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EXPERT ANALYSIS

Assumption of the Risk as a Defense In Smoking Lung Cancer Cases: An Example From Baltimore

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Along with the increase in the number of cases filed by plaintiffs alleging lung cancer caused by exposure to asbestos comes an increase in the number of such cases in which the plaintiff also had a history of smoking cigarettes.

The theory in these smoking lung cancer cases, according to plaintiffs, is that the combined effect of smoking cigarettes with exposure to the defendants' asbestos-containing products created an increased the risk that the exposed individual would develop lung cancer.

A recent case in Baltimore, Maryland, provides an example of how the defense of assumption of the risk can be used by defense counsel to defeat such claims.

This article provides litigators a look into how defense counsel utilized the doctrine of assumption of the risk to obtain a directed verdict as to all damages relating to lung cancer in a recent trial in the Circuit Court for Baltimore City, Maryland.

A short background of the case is provided, the elements of the assumption of the risk defense under Maryland law are briefly reviewed, and then the evidence presented in the Baltimore case analyzed.

JUDGE GRANTS A SEALING PRODUCT MANUFACTURER'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON ASSUMPTION OF THE RISK AT TRIAL

On July 15, 2016, a Judge presiding at trial in the Circuit Court for Baltimore City, Maryland granted a sealing product defendant's Motion for Judgment as a Matter of Law in an asbestos-related personal injury matter, finding that the Plaintiffs' damages related to lung cancer were barred by the doctrine of assumption of the risk. The Motion was made by the defendant, represented by counsel from Manion Gaynor & Manning and Goldberg Segalla, after the close of Plaintiffs' evidence in *The Estate of Willard Entwisle, et al. v. ACandS, Inc. et al.*, Consol. Case No. 24X15000108.

In Maryland, assumption of the risk is a defense that serves as a complete bar to plaintiff's recovery of damages under both negligence and strict liability for failure to warn causes of action.[1]

To prevail on the defense of assumption of the risk, the defendant must show that the plaintiff, "1) had knowledge of the risk of danger; 2) appreciated that risk; and 3) voluntarily confronted the risk of danger."[2]

Under Maryland law, the first two elements are judged by an objective standard. The third element requires that the defendant establish that there was no restriction on the plaintiff's freedom of choice either by existing circumstance or by coercion emanating from the defendant.[3]

In the *Entwisle* case, the Plaintiffs' decedent developed lung cancer and was later also diagnosed with mesothelioma. Plaintiffs' medical causation expert, Dr. Christine Oliver, testified at trial that it was her opinion that the decedent's cause of death was both lung cancer and mesothelioma; that other medical complications including a stroke and seizure were caused by metastases

from the primary lung cancer; that all of the decedent's medical treatment was necessary as a result of the lung cancer (aside from the treatment for mesothelioma diagnosed a few weeks before death); and that smoking cigarettes was a cause of the decedent's lung cancer.

The Court found that evidence of (1) the decedent's 20 pack-year cigarette smoking history (a pack a day for 20 years), along with (2) testimony from the decedent's co-worker that he had knowledge of the risks of smoking, including the increased risk of lung cancer from the synergistic effect of asbestos exposure and smoking, and (3) testimony from the decedent's daughter that her father appreciated the risks of smoking, and yet chose to voluntarily continue to smoke despite that knowledge and appreciation was sufficient to rule that Plaintiffs' decedent assumed the risk of his lung cancer and that the damages that emanated therefrom were barred as a matter of law.

KNOWLEDGE OF THE RISK: HEALTH WARNING LABELS ON CIGARETTES HAVE BEEN REQUIRED ON ALL CIGARETTE PACKAGING SINCE 1965

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Before Plaintiffs' decedent began smoking cigarettes, there was a nationwide effort to warn at least as to the dangers of smoking.

The Federal Cigarette Labeling and Advertising Act of 1965 (Public Law 89-92), for example, required that the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" be located in a conspicuous place on every cigarette package.

In 1969, Congress passed the Public Health Cigarette Smoking Act[4], which required that each cigarette package contain the label "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health."

By 1984, Congress had enacted the Comprehensive Smoking Education Act of 1984,[5] which required four specific health warnings on all cigarette packages and advertisements, including that "Smoking Causes Lung Cancer" and that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."

That these warnings were on the packages of cigarettes from the mid-1960s on are facts that can be established with the Plaintiff during a discovery deposition, through an expert, or, depending on your jurisdiction, the Court may take judicial notice of by motion.

In *Entwisle,* the decedent's medical records demonstrated that he had a twenty pack-year smoking history. Since a single pack contains twenty cigarettes, he necessarily reached into a pack of cigarettes containing a warning label warning about the hazards of smoking, an astounding 146,000 times.

UNION KNOWLEDGE OF THE HAZARDS OF SMOKING, ASBESTOS EXPOSURE, AND SYNERGY

Whether a proponent of the assumption of risk defense in a case must establish that the plaintiff, or plaintiff's decedent, possessed the specific knowledge that there is an increased risk of lung cancer from the combined effect of smoking cigarettes and exposure to asbestos, is a jurisdiction dependent question.

However, in some cases, knowledge of unions may be a source for such evidence of specific knowledge of synergy. Unions for industrial trades such as plumbers and pipefitters frequently advised their members on safety issues, including the hazards of smoking and asbestos. Dig hard and you may find that some specifically warned regarding the synergistic effects between the two.

Under Maryland law, whether a plaintiff had sufficient knowledge of the risk of danger of an activity to have assumed the risk is judged by an objective standard.[6]

In the *Entwisle* matter, the decedent's co-worker testified that they were both members of the Baltimore Chapter of the Plumbers and Steamfitters Union, Local 438.

