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PUSTEJOVSKY V. PITTSBURGH CORNING

LAWYER: This case involves the issue and anticipated by this court in its 1998 opinion in *Childs v. Hosseker(?)*. That's the case in which the court held that the discovery rule formulation of the statute of limitations applies in cases of latent occupational injury.

In the course of describing the discovery rule in that case this court observed that "although the issue is not before us, we note that our formulation of the discovery rule for latent injury cases does not necessarily preclude a plaintiff from recovering damages for every disease that ultimately manifests itself as a result of the occupational exposure."

O'NEILL: If we were to adopt your position, what would we do about cases that have been tried to verdict - asbestosis cases - that have been tried to verdict? Let me preface this with my experience on the TC indicated that typically plaintiffs wanted to do a group of asbestos cases that would show a progression of the disease. They'd want some _____ cases, some asbestosis cases and at least one meso case so that the jury could have a picture of the disease's progression. If that is the way a case is tried, isn't there some element of recovery even if a plaintiff only has asbestosis because of the fear of developing mesothelioma, and doesn't the jury take that into account in making that award? So I guess my question is, what do we do with cases that have been tried to verdict on asbestosis?

LAWYER: I will explain my answer and your question raised a number of issues that I would like to address. Let me just say, you have to look at each case that's been tried on a case-by-case basis. I'm aware of cases that we've tried in our office that would be in my view unaffected by recognition of a separate cause of action for separate latent injuries.

GONZALEZ: What about this case under the settlement? Was there a recovery by your client for increased risk of cancer?

LAWYER: In this case, Mr. Pustejovsky sued one defendant in 1982 for his asbestosis and received a settlement in the neighborhood of $20,000-25,000. The release is not in the record. There is no showing of what was alleged in the plaintiff's complaint. And in failing that, I think it's appropriate to say that he recovered damages for asbestosis. There is no judgment. There is no rule of claim preclusion that would hold that he's already had his claim for increased risk of cancer adjudicated.

OWEN: Do you know if he made a claim for future damages for fear of cancer or the possibility that he would develop cancer?

LAWYER: I don't know. That case was handled by another law firm and that complaint

is not in the record.

OWEN: How would that affect your case if those had been the facts?

LAWYER: First of all, our position is that damages for fear of cancer are not duplicative of the damages that one would recover if someone would eventually get cancer. We think that that is a proper element to recover in a case as asbestosis. So, there is not that notion of double recovery.

ABBOTT: So you can recover for both cancer and fear of cancer in addition to the mental anguish that goes along with having cancer?

LAWYER: In the two suits, yes.

HECHT: Under your view of how the rule would work trying an asbestosis case would not be affected at all?

LAWYER: Because of the facts that we are accustomed to, the answer is it would not be affected at all. Our experience is that we don't seem to be able to recover for increased risk of cancer because our proof does not amount to a greater than 50% chance that the plaintiff will contract the cancer in an asbestosis case. My examples: *Fiberboard v. Poole*; *Dartez*, which was discussed recently and the _____ is another, where the courts come out and say the plaintiff in an asbestosis case is unable to present evidence that more likely than not he will contract the cancer in the future; therefore, damages for the increased risk, damages representing the medical expenses, the pain and suffering and all that that could be recovered were the plaintiff to contract cancer can't be awarded by a jury in those type of cases. So we do not currently receive damages for future cancers per se.

HECHT: But if the court should limit the first case to where you could not put on that kind of evidence about the possibility of cancer or mention it at all and still then bring a separate subsequent action, would you still be in favor of the separate injury rule?

LAWYER: Mrs. Pustejovsky would be very much in favor of the separate injury rule because she is the survivor of someone having recent mesothelioma. So on behalf of her, yes, she would. I don't believe that that type of limitation would be appropriate and justified in asbestosis litigation in general. I believe that the weight of authority from other jurisdictions recognizes that evidence of the increased risk of cancer should be admissible in the underlying and in the first case, the asbestosis case.

PHILLIPS: That weight of authority was something like 3 to 1 with 45 jurisdictions unheard from.

LAWYER: My count was 23 decisions recognizing the separate injury rule and 3 decisions, all federal cases, predicting what state law would be against. But every state SC that has

addressed the issue, and I believe there were 8 of them, has found that they are separate, that the same toxic exposure could give rise to separate causes of action for separate injuries.

PHILLIPS: I didn't mean that question. I meant in answer to Justice Hecht's question about whether or not there should be a - if you're going to have separate causes of action can the first cause of action take into account the possibility of recovery from or fear of incurring something that you in fact can later sue for? It looked to me while you have a fairly good string of cases, there were only from 3 jurisdictions and there is one jurisdiction the other way.

LAWYER: Reciting the ones that I can recall and that have explicitly written on the subject: New York, New Jersey and Florida are all the jurisdictions that expressly permit claims for fear of cancer in the first suit and the actual eventuation of cancer in the second. Also *Haverty* from the 5th circuit, which was decided after ____ applying the *Jones* Act, said there can be a cause of action for fear in the first case and for the actual development in the second. There is one jurisdiction that held not in a malignant case, but in a nonmalignant case that damages for fear cannot be recovered unless the claim actually involves cancer. We do not think that represents a proper view. We think it's wrong as far as policy is concerned and certainly is in the minority jurisdictions. No other jurisdiction has adopted that rule. We would urge the court to read the case. I think it says it most plainly is *Eagle Picture v. Cox*. It's a 1985 Florida decision that holds that evidence of an increased risk of contracting cancer is admissible in an asbestosis case to show the plaintiff's reasonable fear of what the future holds. It is a present injury. But the evidence is not inadmissible insofar as the plaintiff is claiming damages for cancer and wants to get hospitalization costs...

