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www.rawle.com

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 Fax 516. 294. 2006

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 Fax 856. 596. 6164

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 Fax 412. 261. 5710

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 Fax 717. 234. 7710

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 302. 778. 1200
 Fax 302. 778. 1400

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 304. 232. 1203
 Fax 304. 232. 1205

@1783Rawle

PENNSYLVANIA TOXIC TORTS

PA Supreme Court Denies Plaintiff's Petition for Allowance of Appeal in Asbestos Case



Angela M. Heim

On June 21, 2016, the Pennsylvania Supreme Court issued an Order denying the Petition for Allowance of Appeal filed by James Herbert, Executor of the Estate of Vincent W. Gatto, Sr., Deceased, which challenged the January 12, 2016 Order of the Pennsylvania Superior Court affirming the trial court's entry of summary judgment in favor of ten manufacturers and/or

distributors of asbestos-containing products. Rawle & Henderson LLP represented Hajoca Corporation in the matter, but took the lead in preparing the Brief of Appellees and oral argument in the Superior Court and the Response to the Petition for Allowance of Appeal in the Supreme Court on behalf of all defendants involved in the appeal.

In the case, plaintiff alleged that the decedent, Vincent Gatto, was occupationally exposed to asbestos while working as a brick mason in Virginia from the early 1950s until the late 1970s, causing him to contract malignant mesothelioma. Gatto died on April 19, 2010, at the age of 86. Plaintiff instituted the wrongful death lawsuit in the Court of Common Pleas of Allegheny County in 2011 against various manufacturers and distributors of asbestos-containing products that Gatto was purportedly exposed to during the time period in question.

Hajoca Corporation and other defendants moved for summary judgment on the ground that Gatto's claims were barred by the statute of limitations set forth in Va. Code Ann. §§ 8.01-243(A) and 8.01-249(4). Specifically, the defendants asserted that Gatto underwent a CT



John C. McMeekin II



Carl D. Buchholz, III

scan in 2003 which resulted in a diagnosis of asbestosis. Since litigation was not instituted within two years after the diagnosis of asbestosis was communicated to Gatto by his physician, defendants argued it was time-barred under Virginia law. Unlike Pennsylvania, which follows a “two-disease rule,” Virginia has traditionally adhered to the “one-disease rule,” which provides that “when the statute begins to run, it runs as to all damages caused by ‘the wrongful or negligent act of another,’ even if the individual suffers additional damages at a later date.” *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 22, 736 S.E.2d 910, 916 (2013)(quoting *Street v. Consumers Mining Corp.*, 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946)).

Plaintiff did not challenge the application of the Virginia statute of limitations since all of the asbestos exposure occurred in Virginia. Instead, he opposed the summary judgment motion on the ground that the physician who conducted the 2003 CT scan testified, more than a decade after he conducted and interpreted the CT scan and attested to the accuracy of the diagnosis set forth therein, that there was either a transcription error in the CT scan report or he had misdiagnosed Gatto, and that Gatto did not have asbestosis in 2003. Plaintiff argued, therefore, that since Gatto did not have asbestosis in 2003, the statute of limitations did not commence running until Gatto was diagnosed with mesothelioma in 2010.

However, the defendants pointed out that this physician’s testimony was based solely on his review of the clinical findings in his earlier report and without reviewing the CT scan films themselves since they were unavailable. In addition, the physician admitted that he could have observed other indicators of asbestosis that he did not specifically include in his report.

The trial court (Judge Marmo of the Court of Common Pleas of Allegheny County) determined that the Virginia

statute of limitations did in fact apply, and granted the defendants’ summary judgment motion. Judge Marmo held that Gatto’s cause of action accrued when the diagnosis of asbestosis was communicated to him, and that he had two years from that moment to institute his lawsuit, which he failed to do. Judge Marmo did not comment on plaintiff’s misdiagnosis argument.

