NEW JERSEY DEFENSE

A Publication by the New Jersey Defense Association | Volume 30 Issue 2 | Winter 2014

President's Message

Mario Delano, Esq.

I realize that the older I get the faster time seems to go by, but in the blink of an eye my term as President is about half over. So far it's been very busy, but I am fortunate to be surrounded by professional and incredibly dedicated board and committee members who make my job much easier.

We have had 3 very successful seminars over the past few months and I would like to thank everyone for attending. On October 13, 2014 Past President, Marie Carey chaired the annual Trial College. Attorneys who were looking to experience the feel of being in trial, making opening and closing statements and examining witnesses got the chance to do so under the watchful eyes of seasoned trial attorneys. As if she were not busy enough, Marie than chaired the sold out 5th Annual Women and the Law Seminar on November 11, 2014. She assembled one of the most impressive speaking panels I have ever heard, and the interaction with the attorneys who attended was lively and informative. Thank you, Marie for all your hard work on these two seminars and thanks to all the speakers who gave up their well earned day off to help us. On November 25, 2014 Robert Luthman chaired the annual Automobile Liability Seminar which had one of largest turnouts we have ever seen. The seminar was co-sponsored by our friends at the Insurance Council of New Jersey. Rob did a great job putting together a program of interesting topics and informative speakers. Thank you to Rob and his panel of speakers for a great presentation. We look forward to seminars from some of our other committees after the first of the year.

On November 10, 2014 Aldo Russo represented us in front of the New Jersey Supreme Court for the hearing on *Maida v Kuskin*. Aldo prepared the Amicus brief on behalf of the NJDA and wrote an article on the case in our Summer 2014 issue.

I am very proud to announce that on October 22, 2014 Past President, Stephen J. Foley, Jr., was recognized as one of the recipients of Professional Lawyer of the Year, presented by the New Jersey Commission on Professionalism in the Law.

Continuing in my efforts to plug the 2015 Annual Seminar at the Bedford Springs Resort and Spa in Bedford Springs, PA, I would like the membership to know that this year we intend to recognize individuals as Lawyer of the Year and Young Lawyer of the Year. The convention committee will be accepting nominations some time after the first of the year. Stay tuned to our website for details on how to make a nomination.

Finally, I would like to wish you and your families safe and very Happy Holidays. In our business, we seem to spend more time at the office and less time at home than we did in the past. At least at this time of year, I would like to quote an attorney friend of mine who found me at the office on a Sunday morning. "In the end you will not lament that you could have billed more hours, but you will regret not spending enough time with family." Enjoy your time with friends and family this Holiday Season.

In This Issue

Equipment Manufacturers' Liability For Injuries Caused By Replacement Component Parts: ELBERT HUGHES v. GOULDS p. 3
Steven F. Satz, Esq. and Richard J. Mirra, Esq.

How To Select A Corporate Respresentative For A RULE 30(b)(6) AND RULE 4:14-2 Depositions In Products Liability Actions p. 7
Eric Probst, Esq.

Employers Strike Back p. 11
Christopher Leddy, Esq.

Christmas Trimmings p. 16
Brian O'Toole, Esq.

DRI'S 2014 Annual Meeting - DRI For Life p. 18
Edward J. Fanning, Jr., Esq.

EQUIPMENT MANUFACTURERS' LIABILITY FOR INJURIES CAUSED BY REPLACEMENT COMPONENT PARTS: ELBERT HUGHES V. GOULDS

Steven F. Satz, Esq. and Richard J. Mirra, Esq.**

Steven F. Satz, Esq

Richard J. Mirra, Esq

A worker services a piece of equipment that was manufactured many years before. He removes the existing asbestos gaskets and packing from the equipment (which had been serviced in a similar manner many times before), and replaces it with new asbestos gaskets and packing purchased from a vendor unrelated to the equipment manufacturer. He is subsequently stricken with an asbestos related disease. The manufacturer and seller of the asbestos containing components, installed after the piece of equipment in which they are incorporated left the factory, but before the injured claimant worked on it, cannot be identified. Is the manufacturer of the equipment in which these components were installed well after it left the factory liable?

Notwithstanding that the courts in numerous states, including the Supreme Courts of California and Washington, have weighed in on this issue, there were no published decisions in New Jersey until the Appellate Division decided this unconsolidated group of four appeals in April 2014. The Supreme Court of New Jersey denied Plaintiffs' Petition for Certification on October 17, 2014.

