State Appeals Court Rejects Medical Monitoring

June 20, 2011 by Sean Wajert

The Wisconsin court of appeals last week affirmed the dismissal of a plaintiff's medical monitoring complaint for failure to state a claim. Alsteen v. Wauleco Inc., No. 2010AP1643 (Wis. Ct. App., 6/14/11).

Plaintiff alleged that, while living in a nearby neighborhood, she was exposed to carcinogenic chemicals that defendant Wauleco allegedly released from the Crestline window factory. Alsteen did not allege that she suffered any present health problems due to this exposure; however, she contended she was at an increased risk of developing cancer in the future. She therefore sought damages for future medical monitoring expenses.

From approximately 1946 to 1986, operations at the Crestline site included treatment of wood products with a preservative called “Penta.” Plaintiff alleged that Penta contains hazardous chemicals, including dioxins, pentachlorophenol, and benzene. These chemicals, plaintiff asserted, are harmful to human health and some are classified as possible carcinogens. As a result, the air, soil, surface water, and groundwater in her River Street neighborhood allegedly became contaminated with dangerous levels of these hazardous chemicals. Current and former residents of the neighborhood had ingested, inhaled, and absorbed these chemicals, the complaint averred.

Some neighbors sued for personal injuries; others sued for property damage. A third group, including plaintiff, sued for medical monitoring. Readers know we have posted on medical monitoring issues before.

The trial court dismissed the action for failure to state a claim. The key issue on appeal was whether Wisconsin law recognized a cause of action for medical monitoring, for increased risk of future disease in the absence of present injury. The court of appeals affirmed, relying on Wisconsin case law that requires actual injury before a plaintiff may recover in tort; on the reasoning of the Supreme Court’s decision in Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997)(asymptomatic railroad worker who had been exposed to asbestos could not recover medical monitoring expenses under FELA); and on the persuasive reasoning of courts in several other jurisdictions that have addressed the issue and have articulated sound policy reasons for refusing to recognize medical monitoring claims in the absence of actual injury.

Increased risk of future harm is not an actual injury under Wisconsin law. Meracle v. Children’s Service Society of Wisconsin, 149 Wis. 2d 19, 437 N.W.2d 532 (1989), and mere exposure to a chemical is not an affront to plaintiff's body that constitutes an actual injury. Dyer v. Blackhawk Leather, LLC, 313 Wis. 2d 803, 758 N.W.2d 167 (2008). The court recognized that while medical monitoring in essence substitutes the increased risk of future disease for the traditional tort injury element, this argument is inconsistent with Wisconsin law, which requires plaintiffs to prove present injury. This "argument turns tort law on its head by using the remedy

sought —compensation for future medical monitoring — to define the alleged injury." See also Henry v. Dow Chem. Co., 701 N.W.2d 684, 691 (Mich. 2005). Similarly, other courts have rejected the argument that the "need" for medical monitoring itself is an injury, reasoning, "With no injury there can be no cause of action, and with no cause of action there can be no recovery. It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 855 (Ky. 2002).

The state court also found persuasive the worries of the Supreme Court in *Buckley*: First, it recognized that medical monitoring claims present special difficulties for judges and juries who will be forced to identify which costs are the extra monitoring costs, over and above those otherwise recommended. This problem is compounded by uncertainty among medical professionals about just which tests are most usefully administered and when. The Court also expressed concern that permitting a medical monitoring claim without actual injury could lead to unlimited and unpredictable liability.

Importantly, the state court here recognized that many of the policy concerns identified in *Buckley* also apply in the context of a court-supervised medical monitoring fund (as opposed to damages). Specifically, the Supreme Court's concerns regarding the difficulty of assessing the costs of the remedy, unlimited and unpredictable liability, and confusion over application of secondary sources of payment, apply regardless of the form of remedy.

Finally the court aligned itself with the trend in recent cases around the country to reject such claims: E.g., *Henry*, 701 N.W.2d 684; Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001); Lowe v. Philip Morris USA, Inc., 183 P.3d 181(Or. 2008); Badillo v. American Brands, Inc., 16 P.3d 435 (Nev. 2001); Paz v. Brush Eng'd Materials, Inc., 949 So. 2d 1, 3, 5 (Miss. 2007).

The court accordingly refused to "step into the legislative role and mutate otherwise sound legal principles" by creating a new medical monitoring claim that does not require actual injury.