

VERDICTS & SETTLEMENTS

RESULT DATE:

May 3, 2010

CASE:

“The Lopez Case” filed in Los Angeles Superior Court, Pomona Division (No. KC049079), Hon. R. Bruce Minto.

TOPIC: Torts

SUB TOPIC:

Products Liability

DESCRIPTION:

Design Defect

VERDICT: Defense

ATTORNEYS: Plaintiffs- Thomas F. Mortimer, II (Rose, Klein & Marias LLP, Long Beach, California). Defendant- Ruth D. Kahn (Steptoe & Johnson LLP, Los Angeles, California).

MEDICAL EXPERTS: Plaintiffs - Nachman Brautbar, M.D. (toxicology); William Sawyer, M.S. (toxicology). Defendant- M. Joseph Fedoruk, M.D., CIH (toxicology and industrial hygiene); Seymour Grufferman, M.D., M.P.H., Dr.P.H. (internal medicine, epidemiology); Gregory P. Sarna, M.D. (oncology).

TECHNICAL EXPERTS: Plaintiffs - Barbara Luna, Ph.D. (forensic economics); Roger Wabeke (industrial hygiene). Defendant - Arthur Peralta (timber products specialist); Jack Sahl (epidemiology); David Weiner, M.B.A. (economics).

DESCRIPTION OF CASE: This was a wrongful death and survival products liability toxic tort case brought by the wife and children of Rudy Lopez (“Lopez”), deceased. Plaintiffs alleged that Lopez, a career cable splicer and installer with a global telecommunications company from 1975 to 2005, was exposed to the wood preservatives, creosote and pentachlorophenol that were used on utility poles, and that the poles on which he worked were jointly owned by a major California electric utility company (defendant).^{*} Plaintiffs claimed that the defendant purchased and installed the majority of the poles in the areas where Lopez worked. At the age of 51, Lopez developed a type of cancer known as multiple myeloma from which he died at the age of 53. Plaintiffs alleged that Lopez’s exposures to the treated poles caused his cancer.

Prior to trial, the defendant moved for summary judgment or, alternatively, summary adjudication of issues, and the motion was denied on December 22, 2009.



Defense attorney Ruth D. Kahn

The following three causes of action were presented to the jury: negligence, strict liability/failure to warn, and strict product liability/design defect (under the risk-benefit prong). Plaintiffs sought monetary damages for loss of society, comfort, companionship and financial support of Lopez. Although the Complaint alleged additional causes of action based on theories of strict liability/manufacturing defect, breach of express warranty, breach of implied warranty of merchantability, and breach of warranty for fitness for a particular purpose, plaintiffs voluntarily dismissed those four claims prior to closing argument.

The jury found that the treated utility poles did not contain a design defect and the defendant was not negligent.

PLAINTIFFS’ CONTENTIONS: Plaintiffs contended that the defendant purchased and installed the majority of the poles in the areas where Lopez worked. Plaintiffs claimed that the wood preservatives with which the poles were treated were carcinogenic; that the pentachlorophenol contained dioxin in the range of one-tenth to nine-tenths of one percent and that dioxin is carcinogenic; that creosote is derived from coal-tar and coal-tar is a carcinogen; that Lopez received a heavy dose of both wood preservatives; that the creosote potentiated or strengthened the toxicity of the pentachlorophenol; and, that the two wood preservatives, together, caused decedent’s multiple myeloma.

Plaintiffs contended the defendant designed the treatment for the poles by identifying the particular wood preservatives to be used and by writing the specifications for the penetration and retention of wood preservatives on the treated poles, subjecting defendant to liability under a theory of strict liability based on a design defect, and defendant knew that the wood preservatives were carcinogenic and it should have provided a cancer warning on poles or in writing to Lopez’s employer, for which it should be found liable for strict liability based on a warning defect.

DEFENDANT’S CONTENTIONS: The defendant presented evidence at trial that the penetration and retention of wood preservatives in poles is governed by various governmental agencies and trade associations, that its identification of the particular wood preservatives to be used did not make

^{*}The identity of the defendant has been intentionally omitted from this reprint.

it a “designer” of the treated poles such that strict products liability should attach, and that the wood preservatives are highly effective in keeping the pole in service as evidenced by the fact many poles that were treated and installed in the 1950s and 1960s are still in use today.

The defendant also presented testimony that its own work force has the potential for the same or more exposure to the wood preservatives as do phone company employees and the defendant’s employees do not have any higher incidence of or mortality from multiple myeloma than anyone else. The Defendant also presented evidence that the wood preservatives can be handled safely, have been approved for use by the United States EPA, and, indeed, were re-registered by the EPA as recently as 2008.

The defendant contended the wood preservatives and their components have not been shown to cause cancer in humans in the settings in which Lopez allegedly worked and, in any event, based on principles of science and medicine, the wood preservatives were not known to causes of multiple myeloma at the time of Lopez’s alleged exposures.

Although there was evidence the wood preservatives contained carcinogens, the defense explained Lopez’s dose was not toxicologically significant, the cause of most cases of multiple myeloma is unknown, and Lopez’s disease was idiopathic, meaning it had no known cause.

The defendant’s experts testified that, as with most cases of multiple myeloma that are diagnosed, Lopez’s multiple myeloma was idiopathic, meaning no known cause. The defendant also contended that Lopez’s exposures to, and doses of, the wood preservatives were so small that they were not significant and, if there was any risk of harm associated with work on treated poles, Lopez’s employer, which had also bought and installed poles that were treated with the same wood preservatives for which the defendant was sued, should have known about the risks and provided Lopez with appropriate protective clothing. There was evidence that both The defendant and Lopez’s employer received the same information from the chemical manufacturers and the treaters of the poles about the chemical composition and the known health hazards of the wood preservatives.

DAMAGES: Plaintiffs’ economist estimated the economic losses, including medical expenses, were between \$828,000 and \$1,122,000. The defense estimated the total economic losses were approximately \$628,000, the differences between the two being primarily (a) an offset which the defendant’s

economist took for a pension plan distribution made to Lopez before his death and (b) the number of years Lopez would have worked. Plaintiffs sought non-economic damages in the amount of \$2.6 million.

SETTLEMENT DISCUSSIONS: Eleanor Barr from ADR Services Inc. conducted a private mediation six months before trial at which all the defendants, except Ruth’s client, settled the case. Shortly thereafter, both sides served statutory offers to compromise: the defendant’s statutory offer was in the sum of \$25,000; plaintiffs’ statutory was in the amount of \$585,000. Prior to the start of trial, Hon. R. Bruce Minto also served as settlement officer, presiding over several settlement conferences (with all principals present).

RESULT: Defense verdict. The jury found that the treated utility poles did not contain a design defect and the defendant was not negligent.