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## La. Court Grants Partial Summary Judgment on Issue of Defense Warnings on Benzene Exposure Prior to Late 1970s

NEW ORLEANS — A Louisiana court has ruled that benzene plaintiffs with claims pending in federal court have established that the defendants did not warn users that their gasoline products contained benzene or that benzene could cause leukemia before the late 1970s, but emphasized that its ruling was not a determination on whether the defendants owed the plaintiffs a duty to warn of those dangers.

In the Aug. 8 opinion, the U.S. District Court for the Eastern District of Louisiana also denied efforts by the plaintiffs to obtain partial summary judgment on medical causation and the defendants' knowledge of the harmful effects of benzene exposure in 1958, citing genuine issues of material fact.

The plaintiffs asserted the claims on behalf of Bernard Ernest Burst Jr., contending that his work at a number of gas stations from 1958 to 1971 exposed him to benzene-containing products, including gasoline, diesel and other solvents.

Burst was later diagnosed with acute myeloid leukemia (AML), the plaintiffs alleged.

The plaintiffs moved for partial summary judgment on several issues, including whether benzene can cause acute myeloid leukemia; whether, before 1958, the defendants knew that benzene exposure could cause leukemia in humans; and whether, before the 1970s, defendants failed to warn users that the products in question contained benzene. For more on the plaintiffs' motion, and the defendants' opposition, please see the June 2014 issue of *Litigation Watch: Benzene*.

The federal court addressed each aspect of the motion in turn, first examining the plaintiffs' contention that benzene can cause acute myeloid leukemia.

The defendants opposed this argument on grounds that the "proper general causation question is whether exposure to gasoline, not benzene, can cause leukemia."

The court agreed.

"Here, the substance to which Bernard Burst was allegedly exposed is gasoline, not pure benzene," the court concurred, noting expert testimony provided by the defendants backed their position that exposure to benzene-containing gasoline and exposure to pure benzene are not comparable. "In light of this evidence, the Court cannot presume, on summary judgment, 'that the qualitative toxic and carcinogenic effects of benzene from any source are the same.' Defendants have offered no stipulation regarding the toxicity of gasoline or the toxicity of benzene as a component of gasoline. Accordingly, Plaintiff is required, on summary judgment, to

submit expert opinion evidence on the issue of general causation. This she has not done. Accordingly, her motion for partial summary judgment on the issue of general causation fails.”

The court reached a similar conclusion with regard to the plaintiffs’ attempts to obtain summary judgment on the issue of the defendants’ knowledge of the effects of benzene exposure before 1958.

While the plaintiffs produced letters and reports directed to and from the defendants reporting the harmful effects of benzene, the court found that they failed to establish that the defendants was aware of a causal relationship between benzene exposure and leukemia.

Instead, the court opined that there was a genuine issue of fact on the issue in light of testimony from a defense expert, who asserted that, in 1958, there was “not a single quantitative epidemiology study that demonstrated an increased risk of AML among benzene-exposed workers....”

“The affidavit indicates that, as late as the 1960s or even the early 1970s, there was no consensus in the scientific community that benzene exposure could cause AML,” the court opined. “Thus, while the documents Plaintiff proffers indicate that Defendants were aware of an association between benzene exposure and AML before 1958, there remains a genuine question of fact whether they actually knew at that time that benzene exposure could cause AML. The court finds that summary judgment on the issue of Defendants’ knowledge is not warranted.”

Finally, the court examined the plaintiffs’ contention that they were due summary judgment on the issue of whether the defendants failed to warn of the dangers of benzene before the late 1970s, finding that the plaintiffs had in fact satisfied their burden of establishing these facts.

In doing so, the court noted that the plaintiffs did not seek summary judgment on the issue of whether the defendants had a duty to warn, but merely if the defendants had provided such warnings.

Citing evidence that the defendants produced “generalized” warnings in the 1970s and early 1980s, the court found no proof that they had issued warnings before the late 1970s.

“Accordingly, the court finds that, before the late 1970s, Defendants did not warn users that their gasoline products contained benzene or that benzene exposure could cause leukemia,” the court concluded. “The court emphasizes, however, that at this time Plaintiff has not shown that Defendants had a duty to issue such warnings during the years Bernard Burst worked as a gas station attendant.”

Counsel for the plaintiffs are Richard J. Fernandez and Amber E. Cisney of Law Offices of Richard J. Fernandez in Metairie, La.; and L. Eric Williams Jr. of the Williams Law Office in Metairie, La.

The defendants are represented by Tim Gray and Lea Ann Smith of Forman Perry Watkins Krutz & Tardy LLP in New Orleans; Mary S. Johnson and Ingrid M. Kemp of Johnson Gray McNamara in Mandeville, La.; and Suzanne Mahoney of Johnson Gray McNamara in New Orleans; and Stan Perry and Rhonda R. Caviedes of Reed Smith in Houston.

Burst, et al., v. Shell Oil Company, et al., No. 14-109 (E.D. La.).

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