O'NEILL: Haven't we already rejected that position in *Temple*____?

LAWYER: No, I don't believe you have. In *Temple*_____ there was no current physical injury that the plaintiff sustained. These were people who were merely exposed who had not manifested any sign of harm from the exposure who attempted to recover damages for their fear of cancer. And in that case, the court held there has to be some predicate to let you into court. There has to be some limiting principle for you to recover damages for the mental anguish that you sustained, or else anyone who is exposed could file such claims.

Those claims of mental anguish resulting from a mere exposure with no physical manifestation are too on the present for the court to really recognize an _____ recovery of those kind of damages.

ENOCH: In those jurisdictions that permit recovery for fear of cancer, and then to proceed to a litigation or damages because of cancer, do they then limit in the second case any additional recovery for this mental anguish?

LAWYER: I have not seen any decision in a second injury case which goes into great detail about how the rule is to be applied. But let me say that as a practical matter, once the second

injury occurs, I think the focus would be entirely on the cancer itself and the difficulty in dealing with cancer as opposed to all those years that you were worried about the cancer before it came up. Now I don't have a case in support of that, but that just seems to me to be common sense. And that's why we say that if the court were to say, "Well asbestosis cases you are limited to only evidence related to asbestosis, you can't even put on any evidence of increased risk of cancer to show the fear." That fear would be as a practical matter never compensated. It wouldn't be compensated in the earlier asbestosis case because the plaintiff wouldn't have the opportunity to put on the evidence in support of it. And it wouldn't be compensating in later cancer cases because once somebody has cancer, that's really the element of damages that needs to be focused on.

ABBOTT: If we allow a second injury claim, there likely or possibly will be at least two lawsuits filed: One for the initial injury; one for the second injury. It may turn out that with regard to the second injury, there are going to be defendants either in addition to or totally different from the initial claim. Do you agree with that?

LAWYER: Yes.

ABBOTT: With regard to the second lawsuit, would you concede that at least with regard to the defendants who were the subject of the initial claim, that they should not be subject to a second round of punitive damages?

LAWYER: I'm pausing because I am not sure that that's something I should concede.

HECHT: Your brief says no.

LAWYER: In that case there is your answer. I am opposed to duplicative punitive damages and I don't think that - it depends on the scope of the first claim and it depends on the nature of the punitive award returned in the first case.

ABBOTT: I'm guessing that you believe you can obtain punitive damages the second time around, but only from defendants who have not already paid punitive damages?

LAWYER: Well of course. Yes. That's true.

ABBOTT: But you should not be able to double recovery on punitive damages against a defendant who is already paid punitive damages?

LAWYER: I think that's a fair statement.

ABBOTT: In that regard then and going down that path in what respect will there be any collateral estoppel or res judicata in the second claim as it pertains to the first claim as it concerns the same defendants?

LAWYER: It depends on the facts that actually come out in the first trial. For example: In the event that you try a case against a defendant, you have an asbestosis case, you settle it with everyone, and you try it against one defendant and the jury returns a finding that the plaintiff was not exposed to the defendant's product. I think that defendant would be insulated in the second suit because that finding would be equally applicable in the second suit and would bar the case.

If there is a finding that the plaintiff doesn't have an asbestosis related injury, that's not the kind of finding that would preclude a second suit, because that doesn't mean that in the second suit he doesn't have the second injury meaning mesothelioma. So it depends on the issues, the way the jury questions are answered, and the evidence adduced in each case. But this is not - I think that these collateral issues, and some of them are more interrelated with the issues to be addressed here than others, can be resolved by the CA on a case-by-case basis as they arise.

ABBOTT: Is this the first step down a much broader road? Are we going to have second injury claims for plural thickening, plural placks, asbestosis, mesothelioma, whatever else?

LAWYER: Well obviously that depends on the type of opinion that you write. There are a number of alternatives for the court to go down.

ABBOTT: I guess what I am asking, are you going to draw the line solely between mesothelioma and all other claims unlike asbestosis related claims?

LAWYER: I think the line should be drawn with separate disease processes. And if the evidence indicates that there are entirely separate disease processes those claims should be separately recoverable. I think that there may be evidence that, although it's not in this record, that plural disease and asbestosis are interrelated processes that are basically part of the same scarring of the same part of the tissue and that one could say that they are not separate, that they are part of the same on-going process. The Colorado SC has held that they are indeed different diseases. That's a question that I don't think this record allows to be answered. But the dividing line is the separateness of the process.

I do not draw the line arbitrarily we say in the brief at two diseases. Because there may be more than even two separate disease processes. For example, as the defendants point out, exposure to asbestosis could cause asbestosis warts on the skin. Under their view, under the single action rule, that would bar any claim even respiratory claims in the future. I don't see how that could possibly be the law.

PHILLIPS: Should this be limited to just asbestosis, all toxic torts, or should this be a new principle - I mean that overrules the 17.01 case and all the other single action jurisprudence?

