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COURT OF APPEALS

STATE OF NEW YORK

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IN THE MATTER OF:

NEW YORK CITY ASBESTOS LITIGATION  
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ANNE M. SOUTH,

No. 8

Respondent,

-against-

CHEVRON CORPORATION, et al.

Appellants.  
-----

20 Eagle Street  
Albany, New York  
January 10, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sharona Shapiro  
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CHIEF JUDGE DIFIORE: Good afternoon, everyone. I am well, but I have lost my voice. My colleague, Judge Rivera, has graciously agreed to call the calendar today. So please indulge me.

JUDGE RIVERA: Good afternoon, and of course we wish the Chief Judge a quick recovery. Her voice is much needed, and we want to hear her.

Calling today's calendar, Thursday, January 10th, 2019, first case number 8, Matter of New York City Asbestos Litigation.

Counsel? Please.

MR. FEDER: May it please the court. Meir Feder for appellant Texaco. The decision below this case - - -

JUDGE RIVERA: Counsel, excuse me. Do you want to reserve any time for rebuttal?

MR. FEDER: Thank you, Your Honor. I would like to reserve two minutes, please.

JUDGE RIVERA: Two minutes, yes.

MR. FEDER: Yes. The decision below should be reversed because the release here was a straightforward settlement of Mr. South's asbestos claims that he had asserted in a lawsuit.

JUDGE FEINMAN: So if we accept your argument that under Callen this release doesn't fall under Section 5



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2 of FEELA, therefore we don't need to look at Babbitt or  
3 Wicker and pick between them, if we accept that, why don't  
4 we still have to then look at the Supreme Court's decision  
5 in Garrett which applies to mariners or seamen - - - I'm  
6 going to use the term "mariners" - - - and - - - and then  
7 figure out, under those factors, whether this is an  
8 enforceable release?

9 MR. FEDER: Well, I - - - I think that,  
10 presumably, you're referring to the language in cases like  
11 Garrett about seamen being wards of the court and the - - -  
12 and the heightened review - - -

13 JUDGE FEINMAN: Um-hum, correct.

14 MR. FEDER: - - - and so forth. So I guess,  
15 first of all, I'm going to say two things about it. Number  
16 one, I don't think that actually applies here because we're  
17 not talking about a - - - a contract made by a mariner.  
18 This is someone who retired as a seaman in 1982, according  
19 to the record here. This - - - his lawsuit and release was  
20 in 1997, fifteen years later, so all of the - - -

21 JUDGE FEINMAN: So it doesn't matter that the  
22 injury occurred when he's working as a Merchant Marine - -  
23 -

24 MR. FEDER: I think that's - - -

25 JUDGE FEINMAN: - - - mariner - - -



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MR. FEDER: I think that's right. I think if you look at Garrett and - - - and those cases, there's a lot of emphasis on the inequality of bargaining power, the isolation of seamen at sea, lots of ways in which they're not able to make their own decisions reliably, and so the court has to protect them. None of those apply. It's not based on the nature of the injury occurring at sea; it's based on the nature of the relationship between the seaman and - - - and employer when - - - when he's a seaman, and ordinarily - - -

JUDGE FEINMAN: So we shouldn't look at Garrett at all?

MR. FEDER: I don't think so.

JUDGE FEINMAN: What if we disagree and we do think that Garrett applies - - -

MR. FEDER: Yes.

JUDGE FEINMAN: - - - then what?

MR. FEDER: I think that - - - that, even in that case, this is a situation where Garrett would be fully satisfied. I think we've cited cases in our brief enforcing releases entered and analyzed under - - - under Garrett. There's a - - - including a Second Circuit case whose - - - unfortunately whose name is slipping my mind at the moment. The - - - because you have a situation here



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where, you know, again, some of the same factors come into play. The - - - you know, the bargaining power situation is different. This is someone who is represented by counsel. It's a very clear agreement.

JUDGE FEINMAN: This particular counsel had his issues, but nevertheless he is represented, I grant you that.

MR. FEDER: And you know, I don't think there's - - there's really a record on that. And that particular counsel still represented him in filing this lawsuit. So - - and - - - and there hasn't been a claim here that there was some sort of, you know, deficient representation. So - -

JUDGE RIVERA: Counsel, how is it there's not a triable issue of fact. I mean, the number that he settles for, 1,750, correct?

