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COURT DRAMATICALLY EXPANDS STRICT LIABILITY TORT THEORY

by

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In *Lunsford v. Saberhagen Holdings, Inc.*, 106 P.3d 808 (Wash. Ct. App. 2005), Division One of the Washington State Court of Appeals expanded the class of potential plaintiffs in strict liability actions to include the "household family members" of a user or consumer of asbestos containing products. *Id.* at 812. Specifically, the opinion in *Lunsford*, authored by Judge H. Joseph Coleman, held that a plaintiff could sue his father's workplace for injuries allegedly resulting from asbestos fibers brought home by the father. More broadly, it held that bystanders should have standing to sue under strict liability even though there is a "lack of clear authority" on this issue in Washington State and in other states. *Id.* The *Lunsford* court concluded that the "public policy" interest in having product sellers bear the cost of injuries resulting from bystander exposure to asbestos containing products justified the expansion of strict liability to these circumstances. *See id.* In so doing, the court expanded the reach of Washington products liability law to give standing not only to "users" or "consumers," but also to those whose exposure to the product was "foreseeable." This decision has implications not only for asbestos litigation, but for other toxic tort claims.

Overview of the Facts in Lunsford

Unlike most asbestos personal injury suits, where the plaintiff's exposure to asbestos resulted solely from his or her work with or around asbestos containing products, the *Lunsford* case also involved so-called "second hand" or "bystander" exposure, where the plaintiff never worked directly with any asbestos containing products that were manufactured, sold or provided by the defendant. In *Lunsford*, the plaintiff's father installed insulation at a refinery in Washington State. The plaintiff alleged that his father was exposed to asbestos while he was working at the refinery and that he was then exposed to the asbestos dust that his father brought home via his work clothes, hat, automobile and tools.¹ *See id.* at 809. The plaintiff claimed that this indirect exposure to asbestos caused or

¹The court also noted that the plaintiff "was exposed to asbestos over a number of years from a variety of sources." *Id.* at 809.

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contributed to his disease. He sued Saberhagen Holdings, Inc. ("Saberhagen"), a successor in interest to his father's employer at the refinery, claiming that the defendant should be held strictly liable for his injuries. Interestingly, the plaintiff also alleged that the defendant was negligent in that it knew or should have known of the potential for injury arising from his father's exposure to asbestos containing products.

Legal and Public Policy Considerations Bearing Upon the Court's Holding

The *Lunsford* court reviewed: (1) the RESTATEMENT (SECOND) OF TORTS § 402A (1965); (2) Washington state cases interpreting § 402A; and (3) case law from other jurisdictions addressing this issue.

THE RESTATEMENT (SECOND) OF TORTS § 402A

The RESTATEMENT (SECOND) OF TORTS § 402A is limited by its own terms to the protection of "users" and/or "consumers" against harm resulting from unreasonably dangerous products. Comment 1 of § 402A defines "consumers" as "not only those who in fact consume the product, but also those who prepare it for consumption," and the term "user" applies to "those who are passively enjoying the benefit of the product." As the *Lunsford* court concedes, the drafters of the *Restatement* explicitly did not take a position on the issue of bystander standing to bring strict liability claims. See *id.* at ct. o; *Lunsford*, 106 P.3d at 810. In fact, the commentary to the *Restatement* states that bystanders "do not have the same reasons for expecting such protection as the consumer who buys a marketed product" and "there is not the same demand for the protection of casual strangers." RESTATEMENT (SECOND) OF TORTS § 402A at ct. o.

Washington Case Law

The Washington State Supreme Court adopted the RESTATEMENT (SECOND) OF TORTS § 402A in *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969). Since *Ulmer*, Washington case law has remained silent on the issue of bystander standing to bring strict liability claims under § 402A. See *Lunsford*, 106 P.3d at 811 ("There are no Washington cases that have addressed whether a bystander or a person in Lunsford's position is a user for the purposes of section 402A."). Acknowledging the absence of any controlling authority in Washington State, the *Lunsford* court argued that Washington case law supported "at least an *assumption* that a person in Lunsford's position may bring suit under a theory of strict liability." *Id.* (emphasis added). In support of this "assumption," the *Lunsford* court cited two cases — *Lockwood v. AC&S, Inc.*, 109 Wash.2d 235, 744 P.2d 605 (Wash. 1987), and *Novak v. Piggly Wiggly Puget Sound Co., Inc.*, 22 Wash.App. 407, 591 P.2d 791 (Wash. Ct. App. 1979). The *Lockwood* case involved an employee's occupational exposure to asbestos from products with which he did not work directly, while the *Novak* court was primarily concerned with whether a BB gun that injured the shooter's friend was unreasonably dangerous. Neither case specifically addressed the plaintiff's standing to assert strict liability claims for indirect exposure to the defendants' products. In addition, in each case the foreseeability of an injury to the plaintiff was arguably greater than in *Lunsford*, where the plaintiff had never been present at the defendant's workplace.

