESTOS LITIGATION

Concession From Plaintiffs Counsel

Peter J. Neeson

Rawle & Henderson lawyers, led by Peter J. Neeson, gained a concession from asbestos plaintiffs counsel in a recent case before the Pennsylvania Supreme Court, *Howard v. A.W. Chesterton Co.* Neeson argued before the Pennsylvania Supreme Court regarding plaintiffs' long-standing practice of filing generic non-case specific expert affidavits and reports whose sole purpose is to defeat summary judgment motions filed by virtually any defendant regarding almost every product involved in asbestos litigation.

Neeson, in arguing the firm's second asbestos case before the Supreme Court in the last 18 months, took the position that the lower tribunals have not been following Supreme Court precedent in asbestos cases and that the current practice of asbestos plaintiffs to file generic expert reports to force defendants to go to trial was an opportunity for the Supreme Court to send a message to lower tribunals that the Supreme Court means what it says.

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In a tactic rarely seen at the Supreme Court level, plaintiffs first attempted to avoid a precedential decision by the Supreme Court by voluntarily dismissing the case before the Supreme Court had a chance to hear oral arguments, but the Justices unanimously rejected that tactic. When that failed, plaintiffs' lawyers then admitted in their briefs to the Supreme Court that the defense position, as expressed by Neeson in front of the Court, was in fact the correct position and that both the Superior Court's decision and plaintiffs themselves had advanced erroneous arguments which, under current Supreme Court precedent, were no longer valid and enforceable. Some of the Supreme Court Justices expressed amazement and incredulity with regard to the plaintiff's position by acknowledging that the tactic was expressly designed to have the Supreme Court avoid writing an opinion on the issues before it.

In response, Neeson argued that the Supreme Court should lay down a set of factors going forward which will prohibit the continued use of this expert report tactic by the asbestos plaintiff's bar. Neeson argued that all expert reports, hence forth, should be "circumstance dependent"; that experts be required to consider the various factors of dose associated with each individual defendant's product; that summary judgment should still be considered a correct vehicle in which to eliminate cases based on generic affidavits or opinions based on the every exposure theory; that individual product exposures be addressed by plaintiffs experts and that the trial courts consider whether such expert opinions under Restatement 2nd 433 are valid, a rule which would require a comparative assessment of dose between the various individual products and exposures alleged by plaintiff to be the cause of his injuries.

A decision from the Supreme Court is expected before the end of this year.

Howard v. A.W. Chesterton Co., 48 EAP 2012, 49 EAP 2012 and 50 EAP 2012, Supreme Court of Pennsylvania

Peter Neeson is Chair of the Environmental Law and Toxic Torts sections. Peter graduated from the University of Notre Dame with a B.S. in Aerospace Mechanical Engineering and from the University of Miami (*cum laude*) with a J.D. He has been involved in numerous toxic tort matters in multi-district litigation and class action cases in both state and federal courts, including formaldehyde, multiple chemical sensitivity, sick building, latex glove, benzene, underground storage tank, silica, orthopedic bone screw, asbestos litigation and CERCLA Superfund cases. In 2007, he served as Chair of TIPS, the Tort Trial and Insurance Practice Section of the American Bar Association. In 2012, the ABA TIPS section awarded Peter its most prestigious honor, the James K. Carroll Award for outstanding leadership qualities and service to the Section. Peter has been elected Chairman of the Board of Trustees of The National Judicial College, beginning in June 2014. He is admitted to practice in Pennsylvania and New York, and has been rated AV by Martindale-Hubbell. He was selected as 2013 Top Rated Lawyers for Energy, Environmental and Natural Resources by Martindale-Hubbell. Peter has been selected by his peers in an extensive nomination and polling process conducted by ***Law & Politics*** as one of Pennsylvania's Super Lawyers for 10 consecutive years.

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