Legal Backgrounder

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MISSISSIPPI HIGH COURT PROVIDES CLEAR GUIDANCE ON MASS TORTS THROUGH ASBESTOS RULING

by

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On January 20, 2005, the Supreme Court of Mississippi reversed four identical $25 million asbestos verdicts entered after a jury trial in Holmes County, Mississippi. *3M Company v. Johnson*, 895 So. 2d 151 (Miss. 2005).[1] The Court rendered judgment for 3M Company, the sole appellant,[2] ordering that the plaintiffs' claims against 3M be dismissed in their entirety. *Id.* at 167.

In its decision, the Court provided important guidance for litigants in product liability cases and also strengthened its recent jurisprudence on joinder and venue. *See, e.g., Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004). These issues are central to the mass tort litigation prevalent in Mississippi courts.

Procedural History. The *Johnson* plaintiffs each claimed to have non-malignant asbestos-related injuries. Their claims against 3M arose from 3M's manufacture of two products — the 8500 dust mask and the 8710 disposable respirator. *See Johnson*, 895 So. 2d at 154. Neither product contains asbestos, and only the 8710 was marketed or designed for use against asbestos. *Id.* All other defendants, by contrast, were alleged to be manufacturers or distributors of asbestos-containing products. *Id.* at 157. Nevertheless, all 154 plaintiffs joined their claims against more than 70 defendants in a single lawsuit.

Each of the six plaintiffs whose claims went to the jury received verdicts for actual damages of $25 million. The jury assigned to 3M either 20% or 25% of the fault with respect to each of four

[1] On March 24, 2005, the Mississippi Supreme Court denied Plaintiffs' Petition for Rehearing.

[2] 3M was one of more than 70 defendants sued by more than 154 plaintiffs in this action. Pursuant to an order by the trial court, a group of 10 "trial plaintiffs" was to go to trial jointly against all defendants. In the end, only eight of these plaintiffs and seven defendants went to trial; two of the eight plaintiffs were dismissed before the verdict. Of the seven defendants, all except for 3M either settled with plaintiffs or did not appeal due to ongoing bankruptcy proceedings.

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plaintiffs: Simeon Johnson, James Curry, Phillip Pate, and Bobby Joe Lawrence. 3M's cumulative liability following the verdicts was $22.5 million. After the trial court denied 3M's post-trial motions, 3M obtained an order certifying the judgment against it for appeal to the Supreme Court of Mississippi. *See Johnson*, 895 So. 2d at 154.

The Plaintiffs. The plaintiffs had widely varying occupational and medical histories. *Id.* at 155-56. James Curry testified he had worked for several railroad companies and did drywall repair for many years, all without any respiratory protection equipment. He used a mask only while working as a welder in the late 1960s, but did not wear it for protection from asbestos. Simeon Johnson testified he wore a 3M mask during a single year. Mr. Johnson did not use asbestos products during this time period. At most, for about ten 30-minute periods during that year, he was in the same large building as other workers who used a pipe covering and insulating cement; there was no evidence that either of those products contained respirable asbestos. Even assuming those products did contain asbestos, his cumulative exposure while wearing a 3M mask was for no more than six hours of his entire working life. Mr. Pate's and Mr. Lawrence's medical and occupational histories also varied widely. *See id.*

Although each of the plaintiffs claimed to have worked in "dusty" conditions, all admitted that they had not known they were working around asbestos. *Id.* at 157. Mr. Curry and Mr. Lawrence were diagnosed with "pleural thickening," a condition that can have a variety of causes other than asbestos exposure. Mr. Johnson was diagnosed with "mild asbestosis," and Mr. Pate with "probable" asbestosis. Dr. Obie McNair, the physician who made these diagnoses and who testified for plaintiffs at trial, placed no medical restriction on any of the plaintiffs' activities. *Id.* at 155-56. Dr. McNair's histories of the plaintiffs stated that two of them denied ever wearing respiratory protection. As to the others, there was no mention of respiratory protection, but Dr. McNair agreed that he would have noted any reported respirator use as significant. *Id.* at 157. No plaintiff claimed to have missed work due to asbestos-related medical problems, nor did any prove any special damages.

