

In our Fall 2004 Newsletter, we have two concurrently running themes - asbestos liability and architect and engineer liability. As to the first theme, I have provided a short article discussing a recent Pennsylvania Superior Court decision on when and where to apply the *Eckenrod* test for proving sufficient exposure to a defendant's asbestos-containing products so as to withstand a motion for summary judgment. Defense practitioners in the field of toxic tort law will, hopefully, find this decision informative and useful as they go about the process of filing their dispositive motions.



Continuing with asbestos law, Marla Presley has carefully examined another recently decided Superior Court case, *Nybeck*, which addresses the issue of the extent of what can be seen as a compensable injury in Pennsylvania asbestos claims, how that decision interplays with the *Quate* decision from last year and what this all means in terms of practical implication.

James Creenan, a contributor in the past, has again addressed a growing and serious area of concern - copyright infringement. Mr. Creenan notes how the proliferation of technology has caused significant expansion of copyright infringement cases, particular

cases involving architects. Copyright law protects the way in which an author expresses an idea, but not the idea itself. The federal Copyright Act protects the creative elements contained in the architect's work product and provides for potentially severe damages for infringement.

In keeping with the theme of design professional liability, Mark Gesk has submitted a interesting look at the various avenues of exposure being faced by architects and engineers. Previously thought to be protected by the limiting terms of the contract, a design professional, more and more, is being assaulted by claims based upon negligence theories, implied duties and duties being chiseled and refined by case law. Mr. Gesk provides useful information for design professionals trying to recognize and, hopefully, avoid liability.

As always, we hope you find Your Best Defense useful and informative.

*If you know of anyone who is not on our mailing list and who might want to read our Newsletter, or if you have any suggestions for topics to be addressed, please e-mail me at [dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com).*



## **ECKENROD REFINED**

**By: Dale K. Forsythe**

A recent decision by the Pennsylvania Superior Court addresses the continuing argument over the applicability of the *Eckenrod* "regularity and frequency" test for the sufficiency of product identification in an asbestos case.

In *Gilbert, et.al v. Monsey Products Company, et.al*, 2004 Pa.Super 380, the Superior Court reversed the decision of the trial court which had granted the Motions for Summary Judgment of two defendants. Plaintiff had sued a number of defendants in a products liability claim, asserting that he had contracted mesothelioma as a result of exposure to asbestos-containing products which they had produced. Defendants Monsey and IPA had filed Motions for Summary Judgment based

upon the argument that plaintiff had failed to prove, under the standard announced in *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988), that he had frequent, regular and proximate exposure to their products. The court granted the defendants' Motions, and defendants appealed.

On appeal, it was held that because plaintiff himself had been able to testify that he had worked with and inhaled fibers from these defendants' products, i.e., direct instead of circumstantial evidence, the lower court had erred in applying the *Eckenrod* test. The *Gilbert* court cited to the recently decided *Wilson v. A.P. Green Industries, Inc.*, 807 A.2d 922 (Pa.Super.2002) as authority. That court, in deciding similar issues, had stated that "ideally, a plaintiff...will be able to directly testify that plaintiff breathed in asbestos fibers and that those fibers came from defendant's product." Without that direct evidence, *Gilbert* further cited *Wilson*, plaintiff must rely on circumstantial evidence and meet the *Eckenrod* test. 807 A.2d at 924.

Accordingly, the court has now provided further clarification to when *Eckenrod* needs to be applied - only where there is a lack of direct evidence of exposure, a plaintiff must prove the regularity and frequency of exposure required in the landmark *Eckenrod* opinion. The test should only be applied to cases where exposure is based upon circumstantial evidence.

*Please contact Dale Forsythe at [dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com) with any questions or concerns you may have in this area of law.*

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### COMPENSABLE INJURY IN ASBESTOS CASE REVIEWED

By: Marla Presley

The Pennsylvania Superior Court recently heard the appeal in *Nybeck v. Union Carbide Co.*, 2004 PA Super 339 (2004), in which it addressed asbestos-related injuries and the plaintiff's burden of proof in establishing a causal connection between his symptoms and the asbestos exposure. In reversing the trial court's decision granting the defendant's motion for summary judgment, the Court effectively interpreted its recent line of cases discussing what constitutes a "compensable injury" in asbestos-related cases.

