

NEWS & VIEWS

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Attorney Advertisement

DEALING SAFELY WITH ASBESTOS IN YOUR HOME

Most homes contain asbestos in some form. Asbestos is a common element found in a wide range of building materials. For the last few decades, asbestos has been known, generally, to be a grave health risk. Long before that, the manufacturers of asbestos-containing materials knew that exposure to asbestos dust had the potential to cause fatal diseases, including mesothelioma. Too often, home owners begin renovations unaware that asbestos may be present in the materials they are disturbing. The question then becomes, "What should the property owner do before beginning renovations?"

"This is becoming a more common situation as homes are aging and home owners need to renovate to increase their property value and replace outdated materials," said Paul Gizzarelli, manager of Stohl Remediation Services, Inc., a Blasdell, NY asbestos remediation company. Asbestos can be found in transite siding, in insulation (as loose fill in the attic, block wrapped around older boilers or insulation that wraps around heating ducts or pipes found in a basement), on ceilings (in popcorn skim or acoustic tiles) in plaster, drywall, floor tile, drywall joint compound and a multitude of other building materials.

"All too often, home owners go and rip off siding and crack floor tile without the knowledge that it may contain asbestos. You cannot always tell if materials contain asbestos by just looking at them.



Pictured above, cross section of Aircell, asbestos pipe insulation.

Ideally, the material in question should be sent to a lab so it can be analyzed by a professional," Gizzarelli said.

"If there is a question as to whether or not a material contains asbestos, you want to avoid disturbing it." Asbestos fibers are dangerous when they become airborne, he said, and the last thing you want to do is go and disturb something that is intact for the time being. If a home owner finds a material in their home that is crumbling or flaking, it is best to have a licensed asbestos company sample and then remove it. For homeowners, most average asbestos removal jobs can cost anywhere between \$2,000 to \$15,000. ■

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OUR ATTORNEYS WILL COME TO YOU

In the past year, our attorneys have made dozens of trips throughout the United States to assist clients exposed to toxic materials, such as asbestos, while living and working in New York State. Because diseases, such as mesothelioma, typically have a latency period of approximately ten to fifty years between initial exposure to asbestos and the development of this deadly disease, symptoms may first begin to surface long after a worker has retired and moved out of state.

Keith R. Vona, an attorney and former Buffalo City police officer who joined our Firm in 2005, has criss-crossed the country during the past several months representing clients in their lawsuits against manufacturers of asbestos products. "If one of our clients was exposed to asbestos at a job site anywhere in the State of New York, but is

now living in, for example, Washington State, one of our attorneys will travel to his home to prosecute a lawsuit," said Mr. Vona. This year alone, Mr. Vona traveled to eight different states representing clients who were at one time employed at five different New York job sites :

- Durez Plastics in North Tonawanda, NY - Keith went to Boston, MA, Myrtle Beach, SC, and Newburgh, NY to represent clients from Durez.
- Diemolding Corporation in Canastota, NY - St. Petersburg, FL and Hartford, CT.
- Navy Cases - Portland, OR, Richland, WA and Raleigh, NC.
- Chevy Foundry - Holland, MI.
- Pohlman Foundry - Charlotte, NC.
- Eastman Kodak - Ocala, FL. ■

ASBESTOSIS DENIAL REVERSED

After more than five years of litigation before the New York State Workers' Compensation Board, Lipsitz & Ponterio has succeeded in establishing that the death of Joseph "Joe" Mahoney (close friends and family also knew of him as "Herk"), a former employee of the Linde Division of Union Carbide in Tonawanda, New York, was caused by his workplace exposure to asbestos. Mr. Mahoney worked at the plant from 1952 until his retirement in 1985. He died in 2003, and was survived by his wife Shirley, who now resides in Arizona.

It took a long time to establish this case, and a great deal of legal work and medical analysis, because the death certificate did not state clearly that Joe Mahoney died of asbestosis.

At the initial hearing in this case, the Workers' Compensation insurance carrier for Union Carbide objected to the claim asserting that the deceased worker was not, in fact, exposed to asbestos during the course of his employment at Union Carbide. Even though we filed a

pathology report in 2005 stating that Joe died of asbestos disease and even though we presented co-workers who testified that asbestos was used in the areas where Joe worked, the carrier still wasted the next four years of the widow's time disputing the claim. After much argument over details, Mahoney's lung tissue samples from the autopsy were sent to Union Carbide's designated pathologist, and it was concluded that Joe's fatal lung disease was indeed caused by exposure to asbestos. Finally in 2009, the compensation carrier agreed that Mahoney was exposed to asbestos during the course of his employment, and the employer's insurer agreed that the death claim should be established.

