

PRODUCTS LIABILITY  
*update*

**Illinois Supreme Court's Recent Decision Presents  
Novel Issues That Will Shape the Future of Asbestos Litigation in Illinois**

The Illinois Supreme Court recently released its opinion in the matter of Nolan v. Weil-McLain, No. 103137 (Ill. Apr. 16, 2009), overruling the "Lipke Rule" announced in Lipke v. Celotex Corp., 505 N.E.2d 1213 (Ill. App. Ct. 1987), which prevented defendants in asbestos cases from introducing evidence of a plaintiff's exposure to asbestos attributable to a party that is not present at trial. The matter was on appeal from the Fourth District, and the decision had been long awaited, oral arguments having taken place in the summer of 2007. In actuality, the

Illinois Supreme Court overruled the erroneous application of Lipke contained in Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683

(Ill. App. Ct. 1993) and Spain v. Owens Corning Fiberglass Corp., 710 N.E.2d 528 (Ill. App. Ct. 1999), but not Lipke itself. Regardless, the end effect is that asbestos defendants will now be allowed to introduce evidence at trial of the plaintiff's exposures to asbestos attributable to parties not present at trial as evidence of alternative causes for the plaintiff's injuries in support of a sole proximate cause defense. The Nolan decision presents a number of novel issues that will shape the future of asbestos litigation in Illinois, both from a strategic and practical perspective.

Clearly, defendants are now in a stronger position at trial. However, it may prove that cases are more difficult to settle. Plaintiff firms may be less inclined to leave one defendant standing as the target at trial. Instead, we may see plaintiffs taking multiple defendants to trial in an effort force them to point the finger at one-another. Further, the approach plaintiffs take to discounting alternative exposures may in fact

be supported by the prior contentions of defense experts. As a hypothetical, a life-long mechanic plaintiff may use pre-Nolan expert affidavits from defense experts who opined chrysotile asbestos fibers and/or brake work do not cause mesothelioma to refute a defendant's assertion it was the brake work and not the defendant's amphibole product that caused the disease.

The Nolan decision will undoubtedly give rise to more conflicts of interest than during the Lipke era. It is difficult to fathom a



law firm at trial on behalf of one client pointing to another settled client as the cause of the plaintiff's injury. Even if not an actual conflict,

it may lead to unrest between clients and their counsel. Accordingly, a shuffle in representation may be seen, with defendants with the same types of defenses, e.g., the chrysotile defense, aligning themselves.

It will also be interesting to see how local venues are impacted. The two primary reasons asbestos plaintiffs filed in Madison County, Illinois were (1) expedited procedures and trial dates and (2) the Lipke Rule. Now that the Lipke Rule is no longer at play, we may see more filings in St. Louis City, Missouri, just across the river, since several points of Missouri law are more beneficial than Illinois. In particular, Missouri allows punitive damages in death cases, whereas Illinois does not, and there is no Missouri equivalent to the Illinois Strict Products Liability Statute of Repose, which generally prevents plaintiffs in Illinois from suing in strict liability due to the latency period of mesothelioma and lung cancer.

The "Reader's Digest" version of the 39-page Nolan opinion is set forth below.

**Nolan v. Weil-McLain, Docket No.  
103137 (Ill. S. Ct. Apr. 16, 2009)**

Thacker reaffirmed the axiomatic rule that a plaintiff alleging personal injury in any tort action—including asbestos cases—must adduce sufficient proof that the defendant caused the injury. Thacker, 151 Ill. 2d at 354-55. In so doing, we reiterated black-letter, general principles of tort causation law, and repeated the well-settled rule that proof which relies on conjecture, speculation or guesswork is insufficient. Although we noted that asbestos plaintiffs face unique challenges in showing causation, we did not carve out an exception for asbestos cases which relieved those plaintiffs from meeting the same burden as all other tort plaintiffs. Rather, we adopted Lohrmann's frequency, regularity and proximity test—tailored to application in asbestos actions—as a means by which a plaintiff choosing to prove cause in fact through use of the substantial factor test may meet that burden. In addition, by adopting the rationale of the Lohrmann decision, Thacker thereby rejected the argument advanced by plaintiff here—and accepted by the appellate panel below—that so long as there is any evidence that the injured worker was exposed to a defendant's asbestos-containing product, there is sufficient evidence of cause in fact to allow the issue of legal causation to go to the jury. As the Lohrman court observed, such an approach is contrary to the concept of substantial causation, as without the minimum of proof required to establish frequency, regularity and proximity of exposure, a reasonable inference of substantial causation in fact cannot be made. Nolan, No. 103137 at 14.