In *Nybeck*, the plaintiff appealed the Court of Common Pleas' order granting summary judgment to Union Carbide Corporation on behalf of itself and defendants similarly situated (collectively, Union Carbide). The trial court ruled that Mr. Nybeck failed to present a prima facie case showing that he had been diagnosed with an asbestos-related condition and that he consequently suffered a discernible physical symptom, a functional impairment, or a disability. Thus, the trial court concluded that Mr. Nybeck failed to present sufficient evidence of a compensable injury to warrant a full trial. On appeal Mr. Nybeck contended the trial court abused its discretion in its finding, given his submission of an un rebutted expert medical report stating to a reasonable degree of medical certainty that he satisfies these criteria.

Mr. Nybeck worked for the Navy for thirty years as a technician and mechanic. He was exposed to asbestos frequently and suffered from progressive dyspnea, which is "shortness of breath, a subjective difficulty or distress in breathing, usually associated with disease of the heart or lungs." STEDMAN'S MEDICAL DICTIONARY 535 (26th ed. 1995). In support of his medical condition, Appellant offered the testimony of Jonathon L. Gelfand, who, in 2003, opined:

*"In my opinion, exposure to asbestos in the workplace is the cause of the pleural thickening and pulmonary asbestosis and is a substantial contributing factor to his diffusion abnormality and to his dyspnea on exertion. Each and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted. I hold these opinions to a reasonable degree of medical certainty. In addition, Mr. Nybeck has severe chronic obstructive lung disease. In my opinion, cigarette smoking is the cause of the severe chronic obstructive lung disease and is a substantial contributing factor to his pulmonary function abnormalities..."*

Gelfand Letter, 8/19/03, at 2 (emphasis added).

On November 3, 2003, Union Carbide filed its Motion for Summary Judgment arguing that Pennsylvania caselaw dictates that "pleural thickening, plaque formation, and/or shortness of breath, unless clearly discernible through physical manifestation and/or medical reports is not sufficient under *Giffear v. Johns-Manville Corp.*, 429 Pa. Super. 327, 632 A.2d 880 (Pa. Super. 1993), and progeny, to rise to the level of a compensable injury under Pennsylvania law." Motion for Summary judgment, 11/3/03, at 4.

The trial court agreed with the defendants, finding that the "well established law in Pennsylvania in asbestos cases is that damages may only be awarded for a compensable injury where a plaintiff is diagnosed with an asbestos-related condition and has suffered a discernible physical symptom, a functional impairment or disability resulting from said asbestos exposure." Trial Court Opinion (T. C. O.), 12/29/03, at 3 (citing *Giffear*, 429 Pa. Super. 327, 632 A.2d 880 at 881). Principally, however, the trial court found that the Superior Court's decision in *Quate v. American Standard, Inc.*, 2003 PA Super 64, 818 A.2d 510 (Pa. Super. 2003), was binding and conclusive against Mr. Nybeck. Relying on that opinion's broad language, the trial court noted that "where a plaintiff suffers from a non-asbestos related medical condition, the symptoms of which are consistent with medical conditions arising from exposure to asbestos, the existence of those non-asbestos-related medical conditions negates his ability to establish the necessary causal link between his symptoms and asbestos exposure." T.C. O., 12/29/03, at 4 (quoting *Quate*, 818 A.2d at 511). The trial court thus found it "impossible to causally relate [Nybeck's] shortness of breath to any particular medical condition that [Nybeck has] or any physical restriction that [he] may experience." T.C. O., 12/29/03, at 4.

