

Client Alert **Product Liability Law**

The Duty Of Care In Take-Home Toxic-Tort Cases: Its Not Just For Spouses Anymore

In *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394 (2006), the New Jersey Supreme Court imposed a duty of care on a landowner in a premises liability case for injury to a spouse from take-home exposure to a toxic substance. The Supreme Court recently clarified the scope of this duty in *Schwartz v. Accuratus Corp.*, A-73 September Term 2014, 076195, 2016 N.J. LEXIS 691 (July 6, 2016) when it responded to the following question posed by the Third Circuit: whether the premises liability rule set forth in *Olivo* may extend to non-spouses exposed to toxic substances. The Supreme Court held that the *Olivo* duty of care may apply to non-spouses if the injury is reasonably foreseeable and imposition of the duty serves the interests of fairness and justice.

Schwartz involved a married couple, Plaintiffs Brenda Schwartz (“Brenda”) and Paul Schwartz (“Paul”) (collectively “Plaintiffs”), who filed a complaint in Pennsylvania state court raising claims of negligence and strict liability for injuries allegedly sustained by Brenda as a result of her exposure to airborne beryllium particles resulting in her contracting beryllium disease (an irreversible and largely untreatable disease affecting lung tissue). The complaint included allegations against Accuratus Ceramic Corporation (“Accuratus”), a ceramics facility located in Washington, New Jersey, where Paul worked in 1978 and 1979 prior to the couple’s marriage.

Plaintiffs alleged that in the spring of 1979, Paul began sharing an apartment in Pennsylvania with another Accuratus worker, Gregory Altemose (“Altemose”). At the time, Paul and Brenda were dating and Brenda frequently visited and stayed overnight

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with Paul. The couple continued to reside in the apartment with Altemose after they were married in June 1980. Brenda performed laundry and other chores at the apartment before and after their marriage. According to Plaintiffs, Brenda was exposed to beryllium deposited on Paul and Altemose's work clothing while they were working at Accuratus prior to her marriage to Paul. Plaintiffs alleged that Accuratus was liable for this injury based on a theory of take-home toxic-tort liability.

After the complaint was filed, the case was removed to the United States District Court for the Eastern District of Pennsylvania and Accuratus filed a motion to dismiss, which was granted. In granting the motion, the Eastern District concluded that since Brenda was not married to Paul at the time of her exposure, she was not owed a duty of care by Accuratus, declaring it “unreasonable to hold Accuratus to sharp enough foresight to realize that [Brenda] would later marry one of their employees.” *Id.* at *15. Plaintiffs appealed the dismissal to the United States Court of Appeals for the Third Circuit, which filed a Petition for Certification of a Question of State Law with the New Jersey Supreme Court to decide the following issue:

Whether the premises liability rule set forth in *Olivo* may extend beyond providing a duty of care to the spouse of a person who was exposed to toxic substances while on the landowner's premises.

Id. at *16. The New Jersey Supreme Court accepted the Third Circuit's Petition and concluded that the duty of care recognized in *Olivo* could extend to non-spouses in appropriate circumstances.¹

Olivo v. Owens-Illinois, Inc.

In issuing its ruling, the Supreme Court addressed the *Olivo* case at length. *Olivo* was brought by a pipe welder, Anthony Olivo (“Anthony”), who worked for nearly forty years at an Exxon Mobil (“Exxon”) refinery where he frequently came into contact with asbestos-containing materials. At the end of each workday, Anthony would return home in his work clothes and leave them for his wife, Eleanor, who laundered the clothes every day. Eleanor was diagnosed with mesothelioma in 2000 and died shortly thereafter in 2001. Anthony brought a wrongful death action on behalf of his wife's estate.

1. The parties disputed whether New Jersey or Pennsylvania law applied to Plaintiffs' claims. The federal district court concluded that the issue was “not a matter of concern” because neither Pennsylvania nor New Jersey recognized a duty of an employer to protect a worker's non-spouse. Presumably the Third Circuit asked the New Jersey Supreme Court to clarify its ruling in *Olivo* because it believed that New Jersey law applied.

