

“Slip Slidin’ Away” – Down the Slippery Slope in ‘Take-Home’ Cases

By Carter E. Strang

Introduction

The lyrics of Paul Simon’s 1977 hit song “Slip Slidin’ Away” include a refrain proclaiming that “the nearer to your destination, [T]he more you’re slip slidin’ away.”

The song comes to mind when considering limits to potential liability -- if any -- in “take-home” premises liability in jurisdictions that permit such claims.

What may be slip slidin’ away is any reasonable restraint on who may bring such claims, particularly in light of the recent New Jersey Supreme Court ruling in *Schwartz v. Accuratus* (Case No. A-73-14), which permitted a take-home premises claim arising from alleged exposure as a guest and roommate.

No court -- prior to *Schwartz* -- had extended take-home premises liability beyond family members, such as spouses, children, nieces/nephews, and in-laws.

Take-Home Claims

Before further discussing *Schwartz*, a little background on take-home claims is in order. Take-home claims are asserted by plaintiffs who allege exposure -- typically in a home environment -- to toxic substances from the contaminated workplace clothing of others.

Despite the fact that the number of direct exposure claims is generally decreasing, the number of take-home claims is increasing in the never-ending effort to find available deep pockets.

Courts addressing take-home claims asserted against premises owners -- which sound in negligence -- have applied one of two legal tests: 1) a relationship test or (2) a foreseeability test. In the former, absent a special relationship between the take-home plaintiff and the premises defendant (such as being an “invitee” to the business premises), take-home claims are denied.

In the latter, take-home claims may be asserted, depending on case specific factors, including the nature of relationship between the plaintiff and the person wearing the allegedly contaminated clothing, knowledge of the risks, etc.

An emerging majority of courts in states where the issue has been addressed have held no duty is owed by premises owners to take-home plaintiffs. A principle reason cited is concern about a slippery slope that could lead to assertion of take-home claims by virtually anyone that had contact with the worker’s contaminated clothing (housekeepers, babysitters, guests, cab drivers, etc.).

New Jersey and *Schwartz v. Accuratus*

In *Schwartz*, plaintiff Brenda Ann Schwartz alleged her chronic beryllium disease was caused by beryllium brought home on the contaminated workplace clothing of her husband Paul, both while she was his girlfriend -- and a frequent visitor to his apartment -- and after they were married and lived

together. She also alleged exposure from her husband's roommate Greg, who occupied the same apartment unit with Paul both before his marriage to Brenda and with both of them after their marriage. Brenda contended that at all relevant times she helped wash contaminated clothing and towels and helped clean the apartment.

While Brenda also asserted products liability claims, the only question pending before the New Jersey Supreme Court pertains to her premise liability claims and the duty owed, if any, during her alleged exposure while a girlfriend, guest, and roommate.

On that issue, the trial court denied her "non-spousal" claims, citing the seminal *Olivo v. Owens-Illinois, Inc.*, 895 A. 2d 1143 (N.J. 2006), which permitted the take-home claims of a spouse. Specifically, the trial court held that the duty recognized was "focused on the particularized foreseeability of the harm to the plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband." *Schwartz v. Accuratus*, 7 F.Supp. 3d 490,495 (E.D.Pa. 2014), citing *Olivo*, p. 1150.

The trial court's ruling was appealed to the U.S. Court of Appeals for the Third Circuit (Case No. 14-4002), which certified the following question to the New Jersey Supreme Court:

Does the premise liability rule set forth in *Olivo* [citation omitted], extend beyond providing a duty of care to the spouse of a person exposed to toxic substances on the landowner's premises, and if so, what are the limits on that liability rule and the associated scope of duty?

Oral argument was held in April 2016, and the Court's unanimous decision was issued July 6, 2017.

As to the certified question, the Court refused to restrict take-home liability to spouses. In so ruling, it stated that its *Olivo* decision was not based on Eleanor Olivo's legal status:

"*Olivo* does not state, explicitly or implicitly, that a duty of care for take-home toxic-tort liability cannot extend beyond a spouse. Nor does it base liability on some definition of 'household' member, or even on the basis of biological or familial relationships."

The Court -- in addressing the second half of the certified question -- rejected any "bright line test" as to "who is in and who is out" in favor of a "case-by-case" approach that includes a "refined analysis for particularized risk, foreseeability, and fairness."

Impact of *Schwartz*

The immediate impact of the ruling will be to reduce the number of take-home premises claims -- where New Jersey law is applied -- that will be dismissed outright through a motion to dismiss or later through summary judgment.

Conversely, it will result in assertion of more claims, which will result in more settlements and verdicts against premises owners. And it will be cited as precedent in other jurisdictions where take-home claims are asserted by non-family members.

The case returned to the U.S. Court of Appeals for the Third Circuit, which remanded it to the trial court for further handling, including discovery to address the case-by-case factors outlined in *Schwartz*.

Conclusion

Schwartz vividly illustrates the slippery-slope nature of take-home premises claims which can result in liability to virtually anyone that had contact with the worker's contaminated clothing.

Of course, that is a major reason that the emerging majority of jurisdictions have declined to permit assertion of take-home claims against premises owners.

How far much further we may slide down the slippery slope of premise liability remains to be seen, but clearly we are on our way.

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