

Toxic Tort

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Seventh Circuit Holds that a Product Manufacturer May Have a Heightened Duty to Warn for Products Manufactured by Another Company

In *Johnson v. Edward Orton, Jr., Ceramic Foundation*, the plaintiff, Deborah Johnson, alleged that her deceased husband, Bruce Johnson, contracted and died from mesothelioma caused by exposure to asbestos-containing products. 71 F.4th 601, 606-607 (7th Cir. 2023). The plaintiff's complaint against the defendants sought damages based on negligence, wrongful death and survival. *Johnson*, 71 F.4th at 607.

As to defendant Edward Orton Jr., Ceramic Foundation, the plaintiff alleged that Bruce Johnson was exposed to asbestos contained in vermiculite packaging material used by Orton, a manufacturer of pyrometric cones used in the ceramic product manufacturing process. *Id.* at 605-606. Orton shipped its pyrometric cones to customers in cardboard boxes filled with mineral vermiculite packaging material purchased from W.R. Grace and J.P. Austin between 1963 and 1983. *Id.* at 606. At its request, Orton received a Material Safety Data Sheet (MSDS) from W.R. Grace in 1981 stating that the vermiculite in the packaging materials originated from a mine in Libby, Montana. *Id.* The MSDS further stated that the packaging material contained less than 0.1% by weight asbestos. *Id.* The decedent was a ceramics artist and teacher who opened and dug through boxes of the ceramic cones filled with the vermiculite packaging material. *Id.*

Originally, the plaintiff filed this case in Cook County, Illinois. *Johnson*, 71 F.4th at 606. Orton removed the case to federal court to the Northern District of Illinois after the non-diverse defendants had settled and/or been dismissed from the action. *Id.* at 606-607. After removing the case from Cook County to the federal district court, the district court granted summary judgment to Orton, holding that Orton did not owe a duty to the decedent. *Id.* at 607. The plaintiff appealed the case to the Seventh Circuit. *Id.* at 608.

To state a claim for negligence under Illinois law, a plaintiff "must allege facts that establish the existence of a duty of care owed by a defendant to the plaintiff, a breach of that duty, and an injury caused by that breach." *Id.* at 609 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (Ill. 2006)). In determining whether a duty exists, Illinois law focuses on whether a plaintiff and defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Id.* at 609 (citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18).

The Illinois Supreme Court discussed the touchstone analysis to determine whether a duty exists in tort cases in *Simpkins*. *Simpkins*, 2012 IL 110662, ¶ 18; *Johnson*, 71 F.4th at 609. In *Simpkins*, the Illinois Supreme Court held that the duty analysis focuses on "whether a plaintiff and a defendant stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Johnson*, 71 F.4th at 609 (citing *Simpkins*, 2012 IL 110662, ¶ 18). To make this determination, courts consider the following four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Id.* at 609-10; *Simpkins*, 2012 IL 110662, ¶ 18.

The Seventh Circuit held that the facts in the record support the conclusion that Orton lacked actual knowledge that the W.R. Grace vermiculite packaging was contaminated with asbestos prior to receiving the MSDS in 1981. *Johnson*, 71 F.4th at 611-12. The Seventh Circuit focused on whether Orton should have known about the contamination and associated hazards after receiving the MSDS sheet in 1981. The court first examined the Illinois standard applicable to Orton. Illinois law holds manufacturers “to the degree of knowledge and skill of experts,” and therefore, found that Orton had a duty “to keep abreast of scientific developments touching upon the manufacturer’s products.” *Id.* at 613 (citing *Anderson v. Hyster Co.*, 74 Ill. 2d 364 (1979) and *Proctor v. Davis*, 291 Ill. App. 3d 265 (1st Dist. 1997)). The district court viewed Orton as being akin to a supplier of the vermiculite packaging, but the appellate court viewed Orton as a manufacturer and held Orton to the higher standard of knowledge to which Illinois law holds manufacturers. *Id.* at 613. The Seventh Circuit reasoned that Orton should be held to the manufacturer standard because the vermiculite packaging accompanied the product manufactured by Orton, even though Orton undeniably did not manufacture the vermiculite material. *Id.* at 613-14.

The Seventh Circuit reversed the district court’s judgment and remanded the case for further proceedings. While Orton did not have actual knowledge of the contamination of W.R. Grace’s vermiculite prior to receiving the MSDS in 1981, the Seventh Circuit held that a genuine issue of material fact existed as to whether Orton had constructive knowledge that the vermiculite packaging material was possibly contaminated with asbestos prior to receiving the MSDS sheet in 1981. *Id.* at 615-16. The court reasoned that it was “possible” for Orton to be aware that the vermiculite was potentially contaminated with asbestos based on a 1963 published article describing potential amphibole asbestos contamination at a Zonolite Company mining operation, a published 1959 Montana Bureau of Mines and Geology bulletin, and an air monitoring report conducted by the Kentucky State Department of Health on a W.R. Grace vermiculite processing facility in 1971. *Id.* at 616.

Further, the Seventh Circuit held that the district court improperly granted summary judgment to Orton on the issue of duty to the plaintiff after receiving the MSDS in 1981. *Johnson*, 71 F.4th at 617. After receiving the MSDS sheet in 1981, Orton had actual knowledge that the W.R. Grace vermiculite packing material may be contaminated with asbestos. *Id.* As such, a genuine issue of triable fact existed regarding Orton’s use of the vermiculite packaging after its receipt of the MSDS. *Id.*

Rejecting Orton’s argument that it should be held to a lesser standard of knowledge based on the general knowledge of the ceramics industry at the time, the court held that Orton should be held to a standard of knowledge based on what a manufacturer knows or should have known based on the “present state of human knowledge” at the time. *Id.* at 614-15. The court concluded that Orton should be held to an expert standard in its knowledge of the packaging material included in its product packages. *Id.*

The Seventh Circuit held Orton to a heightened duty to warn associated with the packaging material, even though Orton unquestionably took no role in manufacturing the packaging material. Following *Orton*, a court could hold a defendant to an expert standard when it comes to products or materials supplied in conjunction with the defendant’s products, even when the defendant did not manufacture the products. This case raises concerns regarding when Illinois courts may elevate a supplier or other defendant to a standard of knowledge and duty typically reserved for the manufacturers of the product at issue.

About the Author

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