The Scope of the Replacement Parts Issue

This case (referring to the consolidated group) is distinguishable from "assembler's liability" cases, in which a manufacturer incorporates in its finished product a defective component part. Plaintiffs in this case conceded that there was no evidence that they were exposed to asbestos from the original asbestos-containing parts incorporated into the pumps they serviced years after they were manufactured. Nor was any evidence presented that the Defendant specified or required that asbestos-containing components be used when the pumps were serviced subsequent to their manufacture. Lastly, there was no proof that any of the replacement components were placed into the stream of commerce by the equipment manufacturer. Instead, Plaintiffs alleged that the equipment manufacturer was strictly liable because it was **foreseeable** that asbestos-containing replacement gaskets and packing would be used in its pumps during the lifespan during their lifespan.

Plaintiff also argued in two of the four cases in the group that in addition to being strictly liable, Defendant was liable on common law negligence grounds. The alleged basis was that the equipment manufacturer either knew, or should have known, that individuals would in the future service install asbestos containing gaskets and packing when they performed service or repair work.

The Trial Court's Decisions

Defendant moved for summary judgment in two of these cases (Hughes, Greever) in August 2011. It moved for summary judgment in the Fayer and the Mystrena cases in November 2011. The basis was that Plaintiffs failed to present any evidence that any Plaintiff was exposed to asbestos from asbestos-containing replacement gaskets or packing manufactured, distributed, sold, or supplied by the Defendant pump manufacturer.

The trial court granted summary judgment in all four cases. It issued an unpublished Memorandum Decision in the latter group of two cases, it framed the issue as the liability of the equipment manufacturer for failure to warn regarding exposure to replacement parts that contained asbestos that the manufacturer did not manufacture, sell, specify or require. The basis of the court's decision was that a plaintiff in New Jersey has long been required to

(Continued on page 4)

(Continued from page 3)

prove that a defect existed in a product when it left the manufacturer's control, and that only those in the chain of distribution of the replacement components may be found liable. The record was devoid of any evidence that the pump manufacturer placed into the stream of commerce any asbestos-containing component which exposed any of the Plaintiffs to friable asbestos

The First Published Decision on this Issue in New Jersey

The Appellate Division framed the issues in this case in terms of the classic elements of tort law – the establishment of a duty, its breach, and proximate causation. Like the Courts in several other jurisdictions that have addressed the issue of component parts replacement liability, the Appellate Division arrived at the same conclusion when it affirmed the trial court's entry of summary judgment in all four cases. It did so, however, in a manner that differed from those other court's analyses.

The Scope of the Duty to Warn

The Appellate Division initially noted that the New Jersey Product Liability Act (PLA) does not apply to environmental tort matters. N.J.S.A. 2A:58C-6. It therefore analyzed this case based on common law principles.

The Court first devoted a substantial portion of its opinion to the fundamental issue of whether the manufacturer of a "bare metal" piece of equipment need place a warning on its product regarding potential dangers associated with exposure to friable asbestos.

The Court noted that the starting point in the analysis, given that the PLA is inapplicable, is whether the action sounds in strict liability (which presumes that the manufacturer/seller knew of the dangers associated with its product), or negligence (which requires a plaintiff to prove what the manufacturer/seller knew, or reasonably should have known). The Court noted that the absence of a warning by itself render the equipment or machinery defective. In the toxic tort context, New Jersey courts (i.e. Becker v. Baron Bros., 138 N.J. 145, 159-61 (1994)) have held that it cannot be presumed that all asbestos-containing products are pose an equal threat of harm. Therefore, there can be no blanket requirement to warn. Instead, the focus must be on the unique aspects of the particular product that allegedly caused the harm complained of.

