Judge Mark Davidson

Multi District Litigation Asbestos Judge

201 Caroline

Houston, Texas 77002

713-368-6060

December 17, 2009

In re: Cause No. 2007-74,274; *Beadle v. Ametek*

Dear Counsel:

You will recall that this court earlier granted a Motion for Summary Judgment in the above case on the ground that the statute of repose barred the Plaintiff's cause of action against the two Engineering Defendants. The Plaintiff filed a Motion for rehearing, which this court took under advisement. This letter constitutes the ruling of the court on the Motion for Rehearing.

The motion for summary judgment calls for an interpretation of Section 16.009 of the Civil Practice and Remedies Code. It states (in part):

> A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

The statute does not appear to be ambiguous. If a defendant who is a repairer or constructor of an improvement is sued, they are entitled to dismissal if the suit is brought more than 10 years after completion of the project. The public policy behind the statute is clear – if there is a defect in design or construction of a building, it ought to be obvious within ten years of the time of completion.[i] The Legislature probably did not intend to include injury with latency periods of twenty or thirty years in the reach of the statute, but since it not exempted, it must be included.[ii]

The law becomes less clear if the subject of the suit is a tort arising (in whole or in part) out of the construction or improvement, as is the case here, as opposed to an injury that takes

place after its completion. In other words, if the injury is alleged to have taken place before something was annexed to the property, and while it was still personalty, there is a question as to whether the statute provides protection to the contractor.

Both parties agree that the most direct commentary on this point by the Texas Supreme Court is found in *Sonnier v. Chisolm –Ryder Co., Inc.,* 909 S.W.2d 475 (Tex. 1995). The case is not directly analogous to the facts of this case. I read the holding of the case to be that a manufacturer of a product who neither constructs nor repairs an improvement to real property is not entitled to the protection of the statute. In this case, both the movant defendants and the amicus are contractors, and are clearly within the intended protection of the statute.

Plaintiff cites *White v. CBS Corp*., 996 S.W. 2d 920 (Tex. App. – Austin, 1999) for the proposition that pre-annexation work by a contractor can be actionable and that the statute of repose does not apply. Defendants and amicus do not dispute the holding of *White*, but argue that the case improperly applies the law. They argue the more appropriate interpretation of the statute can be found in the holdings of cases from other states. They argue that either the explicit language of statutes of repose in other states, or interpretation of less clear statutes in those states make it clear that its reach is intended to both "object based" and "activity based" causes of action. Finally, Defendant and amicus argue that inclusion of "claims relating to construction" of the improvement establish the effect of the statute to include actions brought by someone who worked on the construction.

While the cases from other states are powerfully eloquent, and express proper interpretation of those states' statutes, I am unable to find that the opinion of a Texas Court of Appeals is entitled to no weight. To the extent to which the Plaintiff is alleging contact with and exposure to asbestos at a time that it was personalty, I accept the opinion of the Third Court of Appeals that if the Plaintiff's case is limited to evidence of exposure to asbestos before it was annexed, it constitutes an exception to the statute of repose.

I should note that the Texas Legislature has met and adjourned four times since the White case was announced in 1999. No attempt has been made to clarify the statute to expressly include both "object based" and "activity based" causes of action. There have been at least three rounds of tort reform, including comprehensive statutory amendments covering asbestos litigation since then, and the statute of repose has remained unchanged.

The motion to reconsider the Summary Judgment granted is granted, and the summary judgment is set aside. Counsel is asked to prepare an order.

I am sending this letter to Judge Linda Chew of the trial court to advise her of the potential return of this case. I would ask counsel to advise me of an appropriate trial date at your earliest conveneience.

Respectfully yours,

MARK DAVIDSON

MD/

[i] In the interest of full disclosure, your author, as a 24 year old aide to a state senator, drafted the first statute of repose adopted by the Legislature in 1977. I am in a good position to have knowledge of the intent of the author.
[ii] Chalk that up to a drafting defect. See footnote 1.