MR. FEDER: So - - -

JUDGE RIVERA: Correct, that is the number?

MR. FEDER: So we're told.

JUDGE RIVERA: Is - - - okay.

MR. FEDER: How it gets in the record is a little weird, and it wasn't in our - - -

JUDGE RIVERA: Well, you didn't argue otherwise?

MR. FEDER: No, and we're not arguing otherwise.



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JUDGE RIVERA: Okay. So it seems odd that number, not just because it seems incredibly low, even for the year in which you had the settlement, but the number is odd. Is there any explanation for that?

MR. FEDER: I don't know the explanation for the exact number, and I think - - -

JUDGE RIVERA: Does that perhaps weigh in favor of saying there's some question of fact?

MR. FEDER: No, I don't think it does at all.

JUDGE RIVERA: Why not?

MR. FEDER: Because, I mean, the number - - - it's very important to understand, looking at this number, that this was a lawsuit in which he sues 116 defendants; this is the settlement with 1 out of 116, at a time when his injuries were obviously nowhere near as serious as - - -

JUDGE FAHEY: Well, the injuries - - -

JUDGE STEIN: Is there anything in the record about the settlement with any of the other defendants?

MR. FEDER: There is - - - there is not, but what is in the record is that his, you know, ship, his maritime history, he was only on Texaco ships 2 out of his 37 years as a seaman, starting in 1945.

JUDGE FAHEY: Let me ask you this question. Take



1 a step back a second. Did this person have a negligence  
2 cause of action at the time that this case was settled?  
3 And the reason I ask that is because I think of a  
4 negligence cause of action as one that has both - - - that  
5 there is an allegation of liability, and there's a basis  
6 for that allegation, a prima facie basis for that  
7 allegation, and there's an allegation of damages resulting  
8 from that liability.  
9

10 MR. FEDER: Right.

11 JUDGE FAHEY: So the way I see the record is that  
12 he doesn't appear to have had a negligence cause of action  
13 at the time this - - - this settlement took place; would  
14 you agree with that?

15 MR. FEDER: No, and I'm not sure I understand why  
16 you're suggesting it.

17 JUDGE FAHEY: Well, forget about why. I want to  
18 know if you think - - -

19 MR. FEDER: I think he did - - -

20 JUDGE FAHEY: No, let me get my question out.

21 MR. FEDER: Yeah.

22 JUDGE FAHEY: I want to know: do you agree that  
23 those are the elements of what a negligence cause of action  
24 is, all right?

25 MR. FEDER: Yeah.





1  
2 JUDGE FAHEY: Okay. Well, if that's the case,  
3 and they aren't here in this case, then it seems to me that  
4 we're only dealing with the potential future liability  
5 which is a possibility of one part of a negligence cause of  
6 action. And so my - - - I have a - - - I'm having a hard  
7 time getting my mind around a settlement for a potential  
8 future liability. It doesn't seem that that's, even under  
9 the most restrictive use of the term of release, that  
10 that's not what covers a release.

11 MR. FEDER: Well, I guess - - -

12 JUDGE FAHEY: You can't give up a cause of action  
13 for something that you don't even have.

14 MR. FEDER: Well, I guess, first of all, I think  
15 that the premise is wrong because the - - - and this was  
16 repeatedly in the plaintiff's briefs in this case that,  
17 recognizing that he did have an existing diagnosed injury,  
18 it was a much less serious injury.

19 JUDGE FAHEY: Okay. So you're saying the record  
20 shows that he had been diagnosed with mesothelioma at the  
21 time - - -

22 MR. FEDER: No, no - - -

23 JUDGE FAHEY: - - - of the settlement?

24 MR. FEDER: No, no, no.

25 JUDGE FAHEY: Okay. I didn't understand that.



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JUDGE FEINMAN: No, no, he had a nonmalignant asbestos-related disease.

MR. FEDER: Non-malignant, correct.

JUDGE FEINMAN: All right. But that was not what the Appellate Division majority said. And so then the question becomes, so that's a question of - - - is that a question of fact that's now been found by the Appellate Division majority that we don't necessarily have the authority to upset?

