

## Eighth Circuit Affirms Dismissal for Arkansas Silica Case

On August 3, 2015, The United States Court of Appeals for the Eighth Circuit, in its unanimous opinion, affirmed summary judgment for Forman Watkins & Krutz LLP clients Precision Packaging and Clemco Industries in *Robinson v. Mine Safety Appliances Co. et al.*, a silica case filed in the Eastern District of Arkansas. The court ruled all claims in the case were time-barred by Arkansas' three-year statute of limitations.

Robinson, a lifelong blaster and painter, went to his doctor for lung problems as early as 1999 and then began seeing a pulmonologist in 2007. Nevertheless, Robinson's attorneys claimed he did not know he had silicosis until 2011 and subsequently filed his case in October 2012.

During the course of discovery, Forman Watkins uncovered previously unproduced medical records from 2007 that neither Robinson's treating physicians nor Robinson produced in discovery. The game-changing records revealed Robinson was diagnosed with "silicosis related to sandblasting" by his pulmonologist in March 2007, more than three years prior to filing suit. Forman Watkins filed a motion for summary judgment in the district court based on the statute of limitations citing the newly-discovered records. The exposure of hidden facts related to the 2007 diagnosis did not end there.

Just one day after the motion was filed, while deposing Robinson's medical expert, Forman Watkins found a never-produced affidavit signed by the treating pulmonologist in the expert's file. In the affidavit, which was apparently crafted specifically to defeat a statute of limitations motion, the pulmonologist stated, in essence, that he could not remember telling Robinson that he had silicosis. Plaintiff's counsel relied heavily on this affidavit in the response to the motion for summary judgment.

Following additional discovery which revealed inconsistencies in the pulmonologist's testimony, the affidavit and Robinson's assertions, both the Forman Watkins defendants and Robinson filed supplemental pleadings. In the end, the district court sided with Precision Packaging and Clemco Industries.

No juror could reasonably conclude that Robinson first found out about his conditions after October 2009. The diagnoses were in his medical records. Assume that neither [doctor] mentioned the silicosis and COPD diagnoses, or even Robinson's heightened cancer risk, between early 2007 and late 2009—a broad assumption that [the

pulmonologist] acknowledged on deposition was unlikely and probably unethical. ... Even so, with reasonable diligence, Robinson should have discovered his conditions before October 2009.

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[The] affidavit is simply not enough to create a genuine issue of material fact. At the minimum, Robinson's claim accrued before October 2009 because he should have known before then about his silicosis and its roots in his work. Because Robinson waited more than three years after either learning about his blasting-related illnesses, or after he could have discovered them with reasonable diligence, all his claims are untimely.

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The belated revelation of [the pulmonologist's] key records, and the tardy disclosure of his hedging affidavit, are troubling.

Affirming the district court's order, the Eighth Circuit ruled:

There is no genuine dispute that, by the exercise of reasonable diligence, Robinson should have known in 2007 that silica-related products had damaged his lungs. Because he did not sue until 2012, his suit is barred by the three-year statute of limitations. We affirm the grant of summary judgment.

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The issue of Robinson's actual knowledge is so confused because of the actions of Robinson's two lead attorneys in the district court. One attorney received Dr. Ridgeway's 2007 records months before Robinson filed suit. The attorneys concede that they improperly failed to disclose these records, which are crucial to the issue of Robinson's actual knowledge. Moreover, despite the first attorney's possession of the 2007 records, he did not correct Robinson's misstatement in a deposition that he first saw Dr. Ridgeway in 2011 – a misstatement the defendants effectively could not question because the attorney had not disclosed the 2007 records. And the other attorney signed an interrogatory answer providing visitation dates ranging back to 1990 for eight of Robinson's medical providers, yet listing "cannot recall exact dates" for Dr. Ridgeway – again despite the other attorney's possession of the 2007 records. The district court denied without prejudice a motion for sanctions as moot in light of the grant of summary judgment. It did, however, call the nondisclosure "troubling." We agree.

Fred Krutz and Daniel Mulholland with Forman Watkins & Krutz LLP represented Precision Packaging and Clemco Industries.