Another Smoking Lung Cancer Asbestos Claim Gets Burned in Baltimore

December 5, 2016

Five plaintiffs in a smoking lung cancer case in a Baltimore City, Maryland case captioned *James Harrell, et al v. ACandS, INC., et al,* Consol. Case No. 24X16000053 saw their claims go up in smoke on November 15, 2016 when the Court granted certain Defendants' Motion for Summary Judgment on the Basis of Assumption of Risk and Contributory Negligence. With Judge Althea M. Handy presiding, the Court addressed whether the plaintiffs had assumed the risk of developing lung cancer by knowing of the addictiveness of cigarettes and their ability to cause lung cancer, but nevertheless proceeding to smoke cigarettes numbering in the thousands.

In Maryland, assumption of the risk is a defense that serves as a complete bar to plaintiff's recovery of damages under both negligence and strict liability for failure to warn causes of action.[1] To prevail on the defense of assumption of the risk, the defendant must show that the plaintiff "1) had knowledge of the risk of danger; 2) appreciated that risk; and 3) voluntarily confronted the risk of danger."[2] Under Maryland law, the first two elements are judged by an objective standard. The third element requires that the defendant establish that there was no restriction on the plaintiff's freedom of choice either by existing circumstance or by coercion emanating from the defendant.[3]

With regard to the first element, the Court in *Harrell* found that the plaintiffs had knowledge and appreciated the risk that cigarettes were hazardous ***not by any direct evidence***, but instead by relying on discussions of the hazards in the popular media, an almost guilt by association theory. For example, the Court noted that Reader's Digest, "one of the most widely read publications in the 1920s and 1930s published articles discussing the addictiveness of cigarettes" and that a popular country artist recorded lyrics in 1947 that used phrases like "nicotine slave" and "smoke yourself to death." The Court further relied on Maryland jurisprudence that concluded that "the ordinary consumer was aware of smoking hazards . . . since the 1950s."[4]

With regard to the second element, the Court again relied not on any appreciation of risk specific to the plaintiffs, but on "common knowledge by the 1950s" that smoking cigarettes caused lung cancer. The court cited CBS News Program airings on smoking and lung cancer, 1950s print media reporting the connection, and again referenced case law that "found that from 1947 to 1984 the dangers of smoking were obvious and generally known so as to bar the plaintiff's claims."[5]

Finally, with regard to the third element, the court found that because the plaintiffs smoked such a high number of cigarettes (reaching in the tens and hundreds of thousands) from the 1950s through the subsequent decades, during a time when warning labels were required on every package, they voluntarily confronted the risk of smoking.

Earlier this year in the *The Estate of Willard Entwisle, et al. v. ACandS, Inc. et al.*, Consol. Case No. 24X15000108, a different Baltimore City Judge granted a sealing product defendant's Motion for Judgment as a Matter of Law in a smoking lung cancer asbestos personal injury matter, also finding that the plaintiffs' damages related to his lung cancer were barred by the doctrine of assumption of the risk. However, in the *Entwisle* matter, the court required specific testimony that the decedent in the case had knowledge not only of the risks of smoking, but of the increased risk of lung cancer from the synergistic effects of asbestos exposure and smoking, something that the Court in *Harrell* did not mention. The evidence in *Entwisle* with regard to the knowledge and appreciation of the risk were also more plaintiff specific (i.e. testimony from the decedent's co-worker and daughter), rather than broadly encompassing a "prevailing knowledge of the day" standard that the court in *Harrell* seemed satisfied with.

Does *Harrell* signal that courts in Baltimore may be willing to view the assumption of the risk doctrine more expansively in smoking lung cancer cases? Only time will tell.

[1] *Blood v. Hamami*, 143 Md. App. 375, 385 (2002).

[2] *Blood*, 143 Md. at 386 (*quoting Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630 (1985).

[3] *Crews v. Hollenback*, 358 Md. 627, 644 (2000).

[4] Citing to *Estate of white ex rel. white v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433 (D. Md. 2000).

[5] *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d. 432, 437-38 (D. Md. 2005).

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