MR. FEDER: I don't think it is. I think - - - and you know, we - - - we certainly pointed out, pretty extensively, the numerous places in which the plaintiffs conceded that in fact he did have - - - and they haven't contested that the Appellate Division was just wrong, so I don't think that that's an issue that is in the case. I think it's agreed by everyone that there was a - - -

JUDGE FEINMAN: Okay. The - - -

MR. FEDER: And as to - - - there was no mesothelioma then, of course - - -

JUDGE FAHEY: Um-hum.

MR. FEDER: - - - but ordinarily, as in Callen itself, when you have a less serious injury, based on tortious conduct, you can still settle anything arising out of that conduct, including potential future more serious



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injury. And if you couldn't - - -

JUDGE FAHEY: Well, that's the question that's really before us. Now - - -

MR. FEDER: Yeah.

JUDGE FAHEY: - - - the second question I had is - - - and I know your light's on, but if the judge would allow me just to ask this one question. We've got a spectrum of cases to look at in these releases between Babbitt, and is it Whitmore? Is it Wicker? I'm sorry, Wicker - - -

MR. FEDER: Wicker, yes.

JUDGE FAHEY: Yeah, Babbitt and Wicker. But it seems like the Appellate Division said that even under the more favorable standard for you, the Wicker standard, this case still - - - this release is still insufficient. Would you agree with that reading of it? Is that what they're saying?

MR. FEDER: With their reading?

JUDGE FAHEY: With that reading of it, what I just said.

MR. FEDER: I agree that that's what the Appellate Division said, yes.

JUDGE FAHEY: Okay.

MR. FEDER: The Appellate Division just - - - if



1  
2 I may respond just to that? They ignored the recent  
3 decision from the same court that decided Wicker on - - -  
4 which is Collier, that we cited to them, basically almost  
5 exactly the same facts, so that, you know, we have a lot of  
6 reasons why, even under Wicker, they're wrong. But I mean,  
7 that's the most straightforward that if you look at how  
8 that court interprets its own case they're wrong.

9 JUDGE RIVERA: Thank you, counsel.

10 MR. FEDER: Thank you.

11 JUDGE RIVERA: You have rebuttal.

12 MR. BOGRAD: May it please the Court, Louis  
13 Bograd for respondent, Anne South.

14 JUDGE RIVERA: Counsel, can you clarify, from  
15 your perspective, what's the burden that opposing counsel  
16 had on the summary judgment motion? What was the burden  
17 that they had to carry?

18 MR. BOGRAD: They have to prove - - -

19 JUDGE RIVERA: Um-hum.

20 MR. BOGRAD: - - - that there is no - - - beyond  
21 - - - to the summary judgment standard, so that there's no  
22 genuine dispute of material fact, that there was a valid  
23 release here that extended to include the claim for  
24 mesothelioma.

25 JUDGE RIVERA: And how would they meet that with



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respect to the release? Do they have to establish that there's only one way to interpret the intent?

MR. BOGRAD: I would think so, Your Honor. If we - - -

JUDGE RIVERA: Of employing him?

MR. BOGRAD: I mean, let - - - it depends, in part, on which of the forms of analysis this court chooses to adopt. Under the Babbitt test, there would be no way they could establish that.

JUDGE FEINMAN: Well, speaking - - - before we get to that - - -

MR. BOGRAD: Um-hum.

JUDGE FEINMAN: - - - is there a way for you to prevail without picking between Babbitt and Wicker? In other words, saying, okay, you know, we have Callen and we have Garrett, and if you use the heightened standard from Garrett because this is a mariner - - -

MR. BOGRAD: Yeah, I think that's right, Your Honor. I think we - - - we win without even getting into this analysis. As we pointed out in our brief, the language in Callen says that Section 5 doesn't apply where a controversy exists as to whether there is liability.

JUDGE WILSON: So in 1997, could you have settled a future claim for mesothelioma where Mr. South had not



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been diagnosed with it?

MR. BOGRAD: No, we could not, Your Honor.

JUDGE WILSON: Could not have? There's no way you could write a settlement agreement to do that.

MR. BOGRAD: Not - - - not under Section 5 of FELA. I mean, maybe there's some way that I can - - -

JUDGE WILSON: Is that simply because of Section 5 of FELA, or could someone who's not subject to FELA settle such a claim?

