IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 2, 2014

EARL T. ADAMS v. AIR LIQUIDE AMERICA, L. P. ET AL.

Appeal from the Circuit Court for Davidson County
No. 11C2048 Thomas W. Brothers, Judge

No. M2013-02607-COA-R3-CV - Filed November 25, 2014

The sole issue presented in this appeal concerns the constitutionality of Tenn. Code Ann. § 29-28-103, the ten-year statute of repose under the Tennessee Products Liability Act and the exceptions to the statute of repose for asbestos claims and silicone gel breast implant claims, but not for silica-related claims. After working as a sandblaster for thirty years, Plaintiff developed silica-related injuries. Thereafter, Plaintiff commenced a products liability action against several silica manufacturers and suppliers, which was filed outside the ten-year period. When the defendants moved for summary judgment contending the action was time-barred by the ten-year statute of repose, Plaintiff challenged the constitutionality of the statute of repose as applied to silica claimants on equal protection grounds. Utilizing a rational basis analysis, the trial court found that silica claims were not similarly situated by injury or class to asbestos claims, and, if they were similarly situated, a rational basis exists to distinguish between the two. The trial court also found that silica has no similarity to silicone gel breast implants. Thus, the trial court summarily dismissed the action as time-barred based on the ten-year statute of repose under the Tennessee Products Liability Act, specifically Tenn. Code Ann. § 29-28-103(a). We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Pat Montgomery Barrett, III, Nashville, Tennessee, and Lance P. Bradley and Jill S. Chatelain, pro hac vice, Port Arthur, Texas, for the appellant, Earl T. Adams.

Samuel P. Funk, Nashville, Tennessee, for the appellee, Air Liquide America, L.P.

Joseph M. Huffaker, Nashville, Tennessee, for the appellee, Empire Abrasive Equipment Corporation.

Edward U. Babb, Knoxville, Tennessee, for the appellees, The Morie Company n/k/a Unimin Corporation and Unimin Corporation.

Robert E. Cooper, Jr., Attorney General and Reporter, Joseph F. Whalen, Acting Solicitor General, Ryan L. McGehee, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

For a period of thirty years, from 1977 to 2007, Earl T. Adams ("Plaintiff") worked as a sandblaster. He was diagnosed with silicosis and silica-related lung cancer in 2010. On May 27, 2011, Plaintiff filed this products liability action against several defendants alleging that his injuries stemmed from employment-related exposure to silica while using products that were manufactured and supplied by the defendants.[1] It is undisputed that 1991 is the latest Plaintiff could have first used or consumed any of the defendants' products.

Defendants Clemco Industries Corporation, Air Liquide America, L.P., The Morie Company n/k/a/ Unimin Corporation, Unimin Corporation, Empire Abrasive Equipment Company, L.P., and Empire Abrasive Equipment Corporation filed motions for summary judgment on the basis that Plaintiff's claims were barred by the statute of repose set forth in Tenn. Code Ann. § 29-28-103(a). Plaintiff then challenged the constitutionality of the statute of repose on equal protection grounds. Specifically, Plaintiff argued the statute of repose and its exceptions for asbestos claims and silicone gel breast implant claims, but not silica-related claims, violated the Equal Protection Clause of the United States and the Class Legislation Clause of the Tennessee State Constitution. Due to Plaintiff's constitutional challenge of the statute, the trial court granted leave for the Office of the Tennessee Attorney General to intervene.

Following a hearing, the trial court granted summary judgment to defendants Air Liquide America, L.P., The Morie Company n/k/a/ Unimin Corporation, Unimin Corporation, Empire Abrasive Equipment Company, L.P., and Empire Abrasive Equipment

[1]The defendants named in the complaint are Air Liquide America, L.P., Bob Schmidt, Inc. and Schmidt Manufacturing, Inc., Clemco Industries, Inc., E.D. Bullard Company, Empire Abrasive Equipment Company, L.P., Empire Abrasive Equipment Corporation, F & S Equipment & Supplies, Inc., Ingersoll-Rand Company, Ingram Industries, Inc. a/k/a/ Ingram Materials, Inc., Marion Sand and Gravel Company, Inc. n/k/a Galvanizing Services Co., Inc., 3M Company f/k/a Minnesota Mining & Manufacturing Company, The Morie Company n/k/a Unimin Corporation, Porter Warner Industries, LLC, Unimin Corporation, and Wedron Silica Co.

