WEDNESDAY, FEBRUARY 5, 2020 | SERVING CHICAGO'S LEGAL COMMUNITY FOR 164 YEARS | CHICAGOLAWBULLETIN.COM

Chicago Daily Law Bulletin®

VOLUME 166, NO. 25

LAW BULLETIN MEDIA

Plaintiffs fail to supply sufficient asbestos evidence to keep verdict

Plaintiffs filed suit against window and building materials manufacturer Tremco alleging that it had manufactured and sold asbestos-containing products that the decedent, Willard Krumwiede, used or was exposed to while working as a window glazier.

In *Krumwiede v. Tremco,* 220 IL App (4th) 180434, Jan. 21, 2020 (4th Dist.), the plaintiffs complained Krumwiede's exposure to two asbestos-containing products, 440 tape and Mono caulk, caused him to develop mesothelioma.

Both products were manufactured using chrysotile-type asbestos fibers. An autopsy showed that Krumwiede had malignant mesothelioma consistent with industrial exposure to asbestos.

The plaintiffs presented Dr. Arthur Frank. He testified that in the United States mesothelioma is virtually only caused by exposure to asbestos. He further stated that there is no known safe level of exposure to asbestos and that there is no scientific way to determine which exposure to asbestos caused a person to develop the disease.

Frank opined that when a person is exposed to respirable asbestos fibers in their work, that exposure is "above background" and that all such exposure would have contributed to Krumwiede developing mesothelioma.

The plaintiffs also presented the testimony of Dr. John Migas, who had treated Krumwiede during his lifetime for colon cancer. He testified that he had treated approximately 50 cases of mesothelioma during his career.

While all of the cases involved exposure to asbestos, some patients had long-standing exposures as a result of employment, while others had much shorter periods of exposure.

Plaintiffs' counsel asked Migas to assume that Krumwiede worked as a window glazier from 1956 until 1991, from the 1950s to the 1980s he worked daily with asbestos-containing tapes and caulk and he worked around other "construction trades" performing their duties, including insulators.

Based on those facts, Migas opined that these factors could all be implicated as a risk that could have potentially caused mesothelioma. However, on cross-examination he admitted that he had only treated the decedent for his colon cancer — not for anything related to mesothelioma. He further agreed that he did not hold himself out as an expert in the field of asbestos medicine and had not done any research in that area.

After the plaintiffs rested, Tremco moved for a directed verdict, arguing that the plaintiffs failed to meet their burden of establishing that Krumwiede was exposed to asbestos fibers from its products or that such exposure was a substantial factor in causing the decedent's mesothelioma. The trial court denied the motion.

TOXIC TORT TALK

CRAIG T. LILJESTRAND

CRAIG T. LILJESTRAND, *a partner at Hinshaw & Culbertson LLP, has experience in toxic tort litigation. He practices in the areas of asbestos, silica, welding fumes, lead paint, chemical and occupational disease claims. His client base includes Fortune 500 companies in which he has defended various industrial product and equipment manufacturers, contractors and premises owners in numerous toxic tort cases throughout the country. He is also the regional counsel for a major industrial manufacturer.*

Tremco presented the testimony of Dr. Michael Graham, a forensic pathologist. According to Graham, while the decedent may have been exposed to amosite asbestos from working around pipefitters and insulators, the decedent's "work with Tremco's products had 'nothing to do' with his development of mesothelioma."

While he admitted on cross- examination that he was not a researcher in the area of asbestos or asbestos disease, he opined that Tremco's products "wouldn't release any significant amount of fiber" and certainly not enough to cause an asbestos-related disease.

Tremco also presented the testimony of Dr. William Longo, the president of Material Analytical Services. Tremco provided the products and Longo was personally involved in the testing and analysis of those products. He opined that air sample testing did not detect any measurable amounts of asbestos fibers in the 440 tape or the caulk.

The jury returned a verdict in favor of the plaintiffs and against Tremco. Tremco filed a post-trial motion, seeking a judgment notwithstanding the verdict or a new trial on all issues. The trial court denied these requests.

On appeal, Tremco argued that it was entitled

to a judgment not withstanding the verdict because the plaintiffs failed to prove causation. Tremco asserted that the plaintiffs presented no competent or admissible evidence that its Mono caulk or 440 tape released respirable asbestos fibers.

Further, Tremco argued that even assuming its products did release respirable asbestos fibers, the plaintiffs presented no competent evidence that Krumwiede was exposed to those fibers with "such frequency, regularity and proximity," that they could be viewed as a substantial factor in causing Krumwiede's mesothelioma.

The appellate court stated that a motion for judgment not withstanding the verdict should be granted only when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors a movant that no contrary verdict based on that evidence could ever stand. In negligence actions, a necessary element of proof is that the defendant's asbestos was a "cause" of the decedent's injuries.

The Illinois Supreme Court adopted the "frequency, regularity and proximity" test for an asbestos plaintiff to prove more than minimum contact to establish that a specific defendant's product was a substantial factor in being a cause in fact of a plaintiff's injury.

Under that test, the plaintiff must show that the injured worker was exposed to the defendant's asbestos through proof that (1) he regularly worked in an area where the defendant's asbestos was frequently used and that (2) the injured worker did, in fact, work sufficiently close to this area so as to come into contact with the defendant's product.

Adoption of this test also rejects the argument that so long as there is any evidence that the injured worker was exposed to a defendant's asbestos-containing product, there is sufficient evidence of cause in fact to allow the issue of legal causation to go to the jury.

The appellate court held that given Frank's testimony and Longo's acknowledgment that he could not rule out fiber release, there was sufficient evidence from which the jury could determine that Tremco's 440 tape and Mono caulk were capable of releasing asbestos fibers.

However, the plaintiffs were also required to present evidence to show that Krumwiede was exposed to asbestos from Tremco's products with such frequency, regularity and proximity that the asbestos from those products could be viewed as a substantial factor in causing the mesothelioma.

The court held that, even accepting that the products were capable of releasing respirable asbestos fibers, the evidence did not establish substantial factor causation.

Specifically, there was no evidence showing when, and under what circumstances, Tremco's products released such fibers and whether these circumstances were of the type that decedent regularly encountered when using the products or whether the release of fibers was anything more than minimal.

The court held that the plaintiffs' evidence showed that the decedent came into frequent, regular and proximate contact with Tremco's products and that they were capable of releasing asbestos fibers.

However, no evidence established that the activities engaged in by the decedent when working as a window glazier with Tremco's products caused the release of asbestos fibers or that the products released asbestos fibers in such amounts that decedent had more than de minimis, casual or minimum contact with asbestos from Tremco's products.

The court stated that "relevant asbestos case authority dictates that plaintiffs must show more than a de minimis exposure to defendant's asbestos."

Finally, the court held that Frank's opinion testimony was not contrary to Illinois law, as argued by Tremco. Tremco asserted that his opinions on causation were based on an "each and every exposure" theory, under which any exposure to asbestos fibers is a substantial factor in causing asbestos-related disease.

The plaintiffs countered that his testimony was that a disease such as Krumwiede's is caused by that person's total and cumulative exposure to asbestos. The court agreed with the plaintiffs' characterization of Frank's testimony and held that it was not contrary to Illinois law. However, his testimony still did not satisfy the substantial factor test as required under Illinois law.

Accordingly, the appellate court held that Tremco was entitled to a judgment notwithstanding the verdict.