MR. BOGRAD: Well, I mean, I think - - - you know, I think people can enter contracts. There might well be a contract that one could - - -

JUDGE WILSON: I mean, I guess I'm getting at Judge Fahey's question in the opposite direction which is: put FELA aside for a second.

MR. BOGRAD: Sure.

JUDGE WILSON: Would it be possible for someone to settle a claim for a future risk, of a knowable type, that had not yet occurred, arising from past events?

MR. BOGRAD: I - - - I mean, I think the answer to that is - - - is probably yes, Your Honor. I think - - -

JUDGE WILSON: Okay. So it's just FELA here.

MR. BOGRAD: It's - - - it's not just FELA. I



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2 mean, because there's also the facts of this release which  
3 never mentions cancer and never mentions mesothelioma.  
4 There's the fact that this release was entered in a court,  
5 a U.S. district court in the Sixth Circuit - - -

6 JUDGE STEIN: But - - -

7 MR. BOGRAD: - - - within twelve months after  
8 Babbitt.

9 JUDGE STEIN: - - - if we determine under Callen  
10 - - -

11 MR. BOGRAD: Um-hum.

12 JUDGE STEIN: - - - that it's possible, if  
13 there's a showing of the appropriate intent, then can't we  
14 read the release together with the 1997 complaint and put  
15 those allegations together to determine whether there's a  
16 showing of intent, whether it's as a matter of law or  
17 whether there's a question of fact?

18 MR. BOGRAD: Well, I - - - I was going - - -  
19 that's where I was going to go, Judge Stein. It's a  
20 question of - - - it is a question of fact - - -

21 JUDGE STEIN: But you agree - - -

22 MR. BOGRAD: - - - at that point - - -

23 JUDGE STEIN: - - - that under Callen that we - - -  
24 - that it may be possible to refer to that 1997 complaint?

25 MR. BOGRAD: I'm - - - I mean, under Callen, I -



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- - we read Callen much more narrowly. We think - - - we think Babbitt actually accurately captures what Callen said because what Callen says is - - -

JUDGE STEIN: I guess what I'm saying is if we disagree with you - - -

MR. BOGRAD: Right, so but - - - but we would contend that under Callen itself the - - - Callen says there's an exception to Section 5 only where a controversy as to liability exists. And while there was obviously a controversy as to liability for his pulmonary - - - Mr. South's pulmonary injury, there was no controversy as to liability about mesothelioma because he did not have mesothelioma at the time.

JUDGE GARCIA: But it seems to me, counsel, that people are talking about should we take Wicker or should we take Babbitt, but it seems to me that those two circuit cases are the Courts trying to interpret Callen in very different circumstances. So in the one it's a separation agreement, and there's an agreement not to sue, essentially, which so clearly seems to be under Section 5. But in Wicker, before they get to Collier, Wicker is back injuries and I think asbestos exposure, and then injury from a different harm is alleged. And in that case the Third Circuit's trying to again apply Callen in a way that





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2 goes to the intent of what the Supreme Court was trying to  
3 say: Is this an immunity grant or is it something else?  
4 But to me this case seems so much like Callen. You have  
5 exposure to asbestos. Forget the complaint. You have  
6 exposure to asbestos and you have a straightforward release  
7 that says we're settling this claim for my exposure to  
8 asbestos.

9 Now, if you came in with a different type of  
10 injury alleged, different type of tortious conduct, then  
11 maybe we apply Wicker, maybe we apply Babbitt, but here why  
12 don't we just apply Callen?

13 MR. BOGRAD: Well, Your Honor, the - - - the - -  
14 - I'm sorry; I just lost my train of thought for a second.  
15 The - - - first off, I think the cases are - - - are not as  
16 different as you would suggest.

17 JUDGE GARCIA: A release on separation - - -

18 MR. BOGRAD: Well - - -

19 JUDGE GARCIA: - - - as opposed to I'm suing you  
20 for asbestos exposure and I have an asbestos-related  
21 injury?

22 MR. BOGRAD: I - - - I see that distinction, Your  
23 Honor, but we've - - - we cited in our briefs to both the  
24 Arpin case and the Anderson case in Ohio which apply  
25 Babbitt in the state of Ohio. And those are cases that are



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much more like this one. They're asbestos cases where there's a double injury, and the first one was a settlement of an earlier asbestos injury. So while you're absolutely correct that, factually Babbitt, was not that case, there - - -

JUDGE GARCIA: And neither really was - - -

MR. BOGRAD: - - - the case law applying Babbitt was - - -

JUDGE GARCIA: - - - was Wicker, so I think what I'm having trouble with is how could you ever settle one of these cases unless the person - - - the plaintiff has a full-blown effects of the exposure?