Shirley Mahoney persevered and is now receiving the weekly monetary benefits sadly denied to her for several years by the compensation carrier. In addition to a lump-sum amount for retroactive benefits dating back to the date of her husband's death, Shirley will also receive a weekly monetary benefit for the remainder of her life. ■

REMEMBERING ASHLAND OIL - INTERVIEW WITH JOSEPH ("JOE") J. MCNEIL

Joseph ("Joe") J. McNeil retired in 1992 after a career spanning over 35 years with Ashland Oil. A couple of months ago Joe graciously agreed to be interviewed by Lipsitz & Ponterio concerning his memories of working at Ashland Oil. For over an hour, he spoke about his work, his sports activities and his participation in the union. Here are some of the highlights of our discussion:

When were you hired and what was the refinery called at that time? I started in October of 1955. The Tonawanda refinery was owned by Ashland, but it was still called Frontier.

What was the typical assignment for a new hire? Everyone was hired in as a yardman and then worked their way up.

How many people were employed at Ashland when you were hired? About 150 people, but it got bigger and they were always hiring when I first started to work there. I got hired out of a group of 960. There were only 16 who were hired out of that group.

How did people get a job at Ashland? Did you have to know someone to get hired there? No, you didn't need to know anyone. They gave us an I.Q. test before we were hired. A lot of people failed that test. They hired very good people.

Can you tell me something about how the units were staffed? We had one guy working at a time in each unit, with 4-5 shift supervisors. So, it was one operator and one shift supervisor on a unit at a time.



Pictured above, Joe McNeil at Seneca Falls, NY Empire Farm Days (2006)

Let's discuss sports. Tell me about the softball team at Ashland Oil. Our softball league was called the Tonawanda Industrial League and we would get guys from other plants to play against the Ashland Team. One of the teams I remember was from Linde, I guess now it's called Praxair.

Can you tell me a little bit about your softball games? Oh yeah! We had some really great guys that played softball for us. Remember Blackie? Well, Blackie played catcher and his nickname was black cat. He was a great athlete and fast. That boy could run. Blackie also played semi-pro football, that is how good an athlete he was.

How about Bowling? Did you have a league? Oh yeah, there were about 16 leagues throughout the plant when I was there. It was called the Inner Plant League. About 16 leagues at once would bowl.

asbestos bankruptcy update

As part of our continued representation of clients suffering from asbestos disease, Lipsitz & Ponterio files claims against bankrupt asbestos companies. For recent developments concerning bankrupt asbestos companies, visit our Firm's website:

www.lipsitzponterio.com/asbestos

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ALBANY LAWMAKERS RE-INTRODUCE WIDE-RANGING LEAD POISONING PREVENTION ACT; STATE'S BUDGET CRISIS MAY BAR LEGISLATION IN 2009

We suggest that Albany Lawmakers and Governor Paterson be urged not to be pennywise, but pound foolish in any further delay in approving and enacting the Childhood Lead Poisoning Prevention and Safe Housing Act of 2009. While these may be tough economic times, the future economic costs of Special Education and related therapies and/or disability payments for lead-poisoned children outweigh any justification for further delay in taking steps to prevent lead poisoning from occurring in unsafe rental housing in the first instance.

Despite the distraction of New York State's budget crisis, some Albany lawmakers are slow to recognize that childhood lead poisoning remains a serious public health problem that needs to be addressed. Lawmakers have once again introduced legislation denoted as the Childhood Lead Poisoning Prevention and Safe Housing Act of 2009. A similar enacted bill in 2008 was vetoed by Governor Paterson due to the looming budget crisis that is affecting New York State in the current nationwide economic recession. Unfortunately, and with a daring assumption that this legislation again passes both houses in the current fiscally-troubled year, we would expect another Governor's veto because he will most likely view this legislation as too costly.