The Jury. Voir dire revealed that a "widespread asbestos campaign had been waged in Holmes County" in the months leading up to the trial. *Id.* at 156. Prospective jurors, also known as "venire," disclosed that "informational sessions" had been held at locations including the courtroom where the trial was held; the sessions "were intended to both recruit asbestos plaintiffs and to educate the county about the dangers of asbestos." *Id.* A number of venire members had been screened for asbestosis; some sixty percent of the venire had worked for employers whose employees were screened, and venire members agreed that "most" of Holmes County had been "touched by" the asbestos screening and "informational" campaign. *Id.* Nonetheless, the court initially refused to sustain for-cause challenges based on venire members' relationships to the plaintiffs or based on the venire members' potential exposure to asbestos. When the first venire was exhausted without a complete jury being seated, the court did allow such challenges to members of the second venire panel. *Id.* at 156-57.

Despite these irregularities, the trial court denied motions to strike the venire, for mistrial, or for change of venue. It also denied discovery motions aimed at determining the "scope and effect of the asbestos campaign." *Id.* at 156.

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The Experts. Plaintiffs' expert witnesses were Dr. David Egliman, Dr. Obie McNair, and Professor Henry Glindmeyer. Dr. Egilman testified about the hazards of asbestos generally, but did not testify that any of the plaintiffs had been exposed to it. Dr. McNair testified that each of the plaintiffs suffered from an asbestos-related condition, but admitted this diagnosis was based at least in part on the plaintiffs' statements to him that each had worked around asbestos. As the Supreme Court noted, however, "each plaintiff conceded at trial that this was beyond his own personal knowledge." *Id.* at 157.

Professor Glindmeyer testified about the 3M products at issue. As to the 8500 mask, Prof. Glindmeyer's primary criticism was that 3M had a duty to warn users that the 8500 was not approved for use around asbestos; he opined that 3M should have put a label on the mask that said, "Don't use around asbestos." With respect to the 8710 respirator, Prof. Glindmeyer opined that 3M had falsely advertised it as "fitting all faces." However, Prof. Glindmeyer could not provide any evidence that any plaintiff or his employer had relied on the advertisements, packaging, or warnings provided with either product. *See id.* at 157, 164-66. Neither Prof. Glindmeyer nor the plaintiffs testified that the 8710 did not fit *these* plaintiffs. *Id.* at 164.

Analysis. The Supreme Court reviewed its recent joinder jurisprudence, including *Armond* and the five other *Janssen Pharmaceutica* cases following it,[3] and held that, as in those cases, the plaintiffs' claims here were improperly joined. *Id.* at 158. Mississippi Rule of Civil Procedure 20(a) requires that causes of action "arise out of the same transaction or occurrence," and that there be "a question of law or fact common to all the plaintiffs," in order for joinder to be appropriate. MISS. R. CIV. P. 20(a) (West 2004); *Johnson*, 895 So. 2d at 158. In part because the "plaintiffs worked in different occupations, for different employers, at different times, were exposed to different products and used different respiratory protection equipment or no respiratory protection equipment at all," and "were of varying ages, had different work histories, different exposures and different diagnoses," the Court found that joinder of these plaintiffs' claims was improper under MISS. R. CIV. P. 20(a). *Johnson*, 895 So. 2d at 158. In fact, the "only similar trait shared by the plaintiffs" was "the alleged exposure to asbestos at some point in their work history." *Id.*

The Court's joinder decision was consistent with its other recent decisions. But the opinion also contains several additional points about which litigants should be aware. First, the Court noted that not only the plaintiffs, but the *defendants* in *Johnson* had been improperly joined. Specifically, they "were required to defend themselves alongside unrelated defendants." *Id.* For example, 3M, the only defendant in the case whose alleged liability was not based on the manufacture or distribution of asbestos-containing products, was improperly joined with other categories of defendants, who were alleged to sell or make asbestos-containing products. *Id.* The Court thus signaled that trial courts should apply Rule 20's "transactional relationship" test not only to the plaintiffs' individual claims, but to the *defendants* each plaintiff sues. In addition, the Court reiterated, as it had in *Mangialardi*, that Rule 20's joinder requirements include no exception for so-called "mature torts" such as asbestos litigation. *Id.* at 159; *see also Mangialardi*, 889 So. 2d at 493.

