

Product Liability

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Illinois Appellate Court Holds that Plaintiff Must Experience Physical Symptoms of an Asbestos-Related Disease to Recover in Products Liability Action

As asbestos-related lawsuits continue to fill court dockets throughout the United States, advancements in medical research and testing has produced litigation in which a plaintiff diagnosed with an asbestos-related disease is capable of filing a products liability action before the onset of physical symptoms. The Illinois Appellate Court Fourth District recently faced a case with this fact pattern and responded by effectively barring such an action. *Sondag v. Pneumo Abex Corp.*, 2016 IL App (4th) 140918, ¶¶ 23, 29.

In *Sondag*, the plaintiffs, a retired plasterer and his wife, filed a products liability action against Tremco, Inc. alleging that asbestos-containing tape manufactured by the defendant and used by the plaintiff in his profession caused him to develop pleural plaques and interstitial fibrosis. *Sondag*, 2016 IL App (4th), ¶ 1. At trial, the plaintiff's doctor testified that he diagnosed the plaintiff with asbestosis after a 2007 chest x-ray revealed pleural plaques and scarring in his lungs. *Id.* ¶ 14. Significantly, however, the plaintiff never complained of symptoms associated with this diagnosis, such as shortness of breath, chest pain, wheezing or any other restrictions. *Id.* ¶ 15. Moreover, as of the date of the trial, the plaintiff still had no restrictive lung disease, no pulmonary symptoms, no respiratory distress or limitation. *Id.* ¶ 16. In fact, at age 82, the plaintiff could climb two flights of stairs, at a running pace, without difficulty. *Id.*

The jury returned a verdict in plaintiffs' favor, awarding them damages. *Id.* ¶ 1. The defendant appealed, and the Fourth District reversed the trial court's judgment after finding that the trial court should have granted the defendant's motion for a directed verdict based on the evidence and testimony presented during trial. *Id.* ¶ 1. In that regard, the Fourth District held that the evidence showed that the plaintiff was asymptomatic and thus had not suffered "physical harm," an essential element of his products liability claim. *Id.*

What Constitutes Physical Harm?

In reversing the trial court's judgment, the Fourth District noted that "physical harm" is an essential element for any products liability action, regardless of whether the action sounds in negligence or strict liability. *Id.* ¶ 23. In support, the court noted that the Supreme Court of Illinois adopted the Restatement (Second) of Torts, and that section 388, which governs products liability actions premised on negligence, provides as follows:

one who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Id. ¶ 24 (citing Restatement (Second) of Torts § 338 (1965)).

Further, the Fourth District pointed out that the term “harm” is defined in the Restatement (Second) of Torts as “the existence of loss or detriment in fact of any kind to a person resulting from any cause.” *Sondag*, 2016 IL App (4th), ¶ 27. In contrast, the word “injury” is defined in the Restatement as “the invasion of any legally protected interest of another.” *Id.* The Fourth District concluded that the reason for the distinction is that, in some circumstances, the common law recognizes a cause of action for conduct that invades or “injures” a legally protected interest, even though the conduct causes no harm. *Id.* ¶ 28.

Accordingly, as the plaintiff’s pleural plaques and interstitial fibrosis were asymptomatic, the Fourth District determined that they caused him no physically impairing loss or detriment. *Id.* ¶ 30. In fact, but for the x-ray and CT scan, “he would have remained blissfully unaware of any condition in his lungs.” *Id.* As such, because the plaintiffs presented no evidence of “physical harm” as the term is defined in the Restatement—an essential element of plaintiffs’ cause of action—the trial court should have granted the defendant’s motion for a directed verdict. *Id.* ¶ 36.

Room for Argument

Justice Harris dissented, in-part, as he disagreed with the majority’s analysis of section 388 of the Restatement (Second) of Torts for two reasons. *Id.* ¶¶ 40-45 (Harris, J., dissenting). First, he pointed out that the majority determined that the mere presence of pleural plaques and interstitial fibrosis in the plaintiff’s lungs did not constitute a “physical harm,” however, failed to recognize that the plaintiff also sought damages for a “shortened life expectancy, loss of normal life, and pain and suffering.” *Id.* ¶ 42. Second, Justice Harris disagreed with the majority’s analysis of plaintiff’s lung condition using the Restatement’s definition of the term “harm” rather than the definition for the term “physical harm.” In that regard, Justice Harris pointed out that the Restatement’s definition of “bodily harm,” a term used interchangeably in the Restatement with “physical harm,” appeared to accurately describe the condition of pleural plaques and interstitial fibrosis in the plaintiff’s lungs. *Id.* ¶ 44.



Implications

In light of *Sondag*, defendants who are facing products liability claims must identify the injury the plaintiff is alleging and confirm that the injury caused the plaintiff an identifiable “loss or detriment.” In completing this analysis, defendants may now be able to argue that a plaintiff’s alleged injury does not constitute “physical harm” as he or she did not suffer a resultant loss of function. Indeed, *Sondag* creates additional avenues for defendant’s to explore when defending product liability claims.

About the Authors

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