Here's why: The legislation establishes a fund to promote primary prevention and safe housing, and it authorizes a tax credit to income-qualified property owners who undertake lead hazard reduction activities. Both of these programs would fiscally impact the State. A key provision of the bill would also fiscally impact property owners in a down economy. The bill summary highlights a "cornerstone" as requiring all upstate rental properties built before 1970 be certified as either "lead free", "lead contained" or "lead stabilized", and subsequently then be recertified. It would force property owners to perform maintenance activities for compliance and certification within two years of passage of the law.

The purpose of this legislation is to alter the focus of the State's lead poisoning prevention efforts. Lawmakers want to focus on primary prevention, because the historical focus on post-exposure secondary prevention and intervention efforts has not led to a satisfactory decline in new exposures in the targeted population group, lower income children living in rental properties in depressed urban areas. The Legislature recognizes that in New York State about 10,000 children per year are newly identified as having an elevated blood lead level of 10 ug/dL (micrograms per deciliter) or higher.

These additional facts about the serious impact of childhood lead poisoning are widely recognized:

- Even low levels of lead in young children can result in reduced intelligence and attention span, learning disabilities, hearing impairment and behavior problems.
- A tiny amount of lead, concentrated in just one chip of paint, can result in serious poisoning and even irreversible developmental damage in children under the age of six.
- Children are poisoned by simple hand-to-mouth contact with leaded dust that exists in association with degraded lead-based paint in their households.
- Childhood lead poisoning causes enormous societal costs, including medical costs and special education costs.

The current bills (Assembly Bill No. A02087; and Senate Bill No.S1002) have been referred to the Health Committees of the respective legislative houses. Readers of this newsletter are urged to contact their respective State Assembly or State Senate representative to call for passage of The Childhood Lead Poisoning Prevention and Safe Housing Act of 2009. ■

\$100 MILLION EARMARKED FOR LEAD REMEDIATION IN OBAMA'S STIMULUS PLAN

Many items are still being debated for inclusion in President Obama's \$838 billion economic stimulus package, including nationwide lead remediation programs costing \$100 Million. The National Center for Healthy Homes (NCHH) is one of the groups lobbying for the inclusion of lead remediation programs and is keeping up the pressure as the U.S. House of Representatives grapples with a final version of the stimulus bill. NCHH argued that the \$100 million would be well spent because the money could create many jobs required to perform remediation in the field, such as inspectors, lead testers and contractors.

Buffalo and Rochester rank high among cities having older housing plagued by lead paint hazards that endanger its children. Concerned citizens should contact their Congress representatives to urge that Stimulus monies earmarked for lead paint remediation should be kept and that Buffalo and Rochester should receive their fair share of such funds.

If you have concerns with regard to the inclusion of lead remediation programs in the stimulus bill, we urge you to contact the following congressional representatives:

- (D-NY) Louise Slaughter, Buffalo Office, 716.853.5813
- (D-NY) Brian Higgins, Buffalo Office, 716.852.3501 ■

WARNINGS - HANDLE WITH CARE

Lawyers, especially those who represent plaintiffs in asbestos disease lawsuits, tend to think a good deal about warnings. After all, the claim that the defendant companies failed to warn the plaintiff about the potential health hazards of exposure to asbestos dust from their products is at the core of every asbestos lawsuit. Similarly, the failure to warn constitutes the basis of many other types of toxic exposure lawsuits, as well as lawsuits involving consumer goods and medications. Therefore, it is worth commenting in this newsletter on the recent decision of the United States Supreme Court in *Wyeth v. Levine*, which involved the validity of a verdict in favor of a plaintiff against a drug company that manufactured and sold an antihistamine used to treat severe migraine headaches. Because the drug company lost its case before the Vermont courts and took an appeal to the United States Supreme Court, the case is now known as *Wyeth v. Levine*.

In the *Wyeth* case, the plaintiff, Diana Levine, a musician by profession, sought treatment for a severe migraine headache and was given a drug manufactured by Wyeth. The drug was administered by the use of a technique known as an “IV push”, as opposed to the use of a slower “IV drip.” In the process of administering the injection, the drug was inadvertently introduced into one of the plaintiff’s arteries. This caused Ms. Levine to suffer gangrene and the consequent amputation of her arm.

