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RECENT DEVELOPMENT

WALLACE & GALE ASBESTOS SETTLEMENT TRUST v. BUSCH: IN CASES OF ASBESTOS RELATED INJURY, CIRCUMSTANTIAL EVIDENCE OF A DEFENDANT'S SUBSTANTIAL PRESENCE AT A JOBSITE IS SUFFICIENT FOR SUBMISSION TO THE JURY AND FOR THE JURY TO INFER THAT THE DEFENDANT WAS LIABLE FOR THE PLAINTIFF'S INJURY.

By: Curtis Paul

The Court of Appeals of Maryland held that in cases involving asbestos-related injury, circumstantial evidence of a defendant's substantial presence at a jobsite is sufficient for submission to a jury. *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 464 Md. 474, 211 A.3d 1166 (2019). The court further held that it is permissible for the jury to infer from such circumstantial evidence that the defendant was more likely than not responsible for the asbestos products that caused the plaintiff's injury. *Id.* at 489, 1174. The court additionally held that it is not an error to allow a plaintiff to submit responsive evidence of the dismissal of a prior defendant under the "opening the door" doctrine. *Id.* at 498-99, 1180.

Between 1971 and 2001, Busch worked as a steamfitter for Honeywell Corporation ("Honeywell"). During his time with Honeywell, Busch worked in the construction of Loch Raven High School ("Loch Raven") in Baltimore County. Busch's role at Loch Raven was to facilitate the installation of water boilers in the boiler room. To insulate the boiler room, Loch Raven required employees to install magnesia-asbestos blocks around the boilers. Busch worked in the boiler room when the magnesia blocks were cut and installed, and inevitably inhaled asbestos dust. Busch was diagnosed with mesothelioma in 2016.

Busch brought an action for his injuries against multiple defendants including McCormick Asbestos Company ("McCormick"), Georgia-Pacific, and Wallace & Gale. Wallace & Gale responded to Busch's interrogatories with documentation of a partial billing statement that indicated that it only used asbestos-free products in the boiler room. Additional documents provided a description of Wallace & Gale's contracted work as the general insulation of surfaces at Loch Raven. Included in the documentation was a summary of the total work hours at Loch Raven which showed that Wallace & Gale had completed over 4,500 hours of insulation-related work. During pre-trial discovery, Busch identified McCormick and Georgia-Pacific, not Wallace & Gale, as the parties responsible for installing the asbestos products in the boiler room. Busch also presented testimony which indicated that

McCormick and Georgia Pacific were responsible for installing the asbestos products in the Loch Raven boiler room.

During the trial, Wallace & Gale admitted into evidence Busch's complaint against the seven original defendants. Responding to this new evidence, Busch requested that the trial court allow him to submit evidence of McCormick's dismissal, which the court permitted. At the close of evidence, Wallace & Gale and Georgia-Pacific were the only remaining defendants. The jury found in favor of Busch and awarded a total verdict of \$14,568,528.33. The Court of Special Appeals of Maryland affirmed the judgment and held that there was sufficient evidence to submit to the jury that could infer that it was more likely than not that Wallace & Gale was responsible for the asbestos products used in the boiler room. The court further affirmed that it was proper to allow Busch to present responsive evidence of McCormick's dismissal from the lawsuit. Wallace & Gale successfully petitioned to the Court of Appeals of Maryland for a writ of *certiorari* on both the trial court's and intermediate appellate court's rulings.

The Court of Appeals of Maryland examined whether the circumstantial evidence of Wallace & Gale's substantial presence at Loch Raven was sufficient for submission to the jury. *Wallace & Gale Asbestos Settlement Tr.*, 464 Md. at 480, 211 A.3d at 1169. Additionally, the court examined whether the jury could permissibly infer from such circumstantial evidence that Wallace & Gale were responsible for Busch's injury, even though there was no direct evidence linking Wallace & Gale to any asbestos products in the boiler room. *Id.*

The court began by discussing the Maryland standard for bystanders injured by asbestos products. *Wallace & Gale Asbestos Settlement Tr.*, 464 Md. at 487-88, 211 A.3d at 1173-74. A bystander plaintiff must show that the defendant's asbestos products caused their injury by showing: (1) frequent use of the product; (2) that the plaintiff worked near the harmful product; and (3) that they were regularly exposed to the product. *Id.* at 487-88, 1173-74 (citing *Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179, 210, 604 A.2d 445, 460 (1992)). The court stated that a plaintiff claiming harm from an asbestos product must produce evidence that it was the defendant's product that caused his injury. *Id.* at 488, 1173-74 (citing *Reiter v. Pneumo Abex, LLC*, 417 Md. 57, 71, 8 A.3d 725, 733 (2010)).