LAWYER: I do not know. My client obviously wouldn't mind if it were limited to asbestos. I don't see any reason to limit it to asbestos. I don't think that entirely separate independent

disease processes is an exploding phenomenon as we pointed out in our brief...

OWEN: What about car wreck cases where your neck or your knee or some other joint is injured when you are 20 and you come back when you're 50 or 60 and sue for arthritis in that joint?

LAWYER: I think that those - that that type of injury would be more appropriately characterized as a progression of the initial trauma rather than an entirely separate...

OWEN: Why is that, because everyone whose joint is injured gets arthritis in the joint?

LAWYER: But the thing is, that but for the initial trauma, the subsequent events would not occur. Whereas in this context, the asbestosis had absolutely nothing to do with the development of the mesothelioma.

OWEN: But the exposure of the asbestos did it?

LAWYER: That's true, but not the earlier _____ the injury. In the car wreck case, the knee trauma would have caused the...

OWEN: It was the car injury. It's the car wreck that caused the knee trauma and then later causes the arthritis. Why is that any different?

LAWYER: Well I'm attempting to draw a distinction between the natural evolution of an injury, whether or not it's more likely than not, and an injury which occurs entirely independent of the previous injury, which is what I believe this situation is here.

Now it is true that the rule requiring reasonable medical probability works hardships on people sometimes. For example, in your hypothetical maybe the plaintiff would not necessarily be able to recover for the risk of arthritis in the future because that's less than reasonably probable. But we think that as far as _____ is concerned, the separateness of the injury is an appropriate place at which to draw the line between what is actionable as a separate injury and what is not.

BAKER: In some respects it's easy to draw lines in the factual circumstances we have here. Would you say that while here it's a mature tort and all of the studies and surveys and so forth show at least from what you've stated in your brief clear lines but the line doesn't get so clear. So how can you justify extending the rule you want into areas that are not as mature as this at this point and what the policy effects are if you do that?

LAWYER: Well perhaps those type of cases need to awake scientific developments so we can understand what the relationship is.

BAKER: That's my point. You've got the development here and we could exceed to your request to establish that rule but limit it to this very set of circumstances, the exposure to asbestos and what happens without opening that availability of additional lawsuits at a later date to any other toxic tort say unless you have a similar mature background.

LAWYER: I think that's certainly an approach that the court can take.

BAKER: Then what about what a lot of the amici briefs in other states in response to a supposition that the court will go with you the issues and concerns that they raised and whether the court should go past what you've asked for and answer those questions in this case?

LAWYER: I think the court should be limited to the record in this case. I don't think there's a sufficient factual record for this court to make generalizations on the nature of nonmalignant disease...

BAKER: How are you going to try these things? How do submit them? What are the instructions? Those types of things that they are talking about.

LAWYER: In the practice of asbestos litigation although it is a mature tort, there are many, many issues that are debated and uncertain within the precedence that has been set by this court. And trial judges and CA grapple with these areas that are in-between established areas and do their best. And I think that that is the natural way for the law to develop and I think it could develop here. For example, the punitive damage question, the preclusion questions, the questions regarding consolidation with this court's *Ethel*'s opinion as a guide. All of those are matters for the TC's and CA's to resolve in the first instance.

HECHT: As a theoretical matter it's pretty hard to resist the separate injury concept. But as a practical matter is it better for us to struggle along trying the cases as we do now, trying to anticipate the future, trying to worry about when limitations are going to run. Being put in that position, which is a difficult position by any measure, or to trade that set of problems for a separate action rule that does require some sort of compartmentalization, that does require a working out of collateral estoppel and how many cases you can try at once and what you tell the jury, and whether you can mention the future and the past, and the past and the future, which from a pragmatic point of view what's your view, which is better? Assuming those are the two alternatives. I know there are other alternatives.

LAWYER: I look at that as a jurisprudential question: How best for this court to govern? I think to the extent that the issues are so tightly interrelated - for example: talking about the availability of a claim. I think the court can decide that in this case. But I think that a lot of the other issues may be informed by things outside of the record. And I would say that many of the other decisions, if not all of them, that from other jurisdictions that we surveyed, the courts have not found it necessary to talk about these per_____ which undoubtedly are important, but which are better

resolved on a case-by-case basis as they arise. So my answer is, for the most part I think that many of the questions raised by the amici are not before the court at this time.

ABBOTT: If we adopt a separate injury rule, what is the practical effect on the tens or hundreds of thousands of settlements which have already occurred?

LAWYER: I think the effect is nonexistent in that the defendants will continue to be protected by the releases that were presumably given for the claims. The *Gr*_____ case, the *Peckerino(?)*, that are cited in the CA's opinion both show that plaintiffs frequently release these claims and a defendant that has the benefit of the release will continue to enjoy that benefit to the extent that the release reserves future claims. In fact, regardless of this court's decision, they should be able to pursue such future claims because it will be governed by the language of the release.

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RESPONDENT

GONZALEZ: In 1982, petitioner didn't have cancer, and therefore, could not sue your client for cancer. And you're saying today even though he has cancer, he cannot sue your client for cancer. When is a petitioner supposed to sue?