Corporation.[2] As a factual basis for its ruling, the trial court found it undisputed that any product Plaintiff claimed to have used or to which he was exposed was first purchased for use or consumption no later than 1991, and this action was commenced more than ten years from that date. Additionally, the trial court made the following conclusions of law:

> 1. This is a products liability action governed by the Tennessee Products Liability Act of 1978 ("TPLA"), § 29-28-101, *et seq*.
>
> 2. All of Plaintiff's claims against the MSJ Defendants are controlled by the TPLA's statute of repose, . . .
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> . . .
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> 6. The TPLA statute of repose exceptions for claims involving asbestos and silicon gel breast implants as set out in Tenn. Code Ann. § 29-28-103(b) do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article XI, Section 8 of the Tennessee Constitution by drawing a distinction between silica-related claims, on the one hand, and asbestos-related and silicone gel breast implant claims, on the other hand.
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> 7. Silica and asbestos claims are not similarly situated by injury or class.
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> 8. Asbestos has been classified as a toxic substance, whereas silica has not.
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> 9. Silica has no similarity to silicone gel breast implants.
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> 10. Even if silica-related claims and asbestos-related claims were similarly situated, the Tennessee General Assembly had a rational basis to distinguish between the two.
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> 11. Silicosis is by its nature an occupational disease, whereas asbestosis is not so limited given the fact that it historically has been found in homes, schools and the like, in addition to the workplace.

The trial court also directed entry of a final judgment according to Tenn. R. Civ. P. 54.02 as to the defendants that were summarily dismissed. Plaintiff filed a timely appeal challenging the dismissal of his claims against Air Liquide America, L.P., The Morie

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[2] During the hearing, Clemco Industries Corporation withdrew its motion for summary judgment; therefore, the claims as to Clemco remain in the trial court.

Company n/k/a Unimin Corporation, Unimin Corporation, and Empire Abrasive Equipment Corporation. Plaintiff does not appeal the dismissal of Empire Abrasive Equipment Company, L.P.

STANDARD OF REVIEW

This appeal arises from the grant of summary judgment, which is appropriate when a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003). The material facts with respect to the issue raised on this appeal are not in dispute; accordingly, our review is de novo on the record with no presumption of correctness as to the trial court's conclusions of law. *See* Tenn. R. App. P. 13(d); *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003).

ANALYSIS

Plaintiff challenges the constitutionality of Tenn. Code Ann. § 29-28-103; more specifically, he argues that applying the statute of repose to bar his silica-related claim in light of the exceptions for asbestos and silicone gel breast implants violates the Equal Protection Clause of the United States Constitution and the Class Legislation Clause of the Tennessee State Constitution. U.S. CONST. amend. XIV, § 1, TENN. CONST. art. XI, § 8. He contends he is similarly situated to individuals who suffer from asbestos-related and silicone gel breast implant health problems because injuries resulting from silica exposure, such as silicosis and silica-related lung cancer, also have long latency periods. Plaintiff argues there is no rational basis for distinguishing between his claim and asbestos or silicone gel breast implant claims.

The challenged statute reads in pertinent part:

> (a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions, it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption[.]
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> (b) *The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos or to the human implantation of silicone gel breast implants*.

Tenn. Code Ann. § 29-28-103 (emphasis added).

We begin our analysis by recognizing that "[t]he concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)) (other citations omitted). However, things which are different in fact or opinion are not required by either constitution to be treated the same. *Id*. (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Moreover, "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," and state legislatures are given considerable latitude in determining which groups are different and which are the same. *Id*. (citing *Plyler*, 457 U.S. at 216).

Tennessee courts utilize a similar equal protection analysis under the Class Legislation Clause of the Tennessee Constitution as the Equal Protection Clause of the United States. *Winningham v. Ciba-Geigy Corp.*, 1998 WL 432472, n.5 (6th Cir. 1998) (citing *Estrin v. Moss*, 430 S.W.2d 345, 348 (Tenn. 1968); *King-Bradwall Partnership v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21 (Tenn. Ct. App. 1993); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1136 (6th Cir. 1986)). The parties agree that a rational basis standard applies because the classification here does not implicate a suspect class or a fundamental right. *Winningham*, 1998 WL 432472, at *6 (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976)).

