

Asbestos Litigation Case Questions Safety in the Workplace

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Although most would consider asbestos to be an old problem, limited to mainly the manufacturing and construction industries, asbestos has been incorporated into a myriad of products that had many and varied uses. Because asbestos was so pervasive, claims such as the one described below, occurring many years after the last occasions on which asbestos was used and arising from the use of sophisticated equipment in a laboratory, are still prevalent.

Dinsmore attorneys recently handled a premises liability case for a major minerals supply company. The case was unusual in that the plaintiff worked as a technician servicing laboratory equipment and the alleged asbestos exposures occurred into the 1990's. This is in contrast to the typical asbestos case that usually involves exposure in heavy industry prior to 1980.

The plaintiff in this case initially worked as a technician for a manufacturer of laboratory instruments including thermoanalyzers. A thermoanalyzer is an instrument that allows the user to determine the amount of water in the sample being tested as well as certain other characteristics of the sample as the result of heating the sample to high temperatures. The thermoanalyzer at our client's premises contained an asbestos paper separator between the "hot" portion of the instrument and the unheated side. The plaintiff testified that whenever he installed or performed service work on the thermoanalyzers, including the one at our client's laboratory, he was exposed to friable asbestos from the paper separator as well as component insulation on vapor lines contained in the thermoanalyser. The plaintiff also contended that he was exposed to friable asbestos from an asbestos glove and asbestos pad that were provided with the thermoanalyzer. The plaintiff ultimately left his employment with the thermoanalyzer's manufacturer and started his own business doing the same type of work, namely servicing various laboratory instruments, including thermoanalyzers. Significantly, the plaintiff alleged exposures at our client's premises into the 1990's. The plaintiff was diagnosed with mesothelioma, a rare type of cancer which is uniformly fatal and is, except in rare circumstances, a signature disease for asbestos exposure.

The plaintiff's theory of liability as to our client was that because the thermoanalyzer in our client's laboratory had asbestos in it, and further because the client had not provided a warning to the plaintiff regarding asbestos in the thermoanalyzers, that our client had breached its obligation to provide a safe workplace for tradesmen at its premises. As is typical in asbestos cases, it was not initially clear what theory of liability the plaintiff was pursuing. It was not until the plaintiff was deposed and additional discovery undertaken that it became apparent that the plaintiff was focusing on the alleged failure to provide a safe work place because of the asbestos containing components in the thermoanalyzer. The case was further complicated because it was filed in New Jersey, where the plaintiff lived, but our client's premises were located in Pennsylvania. Thus, there was a question as to whether New Jersey or Pennsylvania law would apply. We argued that regardless of which state's law was applied, as the premises owner, our client did not owe a duty of care to the plaintiff, an independent contractor, who was

allegedly injured by the very piece of equipment on which he was hired to work.

The Plaintiff argued that the *Olivo v. Owens – Illinois* case, a New Jersey Supreme Court Case, required a premises owner to provide a reasonably safe place to work for tradesmen coming on to the owner's premises, including an obligation to inspect for defective or dangerous conditions. The *Olivo* case was one in a series of cases in which the New Jersey courts were attempting to address premises liability in terms of a reasonableness standard as opposed to the traditional categories of trespasser, licensee, and invitee, all of which deal with the person's status while on the premises. In *Olivo*, the New Jersey trial court granted summary judgment. The New Jersey appellate court reversed and held there were issues of fact regarding the degree of control the premises owner retained over the work, what safety information the premises owner provided, and what the premises owner told the contractor regarding the presence of asbestos on the premises. The Plaintiff argued that these were exactly the same issues in our case.

Dinsmore argued that Pennsylvania law applied (because the premises in question was in Pennsylvania) and in any event, Pennsylvania law was similar to that of New Jersey, namely, that a premises owner does not owe a duty of care to an independent contractor for dangers inherent in the work the independent contractor was hired to perform. Although the court did not overtly address the choice of law issue, it held that our client, the premises owner, did not owe a duty of care to plaintiff because the plaintiff was responsible for his safety on the equipment on which he was working. In granting our motion for summary judgment, the court focused on the premises owner's lack of any supervision or control over the work performed by the independent contractor. We also emphasized the independent contractor's superior knowledge regarding the thermoanalyzer and its components.

Our Advice

Facilities and equipment managers need to be alert that in facilities built or remodeled prior to the mid-1970's, or equipment, even laboratory equipment, assembled prior to 1980 and where there was a need for thermal insulation, asbestos may still be present and care should be used in dealing with such equipment. Additionally, although waivers of liability, obtained from the tradesmen coming on the property may provide some legal protection, the facilities and equipment managers should make clear with the tradesmen, or the tradesmen's employers, that they are being hired for their expertise and knowledge regarding the proposed work and that they are being relied upon to perform the work in a safe manner.