BOYD: Under Texas law a plaintiff cannot sue for cancer at anytime. What a plaintiff sues for is for the breach of a defendant's legal duty: negligence, product liability, premises liability, whatever that breach is, and then seeks to recover in that suit all past, present and future damages. And we have the reasonable medical probability rule that says in terms of future damages, you have to seek damages and you can recover damages if they are reasonably probable. There is no cancer cause of action in Texas or any other jurisdiction that I'm aware of except those that have carved out this separate injury rule exception.

ABBOTT: But do you think that the plaintiff could put on evidence in that trial more than a decade ago about the future possibility of cancer such that in any jury award of damages for that future cancer would be upheld on appeal?

BOYD: Absolutely. The plaintiff could and the plaintiffs in fact did routinely put on that kind of evidence. And in fact still do put on either evidence that I probably will get cancer, or that I probably will die of an asbestos related disease, or I probably will progress to a worse condition, and because of those probabilities that my experts have testified to, I'm going to have X number of medical expense damages and I'm going to suffer. That evidence is on daily in the courts of Texas today.

ABBOTT: The CA's in Texas have upheld when the probability of getting cancer is less than 25% the award of damages.

BOYD: None have when the probability was less than. But the point is, back in 1982 when this plaintiff filed his suit and chose only to sue one defendant, the expert testimony that was routinely put on was that they probably would develop cancer. And in footnote 68 of my brief, I have cited the published opinions that refer to the fact that the experts have testified that the plaintiffs with asbestosis would probably develop cancer: *Gideon*, *Poole, Jackson* and *Eagle* _____ *v. Cox*. They all refer to that. Now, having said that, the defendants dispute that we don't think that a person with asbestosis will probably develop cancer. But it doesn't matter what disease specifically they will probably develop. What the law gives them having balanced all the policy concerns is the right to recover the future damages they probably will receive.

Now what does that encompass? That encompasses the mental anguish, the medical expenses and so forth that they can come in with the probabilities and testify that they will recover. Is it perfect in every case? I'm the first to admit it's not. Some are over-compensated, some are under-compensated. But that's not inherent in asbestosis litigation. It's not inherent in latency disease litigation. It's inherent in all litigation where a plaintiff seeks future damages.

O'NEILL: But wouldn't adoption of the separate injury rule make it less uncertain? Wouldn't it create more certainty a very narrow separate injury rule? And let me follow that with as a practical matter tell me why you don't want a separate injury rule because it would seem that you could try cases, the verdicts would be lower, the settlements would be lower for asbestosis cases than if we were not to adopt one?

BOYD: Yes, if the court adopted a separate injury rule that would provide more certainty to the awards of future damages that are out there now. But it's a cost benefit analysis that the court has to do. What are you giving up in order to get that certainty? And all of the court's questions to plaintiff's counsel have raised all of those issues that are going to arise. What is the burden on the defendants and on the court system? Yes you can get more certainty. But it's our position that the cost is too great to get that certainty.

O'NEILL: But couldn't you craft a rule narrowly enough, as Justice Baker said, to apply to mature torts like this that would avoid some of the pitfalls, and again develop greater certainty _____?

BOYD: No, I don't believe you can. For two reasons: If you craft the two disease rule or a five disease rule or a separate injury, or however you craft it as narrowly as you can, every one of the asbestosis or plural plaque cases that are out there are going to be tried differently, because they can no longer get the damages related to their cancer. Whether that's risk of only or risk of and fear of, they can't get those anymore. The risk of prejudice of trying those individuals with people who have cancer, which this court acknowledged in the *In Re Ethel* case, quadruples or multiple times greater when you try them together if people with non-malignancies can't recover cancer related damages.

ABBOTT: That could be changed though. Of all the people who are exposed to asbestos what percentage of them get meso?

BOYD: I don't know the answer to that question.

ABBOTT: Less than 1%.

BOYD: It's less than 1%.

ABBOTT: So we're not talking about a whole bunch of more cases to be tried?

BOYD: No we're not, which then raises the question: Why change 150 years of Texas law because of one or two. I'm only aware of 3 cases in Texas in the last 8 years that have involved this issue. And I argued the summary judgment motion in this case after 2 Dallas judges had denied the motions because it seemed a more fair and safer thing to do. But Judge P_____ in San Antonio realized: No, the law is you only have one cause of action.

O'NEILL: But that's not really - the _____ inquiry is not exposure developing into meso. Because I think we've already said that exposure alone without any sort of physical development of disease will not support a cause of action. A more appropriate injury would be a chance of going from a plural disease or asbestosis to meso, which is a much higher percentage. Isn't it more like 25%?

BOYD: Actually that's very unclear in the medical literature. But they don't develop. Plural changes do not develop into asbestosis which develops into lung cancer, which develops...

O'NEILL: But of the percentage of asbestosis cases where the plaintiff will develop mesothelioma, isn't that more around the 25% range?

BOYD: Their expert testified in this case that a person with asbestosis has a 15% chance of developing mesothelioma. We argue it's less than that and there are experts all over the board on that.

ENOCH: Your argument seems to be inconsistent though with your statement that there's a tremendous burden to go to a separate injury because of the problems on estoppel and all that would be involved in these other lawsuits. But you on the other hand argue that the percentage is quite low of people who would ultimately do that. So you would rather have the courts be tied up arguing over the speculation of cancer to be developed than to deal with the problems arising from a 10th of those cases at the other end where the only thing you're arguing about is, was the cancer caused by the asbestos inhalation?

