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## Asbestos case misstep brings remand

In a recent Illinois Appellate Court decision, the court ruled in favor of the plaintiffs and reversed a trial court order that granted summary judgment in favor of the defendants in a toxic tort asbestos action. *Jones vs. Pneumo Abex LLC, et al.*, No. 5-16-0239 (5th Dist. 2018).

In the Richland County Circuit Court, plaintiff John Jones sought to recover for harm he allegedly suffered as a result of asbestos exposure while working in construction. Jones contracted lung cancer from asbestos exposure while handling Kaylo asbestos insulation that was manufactured and distributed by Owens-Illinois.

Jones and his wife, Deborah, filed a civil conspiracy claim against the defendants, Pneumo Abex LLC and Owens-Illinois Inc., alleging that the defendants engaged in a civil conspiracy to conceal information regarding the harmful health effects of asbestos and misrepresent the safety of asbestos.

The plaintiffs alleged 13 overt acts as part of this conspiracy: (1) selling asbestos products to Jones' employer without warning customers of the risks of asbestos exposure; (2) failing to warn employees about the risks of asbestos exposure; (3) altering reports and publications that discussed the health hazards of asbestos exposure originally published by a physician that was employed by another alleged conspirator; (4) an agreement to suppress the results of asbestos exposure research; (5) an agreement with an asbestos magazine to not publish any articles regarding the health hazards of asbestos exposure; (6) suppressing the spread of a report that criticized whether there was a safe level of asbestos exposure; (7) preventing future studies on the health of workers; (8) altering reports and publications by another doctor regarding asbestos exposure; (9) suppressing the

results from studies that concluded asbestos exposure caused lung cancer and mesothelioma; (10) participating in the drafting of a pamphlet that failed to disclose the health risks of asbestos exposure; (11) purchasing asbestos products from co-conspirators that did not contain warning labels; (12) refusing to warn employees who used asbestos materials when manufacturing products for their companies; (13) altering an original report to delete all references to asbestosis and lung cancer.

Nonetheless, the trial court granted summary judgment in favor of the defendants after the defendants argued that there was insufficient evidence to support a finding of a conspiracy.

The issue before the appellate court was whether the trial court erred in entering summary judgment against the plaintiffs. The appellate court found that the trial court erred because the plaintiffs provided sufficient evidence to pose genuine issues of material fact when weighed in the light most favorable to the nonmoving party as to: (1) whether there was a conspiratorial agreement between the defendants to conceal the health hazards of asbestos; and (2) whether the defendants committed overt acts in light of the agreement.

The appellate court found that there were genuine issues of material fact from which a trier of fact could reasonably conclude the existence and acts in furtherance of a civil conspiracy.

First, the appellate court found that the plaintiffs presented evidence of an agreement entered into by both the defendants to suppress and/or misrepresent health warnings regarding asbestos. One agreement was entered into by Pneumo Abex with insulation manufacturer Johns-Manville to allegedly underwrite asbestos experiments.

After the experiments were completed and the findings

### TOXIC TORT TALK



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published, Johns-Manville's general counsel requested the report be returned. Johns-Manville subsequently altered the report by deleting all references to cancer and tumors from the report.

Pneumo Abex also requested that other companies who sponsored the asbestos experiments also delete any reference to cancer and tumors from the final published report.

Another agreement was allegedly entered into by Owens-Illinois to suppress asbestos hazards information after it began to manufacture and sell asbestos thermal insulation, Kaylo. Owens-Illinois continued to sell Kaylo despite a warning that the insulation posed a respiratory hazard and that Kaylo was capable of producing a peribronchiolar fibrosis typical of asbestosis.

The plaintiffs presented evidence that, despite Owens-Illinois' knowledge of the hazards, it failed to post any warnings on the Kaylo packaging, and instead, advertised Kaylo as "nontoxic."

Not only did the appellate court find that there were numerous genuine issues of material fact from which a trier of fact could find that there was a civil conspiracy by clear and convincing evidence, the court also found that the circuit court erroneously relied on two 4th District appellate cases that dealt with judgment notwithstanding the verdict rather than summary judgment when entering summary judgment in favor of the defendants.

The trial court first relied on *Rodarmel*, 2011 IL App (4th) 100463, where the 4th District entered judgment in favor of the defendants and granted judgment notwithstanding the verdict because there was a lack of clear and convincing evidence.

The trial court also relied on *Gillenwater*, 2013 IL App (4th) 120929, where the 4th District found that there was clear and convincing evidence of a conspiracy, but the conspiracy ended before the defendants' sale of asbestos products and, therefore, granted judgment notwithstanding the verdict in favor of the defendants.

The appellate court in the instant action found that *Rodarmel* and *Gillenwater* did not apply because they were not seeking summary judgment.

The appellate court held that in order to survive summary judgment, the plaintiffs need only present sufficient facts that, when viewed in light most favorable to the plaintiffs, a trier of fact could find the existence of a conspiracy by clear and convincing evidence, not actually prove a conspiracy by clear and convincing evidence — the purpose of summary judgment is to gauge whether genuine issues of material fact exist, not to actually try the question of fact.

As a result, the 5th District Appellate Court reversed the circuit court's order granting summary judgment and remanded the case for further proceedings.