Under a rational basis analysis in Tennessee, "the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest." *Doe*, 751 S.W.2d at 841 (citing *Plyler*, 457 U.S. at 216; *State v. Southern Fitness and Health, Inc.*, 743 S.W.2d 160, 164 (Tenn. 1987); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978)). As the Tennessee Supreme Court explained in *Harrison v. Schrader*, 569 S.W.2d at 825-26:

> The classification must rest upon a reasonable basis. If it has a reasonable basis, it is not unconstitutional merely because it results in some inequality. Reasonableness depends upon the facts of the case and no general rule can be formulated for its determination. *Estrin v. Moss*, 430 S.W.2d 345 (Tenn. 1968); *Motlow v. State*, 145 S.W. 177 (Tenn. 1912).
>
> The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld. *Swain v. State*, 527

S.W.2d 119 (Tenn. 1975); *Estrin, supra*; *Phillips v. State*, 304 S.W.2d 614 (Tenn. 1957).

> Before the classification will be held to violate the equal protection guaranty, it must be shown that it has no reasonable or natural relation to the legislative objective. *City of Chattanooga v. Harris*, 442 S.W.2d 602 (Tenn. 1969); *Phillips, supra*. In addition, the statute must apply alike to all who fall within, or can reasonably be brought within the classification. *Massachusetts Mutual Life Insurance Co. v. Vogue, Inc.*, 393 S.W.2d 164 (Tenn. Ct. App. 1965).

As noted above, "[i]f it has a reasonable basis, it is not unconstitutional merely because it results in some inequality." *Harrison*, 569 S.W.2d at 825. Therefore, *reasonableness* is the touchstone in determining whether the legislature has drawn a proper classification, and "the legislature is given fairly broad leeway, for when a court determines that a classification is unreasonable, it is substituting its judgment for that of the legislature, and this it should not do unless the classification is clearly arbitrary and has no rational basis." *Wyatt v. A-Best Products, Co.*, 924 S.W.2d 98, 106 (Tenn. Ct. App. 1995).

In conformity with the trial court's holding, the statute of repose and its exceptions have been upheld under similar equal protection challenges. *See, e.g.*, *Winningham*, 1998 WL 432472, at *6-7 (statute of repose and exceptions upheld in light of constitutional challenge brought by plaintiffs claiming injury from exposure to insecticide who argued that they were similarly situated to individuals suffering from asbestos and silicone gel breast implant health problems); *Kochins*, 799 F.2d at 1136-39 ("we think the statute's exemption of asbestos-related injuries has a rational basis if only because such injuries often take considerably longer than ten years to manifest themselves"); *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984) (upholding statute of repose and exceptions in face of equal protection challenge that exposure to latent-injury-causing phosphate slag is similar to asbestos exposure); *Spence v. Miles Lab., Inc.*, 810 F.Supp. 952, 962-63 (E.D. Tenn. 1992) (upholding statute and exceptions in face of an equal protection argument that AIDS and asbestos victims are similarly situated), *aff'd on other grounds*, 37 F.3d 1185 (6th Cir.1994); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (upholding constitutionality of statute of repose); *Wyatt*, 924 S.W.2d at 106-7 (same).

In fact, two cases are particularly relevant to the issue presented here. First, in *Winningham v. Ciba-Geigy Corporation*, plaintiffs brought an equal protection challenge to the statute of repose, claiming injury from exposure to chlordimeform, an insecticide, and arguing that they were similarly situated to individuals who suffer from asbestos and silicone gel breast implant health problems because injuries resulting from chlordimeform exposure have long latency periods. *Winningham*, 1998 WL 432472, at *6. The Sixth Circuit Court of

Appeals held that "the Tennessee legislature has not violated equal protection by addressing the problem of long latency periods one step at a time," noting that plaintiffs' claims were not materially different from the previous cases challenging the statute's constitutionality. *Id*.