BOYD: If I understand the court's question. Let's assume that there's one case like this

every 5 years. And I don't know what the percentages are. But a case where an individual has asbestosis brings a claim, resolves that claim by settlement or judgment and then later develops lung cancer or mesothelioma. If you change the law because of those few cases, you are affecting every asbestosis and plural plaque case that has been filed if you let it apply retroactively, which we strongly encourage you not to do, but also every case that's going to be tried and it's going to change the law in all these different areas. It's going to raise implications in all these different areas. The alternative is leave the law as it is and recognize that in order to uphold our policy concerns of requiring plaintiffs to be diligent in order to allow defendants who are _____ and to prevent trials based on stale evidence, or policy concerns of providing finality to judgments and settlements, or policy concerns of judicial economy and of preventing multiple lawsuits, if you allow those concerns to outweigh the perceived unfairness in the one or two or three cases that may arise as long as this court as these individuals are on this court, you are allowing the law to affect the policy choice that has been made routinely: *SV v. RV*; *Murphy v. Campbell*; especially *Moreno v. Sterling Drug*. In all of those cases the court has said, Look, in this case the plaintiff is not going to get compensated, but that's because of our policy concerns that are at issue.

ABBOTT: If we were to decide in your favor and say that there is no separate injury, wouldn't justice demand that we uphold a jury verdict awarding damages to a plaintiff who proves that they have a 10% or less probability of the risk of cancer? Wouldn't we have to uphold that in order to obtain justice? Otherwise, if we don't have a separate injury and we don't uphold that award, you're argument basically is they don't get anything for the cancer or the risk of cancer.

BOYD: No. Because you don't award damages for cancer or the risk of cancer. You award damages for mental anguish, medical expenses, lost wages, the different categories. There are no cancer specific claims. And so if a plaintiff comes in and says, Look, I've only got a 10% chance of developing cancer, but I've got severe asbestosis and my expert gets up and says, That asbestosis may turn into lung cancer, he may develop mesothelioma, but even if he doesn't he's going to have $250,000 worth of medical expenses because of his severe asbestosis, he will recover.

OWEN: What about his mental anguish over the 15% or 10%?

BOYD: In that, the jury can award the damages for mental anguish that includes the fear of cancer if he has an existing injury under *Temple Carter v.* _____.

ABBOTT: But here's what you're saying. You're saying, as you opened up, that a plaintiff is injured at a certain point in time and at that point in time limitations begins to run and they have to bring all claims which they have or may have in the future. And in order to establish those claims, let's say for cancer under your point of view, they're going to have to go to court 10 maybe 20 or 30 years before they get cancer and have to prove it up at that time, and the only way they are going to be able to prove it up at that time is put on a percentage probability of being able to recover, and then put on evidence of the mental anguish which would be attendant to the risk of cancer, the medical costs attendant to having that cancer in the future and then let the jury fill in a blank. And it seems

that if justice is to be done we're going to have to uphold that jury award or create a separate injury cause of action.

BOYD: No. Because you don't have to prove a probability of getting cancer - mesothelioma - in order to recover future damages. And that's the point I'm making.

ABBOTT: You're mixing things up. You can recover future damages like future mental anguish but that's more attendant to the asbestosis claim, whatever claim they may have. I'm talking about proving up actual separate damages for the future possibility of having cancer. Because you are saying they can't try that cancer claim later. They've got to try it now. And so they should be able to recover now for the possibility of getting cancer.

BOYD: And ultimately when you bring it down for medical expenses for example, if he gets cancer, he will have medical expenses of $300,000, but he's only got a 10% chance of getting cancer. No, he cannot recover that. Now, that seems unfair. But when you balance out all of the interests of repose and finality in favor of both defendants, plaintiffs and the trial courts you have to try these case. That perceived unfairness is inherent within our judicial system.

ABBOTT: So there's one reality and that is under your proposed solution. Basically in 99.9% of the cases there will be no recovery for the cancer?

BOYD: That's not true. Because what they are recovering for is what their expert witness is saying his prognosis is: possibility of cancer, possibility of mesothelioma, possibility if not probability of his asbestosis getting worse in the future. Because of all of that future possibilities and probabilities, he is probably going to have at least X number of dollars of medical expenses in the future.

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PETERSON: I would like to focus on I think the vice of the change that the plaintiff proposes in this case because all these things ultimately involve a balancing of considerations. And what you're being asked to do is something which really only 3 courts of last resort have so far decided to do which is Maryland, New Jersey and Pennsylvania, and that's to redefine a cause of action. And I think when you start redefining not only what a cause of action is in Texas, but also how you determine whether a cause of action exist, you're setting a major change in the law which is going to have profound implications in various areas.

PHILLIPS: We're a minority jurisdiction on our _____. And we think that's good policy because it's consistent with the preponderance of the evidence standard that we have across the board in all types of cases. We would either have to change that rule or look at this somewhat differently don't we?

PETERSON: The way I see it, what you're being asked to do in this case is the determination of whether or not there is a cause of action. As I understand it it is a transactional based determination which focuses on the existence of legal injury cause if you will. What you're being asked to do now is to decide that you can find multiple causes of action by focusing on specific effects on the individual plaintiff as distinguished from the conduct of the defendant, which has been the traditional basis for definition. And what you're being told is...

PHILLIPS: But we've already crossed that bridge in *Childs*?

