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Pennsylvania Does Not Recognize Duty to Warn an Employee's Spouse

District court predicts that Pennsylvania will not recognize a duty to protect or warn the spouse of an employee in "take home" or "household" asbestos exposure cases.

On August 26, Judge Eduardo C. Robreno of the U.S. District Court for the Eastern District of Pennsylvania issued his opinion in *Gillen v. Boeing Co.*, opining that Pennsylvania would not impose a duty on The Boeing Company to protect or otherwise warn the spouse of an employee about the risks of exposure to asbestos fibers carried into the home on the clothes of the employee—a so-called "take home" or "household" exposure scenario.[1] *Gillen* is significant because it answers a question that Pennsylvania appellate courts have yet to address and restricts a novel expansion of liability sought by the plaintiffs' bar.

Gillen v. Boeing

The plaintiff in *Gillen*, Mrs. Marilyn Gillen, was employed by Boeing as a secretary in the company's Ridley Park, Pennsylvania, facility from 1966 to 2005. Hugh Gillen, Mrs. Gillen's husband, also worked at the Boeing facility in Ridley Park as a machinist from 1966 to 1970 and from 1973 to 2005. According to the complaint, Mrs. Gillen developed mesothelioma after being exposed to asbestos in two ways: (i) in her capacity as an employee when Boeing performed asbestos abatement projects in her proximity and (ii) when she laundered Mr. Gillen's clothes, which allegedly contained dust from asbestos products used by Mr. Gillen.[2] Boeing moved to dismiss the latter half of Mrs. Gillen's negligence claim, contending that the company did not owe a duty to Mrs. Gillen for her take-home or household exposure. Determining that no Pennsylvania appellate court had spoken on this issue, the district court weighed five factors that Pennsylvania courts have considered in determining whether common law negligence would impose such a duty.[3]

First, the court observed that the relationship between Boeing and Mrs. Gillen in the take-home or household exposure context was the equivalent of "legal strangers."[4] Even though Mrs. Gillen was also an employee of Boeing, the relationship at issue "must be viewed in the context of the alleged tort, not in the context of any connection outside the circumstances of this lawsuit."[5] Thus, the only relevant relationship for a take-home or household theory was that of Mrs. Gillen as the spouse of a Boeing employee. Second, the court found that the social utility of Boeing's conduct did not weigh in favor of or against imposing a duty, as Boeing's conduct was lawful and asbestos had been substantially regulated and replaced since the early 1970s.[6]

Third, Judge Robreno considered the nature of the risk imposed and the foreseeability of the harm and concluded that these considerations did not weigh in favor of imposing a duty.[7] In particular, it was not enough for Mrs. Gillen

1. *Gillen v. Boeing Co.,* No. 2:13-cv-03118-ER, slip op. at 17 (E.D. Pa. Aug. 27, 2014), *available at* https://www.paed.uscourts.gov/documents/opinions/14D0725P.pdf.
2. *Id.* at 1–2.
3. *Id.* at 6–7.
4. *Id.* at 8.
5. *Id.*
6. *Id.* at 9–10.
7. *Id.* at 10–11.

to claim that Boeing knew at the time that her husband was exposed to asbestos; rather, she needed to allege "that Boeing knew, or should have known, that if Mr. Gillen took home his work clothing, Mrs. Gillen would be exposed" to asbestos while washing Mr. Gillen's clothes.[8] Mrs. Gillen simply did not allege facts to establish that she was a foreseeable plaintiff, and, even if she had, Pennsylvania's public policy regarding the scope of negligence would not support such a limitless expansion of liability to theoretically foreseeable, yet distant, plaintiffs.[9]

Fourth, the potential consequences of imposing a duty for an "undefined liability" weighed against recognizing a duty in the first instance.[10] Significantly, the court was concerned with the possibility for "limitless liability" in the face of no relationship between Mrs. Gillen's take-home or household theory and Boeing's conduct.[11] Moreover, the court rejected the plaintiff's proposed limiting principle that liability could be restricted to "known" household members, finding that such a distinction is arbitrary and would invite a "huge leap[]" in liability that Pennsylvania courts have cautioned against.[12] Finally, the court surveyed the law in other jurisdictions and concluded that "courts throughout the country have declined to recognize such a duty" and that no court applying Pennsylvania law has found the existence of a duty in similar circumstances.[13]

Implications

As noted above, *Gillen* represents a significant limitation in Pennsylvania on the use of take-home or household exposure liability and will serve as persuasive authority for the same result in states that have yet to address this novel theory. Critically, although the parties did not specifically define the contours of the duty that Pennsylvania law would supposedly impose, the court broadly rejected the notion of a duty between an employer and a spouse.[14]

Gillen adds to other developments under Pennsylvania law that are affecting workplace exposure cases generally, such as the Pennsylvania Supreme Court's recent decision in *Tooey v. AK Steel, Corp.*,[15] which held that the Pennsylvania's Workers' Compensation Act does not bar latent occupational disease lawsuits against employers. In fact, *Tooey* allows employers like Boeing to be named in actions like *Gillen*, where an employee claims to have been exposed to asbestos in the workplace, as Mrs. Gillen did with respect to part of her negligence claim. In the wake of *Tooey*, *Gillen* serves as an important limit to the expanding liability that employers may face in Pennsylvania.

The plaintiffs' bar, however, may attempt to limit *Gillen* in the future by claiming, for example, that Pennsylvania state courts, such as the Philadelphia and Allegheny Courts of Common Pleas, are not bound by the prediction of the federal court in the Eastern District of Pennsylvania. In addition, future plaintiffs may reference the court's dicta that it may be possible for a plaintiff to modify his or her allegations such that they could be considered a "foreseeable" plaintiff. Neither attempt is likely to be successful, however, as the court's decision will serve as highly persuasive authority that provides a thorough evaluation of Pennsylvania law and the law from other states, and the opinion cautioned that foreseeability alone is not determinative of whether Pennsylvania would impose a duty.[16]

Gillen is a helpful development under Pennsylvania law and one that manufacturers, distributors, employers, and

8. *Id.* at 10.

9. *Id.* at 10–11

10. *Id.* at 12–13.

11. *Id.* at 16.

12. *Id.* at 13 n.10.

13. *Id.* at 13–14.

14. *See id.* at 5 n.4.

15. 81 A.3d 851 (Pa. 2013). For further information on *Tooey*, please see our December 9, 2013 LawFlash, "Pennsylvania Supreme Court Rules on Workers' Compensation Act Case", available at http://www.morganlewis.com/pubs/LIT_LF_PASupremeCourtRulesonWorkersCompCase_09dec13.

16. *Id.* at 11 (citing *Estate of Witthoeft v. Kiskaddon*, 733 A.2d 623, 630 (Pa. 1999) and noting that the Pennsylvania Supreme Court has refused to "'stretch foreseeability beyond the point of recognition for to do so will be to make liability endless'").

others facing asbestos product liability claims need to be aware of.

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