

From: HarrisMartin's Benzene & Emerging Toxic Torts Litigation Publication

Date: May 12, 2016

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Louisiana Appellate Court Denies Chance to Weigh in on Dispute Involving Timeliness of Benzene Claims

NEW ORLEANS — A Louisiana appellate court has denied two benzene defendants' efforts to obtain appellate review of a timeliness dispute, rejecting the defendants' position that the plaintiffs were put on notice of the cause of the decedent's injuries when he was diagnosed.

In separate orders issued May 11, the Louisiana Fourth Circuit Court of Appeal denied petitions for supervisory writs filed by Shell Oil Co. and ExxonMobil Corp.

The plaintiffs asserted the claims in October 2015, contending that Preston Washington Sr.'s Acute Myeloid Leukemia (AML) was caused by exposure to benzene-containing products. The complaint said that Washington was diagnosed with AML on Jan. 7, 2012, and died on Jan. 27, 2015.

According to the defendants, however, the claims are time-barred since they were not asserted within one year from the date of his diagnosis. Since Washington did not timely file a claim following his diagnosis, his heirs survival action fails as well, the defendants maintained.

The plaintiffs countered that prescription did not begin to run until February 2015, when a friend of Washington's wife informed the family of the link between chemical exposure and AML.

The Louisiana Civil District Court for the Parish of Orleans sided with the plaintiffs, denying the motions on the ground that prescription begins to run when the plaintiffs actually gain knowledge of the causal link between the injury and its alleged cause.

"Specifically, the trial court stated that until someone tells a person diagnosed with a disease that there is a possibility that benzene caused the disease, he does not have knowledge sufficient to start the running of prescription," the defendants explained.

The defendants filed applications for supervisory writs on April 4. In those briefings, the defendants said that the trial court erred when it considered Washington's actual knowledge of his claim, as opposed to constructive knowledge.

"Under well-settled Louisiana law, 'it is not necessary to have actual knowledge as long as there is constructive knowledge,'" the defendants said. "For purposes of *contra non valentem*, a plaintiff will be deemed to know what he could know with reasonable diligence. A diagnosis is constructive notice sufficient to put a plaintiff on guard to inquire into the cause of his condition. Plaintiffs and Mr. Washington received his diagnosis on Jan. 7, 2012, and did nothing to investigate the cause of his condition. Thus, the survival action is prescribed on the

face of the Petition, and the trial court erred in denying Shell's Exception of Prescription."

Ultimately, the defendants argued that the plaintiffs have not proven that the defendants actively prevented Washington and his heirs from availing themselves of this cause of action or that the plaintiffs could not have discovered the alleged connection between Washington's AML and benzene following his diagnosis.

In an opposition brief, the plaintiffs maintained the trial court did, in fact, address both actual and constructive knowledge in its ruling and found that the doctrine of *contra non valentem* applied.

"The trial court's judgment was based upon substantial evidence, which included an affidavit from Mr. Washington's wife, Clara Washington, which specifically stated that they did not know of the connection between Mr. Washington's disease and his history of benzene exposure until February 2015. Taking into account the entirety of the circumstances, the trial court found that the delay in filing suit was reasonable."

Shell Oil Co. is represented by J. Alan Harrell and Annette N. Peltier of Phelps Dunbar LLP in Baton Rouge, La.; and Patrick A. Talley Jr. and Jeremy T. Grabill of Phelps Dunbar's New Orleans location.

ExxonMobil is represented by Deborah D. Kuchler, Monique M. Weiner and Thomas A. Porteous of Kuchler Polk Schell Weiner & Richeson LLC in New Orleans.

The plaintiffs are represented by Frank J. Swarr, Mickey P. Landry, Philip Hoffman, Matthew C. Clark, and Amanda J. Ballay of Landry & Swarr LLC in New Orleans; and L. Eric Williams of The Williams Law Office in Metairie, La.

Washington, et al. v. Shell Oil Co., et al., No. 2016-C-0340 (La. Ct. App., 4th Cir.).

Documents are Available Call (800) 496-4319 or Search www.harrismartin.com Shell Order Ref# BEN-1605-22 Exxon Order Ref# BEN-1605-23 Shell Writ Application Ref# BEN-1605-24 Plaintiff Opposition Ref# BEN-1605-25

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