The Court heard testimony that this co-worker was "sure" that in Local 438 meetings he was informed about the risks of smoking, the hazards of asbestos, and that an increased risk of lung cancer can occur because of the combination of smoking and working with asbestos.

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The Court further heard testimony that the co-worker attended these meetings with the decedent.

Although not introduced during Plaintiff's case at trial, the defense obtained and intended to introduce United Association (UA) Journal Articles from the 1970s and 1980s supporting the theory that Union members were warned of these hazards. (For more information about the United Association Journal articles, contact Kevin Sloan at ksloan@mgmlaw.com.)

It is worth noting that in the *Entwisle* case the decedent received warnings about synergy in the early 1980s and continued smoking after obtaining that knowledge. Both the decedent and the co-worker remained union members throughout the 1980s and 1990s.

Counsel should examine a plaintiff or co-worker witness during a discovery deposition on union membership. Many will deny warnings about the hazards of asbestos from the unions during the relevant exposure years (typically the 1950s through 1970s), but if the witness remained in the union in the 1980s, 1990s or even 2000s they may confirm that eventually the union warned its members about the hazards of smoking cigarettes, the hazards of exposure to asbestos, and even that individuals had an increased risk of lung cancer from smoking and asbestos exposure.

If, like the decedent in *Entwisle*, the plaintiff continued to smoke after such warnings you have laid a foundation for an assumption of the risk defense.

APPRECIATION OF THE RISK

In *Entwisle*, the decedent's daughter testified at trial that her father "really cut back smoking when [she] was little" and admitted that she knew her father smoked in the 1970s. Moreover, she testified that her parents avoided smoking around their small child.

When taken together with the specific warnings on the packages of cigarettes and the co-worker testimony that their union had warned about the hazards of smoking and the synergistic effect between smoking and asbestos, the Court found that the evidence objectively demonstrated that the Plaintiff appreciated the risk of lung cancer from his decision to smoke.

Demonstrating that a smoker appreciated the risk of his or her decision to smoke cigarettes can be accomplished through the exposed individual, or, as was the case in *Entwisle*, through a family member.

In this example, the best evidence was that the smoker did not want to smoke around his young child because of a concern that second-hand smoke would be harmful to her health.

Interestingly, in an effort to minimize how much the decedent smoked and to push the suggested date of cessation further into the past (thereby suggesting a decreased likelihood that it was cigarettes as opposed to asbestos that caused the lung cancer) the testimony of decedent's daughter also established her father's appreciation of the risk of his smoking. Recognition of this natural tendency to want to minimize a smoking history can be used with a witness to demonstrate knowledge and appreciation of the risks associated with the habit.

Under Maryland law, whether a plaintiff had sufficient knowledge of the risk of danger of an activity to have assumed the risk is judged by an objective standard.

VOLUNTARY CONFRONTATION OF THE RISK

In Maryland, if a plaintiff had knowledge and appreciation of the risk, the final element to establish for a defense of assumption of the risk is that despite that knowledge and appreciation of risk, the plaintiff voluntarily chose to confront it.

In *Entwisle*, the decedent began smoking after health warnings were on the packages of cigarettes. There was no evidence put forth to indicate that his decision to smoke and to continue to smoke, despite knowledge and appreciation of the risk that he could develop lung cancer were anything other than his own free choice.

A consideration in many cases will be the addictive properties of cigarettes. In *Entwisle,* the Plaintiffs introduced no evidence to suggest that the decedent was addicted to cigarettes. During discovery, litigants should explore the nature of the exposed individual's relationship with smoking.

Some smokers will suggest that they quit without any assistance simply by making up their mind to discontinue. Others will say they gave up smoking because of the cost of the habit. In the event that the individual suggests that they were addicted, or still are addicted, be sure to examine the extent of his or her efforts to quit.

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Demonstrating that a smoker appreciated the risk of his or her decision to smoke cigarettes can be accomplished through the exposed individual, or, as was the case in Entwisle, *through a family member.*

By the time examination on the subject is finished you may discover that such claims of addiction are meritless and develop additional evidence of the smoker's knowledge and appreciation of the risk that they could develop lung cancer.

CONCLUSION

The doctrine of assumption of the risk can be a powerful litigation tool. Be sure to be familiar with the application of the defense in your jurisdiction. In Maryland, assumption of the risk is a stand alone defense to negligence and strict liability claims for failure to warn. Maryland is a contributory negligence state, and while the same facts in *Entwisle* may have entitled the defense to a finding of contributory negligence, that defense would apply only to the negligence claim, not the strict liability claim.

In states that would apply comparative fault to a portion of a plaintiff's damages,[7] a carefully crafted assumption of the risk defense can still have a significant impact on the potential damages in a smoking lung cancer case. The evidence discussed in this article combined to form a winning trial defense in Baltimore, Maryland.

In your next case in which a current or former smoker alleges that asbestos exposure caused his or her lung cancer you should consider assumption of the risk as a possible defense and begin development of the facts necessary to prove your burden at the outset of discovery.

NOTES

[1] *Blood v. Hamami*, 143 Md. App. 375, 385 (2002).

[2] *Blood*, 143 Md. at 386 (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630 (1985).

[3] *Crews v. Hollenback*, 358 Md. 627, 644 (2000).

[4] Public Law 91-222.

[5] Public Law 98-474.

[6] *Blood*, 143 Md. App. at 386.

[7] In Louisiana, for example, a decedent's 'survival damages' for his own injuries are governed by pre-comparative fault law, and the heirs 'wrongful death damages' for their own injuries are governed by comparative fault law.

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