

COURT DECLINES TO BAR ASBESTOS SUITS BY THOSE WHO ARE NOT SICK *(Norfolk & Western Ry. Co. v. Ayers, No. 01-963)*

The U.S. Supreme Court this week declined to bar "fear of cancer" emotional distress damage awards to those who have been exposed to asbestos, even in the absence of evidence that they have developed cancer.

The 5-4 decision in *Norfolk & Western Railway Co. v. Ayers* was a setback for the Washington Legal Foundation ("WLF"), which partnered with former Attorney General Griffin Bell to file a brief in the case. WLF argued that awards to uninjured plaintiffs are becoming all too common in asbestos litigation and are undermining the fairness of the nation's tort system.

The Court held that so long as a plaintiff has suffered *some* physical impairment due to his asbestos exposure (in this case, a mild bronchial condition called asbestosis), he is entitled to recover for whatever emotional injuries are claimed to have been due to the exposure. In a dissent on behalf of four members of the Court, Justice Kennedy said that the practical effect of the ruling will be to deplete funds that would otherwise be available to compensate the truly injured.

"The plaintiffs in this case were awarded \$1 million each, even though the symptoms of their alleged asbestos exposure were nothing more severe than shortness of breath," said WLF Chief Counsel Richard Samp after reviewing the Court's decision. "Such verdicts are all too common as the asbestos litigation debacle continues to spiral out of control. If people who are not sick continue to collect damages that have little or no relationship to any real injury, our tort system will have failed to uphold its obligation to distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other," Samp said.

The case involved six retired employees of Norfolk & Western Railway Co. ("N&W"), who allege that they were injured by on-the-job exposure to asbestos. The employees sued N&W under the Federal Employers' Liability Act ("FELA"), which authorizes suits against railroads by employees who allege that they were injured due to their employer's negligence. The plaintiffs never missed any days of work as a result of the alleged exposure, but they claimed that they now suffer shortness of breath.

The principal basis for the plaintiffs' damages claim was their fear that they might later develop cancer, and their assertion that that fear had caused them severe emotional distress. However, they produced no evidence of any physical manifestation of the alleged emotional

injury. The trial judge instructed the jury that any plaintiff who had a reasonable fear of cancer that was related to a physical injury from asbestos exposure was entitled to damages. Moreover, the judge permitted the jury to hold N&W liable for all emotional distress suffered by the plaintiffs, even though they had been exposed to asbestos at numerous other jobs. The multi-million dollar verdict followed. This week's Supreme Court decision upholds that verdict.

In its brief, WLF argued that FELA does not permit award of fear-of-cancer emotional distress damages in the absence of evidence that there was some physical manifestation of the emotional injury. WLF argued that in the absence of such a rule, companies' liability to uninjured tort claimants would be virtually limitless. The Supreme Court disagreed, holding that FELA plaintiffs may recover emotional distress damages so long as they have suffered *some* physical injury, even if the emotional distress arises from fear of *some other* physical injury that has not yet occurred.

Any rule established by the Supreme Court under FELA is not binding on state courts hearing state-law asbestos claims. Nonetheless, this week's decision sends a strong signal to state courts that they too should feel free to apply relaxed common-law tort principles in asbestos cases -- and that any efforts to solve the asbestos litigation crisis will have to come from legislatures, not the courts.

WLF's brief termed the current state of asbestos litigation "scandalous," with hundreds of thousands of suits being filed by uninjured plaintiffs. WLF noted that the onslaught of such litigation has forced more than 55 major companies into bankruptcy and imposed severe hardship on untold numbers of shareholders, employees, creditors, and other stakeholders.

WLF is a public interest law and policy center with supporters in all 50 states. It regularly litigates in support of tort reform and against the creation of new and unfounded theories of tort liability.

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