MR. BOGRAD: Well, you settle the - - -

JUDGE GARCIA: Because why would you settle it?

MR. BOGRAD: You settle the - - -

JUDGE GARCIA: Go to trial.

MR. BOGRAD: I think there's an important distinction here, Your Honor, and - - - and it's a distinction between this case and Callen and also a distinction - - - it - - - it goes to the - - - the crux of this - - - this issue. Asbestos is a latent - - - causes latent disease, and it's therefore - - - it's a - - - the two-injury rule, which this state has recognized as well as most other states, distinguishes between a claim for a



1  
2 noncancer injury from asbestos and a subsequently arising  
3 cancer from - - -

4 JUDGE GARCIA: But does that mean - - -

5 MR. BOGRAD: It treats them - - -

6 JUDGE GARCIA: Does that translate - - - forget  
7 Section 5; does that translate into I settle a normal  
8 asbestos claim - - - normal, I mean, meaning outside a  
9 Section 5 context - - - and then I can never settle,  
10 besides Section 5, for something I don't have yet because  
11 of the two-injury rule?

12 MR. BOGRAD: I think in the context of merchant  
13 seaman and I guess railroad employees - - -

14 JUDGE GARCIA: That's Section 5.

15 MR. BOGRAD: - - - under Section 5, under Callen,  
16 you cannot - - - the statute declares void - - -

17 JUDGE GARCIA: But that's almost importing a two-  
18 injury rule into Section 5, and - - - and I don't think  
19 Section 5 was ever intended as a two-injury rule. I think  
20 Section 5 is getting at what Callen says it's getting at  
21 which is that there's a company trying to grant itself  
22 immunity. So if I have a harm, are they interfering with  
23 my right to bring that harm to trial and to get an  
24 adjudication or settlement for that harm? And here you've  
25 gotten that, so I don't understand why you - - -

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MR. BOGRAD: I - - -

JUDGE GARCIA: - - - would even look beyond Callen.

MR. BOGRAD: I guess it's a matter of perspective, Your Honor, and we may - - - we may just disagree. But this is a case of a company trying to exempt itself from liability. Mr. South had a pulmonary injury, he brought a suit for a pulmonary injury. Clearly he could have and did enter a settlement agreement to provide him with very modest compensation for that pulmonary injury.

Texaco - - - and this is a boilerplate release that Texaco put forward in the case - - - Texaco said, well - - -

JUDGE STEIN: But - - -

MR. BOGRAD: - - - as long as we're settling that case, why don't we also exempt ourselves from any potential future liabilities - - -

JUDGE STEIN: But the release, again, getting back to my earlier question - - -

MR. BOGRAD: Um-hum.

JUDGE STEIN: - - - or point, the release seems to me that it pretty closely tracks the allegations of the complaint. So you say that it's boilerplate, but it's - - - it's exactly if - - - or if not exactly certainly very



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close to what the plaintiff himself alleged he thought his injuries might be.

JUDGE RIVERA: Well, just to clarify, what did the plaintiff allege in that complaint were the injuries that track back to this particular defendant?

MR. BOGRAD: Yes, the problem, Your Honor - - -

JUDGE FEINMAN: As opposed to the master complaint.

JUDGE RIVERA: Correct.

MR. BOGRAD: The problem is it's a master - - -

JUDGE RIVERA: Well, it's everybody else.

MR. BOGRAD: The - - -

JUDGE WILSON: Well, no, isn't there a separate - - -

MR. BOGRAD: It - - -

JUDGE WILSON: - - - complaint from Mr. South that's not - - -

MR. BOGRAD: There is a separate complaint, but the - - - this - - - for better or for worse, all of these maritime asbestos cases that were being litigated in the Northern District of Ohio were litigated - - - it was sort of like a pre-MDL. They were litigated in this mass manner where the Jaques law firm was filing thousands, tens of thousands of lawsuits that were identical in language apart



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from the names of the plaintiffs and the name - - -

JUDGE GARCIA: But am I correct that - - -

MR. BOGRAD: - - - and the particular list of defendants.