PETERSON: No. *Childs* I think offers you a blueprint if you want for an alternative way of dealing with this problem if you think there has to be some change. And that's what we suggested in the *Owens Corning* brief. The courts have undoubtedly quite a lot of authority to adjust accrual rules to deal with these kinds of problems. And that's what a lot of the jurisdictions have done. *Wilson* for example, Justice Gingsberg's opinion in the DC circuit started a lot of this. These are not cases where the courts have ever authorized multiple lawsuits. What they have said instead is, that to ameliorate unfairness if it exists, because the plaintiff can't perceive the cancer soon enough to bring an action upon it, that what you allow in effect is a retriggering of the limitations period...

OWEN: But if they happen to get asbestosis first and sue for that, then they are out?

PETERSON: That's the implication.

OWEN: *Childs* saves them for asbestosis but not for cancer or meso?

PETERSON: What it gives the plaintiff an opportunity to do is to decide particularly in those cases where there isn't much impairment where this court in *Childs* said that there's a legitimate institutional interest in deferring claims and premature claims forcing people into court. In those kinds of cases what it allows people to do is to say the statute of limitations is not going to prevent me from coming back to court at a later time. I'm going to be allowed to defer my lawsuit until I acquire a later condition.

OWEN: So I have asbestosis. I have legitimate medical claims. So I have a choice of foregoing any recovery for that in the chance that I might develop cancer and preserve my cause of action?

PETERSON: No, that's not the way I would suggest it operate. I don't think you forego the recovery entirely. If you then bring the later lawsuit, then I think you're entitled to get that recovery. What it allows you to do in effect is to defer filing, to defer and wait and see if the additional condition develops. In other words, what you do is you don't change the characteristic of the cause of action. You continue to recognize that there is only one cause of action. And the implications of changing the definition are: you're going to turn it into a medically based fact inquiry in this kind of situation.

OWEN: I don't understand what you're suggesting. How do you recover for both asbestosis and then later meso under your theory?

PETERSON: As Mr. Boyd indicated, you retain the principle that the cause of action is focused on the defendant's invasion of the legal injury that the defendant imposes. You don't fracture apart the different types of conditions that can develop as a part of it. What you do instead is you say that once the statute of limitations triggers initially in accordance with the discovery rule, there's an opportunity to sue at that time. If the plaintiff doesn't elect to pursue the opportunity at that time, later develops an additional condition, you allow a retriggering of the statute of limitations.

OWEN: That's my point. You have to either choose to sue, pick which disease you are going to sue on. And you can choose, well I've got asbestosis, I'm really sick, I've got a lot of damages, I better not shoot my wad now because I might get cancer.

PETERSON: But that decision is ultimately motivated by the plaintiff's determination in large part based upon the degree of their impairment. If you have a case where there isn't significant impairment, it's true the plaintiff is being asked to forego something initially and there's a possibility that the later disease may not develop and there is in fact in that instance some foregoing of the claim. On the other hand if the plaintiff is seriously impaired with asbestosis in the first case, there's an excellent possibility that at least some considerable amount of the damage that would be recovered in that case, the lost wages, a good deal of the mental suffering, fear of cancer, a lot of the elements of damage that would be awarded in that case...

OWEN: But mesothelioma is a fatal disease is it not?

PETERSON: It is in fact a fatal disease. There is no question about that. And I'm not suggesting there's a perfect ideal symmetry between these recoveries. What I am suggesting is though, that when you take the definition of a cause of action and you turn it into a medical question - I mean suppose you have a condition where the doctors don't agree on whether it is a progression of an existing illness, which is what the plaintiff concedes.

O'NEILL: But wouldn't that put just an incredible burden on a plaintiff to make the determination outside of the asbestosis context? First of all, you're asking a lay person to decide, Ok, is this a separate disease or not and should I wait? We've been very strict in applying limitation and accrual rules to any indication of injury is when the clock starts running. And aren't we then forcing outside the asbestos context for a lay person to make some kind of medical determination as to whether this will ultimately be found to be a separate disease?

PETERSON: But if you're adopting the rule that's being proposed by the plaintiff, you are altering the existence of a cause of action by requiring precisely that inquiry, as I understand it. That is, is there a new medical illness or condition which can be linked to the exposure which is separate? If that is established by the plaintiff, then there is a separate cause of action. That question is one as

to which the experts will often disagree. In this case in years past plaintiffs were able to prove as in the *Gideon* case that there was a reasonable probability of developing cancer in the future and so you take this question of: Do we have one or two causes of action on which we base all sorts of statutory rights and res judicata and the like as well? And we turned it into a question which may very well have to be given to a jury as to which there could be conflicting outcomes based on the testimony of the same expert witnesses in different courts before different jurors.

ENOCH: Let's assume that the person that develops asbestosis decides it's serious enough - I'm going to sue. It's your position that unless they can establish a reasonable probability of cancer in the future, they don't get a cancer recovery, and the fact that they have sued is a res judicata? They can't recover for it because they can't prove future probability, but it also is res judicata for a later development of cancer because they sued for the asbestosis?

PETERSON: If the case goes to judgment, it would become a res judicata. That's correct. In other words, you would retain the current definition of a cause of action. If they brought the initial lawsuit, you would in addition retain the single action rule. That is, you discourage the multiplicity of lawsuits, and the ameliorating principle you recognize is the one that most courts have. Only three final high courts have gone otherwise. And that is to say that in order to ameliorate any harshness in this situation, we will allow the statute of limitations to be retriggered upon the diagnosis of the discovery under discovery rule principles of the second condition.