Mr. Nybeck appealed, relying in the post-*Quate* decision in *Cauthorn v. Owens Corning Fiberglas Corp.*, 2004 PA Super 1, 840 A.2d 1028 (Pa. Super. 2004). In that case, Cauthorn, much like Quate, suffered from "quite a few serious health conditions" in addition to those associated with his exposure to asbestos, including being a smoker for forty years. *Id.* at 1031. Mr. Cauthorn's expert did admit that "he could not distinguish 'what percentage of [Mr. Cauthorn's diffusion capacity abnormality] is caused by cigarettes and how much is caused by asbestos, opining only that "cigarette smoking and asbestos exposure [were] contributing factors in [Mr. Cauthorn's] diffusion abnormality." *Id.* The *Cauthorn* jury nonetheless found that he had suffered an asbestos-related injury and awarded him damages of \$ 150,000. *Id.*

On appeal, the defendants argued that Cauthorn failed to prove he suffered from a symptomatic asbestos-related disease. The Court noted that after *Giffear* it diverged regarding what constituted "discernible physical symptoms or functional impairment." The Court interpreted its recent line of cases in this area to conclude that where "shortness of breath is casually related to a diagnosis of asbestos, a compensable injury does in fact exist."

Relying on that interpretation, the Court found that Mr. Nybeck's pleural thickening in the lungs and shortness of breath was due in part to his inhalation of asbestos. Mr. Nybeck's expert's report plainly makes a prima facie showing of a disability materially and substantially caused by his occupational exposure to asbestos, which constitutes a "compensable injury" under binding Pennsylvania precedent. Gelfand Letter, 8/19/03, at 1-2. Accordingly, the Superior Court reversed the trial court's order granting Union Carbide summary judgment and remanded the case for trial.

Please contact Marla Presley at [mpresley@waymanlaw.com](mailto:mpresley@waymanlaw.com) with any questions or concerns you may have in this area of law.



### **LIABILITY FOR COPYRIGHT INFRINGEMENT ON THE RISE**

*By: James W. Creenan, Esquire*

In recent years, the proliferation of technology has caused an increase in the number of copyright infringement cases involving design professionals. Copyright law protects the way in which an author expresses an idea. The idea itself is not protected - only the expression of the idea. The federal Copyright Act protects the creative elements contained in the architect's work product and provides for potentially severe damages.

The Act protects **“original works of authorship fixed in any tangible medium of expression.”** 17 U.S.C. § 102. For design professionals, liability usually relates to one of two categories: (1) pictorial graphic, and sculptural works, or (2) architectural works. As stated, the Act does not protect an idea - such as the novel concept of placing a window near the front door of a medical office waiting room. In contrast, the fact that the graphical depiction of a window placed near the front door can be depicted in many different ways necessarily means that a “spark” of creativity was required to compose the architectural details and space. As a result, the Act protects the creative components, including the arrangement and composition of the expressed idea.

For architects and engineers (the authors), a “work” is the tangible product including any blueprints, specifications, drawings, or other design depictions, but only to the extent that the work contains creative or original design, placement, arrangement or details.

Importantly, the Act does not protect design features that could be considered standard or generic. For instance, every depiction of a window requires lines constituting a rectangle arranged in such a way to allow the architect to convey the dimensions and specifications.

Similarly, matters that have been placed in the public domain, i.e., freely distributed without restrictions, do not receive the Act's protection.

Now, knowing what the Act protects, liability will result the infringement of the owner's exclusive rights to use, copy, and reproduce the work. The Act provides exclusive rights to reproduce (copy) the work, prepare derivative works, to distribute, to perform, and to display. 17 U.S.C. § 106.

In many instances, the infringement issue will be determined in the first instance by a judge viewing a side-by-side comparison of the protected work and the infringing work. Therefore, the look and feel (font, line weight, layer usage) of the design documents assumes critical importance.

In limited circumstances, the law allows “fair use” primarily for non-commercial purposes “such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”. 17 U.S.C. § 107.

Works of visual art require special attention. Artists are considered “authors” under the Copyright Act. Architects must consider the possibility, especially in renovations or additions to historical structures, that existing design elements that have been incorporated into the building are works of visual art. The best example of this would be a mural. Author/ artist is entitled to at

least 90 days notice prior to removal.

When encountered with a potential copyright problem, design professionals should determine the “owner” of the “work” from a contractual standpoint and determine whether the owner has granted an implied or express “license” to use the work.

Design professionals reduce their exposure to copyright infringement liability by conducting a complete investigation of existing design documents, examining current design practices, understanding the AIA Contracts, and considering appropriate types and amounts of insurance coverage.