The court next examined whether Busch had presented sufficient evidence to show that Wallace & Gale was the party responsible for the installation of the asbestos products in the Loch Raven boiler room. *Wallace & Gale Asbestos Settlement Tr.*, 464 Md. at 488, 211 A.3d at 1174. The court found that the evidence that Wallace & Gale was primarily responsible for general insulation, and that it had completed over 4,500 hours of insulation related work, indicated that it was more likely than not the party responsible for all

of the asbestos-related work at Loch Raven. *Id.* at 489-490, 1174-75. Based on such evidence, the court found that it was permissible for the jury to make the inference that Wallace & Gale was therefore responsible for performing the insulation work in the boiler room, and therefore it was more likely than not Wallace & Gale's products that harmed Busch. *Id.* The court was not persuaded by the lack of direct evidence linking Wallace & Gale to any asbestos products in the boiler room. *Id.* at 490-91, 1175-76. The court was additionally unpersuaded by the testimonial evidence which indicated that McCormick, not Wallace & Gale, was the party responsible for the asbestos-related work in the boiler room. *Id.* at 492, 1176.

The court next discussed whether the trial court erred when it allowed evidence of McCormick's dismissal from the suit to be heard by the jury. *Wallace & Gale Asbestos Settlement Tr.*, 464 Md. at 492-93, 211 A.3d at 1176-77. The court reviewed the trial court's decision in light of the "opening the door" doctrine. The "opening the door" doctrine will allow a party to submit responsive evidence when otherwise inadmissible evidence is injected into a case by the opposing party. *Id.* at 496-99, 1179-1180 (citing *Little v. Schneider*, 434 Md. 150, 170, 73 A.3d 1074, 1085 (2013)). Under this doctrine, the court found that the trial court did not err when it allowed Busch to submit responsive evidence to Wallace & Gale's submission of Busch's original complaint. *Id.* at 498-99, 1180.

The dissenting opinion, while not commenting on the second issue of the admission of new evidence, disagreed with the majority's ruling on the first issue. *Wallace & Gale Asbestos Settlement Tr.*, 464 Md. at 499-504, 211 A.3d at 1180-83. The dissent argued that there was no evidence that linked Wallace & Gale to any asbestos products used in the boiler room, and therefore the jury merely speculated that Wallace & Gale was the party responsible for the products that harmed Busch. *Id.* at 499-500, 1180-81. The dissent emphasized that in all cases of asbestos-related injury the foundational requirement is that the plaintiff must show that it was the defendant's product that caused his injury. *Id.* at 500, 1181. The dissent argued the majority did not recognize this foundational requirement and allowed the jury to impermissibly infer Wallace & Gale's liability from its generalized presence at the Loch Raven jobsite. *Id.* at 501, 1181.

In this case, the Court of Appeals of Maryland held that in cases involving asbestos-related injury, circumstantial evidence of a defendant's substantial presence at a jobsite is sufficient for submission to a jury, and that it is permissible for a jury to infer from such circumstantial evidence that the defendant was more likely than not responsible for the asbestos products that caused the plaintiff's injury. The court therefore eased the burden of proof for asbestos injured plaintiffs by allowing circumstantial evidence of a defendant's substantial presence at a jobsite to support both the proof of a

plaintiff's exposure to asbestos products as well as the proof that the defendant's products harmed the plaintiff. *Wallace & Gale Asbestos Settlement Trust* will be a useful case to many asbestos injured plaintiffs who may have previously been unable to attach liability to defendants due to a lack of direct evidence linking their asbestos-related injury to the defendant's product.