

Courts Issue Decisions on Ohio Appeal Requirements & Take-Home Asbestos Liability

BUSINESSES THAT FACE TORT CASES COULD BE IMPACTED BY RULINGS

Attempt to e-file appeal backfires

On February 4, 2009, the Ohio Supreme Court decided that electronically filing a notice of appeal does not meet the state's filing requirements, and upheld the dismissal of the appeal of two plaintiffs. *Louden v. A. O. Smith Corp. et al.*, 2009 WL 277993, 2009-Ohio-319 (2009).

In *Louden*, the plaintiffs alleged that their husbands were occupationally exposed to asbestos and died as a result. The trial court granted summary judgment to defendant employers, and plaintiffs attempted to appeal by electronically filing a notice with the clerk of the trial court. The trial court clerk, however, failed to transmit the notice to the court of appeals. More than two months later, plaintiffs tried again by filing a paper notice with the Eighth District Court of Appeals in Cuyahoga County. The court of appeals rejected the late notice as being outside the 30-day limit for appeals.

In upholding the dismissal of the appeal, the Ohio Supreme Court noted that "advancements in information technology appear to be outpacing the promulgation of new rules providing for the use of such technology in Ohio courts." (2009-Ohio-319 at ¶ 32.) Since 2001, the Ohio Supreme Court has authorized the intermediate courts of appeal to adopt rules that would permit various kinds of electronic filing, but only three have done so. (The courts of appeal for the First, Third and Fifth Districts allow filing by fax machine; only the First District, in Hamilton County, allows e-filing over the Internet.)

Thus, without a rule in the Eighth District specifically enabling electronic filing, "filing" a notice of appeal there only "occurs when a person manually presents a paper pleading to the [trial court] clerk of courts." (*Id.* at ¶ 15.)

The Ohio Supreme Court is on record as being pro-technology in dealing with the business of the state's courts, but absent rules adopted by the intermediate courts of appeals, litigants must not be hasty in assuming that modern technology will apply.

Lack of foreseeability bars asbestos "take-home" liability

The Sixth Circuit Court of Appeals recently ruled that it was not foreseeable until approximately 1965 that "take-home" exposure to asbestos could result in injury. Thus, an employer was not liable to its employee's son, who developed mesothelioma as a result of such exposure.



In *Martin v. Cincinnati Gas & Electric Co.*, 2009 WL 188051 (6th Cir. Jan. 27, 2009), the plaintiff's father was employed between 1951-1963 in positions that exposed him to asbestos. Although the employer provided changing rooms, plaintiff's father sometimes wore his dusty work clothes home, and as a child, plaintiff came in contact with his father's work clothes. The district court granted judgment in favor of the employer, and the Sixth Circuit affirmed.

Applying Kentucky law, the court of appeals wrote that while every person must exercise ordinary care to prevent probable injury, foreseeability depends on "what the defendant knew at the time of the alleged negligence." The risk of "take home" or bystander exposure, however, was not foreseeable to the employer from 1951-1963 based on the available "common knowledge at the time and in the community." In particular, the court noted that plaintiff's expert conceded that the first studies of bystander exposure were not published until 1965, after the time that plaintiff's father's exposure ceased.

State law in other jurisdictions offers different approaches to take-home asbestos liability. In Ohio, for instance, a 2004 asbestos tort reform statute was enacted to address the asbestos litigation crisis. With respect to premises-owner asbestos defendants, Ohio Rev. Code § 2307.941(A)(1) provides that in "all tort actions for asbestos claims brought against a premises owner to recover damages ... for exposure to asbestos on the premises owner's property: (1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred *while the individual was at the premises owner's property.*"

The existence of differing approaches to take-home asbestos liability points to the need for careful assessment of these cases.

FOR MORE INFORMATION

If you have questions or would like more information about this topic, please contact:

Elizabeth B. Wright 216.566.5716 Elizabeth.Wright@ThompsonHine.com
Timothy J. Coughlin 216.566.5523 Tim.Coughlin@ThompsonHine.com

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