JUDGE GARCIA: - - - Texaco didn't pay this plaintiff 1,700 dollars? Texaco - - - as I understand it; I I may be wrong - - - paid the lawyer a lump sum, and then that lawyer, who I guess was still a lawyer here, distributed that fund, I guess, according to some formula. But it wasn't that Texaco settled with your client for 1,700 dollars.

MR. BOGRAD: Your Honor, my law firm was not involved at the - - - I see my time has expired; I hope I may - - -

JUDGE RIVERA: Answer the question, please.

MR. BOGRAD: - - - complete the question.

JUDGE RIVERA: Yes.

MR. BOGRAD: My law firm was not involved at the time, and Mr. Jaques has passed on, and I can't tell you exactly what - - - what happened at the time.

JUDGE GARCIA: But was it a lump-sum payment, or was it an individual payment?

MR. BOGRAD: It - - - there's - - - there's no question that there was a settlement reached involving



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2 multiple plaintiffs. I - - - what we don't know, and the  
3 record is unclear about this, is whether - - - you know,  
4 Texaco wrote - - - probably wrote the Jaques law firm a  
5 single check, but whether there was an understanding that  
6 that broke - - - how that broke down across the plaintiffs  
7 who were settling or not, we don't know. So that's - - -  
8 that's an open question.

9 JUDGE WILSON: May I ask one more question?

10 JUDGE RIVERA: Yes. Yes.

11 JUDGE WILSON: In addition to the release,  
12 there's also a judgment or dismissal with prejudice in Mr.  
13 South's action filed in the Northern District of Ohio.

14 MR. BOGRAD: Um-hum.

15 JUDGE WILSON: Can you address the claim  
16 preclusion effect, if any, of that judgment on the claim  
17 you're trying to bring now?

18 MR. BOGRAD: It has none.

19 JUDGE WILSON: Why?

20 MR. BOGRAD: Because of the two-injury rule that  
21 under - - - under the law in Ohio and in New York, a claim  
22 for mesothelioma is a separate cause of action - - - later  
23 developing cancer is a separate cause of action that has  
24 its own statute of limitations, its own - - - exists  
25 independently and the - - - and the resolution of the

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2 earlier claim does not preclude it. In fact, the doctrine  
3 arose precisely because of the dilemma that parties would  
4 otherwise have found themselves in where they would either  
5 have to bring a suit when they had their initial injury,  
6 without knowing whether they were going to have a more  
7 severe injury down the road, or conversely, sit on their  
8 rights and hope they developed a more serious injury before  
9 the statute ran on - - - on their original injury so that  
10 the second-injury rule, which I don't think is in dispute  
11 in this case, is the reason why there is no res judicata or  
12 collateral estoppel - - -

13 JUDGE RIVERA: So just to clarify, your position  
14 is the meso cause of action is not what he was asserting in  
15 the complaint?

16 MR. BOGRAD: In 19 - - -

17 JUDGE RIVERA: Yes, yes.

18 MR. BOGRAD: - - - 97? Yes, he was not asserting  
19 that in his complaint.

20 JUDGE RIVERA: He was asserting cancerphobia?

21 MR. BOGRAD: He asserted cancerphobia. He - - -

22 JUDGE RIVERA: Which included, potentially, a  
23 diagnosis of meso - - - mesothelioma?

24 MR. BOGRAD: A risk of eventually developing  
25 meso. There's no suggestion whatsoever that he contended





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that he had meso in 1997.

JUDGE WILSON: Doesn't his complaint in 1997 say mesothelioma?

MR. BOGRAD: It - - - as I said, Your Honor, this was this - - - this problem with the master complaint process.

JUDGE WILSON: No, no, his specific complaint, not the master complaint, the complaint that just has - - -

MR. BOGRAD: I'm saying there is a - - - there's a laundry list of - - - it says, you know, his exposure to asbestos potentially could lead to blah, blah, blah, blah, blah, blah, blah. But there's no suggestion that there was any contention ever made in that litigation that he had - - -

JUDGE RIVERA: You're saying the claim was his fear that it might eventually - - -

MR. BOGRAD: I - - -

JUDGE RIVERA: - - - develop - - -

MR. BOGRAD: There - - - there - - -

JUDGE RIVERA: - - - as opposed to I'm claiming I have it or I'm likely to have it tomorrow?