The Superior Court, in a unanimous Memorandum Opinion entered on January 12, 2016, affirmed the trial court’s entry of summary judgment in favor of the defendants. The Superior Court noted that “asbestosis” appeared as a diagnosis in the 2003 CT scan report, and that the results of the 2003 CT scan report were specifically discussed with Gatto on more than one occasion (in 2003 and 2005), which was “sufficient to trigger the limitations period.” Although the Superior Court recognized that plaintiff was attempting to challenge the accuracy of the 2003 asbestosis diagnosis—more than a decade after it was made—to defeat summary judgment, the Court held that “Gatto incurred an obligation to pursue his cause of action with all reasonable diligence” after being told he had asbestosis in 2003, and that “any dispute regarding the diagnosis should have been resolved long before Appellant filed his cause of action in 2010.”

As noted, plaintiff filed a Petition for Allowance of Appeal challenging the Superior Court’s January 12, 2016 Memorandum Opinion. In the Petition, plaintiff argued that the statute of limitations cannot commence running based on a transcription error or misdiagnosis but, rather, may only commence running based on an accurate diagnosis. The defendants argued in response that Virginia law imposed a duty on Gatto, upon learning of the asbestosis diagnosis in 2003, whether accurate or not, to use reasonable diligence in pursuing his cause of action. If he had done so, any misdiagnosis would have been revealed at that time, and the present lawsuit would not be time-barred. However, since no such action was taken, plaintiff could not overcome

summary judgment on that ground. The Petition was denied on June 21, 2016, effectively ending his state court appeal.

John C. McMeekin II represented Hajoca Corporation before the trial court. **Carl D. Buchholz, III**, Chair of the Firm's Appellate Department, argued the appeal on behalf of Hajoca Corporation and all of the other defendants, and **Angela M. Heim**, a member of the Firm's Appellate

Department, prepared the Brief of Appellees and the Response to the Petition for Allowance of Appeal.

James Herbert, Executor of the Estate of Vincent W. Gatto, Sr., Deceased v. American Biltrite, et al.: C.C.P. Allegheny County, C.A.No. 11-019602; Pennsylvania Superior Court Docket No. 1702 WDA 2014; and Pennsylvania Supreme Court Docket No. 61 WAL 2016

John C. McMeekin II represents clients as local, national and trial counsel in environmental, toxic and mass torts product and related class actions, products liability, insurance coverage and aviation litigation. He graduated *magna cum laude* from the University of Baltimore School of Law. John is admitted to practice in Pennsylvania, New Jersey and Maryland and related U.S. District Courts. John is a former firefighter and emergency medical technician, and is Hazmat certified. He has been published in professional and law review journals on a variety of topics related to toxic tort and environmental litigation. His significant cases can be found in the *BNA Law Reports* and *Law 360*. He is a past Chair of the ABA TIPS Toxic Tort & Environmental Law Committee and International Law Committee, Chair of the Philadelphia Bar Association Environmental and Toxic Tort Law Committee, and serves as Revenue Officer and a member of the ABA TIPS Council. He is a member of Rawle & Henderson LLP's Executive Committee.

John can be reached directly at: (215) 575-4324 • jmcmeekin@rawle.com

Carl D. Buchholz, III, is Chair of the Maritime, Insurance Coverage and Appellate Sections. His federal appellate practice includes an argument before the United States Supreme Court as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes seven arguments before the Pennsylvania Supreme Court, as well as over 35 oral arguments before the Pennsylvania Commonwealth Court and Pennsylvania Superior Court. From 2006–2012, Carl served as a member of the Disciplinary Board of the Supreme Court of Pennsylvania, including a term as Board Chair. Prior to his appointment to the Disciplinary Board, Carl served a six-year term as Chair and Board Member of the Pennsylvania Lawyers Fund for Client Security. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. He has been rated AV Preeminent and has been selected as a Pennsylvania Super Lawyer by *Law & Politics* Magazine.