ENOCH: I don't understand the harshness being ameliorated. The defendant either escapes liability for asbestosis or the defendant escapes liability for cancer. How does that ameliorate the harshness to the plaintiff who has either asbestos or cancer?

PETERSON: The principle that operates isn't any different than the ordinary principle of repose, which is at some point there has to be a line. Obviously, a line has to be drawn as to which there are going to be a certain number of future damages. Those future damages if we waited longer we would be better able to know what the injuries are and what those damages are going to be. Even the plaintiff concedes in this case that if you have a condition that greatly worsens, the additional worsening of that condition ought not give rise to a new right to sue. So the proposition that there is an imprecision in the system is inherent in the fact that we have to draw a line at some point. The whole theory of repose and res judicata as I understand it is that, and the reason a cause of action is defined as this one unit is that the interest in bringing this matter to a close and finally determining rights is an independent value which outweighs the interest in recovery in certain instances. That after all being what the statute of limitations does routinely. It says that sure, it may very well be that the defendant in this case should have been held liable if it had gone to a jury, but because of these important interests in bringing the claim to a head and getting it resolved, that's a price that the system extracts in exchange for the jurisprudential value.

PHILLIPS: In the ordinary automobile case involving ordinary individuals, we have made this judgment about repose. So it operates. So the late knee injury goes - the second type of injury

goes un_____. Here, we've already crossed the bridge in *Childs* that when you put a product in to the market that causes this type of slow developing injury, you're going to be on the hook for generations. The benefits of repose have already been lost.

PETERSON: I see *Childs* actually as more consistent with the type of accommodation that I'm suggesting. Because as I understand what the court did in *Childs* is, you were focused on the adjustment of the accrual of the claim without trying to go through and redefine what the claim itself is. In other words, you were focused on the question of: When does this claim defined in accordance with the principles that have long been used in res judicata and the rest, when does that claim arise, a claim which is defined by reference to the conduct of the defendant? Now what you're being told is not simply that you're going to give the plaintiff an additional period of time to recognize that claim the one that the common law recognizes. Now you're being asked to go back and redefine how many claims there may be in the first instance and do it by dramatically changing the criteria that one looks to for that purpose.

What I'm suggesting is, that that has - suppose for example the asbestos - the first case had gone to judgment. You had actually devoted all of the resources of the system to having a trial. Many of the states that have acknowledged the later opportunities to sue - Justice Gingberg for example in the *Wilson* case that started much of this debate - she makes clear: My goodness, at this point we're talking about a fundamentally different question because now we've devoted all of these resources into litigation of the question, and it's not simply as the plaintiff would acknowledge that there is collateral estoppel or issue preclusion, that there's a legitimate argument at that point that we ought to be talking about claim preclusion. And because you're redefining the claim in effect, which is what the plaintiff is inviting you to do, you're opening up all of these questions which I don't think you can avoid for deciding this question. And what you're doing you're taking - this in fact is a mature mass tort - that's what you said in the *Ethel* case. The consequence of that is, and the reason it is, is because everyone has understood for a long time how you define the claim, what its elements are, what the damages are, how it can be tried. And if you make this fairly dramatic...

OWEN: As a practical matter in asbestos cases, how many plaintiffs have recovered future damages for either the fear of developing cancer or mental anguish and future medical costs or the possibility that they will develop meso for lung cancer?

PETERSON: It is my understanding that the recovery for fear of cancer is a fairly standard component in the cases. I don't have any statistics on the extent to which people have been able to mount the case for risk of cancer. I do know that in 1982, the attorney that represented Mr. Pustejovsky was the attorney who established the *Gideon* rule that you are here revisiting, because he was able in that case, an asbestosis case, to mount a case for the fact that it was more probable than not that his client would in fact develop cancer, and was awarded cancer recovery.

OWEN: But how common was that? That's my question.

PETERSON: I believe it was a fairly common practice. I am unable to give you any sort of quantification of the precise figure. But it did happen in that case again involving the same lawyer and the same comparison of diseases at the time.

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REBUTTAL

OWEN: How common was it that you had a *Gideon* situation where plaintiffs recovered for either future damages, mental anguish or medical damages for the possibility that they would develop either meso or lung cancer?

LAWYER: I will agree that it is routine in asbestos cases for plaintiffs to recover mental anguish damages represented, including in part their fear of contracting cancer. So that element I think is commonly recovered in asbestos cases. The recovery of the actual medical expenses representing the chance that they will get cancer, I think is very, very rarely recovered.

OWEN: How many plaintiffs ask for it?

LAWYER: I can't really answer how many plaintiffs ask for it. But I can tell you that courts will not admit evidence of specific costs of treating cancer. They will not admit oncologist evidence talking about how cancer is treated, what the pain is. So the plaintiffs do not recover that element of damages as a practical matter.