MR. BOGRAD: There clearly was a - - - a cancerphobia claim - - -



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JUDGE RIVERA: Yes.

MR. BOGRAD: - - - in there. And case law suggests that that's - - - you know, that that could have been adjudicated at the time. Our contention is there was no - - -

JUDGE STEIN: But if the issue is intent, not whether he had it, it was known at that time, but if the issue is whether the intent is - - - was to include that, should he get it later on, then would you agree there's enough in the complaint to relate to that - - -

MR. BOGRAD: Well - - -

JUDGE STEIN: - - - question?

MR. BOGRAD: - - - Your Honor, as we've explained in the brief, there's a serious question whether Mr. South ever even saw the complaint in this case. The - - - you know, this was, as I said, a boiler - - -

JUDGE FEINMAN: And the problem with that argument is - - -

MR. BOGRAD: Yeah, I'm - - -

JUDGE FEINMAN: - - - we use verified complaints by attorneys all the time.

MR. BOGRAD: I - - -

JUDGE FEINMAN: And that's a very dangerous argument - - -



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MR. BOGRAD: I - - -

JUDGE FEINMAN: - - - to pursue.

MR. BOGRAD: I understand that, Your Honor, and obviously the complaint says what it does, and it may raise questions of fact about what the intent of the parties were.

JUDGE RIVERA: Thank you, counsel.

MR. BOGRAD: Our contention is, as a legal matter, that that's all irrelevant because he was not able to settle this claim. We think even if you do look to the question of intent, there is at least a genuine dispute of fact about what that would be that would prohibit - - -

JUDGE RIVERA: Thank you, counsel. Thank you.

MR. BOGRAD: Thank you, Your Honor.

JUDGE RIVERA: Yeah.

Counsel?

MR. FEDER: Yeah, so just quickly, I think that actually that last discussion helps to illustrate how this can't be an exemption by any ordinary definition of the word. As counsel said, he was asserting a cancerphobia claim. In other words, at the time, he was saying he wanted to recover for his fear of cancer, so the notion that when he then settled saying I may - - - this has long-term effects, I may get a new and different diagnosis,



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that he didn't - - - that he wasn't really settling, wasn't aware of the possibility of cancer just, you know - - - it's just not possible to - - - to get there. There's a lot else about the release that makes - - -

JUDGE RIVERA: But if it's only talking about cancerphobia then you can't look at that complaint and say, okay, well, the controversy is about meso. And I - - - I think that's where his - - -

MR. FEDER: Well, I don't know.

JUDGE RIVERA: I think that's part of what his argument is.

MR. FEDER: I understand that - - -

JUDGE RIVERA: So why don't - - - can you respond to that?

MR. FEDER: I understand that that's what that was responding to, but what I'm saying is for - - -

JUDGE RIVERA: No, no, but then what's your response to that?

MR. FEDER: My response - - -

JUDGE RIVERA: Yes.

MR. FEDER: - - - in terms of - - -

JUDGE RIVERA: Yes.

MR. FEDER: - - - the res judicata effect?

JUDGE RIVERA: Yes.



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MR. FEDER: Honestly, Your - - - Your Honor, I don't - - -

JUDGE RIVERA: No, whether or not there's a - - - no, whether or not you satisfied your summary judgment burden and there is a material - - -

MR. FEDER: Oh.

JUDGE RIVERA: - - - question of fact regarding the intent to sign this release.

MR. FEDER: Oh, no, I don't think - - - I think that even if you were going to look to that - - - and for the reasons that Judge Garcia mentions - - -

JUDGE RIVERA: Um-hum.

MR. FEDER: - - - the diff - - - there is that huge difference between Wicker and Babbitt, on the one hand, and this case on the other, and so I don't think you have to get there, but if you do, all - - - it's overwhelming evidence. You have the very opposite of a boilerplate release. It's short; it has an express statement: you may get - - - there are long term effects. He then swears before a notary I've read the whole thing and understood it.

JUDGE RIVERA: But see that's my - - - that's, in part, my problem with your argument. So the - - -

MR. FEDER: Yeah.