Second, in *Wyatt v. A-Best Products Company* this court upheld the General Assembly's decision to classify asbestos-related claims differently from other latent injury claims. *Wyatt*, 924 S.W.2d at 106. We held that "we cannot say that the General Assembly's decision to classify asbestos-related claims differently from other latent-injury claims is so patently arbitrary as lacking any rational basis." We further stated:

> It is perhaps true that the legislature's purpose might have been better or more effectively served by a general exemption for all latent injury claims; however, the Tennessee Supreme Court has noted,
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> > . . . the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others . . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 106 (citing *Swain v. State*, 527 S.W.2d 119, 121 (Tenn. 1975)) (quoting *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)).

We also agreed with and adopted the reasoning stated in *Pottratz v. Davis*, 588 F.Supp. 949 (D.Md. 1984), wherein the court was presented with an equal protection challenge to a similar asbestos exception in an Oregon statute. *Wyatt*, 924 S.W.2d at 106. As the *Pottratz* court stated:

> The reasonableness of statutes of limitations as specially applied to asbestosis claims has been repeatedly recognized. [citations omitted] The legislature is entitled to much deference in this matter, and the statute should be presumed to be constitutional. It will simply be noted that among the many factors which place asbestos-related injuries in a class by themselves, it is known that asbestos-related diseases are not dependent upon repeated inhalations or exposures, but upon the presence of the fiber in the lungs from potentially one, initial exposure. [citation omitted] There is usually a long period of latency of

> up to 30 years before onset of the diseases . . . Over 3000 different products in daily use at one time contained asbestos, including tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material. [citation omitted] With these few factors in mind, it can hardly be said that there is no rational justification for the Oregon legislature's decision to treat asbestos claimants differently from that of other claimants . . . .

Pottratz, 588 F.Supp. at 955-56.

As we noted earlier, the trial court concluded that "[s]ilica and asbestos claims are not similarly situated by injury or class," "[a]sbestos has been classified as a toxic substance, whereas silica has not," "[s]ilica has no similarity to silicone gel breast implants," and "if silica-related claims and asbestos-related claims were similarly situated, the Tennessee General Assembly had a rational basis to distinguish between the two." The court also concluded that "[s]ilicosis is by its nature an occupational disease, whereas asbestosis is not so limited given the fact that it historically has been found in homes, schools and the like, in addition to the workplace." We are in agreement with each of these conclusions.[3]

For the foregoing reasons, the Tennessee General Assembly had a reasonable basis upon which it distinguished claims related to asbestos and silicone gel breast implants from silica-related and other injuries that also have long latency periods. Therefore, the Tennessee Products Liability Act's statute of repose and its exceptions thereto do not violate the Equal Protection Clause or the Tennessee Class Legislation Clause. Accordingly, we affirm the summary dismissal of this action based on the ten-year statute of repose under the Tennessee Products Liability Act, specifically Tenn. Code Ann. § 29-28-103(a).

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[3]We acknowledge that Plaintiff cites to a subsection of the Silica Claims Priority Act ("SCPA") which states that, "No person shall bring or maintain a civil action alleging that silica or mixed dust caused that person to contract lung cancer in the absence of a prima facie showing . . . [e]vidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer." Tenn. Code Ann. § 29-34-304(b)(2) (2006). Plaintiff contends this statute, along with the current statute of repose which bars silica claims after ten years, would effectively abolish all silica claims in Tennessee. This contention, however, is erroneous; according to Tenn. Code Ann. § 29-34-306(a), "*Notwithstanding any other law*, with respect to any silica claim or mixed dust disease claim that is not barred as of July 1, 2006, the period of limitations shall not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment resulting from silica or mixed dust exposure." (Emphasis added). Because it is undisputed that the latest Plaintiff first used or consumed the products at issue was in 1991, the SCPA has no application to the issue presented in this appeal. Thus, as the trial court correctly stated, "when the SCPA is considered in conjunction with the ten-year statute of repose in the [Tennessee Products Liability Act], the plain language of the SCPA extends the discovery rule only to products first purchased for use or consumption after July 1, 1996."

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiff, Earl T. Adams.

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FRANK G. CLEMENT, JR., JUDGE