At issue in *Wyeth v. Levine* was the adequacy of the warning label, as well as the appropriateness of allowing a state court jury to weigh the adequacy of the drug company’s warning. The label that warned against, but did not prohibit “IV push” administration, had previously been approved by the Food and Drug Administration (FDA). The label stated in relevant part “INADVERTENT INTRA-ARTERIAL INJECTION CAN RESULT IN GANGRENE OF THE AFFECTED EXTREMITY.” The plaintiff’s lawyers argued to the jury that Wyeth was negligent because it merely cautioned against the injection technique, instead of outright barring it. The jury agreed and awarded the plaintiff nearly seven million dollars. The judgment of the trial court was eventually upheld by the Vermont Supreme Court, and Wyeth appealed to the United States Supreme Court. In March, the Court upheld the jury’s verdict.

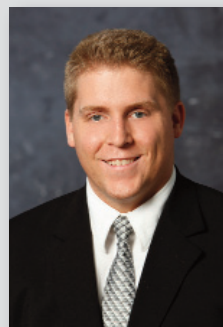
In upholding the jury’s verdict, the United States Supreme Court agreed with the plaintiff, as well as with the Vermont Supreme Court, that the FDA’s labeling regulations created only a minimum requirement, and did not in effect trump (or preempt) the right of the plaintiff to present her case against the drug company to a court or jury. Thus, the Court made it clear that injured plaintiffs may not be deprived of the right to have a jury of their peers determine the liability of a product manufacturer for failure to issue an adequate warning, even in the presence of some government regulation.

The case of *Wyeth v. Levine* is illustrative of the classic tension between the policy arguments of product manufacturers, on one hand, and workers and consumers injured by mass-marketed products, on the other hand. Manufacturers routinely ask juries and courts, as well as legislatures, to relieve them of liability for injuries caused by their products because such liability “might result in excessive risk control, stifle innovation, and impose unreasonable costs, including subjecting them to the costs of liability defense and insurance.”¹ This argument essentially attempts to place the risk of loss on the shoulders of workers and consumers and runs counter to our cherished notions of fair compensation for serious injury.

Lipsitz & Ponterio represents families whose livelihoods have been lost and whose lives have been destroyed by defective products; we make the argument that product liability lawsuits serve the public interest (rather than frustrate it) by providing just compensation for innocent victims of hazardous products, by unearthing evidence of such hazards to better protect the public, and by providing powerful disincentives to risky behaviors on the part of product manufacturers. Too often, manufacturers of products containing asbestos, beryllium, lead and other toxic substances are tempted to place profits before people. Fortunately, in *Wyeth v. Levine*, at least, the argument in favor of the work we do everyday was vindicated by our Supreme Court, even if it was only by a vote of six to three. ■

1. Brief of New England Journal of Medicine Editors & Authors as Amici Curiae in support of respondent.

welcome aboard!



Mathew J. Morton, Esq.

We are pleased to announce that Mathew J. Morton, Esq. has joined Lipsitz & Ponterio, LLC as an associate. Mr. Morton practices in the areas of asbestos and mesothelioma litigation as well as motor vehicle accidents.

Mr. Morton’s work focuses on representation of individuals who have suffered injuries as a result of exposure to asbestos and other toxic substances. Prior to joining the firm, Mr. Morton was an associate at a Buffalo, NY area law firm that concentrates its practice in Workers' Compensation matters.

Mr. Morton attended the State University of New York at Buffalo where he received his J.D. from the School of Law, and his B.A., *cum laude*. He is admitted to practice law in New York State and is a member of the American, Erie County and New York State Bar Associations.

REMEMBERING ASHLAND OIL - INTERVIEW WITH JOSEPH ("JOE") J. MCNEIL ...continued from page 2

What other clubs did you belong to when you were employed at Ashland? The Eldridge Club. It's an old establishment and there I played basketball until I was 58. I was 6'3", but could keep up with the big guys who were 6'5" and 6'8".

Can you tell me a bit about when they started to shut down the plant? I think it was December 1, 1992 that the plant was fully shut-down. Layoffs started in 1982 and then it was sold to United. It was one of the best refineries that I had ever been to. It was well built. Bob Yancey was the engineer who built it. He knew how to build a refinery and made it wide enough for cranes to get in.

Tell me a bit about the union at Ashland. The union just started in 1955 when the new owner bought the plant, he wanted a union. I became a Shop Steward of the union and then the Vice President.

Was there ever international union involvement? We had what was called a travelling union. We would meet at the VFW in Williamsville.

Were they aggressive in terms of organizing? Oh yeah. I never missed a union meeting. I really enjoyed it. I was Vice President for a while.

