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EMPLOYER DUTY OF CARE

Court declines to extend duty of care to employees' unborn children

by Michael Futterman and Jaime Touchstone

A semiconductor engineer's son was born with birth defects allegedly caused by his father's exposure to chemicals. The engineer's family filed a negligence claim against the employer to recover damages, but the California Court of Appeal refused to extend the employer's duty of care to the unborn child. Imposing liability was unreasonable and would result in a substantial burden on the employer and therefore the community. Simply because the employer provided health- and hygienic-related services to employees, it didn't assume a duty to protect their family members from injury.

Company sued for injuries to infant child

Applied Materials, Inc. (AMI), provides equipment, services, and software used in the manufacturing of semiconductor, flat-panel display, and solar products. AMI informs and trains its employees about chemicals in the workplace and employs industrial hygienists to assess and reduce potential hazards and educate employees about them. AMI nurses also provide on-site health services to employees.

Khaled Elsheref, an engineer at AMI's semiconductor manufacturing facility, allegedly worked with tools that contained chemicals and emitted

radiation. State and federal law required that he be examined by an independent physician before being authorized to wear a respirator at work. In connection with that examination, he completed a health questionnaire that included questions about his reproductive history, such as whether his spouse ever had a miscarriage, had difficulty becoming pregnant, or had a child with a birth defect. The questionnaire instructed Khaled not to provide his responses to AMI.

While he was employed by AMI, Khaled's wife, Zainab, conceived and gave birth to their son, Waleed, who suffered from a number of birth defects. Waleed and Zainab sued AMI, alleging that Waleed's injuries and Zainab's resulting emotional distress were caused by Khaled's workplace exposure to chemicals, and they asserted both negligence and strict liability claims.

The trial court dismissed the case on the grounds that an employer owes no duty of care to its employees' unborn and/or future children. The Elsherefs appealed, and the court of appeal affirmed the decision in part, agreeing that employers owe no such duty of care. The court, however, concluded that duty was not an element of the strict liability claim and sent the case back to the trial court for further proceedings.



AMI owed no duty to employees' future children

Each person has a duty to use reasonable care and may be held responsible for injuries caused by a failure to exercise such care. Courts limit this potentially infinite liability by evaluating whether the unreasonable conduct at issue is sufficiently likely to cause the resulting injury. Such an evaluation involves a balancing of the following factors:

- (1) The foreseeability of harm caused by the unreasonable conduct;
- (2) The degree of certainty that injury occurred;
- (3) The closeness of the connection between the conduct and the injury suffered;
- (4) The moral blame attached to the conduct;
- (5) The policy of preventing future harm;
- (6) The extent of the burden to the accused and the community of imposing liability; and
- (7) The availability and cost of insurance for the risk involved.

On appeal, AMI argued that only medical professionals and manufacturers of products related to conception or pregnancy have been held to owe a duty to a subsequently conceived child. The Elsherefs contended that AMI offered employees reproduction-related health services and sought information from them concerning their reproductive health. They further claimed that Waleed's injuries were reasonably foreseeable and that AMI was or should have been aware of the reproductive hazards posed by chemicals present in the semiconductor workplace.

The court of appeal agreed with AMI. Even if it was foreseeable that employees' children would suffer birth defects and even if it was reasonable to blame AMI given that the company may have been aware of the risk, those factors weren't dispositive. There was no close connection between AMI's conduct and Waleed's injuries because Khaled was the one exposed to workplace chemicals, not Waleed. Furthermore, holding AMI responsible for the injuries of nonemployees would saddle the company with excessive liability, inevitably resulting in a substantial burden on the consumer and the community. In light of the relevant factors and the "overwhelming need to keep liability within reasonable bounds," the court of appeal chose not to impose a duty of care on AMI.

No 'special relationship' with employees

The Elsherefs alleged that the existence of a "special relationship" between AMI and its employees obligated the company to protect their children from harm by warning them that certain workplace chemicals posed reproductive dangers. They claimed that this special relationship arose from provisions in California's Labor Code that impose workplace health and safety obligations on employers. The court of appeal declined to acknowledge the existence of this special relationship.

AMI didn't assume duty to protect family members

The Elsherefs further argued that by providing on-site health services, enacting measures to reduce workplace hazards, and requiring physical exams, AMI assumed a duty to protect its employees' children from harm. Not so. Only if a task is specifically assumed is there a corresponding duty to perform the task carefully. Thus, AMI must have specifically undertaken to protect its employees' unborn children for such liability to attach. In this case, the company provided the services in question not to Waleed or

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Zainab but to Khaled, and the services didn't directly concern Khaled's reproductive health.

Further, when an employer requires an employee to submit to a physical examination, whether the employer thereby assumes a duty to discover a medical condition depends on the purpose of the examination. The purpose of Khaled's AMI-sponsored medical examination was to obtain clearance to wear a respirator at work. The fact that he disclosed information about his reproductive history as part of the standard questionnaire doesn't suggest that the examination had anything to do with evaluating or safeguarding his reproductive health or the health of his future children.

Finally, there was no evidence that AMI employed medical personnel to provide reproductive health care. Accordingly, it didn't assume a duty to safeguard Waleed's health. To conclude otherwise would mean that every employer complying with state laws concerning employee health and safety automatically assumes a duty to protect the health and safety of its employees' family members. The court of appeal opted not to expose employers to such potentially boundless liability. *Waleed Elsheref v. Applied Materials, Inc.* (California Court of Appeal, 6th Appellate District, 1/27/14).

Bottom line

In this case, corporate preventive safety measures were used as a vehicle for a negligence lawsuit. While that's unsettling, employers need not be too concerned. It may seem as though California's courts are consistently expanding your obligations to employees, but this ruling demonstrates that courts will limit your liability when public policy dictates that the potential burden on the company—and subsequently the consumer—would be unreasonable.

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