In determining whether to extend the duty of care to Anthony's spouse, the Supreme Court observed that the first question to be addressed is foreseeability. *Olivo*, 186 N.J. at 403. Once foreseeability is established, a court must evaluate the fairness of imposing a duty by weighing and balancing the following factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Id.* at 403-04 (quoting *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 439 (1993)).

The *Olivo* Court concluded that since Exxon should have foreseen that workers' clothes contaminated with asbestos would be laundered at home, and that the person handling and laundering the clothing would be in regular and close contact with asbestos from Exxon's site, Exxon's duty of care to protect on-site workers like Anthony extended to spouses "handling the workers' unprotected work clothing." *Id.* at 404-05. The Supreme Court decided that fairness and justice would be served by extending the duty because of the easily foreseen contact with the dangerous substance which could have been avoided with reasonable precautions and the fact that the dangers to the toxin were known and reducing exposure was in the public interest. *Id.*

Clarifying *Olivo*

The Supreme Court next considered whether the duty in *Olivo* can extend to non-spouses. Plaintiffs argued that *Olivo* should not be limited to spouses because there was no such bright-line espoused in that case. Plaintiffs posited that in imposing a duty of care in *Olivo*, the Supreme Court relied upon factors such as regular cohabitation, the tasks of the cohabitating household member, and the nature of the toxin involved, not marital status. *Schwartz*, 2016 LEXIS 691 at *20-21. Accuratus argued that the duty should not be extended to non-spouses (other than perhaps immediate family members) because their contact with the employee would necessarily be irregular or sporadic and should not be determined as a matter of law to be reasonably foreseeable. *Id.* at *21.

The Supreme Court agreed with Plaintiffs, stating that "[t]he duty of care for take-home toxic-tort liability discussed in *Olivo* was not defined on the basis of Eleanor's role as the lawfully wedded spouse to Anthony." *Id.* at *21-22. It was based on the fact that "it was foreseeable that she would be handling and laundering the soiled, asbestos-exposed clothes, which Exxon failed to protect at work and allowed to be taken home by workers." *Id.* at *22 (citing *Olivo* at 404-05). The Supreme Court pointed out that the imposition of a duty of care in take-home toxic-tort liability cases requires a "case-by-case assessment," that foreseeability is of paramount

importance, and that considerations of fairness and public policy also “inform the analysis.” *Id.* at *25. Specifically, the Supreme Court adopted the following factors to be weighed in determining whether the foreseeability, fairness, and predictability concerns (which were first expressed in *Hopkins*) warrant imposition of a duty of care: (1) the relationship of the parties; (2) the opportunity for exposure to the dangerous substance and the nature of the exposure; and (3) the employer’s knowledge of the dangerousness of exposure. *Id.* at *26.

The Supreme Court flatly rejected the notion of creating a bright-line rule “as to ‘who’s in and who’s out’” in a take-home toxic-tort cause of action. *Id.* at *27. The Supreme Court ultimately concluded that “the *Olivo* duty of care may, in proper circumstances, extend beyond a spouse of a worker exposed to the toxin that is the basis for a take-home toxic-tort theory of liability.” *Id.* at *27.

What Does This Holding Mean?

The New Jersey Supreme Court’s holding in *Schwartz* clarifies that the duty of care imposed on landowners in take-home toxic-tort premises liability can extend beyond the spouse of the worker exposed to the toxin. The test is one of foreseeability and fairness, not marital status. Notably, in extending the rule, the Supreme Court acknowledged an appreciation for the “evolution of societal values and public policy” and the necessity for “flexibility to grow and change when appropriate to accommodate new expectations and ideas,” reflecting a progressive sentiment. *Id.* at *23-24. With this ruling we can expect to see an increase in the number of premises liability lawsuits brought by individuals exposed to toxic substances outside of the workplace.

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