

JAKE PALERMO

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NO. 2004-CA-1804

VERSUS

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COURT OF APPEAL

**THE PORT OF NEW
ORLEANS, ET AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

**ABRAHAM VEAL AND
SHEILA ROCHELLE VEAL**

NO. 2005-CA-1805

VERSUS

**THE PORT OF NEW
ORLEANS, ET AL.**

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

I respectfully concur in the majority's opinion to reverse the judgment of the trial court. I find that under the facts of the case at bar and current Louisiana jurisprudence the defendants lacked a duty to these plaintiffs respecting their exposure to asbestos. We are required to reverse the decision in the plaintiffs' favor.

I respectfully disagree from the majority's reliance on *Zimko v.*

American Cyanamid, 03-0658 (La. App. 4 Cir. 6/8/05), 905 So.2d 465, because that case is not yet final and definitive; an application for a writ of certiorari is pending before the Louisiana Supreme Court.

One must clearly understand the factual and legal basis upon which *Zimko* was premised and its history.

Zimko was a 3 to 2 decision of this court. *American Cyanamid* was found liable to the plaintiff and Tate & Lyle was found not liable to the plaintiff. Neither *American Cyanamid* nor Tate & Lyle sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of Tate & Lyle. By implication, *American Cyanamid* has settled with the plaintiff or agreed not to pursue their appeal further. Thus, the Supreme Court is not reviewing the issue of the correctness of the majority opinion respecting *American Cyanamid*'s liability. (See Judge Kirby's dissent in *Zimko*, 905 So.2d at 494-98, respecting *American Cyanamid*'s liability.) Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of *American Cyanamid*.

Recently, the Court of Appeals of New York (that state's highest court) briefly alluded to the problem of *Zimko* in the case of *In re New York*

City Asbestos Litigation, 5 N.Y. 3rd 486, 495-96, 840 N.E. 2d 115, 806
N.Y.S. 2d 146, 151-52 (N.Y. 2005), and chose not to follow *Zimko*.