WVS NEWSLINE | WILLIAMS VENKER & SANDERS LLC
ATTORNEYS AT LAW

Nolan v. Weil-McLain 233 Ill.2d 416, 910 N.E.2d 549 (2009)

In *Nolan v. Weil-McLain*, the Illinois Supreme Court substantially limited the so-called *Lipke* rule. For years, Illinois courts have relied on *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 509, 505 N.E.2d 1213, 1221 (1st Dist. 1987) to prohibit an asbestos defendant from admitting evidence of a plaintiff's exposure to asbestos other than plaintiff's evidence regarding that defendant's alleged product or premise. In fact, even if an asbestos defendant claimed that the other exposures to asbestos were the sole proximate cause of the plaintiff's injury, Illinois courts still deemed the alternative exposure evidence inadmissible. See *Kochan v. Owens-Corning Fiberglass Corp.,* 242 Ill. App. 3d 781, 610 N.E.2d 683 (5th Dist. 1993); and *Spain v. Owens-Corning Fiberglass Corp.,* 304 Ill. App. 3d 356, 710 N.E.2d 528 (4th Dist. 1999).

In *Nolan,* the Illinois Supreme Court held that any asbestos defendant asserting a sole proximate cause defense *must* be allowed to present evidence of the plaintiff's other exposures to asbestos at trial. This has been the law in Illinois for all other defendants since *Leonardi v. Loyola University of Chicago,* 168 Ill. 2d 83, 658 N.E.2d 450, 459 (1995). The *Nolan* Court expressly rejected the judicially created "asbestos exception" to standard tort principles that came from the *Spain* case, and was rather critical of the exception's creation in the first place.

The *Nolan* Court did not expressly overrule *Lipke*. Therefore, the question remains whether *Lipke* still applies when a defendant, in any case, does not have a sole proximate cause defense. An argument can be made that *Lipke* is limited to its actual holding; i.e., that there can be two or more proximate causes of an injury, and one who is guilty of negligence cannot avoid responsibility merely because some other entity was also negligent. *Lipke,* 153 Ill. App. 3d at 509.

Notably, the Supreme Court spent several pages discussing the *Thacker* test. In *Thacker v. UNR Industries, Inc.* 151 Ill. 2d 343, 355 (1992), the Illinois Supreme Court held plaintiffs in asbestos cases can satisfy the causation in fact requirement by establishing that the plaintiff was exposed to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. This test is often referred to as the "frequency, regularity and proximity" test. Unfortunately for defendants, Illinois courts have interpreted *Thacker* to mean that once a plaintiff meets the frequency, regularity and proximity test, there is a presumption of causation. The *Nolan* Court clarified that this was not the intent of the *Thacker* decision. Instead, the *Thacker* decision only applied to causation in fact. A plaintiff still has the burden to prove legal causation or proximate causation even after the *Thacker* test is satisfied.

Submitted by

Paul E. Petruska, Partner
ppetruska@wvslaw.com
(314) 345-5007