

## THE STANDARD FOR MEDICAL CAUSATION IS RELAXED IN THOSE CASES WHERE A PLAINTIFF WAS DIAGNOSED WITH MESOTHELIOMA

Defendants often move for summary judgment at the conclusion of fact discovery in a mesothelioma case. In doing so, they frequently argue that there is insufficient proof that the plaintiff's injuries were proximately caused by exposure to the defendant's product - otherwise known as medical causation. When properly opposed, a defendant's motion for summary judgment can be defeated, which will require that the case proceed to a jury trial.

To support their summary judgment motions in mesothelioma cases, defendants frequently urge the court to apply the frequency, regularity and proximity test adopted in Sholtis v. Am. Cyanamid Co., 238 N.J. Super. 8, 14-15 (App. Div. 1989), a case in which the plaintiff suffered from asbestosis. That argument, however, ignores those cases decided after Sholtis where the frequency, regularity and proximity test was applied in the context of a mesothelioma diagnosis. See, Kurak v. A.P. Green Refractories, Inc., 298 N.J. Super. 304, 313-22 (App Div.), certif. denied., 152 N.J. 10 (1997); Buttitta v. Allied Signal, Inc., 2010 WL 1427273 (App. Div.), certif. denied., 203 N.J. 579 (2010). These later cases demonstrate that the application of the frequency, regularity and proximity test is far more relaxed where there is a diagnosis of mesothelioma, as opposed to other asbestos-related diseases, because mesothelioma "can develop from the cumulative effects of minimal and infrequent exposure to asbestos." Buttitta, supra, 2010 WL 1427273 at \*9.

A plaintiff in a products liability litigation must demonstrate that his injuries were proximately caused by exposure to the defendant's product. Coffman v. Keene Corp., 133 N.J. 581, 594 (1993). "Our courts have long recognized the "extraordinary and unique burdens facing plaintiffs who seek to prove causation in toxic-tort litigation." Rubanick v. Witco Chem. Corp., 125 N.J. 421, 433 (1991). "[T]he task of proving causation is invariably made more complex because of the long latency period of illnesses caused by carcinogens or other toxic chemicals." Ayers v. Jackson Township, 106 N.J. 557, 585 (1987).

The problem of proving causation with respect to a specific defendant's products is further compounded where, as is often the case, a plaintiff has been exposed to multiple products of multiple defendants over an extended period of time. Sholtis v. Am. Cyanamid Co., *supra*, 238 N.J. Super. at 14-15. In such a case, the burden of proving causation "is a formidable one." James v. Bessemer Processing Co., Inc., 155 N.J. 279, 301 (1998). As a result, "the modern trend has been to relax or broaden the standard of determining causation." Vassallo v. Am. Coding & Marking Inc Co., 345 N.J. Super. 207, 214 (App. Div. 2001).

"In a toxic-tort action, in addition to product-defect causation a plaintiff must prove what is known as 'medical causation' - that the plaintiff's injuries were proximately caused by exposure to the defendant's product." James v. Bessemer Processing Co., Inc., *supra*, 155 N.J. at 299. To prove medical causation a plaintiff must show that the exposure to each defendant's product was a "substantial factor" in causing or exacerbating the disease. *Id.*

In Sholtis - which unlike a mesothelioma case involved asbestos exposures resulting in pleural asbestosis - the Appellate division adopted the frequency, regularity and proximity test to determine whether a plaintiff has made a prima facie case of medical causation. Sholtis v. American Cyanamid Co., *supra*, 238 N.J. Super. at 28-31. The Court held that, in order to prove that a specific defendant's product was a substantial factor in causing or exacerbating a plaintiff's asbestosis, he or she is required to "prove an exposure [to asbestos] of sufficient frequency, with a regularity of contact, and with the product in close proximity; and that such factors should be balanced for a jury to find liability." *Id.* at 28. According to the Court, "[a]t a summary judgment motion a plaintiff only need produce evidence from which a fact-finder, after assessing the proof of frequency and intensity of plaintiff's contacts with a particular manufacturer's friable asbestos, could reasonably infer toxic exposure." *Id.* at 29.

The Appellate Division subsequently considered the application of the frequency, regularity and proximity test to mesothelioma cases in Kurak v. A.P. Green Refractories, Inc., 298 N.J. Super. 304, 313-22 (App Div.), *certif. denied.*, 152 N.J. 10 (1997). There, in determining that the plaintiff's evidence was sufficient to support the jury's

verdict and finding of proximate cause, the Court specifically relied upon “the nature of mesothelioma and the ease with which it can be contracted.” Id. at 322. As the Court explained:

The substantial factor test is not concerned with the quantity of the injury-producing agent or force but rather with its legal significance ... Where there is competent evidence that one or a de minimus number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff’s injury. Id. (citing Wehmeier v. UNR Industries, Inc., 572 N.E.2d 320, 337 (1991)).

The Appellate Division revisited the application of the frequency, regularity and proximity test to mesothelioma cases in Buttitta v. Allied Signal, Inc., 2010 WL 1427273 (App. Div.), certif. denied, 203 N.J. 579 (2010). There, the Court observed, consistent with its holding in Kurak, that the test is less burdensome in mesothelioma cases due to the recognized “distinction between diseases such as asbestosis and lung cancer caused by asbestos, which [] develop from continuous exposure to substantial quantities of asbestos over a period of years and mesothelioma, which can develop from the cumulative effects of even minimal and infrequent exposure to asbestos.” Id. at \*9. In finding that there was sufficient evidence presented by Mr. Buttitta to allow the issue of medical causation to go to the jury, the Court observed, in language particularly relevant to mesothelioma cases:

The frequency, regularity and proximity test “is not a rigid test with an absolute threshold level necessary to support a jury verdict.’ *James, supra.* 155 N.J. at 302, 714 A.2d 898 (quoting *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992).) “The phraseology should not supply ‘catch words’ [and] the underlying concept should not be lost.” *Sholtis, supra.* 238 N.J. Super. at 29, 568 A.2d 1196. Tailoring causation to the facts and circumstances of the case, “[t]he frequency and regularity prongs become less cumbersome when dealing with cases involving diseases like mesothelioma, which can develop after only minor exposures to asbestos fibers.” *Tragarz, supra.* 980 F. 2d at 420. Thus, exposure in this case must be considered in relation to the uncontradicted expert testimony establishing that mesothelioma is associated with the “smallest exposure” to asbestos and can develop from the cumulative effects of minimal and infrequent exposure. Id. at \*10.

It is this understanding of the frequency, regularity and proximity test - as applied in the context of an individual who was diagnosed with mesothelioma - that must inform the Court’s decision on a defendant’s motion for summary judgment.