Case Law from Other Jurisdictions

The *Lunsford* court then reviewed the decisions of other jurisdictions in order to determine whether bystanders should have standing to bring strict liability actions. The court's findings in this regard were mixed. The first case identified by the court, *Stegemoller v. ACandS, Inc.*, 767 N.E. 2d 974 (Ind. 2002), is of limited utility because the defendant's liability in that case was premised on the Indiana Product Liability Act, which explicitly encompasses injuries to bystanders. The court then cited *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. Ct. App. 1998), in which the Texas Court of Appeals held that a bystander plaintiff who was exposed to asbestos in a manner similar to Mr. Lunsford, could seek recovery for damages under strict liability. Finally, the court examined *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992), the primary case cited by the defendant/appellee in *Lunsford*. The *Rohrbaugh* court rejected the extension of strict liability to the bystander plaintiff, holding that to conclude that the defendant "could reasonably foresee that [the plaintiff] would be affected by their products would be an overextension of Oklahoma manufacturers' products liability law." *Id.* at 846-47.

Public Policy Considerations

In light of the split in authority on this issue, the *Lunsford* court focused on its interpretation of public policy concerns. Emphasizing the "special responsibility" that sellers have "toward any member of the consuming public who may be injured by [their products]," the court held that sellers, who are in the best position to bear the costs associated with an individual's foreseeable use of their products, should be responsible for injuries sustained by bystanders. *Lunsford*, 106 P.3d at 812 (quoting RESTATEMENT (SECOND) OF TORTS § 402A at cmt. c). The court then announced the following test for the application of strict liability in bystander exposure cases: "Thus, the question for the jury would be whether it was reasonable for the manufacturer to foresee that Lunsford would be exposed to its product through his father." *Id.*² Consequently, pursuant to *Lunsford*, a bystander plaintiff in Washington State need merely prove that it was foreseeable that he or she would be exposed to the defendant's products in order to recover damages against the defendant under a theory of strict liability.

The Potential Ramifications of Lunsford

The *Lunsford* decision is significant for three primary reasons, all of which concern the potential expansion of liability in products litigation. First, in holding that the rules of strict liability applied to the defendant employer, the *Lunsford* court determined that liability could be imposed without fault — that is, even if the employer had no knowledge and no reason to know that the products that its employees used would cause asbestos related injuries. This is important because in general, it was not until several years after the plaintiff's father worked for the defendant in the late

²Upon granting the plaintiff's appeal, the *Lunsford* court remanded the case back to the trial court for further proceedings. Subsequently, Saberhagen moved the Washington State Court of Appeals to reconsider the test that it announced in *Lunsford*. The Court of Appeals recently rejected Saberhagen's motion for reconsideration.

1950s, that there was any scientific evidence that suggested that the minimal exposure levels associated with a bystander's exposure to asbestos could produce an injury.

Second, this decision gives plaintiffs a way to sue for asbestos related malignancies that are truly "idiopathic" — having no known cause — when there remains some significant scientific doubt about whether such injuries are indeed related to asbestos exposure.

Finally, indirect exposure claims, such as the one at issue in *Lunsford*, are becoming increasingly prevalent in asbestos litigation as plaintiffs' law firms seek to find any potential defendant when their clients have no obvious exposure to asbestos. Plaintiffs' lawyers have thus sued brake manufacturers claiming that relatives of brake mechanics were indirectly exposed to asbestos containing brake products and they have also sued construction companies claiming that asbestos containing dust on a construction worker's clothes caused injury to a relative of the worker.

In light of the potential significant ramifications of the holding in *Lunsford* identified herein, plaintiffs' attorneys and product manufacturers alike have a vested interest in the subsequent treatment and interpretation of this case. How and to what extent this case will have an impact on the scope of product liability litigation and potential liability for product manufacturers will depend largely on whether Washington courts embrace the public policy concerns that the *Lunsford* court seized upon in justifying the expansion of strict liability to include injuries sustained by bystanders. This has implications not only in asbestos but in other toxic tort cases where the plaintiff was not a consumer of the product at issue, but claims exposure from an indirect, but allegedly "foreseeable" source.

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