In our view, Lipke stands for no more than the well-settled rules that it cites: that the concurrent negligence of others does not relieve a negligent defendant from liability. When read correctly, Lipke simply holds that if a defendant's negligence proximately caused a plaintiff's harm, evidence that another's negligence might also have been a proximate cause is irrelevant—and therefore properly excluded—if introduced for the purpose of shifting liability to a concurrent tortfeasor. Lipke simply determined that evidence of the plaintiff's other exposures was not relevant to the specific defense raised, i.e., that the plaintiff did not have an asbestos-related disease, and he had no exposure whatsoever to defendant's asbestos products. In the matter at bar, however, defendant wishes to offer evidence of decedent's other exposures for different purposes: to contest causation through the use of the sole proximate cause defense, which was not raised by the Lipke defendant. As the instant cause presents a factually different situation, Lipke is inapposite. **Nolan, No. 103137 at 17.**

[T]he Kochan court extended Lipke to hold that other-exposure evidence is always irrelevant, and supported this holding with the questionable rationale that because it is "impossible" to determine whether a specific exposure caused injury, "[a]llowing a defendant to present evidence of a plaintiff's exposures to other products whose manufacturers are not defendants in the trial would only confuse the jury," and, therefore, "[t]he purpose for which the evidence is offered is inconsequential." Kochan, 242 Ill. App. 3d at 790. We agree with the circuit court below that Kochan "effectively removed from asbestos defendants any opportunity to point to the negligence of another as the sole proximate cause of plaintiff's injury." **Nolan, No. 103137 at 18.** We also agree with the circuit court that Kochan is "internally inconsistent," as we fail to discern how it is both "impossible" to exclude specific exposures as a proximate cause, and yet "simple" for a defendant to defeat proximate cause at trial. **Nolan, No. 103137 at 18.** Leonardi made it clear that the exclusionary rule first fashioned in Lipke is limited to the facts presented there, and held that it is error to extend that principle to instances where, as here, proximate cause is disputed and the defendant pursues a sole proximate cause defense. As the circuit court observed below, under such an approach, "[d]efendants are precluded from pointing to some other proximate cause since they \*\*\* are presumed [liable] \*\*\* as long as there is any evidence the plaintiff was exposed to their product." The court believed that "Lipke was never intended to result in a presumption of liability in asbestos cases," and we agree. Such an approach improperly removes from the jury the determination of

whether a defendant's conduct is a proximate cause of the plaintiff's injury. Leonardi underscored that in such cases, a defendant has a right to introduce evidence to contest proximate cause, and competent evidence about others as causal factors must be allowed. Accordingly, Leonardi overruled those decisions that held otherwise. Because Kochan improperly extended Lipke to hold that other exposure evidence may be barred as irrelevant in cases in which cause is disputed, Kochan was overruled sub silentio by Leonardi. We now make explicit what was previously implicit: we specifically overrule that portion of Kochan which holds that other-exposure evidence is irrelevant. (p. 20-21). [T]he Spain court erroneously reasoned that "[t]he Leonardi court found the Lipke standard inapplicable to medical malpractice cases, but did not change the law governing asbestos cases," and proceeded to apply an incorrect reading of Thacker—a reading which we rejected earlier in this opinion—that once a plaintiff satisfies the frequency, regularity and proximity test, defendant "is presumed to be a proximate cause of decedent's asbestos injury." Spain, 304 Ill. App. 3d at 364-65. **Nolan, No. 103137 at 22.**

Our ruling in Leonardi is universally applicable to all tort actions. Given that Spain conflicts with both Thacker and Leonardi, it is hereby overruled. **Nolan, No. 103137 at 22.** We hold that the circuit court erred by relying on the appellate court's erroneous—and now overruled—decisions to prevent defendant from presenting evidence of decedent's other asbestos exposures in support of its sole proximate cause defense. **Nolan, No. 103137 at 23.** In sum, the exclusion of evidence of decedent's other exposures to asbestos eliminated evidence of alternative causes for decedent's injuries, improperly preventing defendant from supporting its sole proximate cause defense: "[P]laintiffs would have the issue of proximate cause tried in a vacuum, with no reference to the other actors whose conduct may also have been a proximate cause of [decedent's] injury. In the trial scenario \*\*\* [defendant] could argue to the jury that it was not responsible for the [injury to decedent], but could not suggest who was responsible. Thus, the jury's natural question—'If not you, who?'—would be left unanswered. That result would be untenable." Warner/Elektra/Atlantic v. County of DuPage, No. 83-C-8230 (N.D. Ill. March 6, 1991). Accordingly, the errors at trial compel us to reverse and remand, and proceeded to apply an incorrect reading of Thacker—a reading which we rejected earlier in this opinion—that once a plaintiff satisfies the frequency, regularity and proximity test, defendant "is presumed to be a proximate cause of decedent's asbestos injury." Spain, 304 Ill. App. 3d at 364-65. **Nolan, No. 103137 at 26**

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