Now plaintiffs have tried to aggregate risks in order to get their - the plaintiffs have been dealing with the *Gideon* decision, 1985, which predicted what Texas law, which was the single action rule according to *Gideon*. And so they tried to maximize their future damages by getting the expert to aggregate the risks. You know, add the risk of mesothelioma, and the risk of asbestosis progressing, and the risk of getting heart failure as a result of the asbestosis, and adding all of that risk and come up with a sum for future damages. Sometimes courts allow that testimony. Sometimes it's not objected to. Sometimes they don't. Sometimes the defendants take them on voir dire and say: Well what percentage of that represents your risk of contracting cancer and is that more likely than not? If it's not that's not going back. And that's really the extent of it.

PHILLIPS: If we adopt this new rule should we simplify the rule?

LAWYER: I think that's true. I agree with that.

OWEN: But what do we do about the cases that have all been tried that way?

LAWYER: I am saying that I don't believe those damages have been recovered with any consistency in those cases.

PHILLIPS: But don't we have to look to the release where there's a judgment?

LAWYER: In our experience, occasionally when you have a judgment against a defendant they will issue a release or satisfaction which will dictate the preclusive effect of the judgment. Most often I think those judgments do release future claims. Those releases do release future claims. If they don't in specifying terms that they are reserved, then regardless of what this court holds, that is a decision in the private agreement that will be honored by the courts. So, yes, I would say that the scope of the release does determine the preclusive effect .

O'NEILL: As a practical matter, I'm a little bit confused with the party's position. It seems like your position fits the opposite. And I'm wondering if I'm missing something practical here. Because it seems as though the defendants in these cases would want a separate injury rule drawn in a very limited manner, because then no longer would different types of disease cases be tried together and asbestosis plaintiffs compensated more because a meso case was included in it at trial; settlements of asbestosis cases would probably go down. On the other hand, it would seem to me you would want the opposite rule because the fear of developing mesothelioma pushes up asbestosis verdicts.

LAWYER: I'm here representing Ms. Pustejovsky. Ms. Pustejovsky will be benefitted by the separate injury rule that we advocate. The other issues that you're talking about - it is true that to some degree...

O'NEILL: I guess what I'm saying is it cuts both ways for both parties.

LAWYER: It certainly does. And that's why we have as one of the amici in this case *Owens Illinois*, a manufacturer, a frequently named defendant in asbestos cases, advocating our view with some - we have some differences of course - but they agree that the court should recognize separate accrual dates for separate injuries. The products liability advisory council doesn't advocate against recognizing the separate injury rule that we advocate. They simply ask for additional clarification from the court on these issues that you raise. So, yes, it does cut both ways as far as plaintiffs and defendants in asbestos litigation are concerned. I do not think that this court if it recognizes the rule that we advocate here will have to say: Asbestosis cases and mesothelioma cases and lung cancer cases can't be tried together. I think that despite the fact that they are separate injuries, they have enough in common that juries can decide those cases together. And my two examples are the courts of Maryland, which recognized the separate injury rule and also approved consolidation...

BAKER: That sounds like there's some little tension there. Granted if they were trying all of those kind of cases together now, but you're saying, No we want to have a separate injury so we can go into court later on on a separate and distinct. Why not go the other way and say, Well you can't try them all together now because you've got a separate injury rule and whoever is in there has to wait and try their case by themselves?

LAWYER: I think the court can decide whether there's prejudice from a particular consolidation on a case-by-case basis.

BAKER: Well why do plaintiffs want to try all those together candidly?

LAWYER: Convenience. Consolidation is a tool that allows for resolution of multiple cases when time - and this may not be persuasive to the court...

BAKER: If we bought your argument and you have them all there, would you say a court abused its discretion if it severed out every one of those into separate parts?

LAWYER: Well a TC wouldn't, but I wouldn't say that a TC would necessarily abuse its discretion in consolidating all of those cases. And the reason is, that - well again Maryland recognizes the separate injury rule and gave this court the Maryland factors which it announced in the *Ethel* case and on occasion permits trial of mesothelioma and asbestos cases together. The same for New York. That's the *Malcolm* case, which is prominently cited in this court's *Ethel* opinion. In that case there were too many instances of different diseases. There was a _____ stream of evidence that the jury couldn't segregate out. But in other cases, the New York courts have permitted consolidations. So I don't think that the answer to the separate injury question necessarily prevents consolidation of different injury types. But I don't think that's a question the court needs to address on...

O'NEILL: How would you apply this? If we were attempting to apply it narrowly in this case I assume that the question of whether a disease is a separate disease, it's conceded here and science has developed, but what about those cases where there's not agreement on it and the experts go both ways, do you then submit to the jury whether it's a separate disease and then suddenly we have a jury question on later injuries in all types of different cases?

LAWYER: I think that's certainly possible and I don't see anything wrong with submitting that disputed fact issue to the jury just like issues that arise in the *Childs* scenario. Should the plaintiff have known? When did the plaintiff know or should have known of the relationship between the injury and the occupational relationship? Those are always disputed questions and I don't necessarily have a problem with that. I will say that we cited a couple of cases in our initial brief in which the courts held that as a matter of law the injuries were progressions and not separate injuries and declined to give the plaintiff the benefit of the separate injury rule. So I do think that that is often resolvable as a matter of law by the court as opposed to submitting it to the jury.

O'NEILL: Is that a proposed basis that we could draft a narrow opinion in this regard to say that where science has developed to the point where it's undisputed, that the diseases are separate?

LAWYER: I certainly think that the court can say in this mature tort situation where the

science is established, we can clearly say as a matter of law in all cases mesothelioma and asbestosis are different enough to allow the separate claims.