[3] *Janssen Pharmaceutica, Inc. v. Jackson*, 883 So. 2d 91 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Keys*, 879 So. 2d 446 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Scott*, 876 So. 2d 306 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Grant*, 873 So. 2d 100 (Miss. 2004).

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As to 3M, the Court also found that none of the plaintiffs had met their burden of proof on their products liability claims. *Johnson*, 895 So. 2d at 161, 165-67.

After a review of Professor Glindmeyer's testimony, the Court noted that Prof. Glindmeyer's criticism of the 8710 was essentially that 3M had advertised it as "one size fits all," and that his primary criticism of the 8500 was that 3M failed to warn that the mask should not be used around asbestos. *Id.* at 164. The Court found that plaintiffs had offered no proof that the 3M products at issue failed to fit these plaintiffs. The Court reviewed the plaintiffs' own testimony and found that none had established they had relied upon any representation that the 8710 "fits all faces," or that they had seen or read any warnings, literature, or advertisements concerning the products. Without proof of reliance on such documents, the court held that plaintiffs could not establish a failure to warn claim. *Id.* at 166.

The Court also noted that under MISS. CODE ANN. § 11-1-63(f), the plaintiffs had the burden to show that "at the time the 8500 dust mask and the 8710 disposable respirator left 3M's control, there was a feasible alternative design available that would have prevented the harm [alleged by plaintiffs] without impairing the usefulness of the product." *Id.* at 165. The Court held that the plaintiffs had failed to present any feasible design alternative to the 8710; nor did plaintiffs offer any proof "from which a reasonable jury could conclude that an injury was caused by a defect that existed at the time the mask was sold by 3M." *Id.* at 165-66.

The Court noted that 3M had never represented the 8500 to be suitable for use around asbestos. *Id.* at 165. Moreover, as to both products, the plaintiffs failed to relate their injuries to any alleged failure to warn: "the failure to warn must be the proximate cause of the injuries suffered or it is irrelevant." *Id.* at 166 (citing *Garner v. Santoro*, 865 F.2d 629, 641, 642 (5th Cir. 1989)). Here, the plaintiffs had no evidence that they had read any warnings, or that "some other warning would have given them additional information that they did not already know and that they would have acted upon that new information in a manner that would have avoided the injuries." *Id.* The plaintiffs thus did not make out a *prima facie* case of defective design as to either product.

Conclusion. In rendering judgment for 3M, the Court held plaintiffs Johnson, Lawrence, Curry and Pate to their burden of proof, and concluded they had failed to carry that burden with respect to their claims for failure to warn and for product defect. The Court's analysis will provide a roadmap for similar products liability actions, especially where either reliance on warnings or advertising or proximate cause is at issue. The Court's analysis of joinder issues, particularly with respect to joinder not only of plaintiffs but of defendants, provides another key piece of the developing jurisprudence that has followed *Armond*. The Court might have chosen to dispose of this appeal by reversing the trial court's rulings on motions to strike the venire and to change venue. *Cf. Bailey*, 878 So. 2d at 53, 63 (holding that trial court abused discretion by changing venue to "a county immediately next door to the original county", where the record was "replete with evidence" that the new county was equally biased; remanding for new trial in an appropriate venue). But such a result, while it would have provided 3M with a new trial in, presumably, a venue less affected by pretrial publicity and the "asbestos campaign" waged by plaintiffs' counsel, would have provided far less guidance to trial courts and litigants engaged in mass tort cases so prevalent in Mississippi's court system. The Supreme Court, instead, accepted 3M's invitation extended at oral argument, to "use the three *R*s — reverse, render, and write."

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