The Court's analysis then moved to the underlying purpose of a warning. It noted that fundamentally, it is designed to reduce as much as possible the product's risk without interfering with its intended use. (Beshada v. Johns-Manville Prods. Corp, 90 N.J. 191, 201 (1982). It requires the product's manufacturer or seller to take reasonable measures to communicate the warning to those who will probably use it. That duty can expand the audience of those who may be expected to receive the warning, depending on the context. The Court noted by way of example that a pharmaceutical company has a duty to communicate the warning not only to the health care provider to whom it is sold, but as well to that provider's patient or consumer. (Davis v. Wyeth Labs, Inc., 399 F.2d 121,131 (9th Cir. 1968). As well, the duty may even extend to products that the manufacturer itself did not manufacture or sell (citing Molino v. B.F. Goodrich Co., 261 N.J. Super 85, 93 (App. Div. 1992), certif. denied, 134 N.J. 482 (1993). There, a tire manufacturer was found to have a duty to warn of dangers posed by a wheel rim it did not make, because its tire could not function in the absence of the wheel on which it was mounted to form an assembled unit).

Applying that analysis to the facts of this case, the Court noted that the pump in issue incorporated asbestos-containing components when it left its control. It held that plaintiffs were therefore entitled to an inference that those who replaced the gaskets and packing during the course of maintenance or repairs, or others in close proximity, would be exposed to a risk of exposure to the asbestos in those replacement parts. The Court therefore

(Continued on page 5)

held that it may be presumed that the manufacturer knew of any danger posed by the asbestos-containing components in its equipment, and that it was reasonably foreseeable that those components would be periodically replaced over the lifetime of the pump.

Notwithstanding the fact that the manufacturer never required or specified the use of asbestos-containing components, the Court held that the paucity of widespread alternatives at the time the pumps were sold made it reasonable to conclude that the components encountered by those who worked on them once they were in the field would in all likelihood contain asbestos. Thus, the Court held that not only were those who encountered the original asbestos-containing components that were installed during the manufacturing process in the class of foreseeable users for the purposes of this analysis, but so too were those who would encounter the components during routine maintenance, servicing or repair.

The Court then turned to a risk - ... analysis of the duty to warn. It held that imposing a duty to warn on an equipment manufacturer would only minimally impact the utility of the product, citing Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 206 (1984).

Causation: The Ultimate Issue

The establishment of a duty to warn was only the starting point, and was not dispositive. The Court shifted its focus to the threshold requirement in tort law that every claimant prove exposure to the product in issue in a manner sufficient to establish liability. The courts in New Jersey have consistently rejected efforts to eliminate that bedrock principle. For example, an attempt to substitute "alternative liability" or "enterprise liability" theories have been rejected. (Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 21-25 (App. Div. 1981).

In the toxic tort context, the court in Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989) rejected the concept of "market share" liability. That seminal opinion established that a claimant must establish exposure to asbestos either sold or supplied by the defendant. Id. at 30 – 31. In a subsequent case involving a claimant stricken with mesothelioma, the court reiterated that it was incumbent on the claimant to establish whose product allegedly caused the injury complained of. Kurak v. A.P. Green Refractories Co., 298 N.J. Super. 304, 322 (App. Div. 1997).

In our case, the Court cited the requirement in Sholtis that Plaintiffs establish exposure to a particular manufacturer's friable asbestos with sufficient intensity and frequency in order to withstand summary judgment. Given the difficulties inherent in direct proving such exposure, the Court noted that a plaintiff may meet the burden by circumstantial proof of sufficiently intense exposure, generally supported by expert proof. The bottom line for the Court in this case was that Plaintiffs were required to establish exposure with sufficient frequency, regularity and proximity to asbestos from a product made or sold by Defendant (citing Sholtis, supra, 238 N.J. Super. at 29). Here, Plaintiffs encountered the pumps manufactured by Defendant many years after the original components were replaced. They therefore failed to prove that they were exposed to any such asbestos-containing component made or sold by the pump manufacturer, and summary judgment was therefore warranted.

*** Steven F. Satz is a Partner in the Environmental & Toxic Tort practice area. Steve has been in practice for over 20 years and is AV-rated by Martindale Hubbell. He is also Certified by the Supreme Court of New Jersey as a Civil Trial Attorney and was named to the 2008-2009 New Jersey *Super Lawyers* list where he is recognized in Civil Litigation Defense. Steve concentrates his practice in toxic tort including asbestos defense as well as personal injury and general litigation.**

*** Richard J. Mirra, of counsel to the firm, joined Hoagland Longo in June 2009. His areas of practice include tort/personal injury defense, insurance defense, products liability, miscellaneous general practice, corporate and commercial. Richard is also skilled in the appeals process having written numerous appellate briefs for the courts.**