Carl can be reached directly at: (215) 575-4235 • cbuchholz@rawle.com

Angela M. Heim is Of Counsel to the Firm and concentrates her practice primarily in appellate work and insurance coverage matters. Angela graduated from Penn State University with a degree in Business Logistics and an emphasis in Economics. In 1995, she graduated from the University of Pittsburgh School of Law and began her practice of law at Rawle & Henderson LLP. Angela is a member of the Firm's Appellate Department and has prepared well over 100 briefs filed in the appellate courts of Pennsylvania, both state and federal, and assisted in the preparation of countless other briefs and oral arguments, on a myriad of issues. She is also a member of the Firm's Insurance Coverage Department. Angela has provided coverage opinions and pursued declaratory judgment actions for insurance companies on numerous issues and has litigated contractual insurance coverage and indemnity disputes.

Angela can be reached directly at: (814) 696-5075 • aheim@rawle.com

ABA TIPS



Zachary M. Rubinich

Zachary M. Rubinich, a partner in our Philadelphia office, has been appointed as a Vice-Chair for the **ABA Tort Trial and Insurance Practice Section (TIPS) Workers' Compensation and Employers' Liability Law Committee** for the 2016-2017 year, effective September 2016. This will be the second one-year term that Zach has served in this position.

Zach focuses his practice on the defense of insurance carriers, self-insured entities and third-party administrators against workers' compensation claims in Pennsylvania. Based on his extensive experience, the Pennsylvania Bar Association Workers' Compensation Law Section has certified him as Specialist in the practice of workers' compensation law. Zach has handled all aspects of litigation before workers' compensation judges, the Workers' Compensation Appeal Board, the Commonwealth Court and the Pennsylvania Supreme Court. He routinely counsels employers, insurance carriers and third party administrators on claims management, workplace safety, return-to-work programs, employment practices and risk management. He is rated AV Preeminent by Martindale-Hubbell. He has been selected as a Pennsylvania Rising Star by Super Lawyers from 2010 to 2014. Rising Stars are the top 2.5 percent of attorneys in Pennsylvania who are 40 years old and younger or have been in practice for 10 years or less.

Zach can be reached directly at: (215) 575-4340 • zrubinich@rawle.com



Nigel A. Greene

Nigel A. Greene, a partner in our Philadelphia office, has been appointed Vice-Chair of the **ABA Tort Trial and Insurance Practice Section (TIPS) Commercial Transportation Litigation General Committee** for the 2016-2017 fiscal year. His appointment is in recognition of his professional abilities and reputation among 24,000 TIPS members. This will be the third one-year term that Nigel has served in this position.

Nigel focuses his practice on the defense of commercial motor vehicles, municipalities, commercial general liability, and premises liability matters. In addition, he serves as an arbitrator in Philadelphia County. He is admitted to practice in the state courts of Pennsylvania, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and the U.S. Courts of Appeals for the Third Circuit. He received his J.D. from Georgetown University Law Center in 1994 and his B.A. from the Virginia Polytechnic and State University in 1989.

Nigel can be reached directly at: (215) 575-4278 • ngreene@rawle.com

DELAWARE LAW SCHOOL



Laura Bower Braunsberg

Laura Bower Braunsberg, an associate in our Delaware office, taught Delaware Evidence Law in June 2016 at the Widener University Delaware Law School as part of the school's bar exam prep course. In addition, in May 2016, the *Delaware Journal of Corporate Law* published her article "Asking the Right Question: The Mixed Consideration Denominator Problem." In March, Laura, the University of Delaware Mock Trial team, and the Widener University Delaware Law School hosted an undergraduate mock trial tournament at which regional winners competed for the chance to advance to the national championship.

Laura concentrates her practice on commercial litigation. She earned her J.D., *cum laude*, from the University of Virginia School of Law in 2010 and her B.A., *magna cum laude*, in Philosophy, Japanese, and East Asian Studies from Macalester College in 2006. Laura is the Head Coach for the University of Delaware Mock Trial team, which placed 10th in its division at the National Championship in 2015 and won the Spirit of AMTA award at its regional tournament for its collegiality and good sportsmanship. She also represents victims of domestic violence through Delaware Volunteer Legal Services and children in foster care through the Office of the Child Advocate.

Laura can be reached directly at: (302) 657-2134 • lbraunsberg@rawle.com