Did the union negotiate for health care benefits? Oh yes they did.

Was there a summer picnic? Do you remember where it was held? Yeah, there was a summer picnic. It was held somewhere off of Two Mile Creek Road. I can't remember the name of the park, but they let it go to heck. It was both the union picnic and the company picnic, but a lot of people didn't like that. I used to run the picnic until I went into supervision. ■

important legal documents you need to consider



By making your health care wishes known now, you can provide the authority to individuals who you trust to carry out those directions and preferences when necessary. By making these directions known in advance, you will be exercising control of your affairs, rather than leaving the decision-making up to state statutes or to speculation. In the best of circumstances, you will openly and honestly discuss your wishes with your appointed agents. The following are several legal documents that you should consider and discuss with your legal advisor or health care provider:

- 1. Health Care Proxy.** This names a person as health care agent and authorizes that agent to make health care decisions on your behalf in the event that you are incapacitated and unable to make such decisions. A spouse is not automatically granted such authority, so it is very important that you designate your spouse or family member to make these decisions.
- 2. Living Will.** This is sometimes called "Health Care Instructions" or "Statement of Guidance" and, in New York, is evidence of your wishes concerning medical treatment but is not legally determinative. At a minimum, it can be used to state your preferences regarding whether you would want life sustaining measures, such as artificial nutrition or respiration, if there is no reasonable chance of recovery. In other words, the health care proxy appoints your agent and the living will gives directions to the agent.
- 3. Durable Power of Attorney.** An agent designated in a power of attorney is not authorized to make health care decisions, but the agent may be allowed access to your medical records if the power of attorney authorizes it under HIPAA. The New York statutory power of attorney form will be substantially changed starting September 1, 2009.
- 4. DNR (Do Not Resuscitate Order).** This is a medical order signed by a physician with your consent, or in certain circumstances, the consent of your family members. Generally, these orders are entered when you are in the hospital, but there are circumstances when a physician will issue a "non-hospital" DNR that you can keep at home.
- 5. Appointment of Agent to Control Disposition.** This allows you to designate a particular agent to carry out funeral and burial arrangements, and is particularly useful for unmarried or same-sex couples, because it can override statutory presumptions of who would otherwise be authorized to make your arrangements. Alternatively, pre-planning your funeral with a funeral director will give you the ability to select funeral arrangements that will meet your needs.
- 6. Public Health Law.** The Public Health Law provides that a deceased person's information may be accessed by an heir of the person prior to the appointment of an estate representative. Resort to this law can save time and expense if an estate would not otherwise be required to be opened, which is often the case when a first spouse dies. However, the law does not allow the heir to authorize an autopsy. If litigation has been commenced or is contemplated, an autopsy will provide valuable evidence, and should be expressly authorized by the person while he or she is alive.



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ATTORNEY SPOTLIGHT

Neil J. McKinnon, Esq.

Neil J. McKinnon, Esq. is a key member of Lipsitz & Ponterio's Lead Practice Group which represents children suffering from lead poisoning. For over fifteen years, Neil has practiced in the areas of personal injury, asbestos litigation, construction accidents, lead paint, automobile accidents and product liability cases. He has litigated cases throughout New York State, including Buffalo, Niagara Falls, Rochester, Syracuse, Albany, and New York City.

Throughout his career, Neil has helped injured people obtain monetary awards for their injuries through settlements and trials. "At the end of the day, what really makes this type of work so gratifying is that you are truly helping regular folks get through tough times," Neil explains. "The people I help tend to remind me of my parents, neighbors and friends, and to me that is the most valuable asset of my work here at Lipsitz & Ponterio."

Neil is a past member of the Lead Connections Advisory Board and he has been a longtime member of St. Joseph's Catholic Church. In his free time, Neil is very active with childrens' sports activities including, the Amherst Youth Basketball League, Dance Project of WNY and Lou Gehrig's Softball League.

Neil and his wife, Dawn, are the parents of three children. His hobbies include sailing, basketball, sailboat racing during Buffalo's beautiful warm summer months and snow boarding in the winter. ■

News & Views has been prepared by the attorneys at Lipsitz & Ponterio, LLC and is intended for general information purposes only and should not be considered legal advice. You are urged to contact an attorney concerning any specific questions you have relating to your own situation. Prior results do not guarantee a similar outcome.

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