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RECENT DEVELOPMENT

***DUFFY V. CBS CORP.*: UNDER THE STATUTE OF REPOSE A CAUSE OF ACTION RELATED TO ASBESTOS EXPOSURE ARISES ON THE PLAINTIFF'S LAST DATE OF EXPOSURE**

By: Rena Neuman

The Court of Appeals of Maryland held that the statute of repose did not bar plaintiff's claims because the asbestos-related injury occurred before the statute's enactment. *Duffy v. CBS Corp.*, 458 Md. 206, 223-24, 182 A.3d 166, 176-77 (2018). The court used the exposure approach to determine whether the injury arose prior to the enactment of the statute of repose. *Id.* at 224, 182 A.3d at 176. Additionally, the court held that although the discovery rule may impact the statute of limitations in latent injury cases, it has no legal impact on the temporal limitation imposed by the statute of repose. *Id.* at 234, 182 A.3d at 183.

In March of 1970, CBS Corporation ("Westinghouse") contracted with Potomac Electric Power Company ("Pepco") to build a generator at Pepco's Generating Station. Unknown to James F. Piper ("Piper"), a steamfitter on the site, the insulating materials contained asbestos. As a result, Piper was exposed to asbestos between May 3, 1970 and June 28, 1970. Three days later, the statute of repose was enacted on July 1, 1970. The statute of repose created a twenty-year limitation for causes of action for injuries arising from improvements to real property, starting from the date that the real property improvements are substantially completed.

On December 26, 2013, forty-three years after his exposure to asbestos, Piper was diagnosed with mesothelioma. Following his diagnosis, Piper sued Westinghouse in the Circuit Court for Baltimore City for strict liability, breach of warranty, negligence, and aiding and abetting conspiracy. Westinghouse filed a motion for summary judgement, arguing that Piper's claims were time-barred by the statute of repose, because Piper's mesothelioma diagnosis was outside of the statute's twenty-year limitation. The Circuit Court for Baltimore City granted Westinghouse's motion for summary judgement, finding that Piper's applicable claim was his diagnosis. Piper appealed to the Court of Special Appeals of Maryland, arguing that his injury was the asbestos exposure that occurred before the enactment of the statute of repose. The Court of Special Appeals of Maryland affirmed the lower court's ruling, holding that Piper's injury was his mesothelioma diagnosis in 2013 which was outside the twenty-year temporal limitation. Upon Piper's death, the Court of Appeals of Maryland granted *certiorari* to the Personal Representative of Piper's estate, June Diane Duffy.

The Court of Appeals of Maryland began its analysis by evaluating the brief history of the statute of repose, formally enacted as Courts and Judicial

Proceedings § 5–108 (“CJP § 5–108”). *Duffy*, 458 Md. at 222, 182 A.3d at 174. The court explained that the purpose of the statute was to protect defendants against elongated claims for injuries arising from improvements to real property. *Id.* Next, the court discussed the issue of whether the statute of repose barred Piper’s claims. *Id.* at 210, 182 A.3d at 168.

To determine the applicability of the statute of repose, the court had to decide when Piper’s claim arose. *Duffy*, 458 Md. at 223–24, 182 A.3d at 176. The issue before the court was whether the injury arose at the time of the initial exposure to asbestos or at the time of the resulting diagnosis. *Id.* at 223–24, 182 A.3d at 176. To resolve this, the court applied the exposure approach, which requires the court to look at a plaintiff’s last possible date of exposure to the asbestos-containing product. *Id.* at 223, 182 A.3d at 176 (citing *John Crane Inc. v. Scribner*, 369 Md. 369, 394, 800 A.2d 727, 742 (2002)).

In applying the exposure approach, the Court of Appeals of Maryland determined that the underlying cause of the injury was instrumental in asbestos-related cases because without a cause, there would be no resulting disease. *Duffy*, 458 Md. at 223, 182 A.3d at 176 (citing *John Crane Inc.*, 369 Md. at 394, 800 A.2d at 742). The court further noted that the mesothelioma diagnosis only alerted Piper to the injury that he suffered on a previous date. *Duffy*, 458 Md. at 225, 182 A.3d at 177. Thus, the Court of Appeals of Maryland found that the applicable injury was the asbestos exposure, which last occurred three days before the statute of repose was enacted. *Id.* at 224, 182 A.3d at 176.

After determining when the injury came into existence, the court analyzed the specific construction and general applicability of CJP § 5–108 to decide whether the statute applied retroactively or prospectively. *Duffy*, 458 Md. at 224–25, 182 A.3d at 176–77. Assessing the plain meaning of CJP § 5–108, the court recognized that the applicability of the statute was limited to claims arising after the statute’s enactment. *Id.* at 223, 182 A.3d at 176 (citing MD. CTS. & JUD. PROC. Code Ann. § 5-108 (1991)). Generally, unless the statute clearly states to the contrary, there is a presumption that statutes apply prospectively. *Duffy*, 458 Md. at 224, 182 A.3d at 177. Therefore, because the statute went into effect after the last possible day of Piper’s exposure to asbestos, the court concluded that the statute did not apply in this case. *Id.* at 224–26, 182 A.3d at 176–77.

Next, the court addressed the applicability of the discovery rule in asbestos-related cases. *Duffy*, 458 Md. at 231, 182 A.3d at 180–81. The discovery rule implies that the statute of limitations in a civil action is tolled until the plaintiff discovers he has a cause of action. *Duffy*, 458 Md. at 231, 182 A.3d at 181. The rule recognizes that in cases involving latent diseases, the happening of the wrong and the knowledge of it often do not occur simultaneously. *Id.* at 231–34, 182 A.3d at 180–84. Similarly, the court explained that in asbestos-related cases the injury does not arise and accrue at the same time. *Id.* On that basis, the court found that when the discovery rule applies, the three-year

statute of limitations in a civil action is tolled until the plaintiff discovers he has a cause of action. Here, Piper's claim fell within the statute of limitations because he filed his claim within three-years of his diagnosis. *Id.*

Furthermore, the court noted that had the discovery rule applied to the statute of repose, as the Court of Special Appeals erroneously presumed, then Piper's 2013 diagnosis would have been the applicable injury, occurring outside the twenty-year time limitation imposed by the statute of repose. *Duffy*, 458 Md. at 231-34, 182 A.3d at 180-84. By distinguishing the exposure from the diagnosis, the court allowed Piper to proceed with his claim. *Id.* The court emphasized that because the cause of action arose before the statute of repose became effective, the statute could not bar Piper's claims even though the cause of action accrued more than twenty-years after his exposure. *Id.* at 236, 182 A.3d at 183.

The Court of Appeals of Maryland concluded that Piper's injury was the asbestos exposure that occurred before the statute of repose was enacted. Further, the court held that the discovery rule did not impact the court's decision regarding the applicability of the statute of repose. This holding essentially alters the meaning of injury. Instead of considering the resulting injury, the court recognized the significance of cause and progression. Additionally, this holding clarifies that while the statute of limitations in latent injury cases is tolled until the plaintiff discovers he has a cause of action, the statute of repose runs regardless of when the injury is discovered. In this case, the only factor preventing the claim from being barred was its occurrence before the statute's enactment. Consequently, plaintiffs exposed to asbestos after the enactment of the statute may be prevented from suing defendants more than twenty-years after exposure, regardless of when the damages are discovered.