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### **DESIGN PROFESSIONAL LIABILITY: EXPOSURE ON TWO FRONTS**

*By: Mark Gesk*



Claims against a design professional's competency and skill pose liability threats in two areas of law - Contracts and Torts. This revelation may come as something of a surprise to the design professional who believes that if he adheres to the tenets of the standard AIA contract forms he has done all that is required to shield himself from liability. Unfortunately, the law of torts, or civil wrongs, can in some circumstances be a claimant's preferred means of attacking a design professional's conduct. A claimant is continually attempting to expand the duties of a design professional beyond the contract language. For this reason, design professionals should understand the legal concepts of the standard of care applicable under both contract and tort law.

The standard of care to be observed by design professionals in completing their work cannot be reduced to easily quantifiable terms. Court decisions establish the standard of care for an architect and engineer to be that of “ordinary care exercised by a reasonable person possessing the skills exercised by a person in that profession.” “Malpractice” is simply a deviation from standard practice or a failure to exhibit professional skill or learning that results in injury, loss or damage. Breach of contractual duties and tort negligence may result in liability. This is because, by contract, a design professional commits to complying with the standard of practice of a competent design professional undertaking the same duties. Where such language is not expressly set forth in the contract, courts will imply the presence of this standard.

For the design professional, contract liability poses as great a threat as does liability in tort. First of all, contract damages may be computed differently than tort damages. A party's economic loss (such as the diminution in value of property, cost of repair or replacement, lost profits or lost business opportunities) may be treated differently in a contract action than in a tort negligence action. Secondly, while one may successfully defend an alleged breach of contract by showing that the other party breached the contract first, this is not a defense in tort law. Similarly, a defense of contributory negligence or comparative fault (whereby the



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 **Wayman Watch...**

- *Dale Forsythe and John Bogut represented the firm at the DRI's Asbestos Medicine Seminar in San Diego.*
- *Congratulations to Kate Fagan. Ms. Fagan was recently elected to serve as Assistant Treasurer of the Academy of Trial Lawyers of Allegheny County, as well as to serve on the Judiciary Committee of the Allegheny County Bar Association for a three year term.*
- *Congratulations are also in order for Marla Presley, who recently passed the West Virginia Bar Exam.*

*Design Professional Liability, continued from page 3*

plaintiff is in some way responsible for the problem) is applicable in tort law but fails in contract situations. Lastly, pursuant to the language of the contract, a design professional may assume a degree of liability that approaches absolute or strict liability, even though such liability is not imposed by tort law.

A design professional's duty to adhere to the standard of care is owed not only to the party with whom the contract is made, but also to any third party who might foreseeably be injured as a result of a breach of that duty. The area of third party liability continues to evolve, but court decisions have extended liability to include, among others, general contractors and subcontractors as well as their employees and sureties. Aside from the parties involved in construction, tort liability has extended to, among others, an owner's employees, tenants, their invitee's, as well as an unfortunate passer-by.

A breach of a contract can relate to both explicit and implicit duties, and a number of additional exposure risks arise as a result. One of the more common breaches of an implied duty in the contract is failure to thoroughly research the applicable zoning or building codes prior to preparing the contract documents. Design professionals possess an additional liability risk in that they may be held responsible for risks created by other design professionals that they retain. While the others who are retained are considered independent contractors, a design professional may be held liable based upon the existence of peculiar risks of harm of which he

should have known. A potentially more serious liability risk arises in the area of construction supervision. Even if this power has been eliminated from the contract, its removal does not necessarily protect the design professional from liability imposed by building codes and other regulations. The design professional should especially be careful not to give the impression that he has voluntarily assumed responsibility for jobsite safety.

As construction progresses, the design professional will be called upon to certify the quality and completion of construction so that the contractors may be compensated. In giving such certification, the design professional warrants that the construction is in accordance with the contract documents and meets that level of completion. If after payment the work is found to be unsatisfactory or is not as complete as previously certified, the design professional may be liable to the owner and the contractors' sureties for offsetting the amount of money paid versus any additional amount necessary to repair or replace the work, unless the certification is properly qualified and limited by appropriate language.

Accordingly, a prudent design professional requires a basic understanding of the legal methods by which liability may arise. As a result, the design professional will be more aware of a potential liability risk and can then take appropriate steps to mitigate and/or avoid such risks.

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