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JUDGE RIVERA: - - - strength of your argument is I thought, in part, that you were saying at the - - - at the time - - - the complaint mentions cancerphobia, mentions meso - - -

MR. FEDER: Right.

JUDGE RIVERA: At - - - at the time he signed that, everybody understood these consequences of exposure to asbestos. He's arguing exposure to asbestos. Certainly he understands the - - - the four corners and the scope of this release. And then one would say: how is it possible that he's only getting 1,750 dollars?

MR. FEDER: Oh, so that's - - -

JUDGE RIVERA: That's what I'm saying. I see a tension in this argument that it's so well understood - - -

MR. FEDER: And there is - - -

JUDGE RIVERA: - - - that he's making the argument, and he takes so little.

MR. FEDER: Your Honor, I think there is no tension. It is straightfor - - -

JUDGE RIVERA: Okay.

MR. FEDER: To the extent it can be straightforward, looking at it twenty years plus later with Mr. South no longer alive, et cetera, he is - - - remember,



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2 the mesothelioma, what he is getting for the chance of  
3 mesothelioma is going to be greatly discounted by the fact,  
4 that even for people exposed to asbestos, it's a very rare  
5 disease. So it's not like he's likely, at the time, to get  
6 meso years later. He's getting compensated for some risk  
7 of it.

8 JUDGE RIVERA: Well, I think you just undercut  
9 your argument saying that he really had no understanding of  
10 the risk - - -

11 MR. FEDER: No.

12 JUDGE RIVERA: - - - of - - -

13 JUDGE STEIN: But isn't the other - - -

14 JUDGE RIVERA: - - - getting the actual disease.

15 MR. FEDER: No, what I'm saying - - -

16 JUDGE STEIN: Isn't the other point that Texaco  
17 or Chevron, or whoever is being sued, never admitted any  
18 liability at all - - -

19 MR. FEDER: Yes.

20 JUDGE STEIN: - - - to this plaintiff - - -

21 MR. FEDER: Yeah.

22 JUDGE STEIN: - - - for anything?

23 MR. FEDER: Yes, Your Honor, there are a whole  
24 list of factors which are - - - are in our brief, just - -  
25 - this 1,750, if you try to assess it, again, this is five

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per - - -

JUDGE RIVERA: Yeah, but that's what defendants always do in these cases; they don't admit liability; they're trying to get a number. But even under Wicker, it was a five-digit number.

MR. FEDER: But Your Honor, this is a company that had approximately five percent of his lifetime on ships, so their share is going to be small. The manufacturers are all in the case. They are the ones who are the major defendants - - -

JUDGE RIVERA: Counsel, it just strikes me everything in your argument goes to whether or not there are questions of fact as to his intent. And that was where I started, whether or not you had met your - - -

MR. FEDER: No.

JUDGE RIVERA: - - - summary judgment motion burden.

MR. FEDER: No, what I'm really saying is you can't look at a number for one defendant out of however many and say we're going to draw conclusions from - - -

JUDGE FEINMAN: The point being that the number itself is not dispositive, but I think - - -

MR. FEDER: I think it's not relevant, Your Honor.





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JUDGE FEINMAN: And maybe I misunderstand her - -  
- her point, but I think what Judge Rivera is asking, if I  
can put it differently, is if you're looking at all of  
those factors, including the number, why is that not  
something that a jury would have to resolve in terms of  
whether or not this release covers this claim?

MR. FEDER: And I would say that - - -

JUDGE FEINMAN: I mean, particularly when the  
record isn't even clear that this is the number - - -

MR. FEDER: Right, but - - -

JUDGE FEINMAN: - - - and how you got to that  
number.

MR. FEDER: What I'm saying is that basically  
that you shouldn't be looking at the number. If you were  
going to start looking at the number in cases like this,  
you're essentially saying there are no releases that are  
effective because once you have to litigate that twenty  
years later, the release is useless.

JUDGE RIVERA: Okay, counsel, all the cases say  
you do look at the number. But thank you.

MR. FEDER: All right.

JUDGE RIVERA: Thank you. Thank you, counsel.  
Thank you.

MR. FEDER: Okay.



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF NEW YORK CITY ASBESTOS LITIGATION; ANNE M. SOUTH v. CHEVRON CORPORATION, No. 8, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: \_\_\_\_\_

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