RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000882-MR

DANIEL JOHNSON AND
FREDA JOHNSON — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CI-00811

TRIANGLE INSULATION;
GARLOCK, INC., AND
JOHN CRANE, INC.
— APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND KNOPF, JUDGES, AND HUDDLESTON, SENIOR JUDGE.[1]

DYCHE, JUDGE. Although there are side issues related to appellants' compliance with court orders concerning discovery and the orderly progress of this complicated asbestos litigation, the primary issue is whether there is sufficient

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

proof in the record that Daniel Johnson was exposed to asbestos fibers emanating from products manufactured by appellees, and whether that exposure was a substantial factor in causing his disease of asbestosis. Having made a careful review of the record, and having heard oral arguments by the parties, we find a lack of such evidence, and affirm the summary judgment of the trial court.

Johnson and his wife initiated this action to recover money damages to compensate them for the injuries he had allegedly received as a result of his exposure to asbestosis during his long employment as a plumber and pipefitter. There were originally twenty-five defendants named in the action, most of whom were eliminated as the litigation progressed. Eventually the three appellees moved the trial court for summary judgment pursuant to Ky. R. Civ. Pro. 56, arguing that the record was deficient of any evidence that Johnson had been exposed to their products or that any exposure experienced by Johnson was a substantial cause of his disease.

Appellants Johnson responded to the motions, and filed limited affidavits concerning exposure, but we are cited to no sworn expert testimony, nor have we found any on our own, of causation.

This court has recently spoken on this issue, in an opinion ordered to be published by the Supreme Court following

its denial of discretionary review. Ky. R. Civ. Pro. 76.20(9).

In a similar asbestos-related case, Judge Miller wrote,

> Appellants assert that there exist material issues of fact and that NARCO was not entitled to judgment as a matter of law. NARCO argues otherwise. Specifically, NARCO maintains that summary judgment was proper as appellants failed to prove that any NARCO asbestos product was the legal cause of appellants' illnesses.
>
> In this Commonwealth, we have adopted the legal causation standard set forth in *Restatement (Second) of Torts* § 431 (1965):
>
> § 431. What Constitutes Legal Cause
>
> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.
>
> *See Deutch v. Shein*, Ky., 597 S.W.2d 141 (1980). To defeat the summary judgments, appellants must demonstrate that NARCO asbestos products were a substantial factor in bringing about appellants' illnesses. We shall now review the evidence to determine if appellants presented material issues of fact as to causation.
>
> . . . .
>
> The deposition of one James Menshouse, who worked at Armco, illustrates how certain NARCO asbestos-containing products were utilized at the plant. Menshouse stated that he observed NARCO's gunning mix and NARCO's castable material used at Armco. He

identified the gunning mix and the castable material as NARCO's by the company's trademark on their respective bags. Menshouse deponed that both the gunning mix and castable material had to be mixed by workers at the plant and that dust was released as a result of the mixing process. He further deponed that the gunning material was used daily in some areas of the plant, and that the castable material was used at various locations in the plant.

We now turn to the affidavit of appellants' expert witness, Dr. Arthur L. Frank, which provides, in relevant part, as follows:

> 10. . . . Once released into the air, asbestos fibers and silica particles often remain airborne for long periods of time and travel substantial distances from the point of their liberation. Once inhaled, asbestos fibers and silica particles tend to persist in the body.
>
> 11. I am personally familiar with the Armco Steel plant and taken in the captioned litigation.
>
> 12. . . . each asbestos-containing material and silica-based refractory product installed, . . . in the Armco Steel plant was a substantial contributing factor in the induction of the asbestosis, silicosis and mixed dust pneumoconiosis contracted by Armco Steel plant workers.

Dr. Frank opines that once released in the air, asbestos particles remain airborne for long periods of time and can travel substantial distances. This is referred to as the "fiber-drift" theory. He also states he is familiar with the Armco plant. Within a reasonable degree of medical certainty, Dr. Frank further opined that asbestos-containing material at Armco was a

substantial contributing factor to appellants' illnesses.

In reaching his medical conclusions, Dr. Frank relied upon the fiber-drift theory. NARCO argues that Dr. Frank's expert testimony as to the fiber-drift theory is insufficient to satisfy the substantial factor test as to causation. NARCO attacks such theory as untenable. NARCO urges this Court to adopt the "frequency-regularity-proximity" causation test, which was iterated in *Lohrmann v. Pittsburgh Corning Corporation*, 782 F.2d 1156 (4th Cir. 1986). This test requires that "[t]o support a reasonable inference of substantial causation, there must be evidence of exposure to specific [asbestos-containing] product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-1163. In sum, the test requires a claimant to have been exposed while in close proximity to an asbestos product on a regular and extended basis to prove injury. We are of the opinion that to adopt either the fiber drift theory or the frequency-regularity-proximity theory as a matter of law would infringe upon the mandate of the jury to determine causation. Either theory requires a factual determination as to causation and, perforce, legal cause.

Generally, the existence of legal cause is a question of fact for the jury. It only becomes a question of law for the Court where the facts are undisputed and are susceptible of but one inference. *See Huffman v. S. S. Mary & Elizabeth Hospital*, Ky.[,] 475 S.W.2d 631 (1972). The claimant has the burden to prove legal causation; however, it is well recognized that "legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." *Holbrook v. Rose*, Ky., 458 S.W.2d 155, 157 (1970). To find

causation, the jury naturally draws inferences from circumstantial evidence. These inferences, however, must be reasonable, that is they must indicate the *probable* as distinguished from a*possible* cause." *Briner v. General Motors Corporation*, Ky., 461 S.W.2d 99, 101 (1970). Coupled with the facts herein, we are of the opinion that Dr. Frank's expert testimony created a sufficient "quantum of circumstantial evidence" to raise a factual issue as to legal causation.

Under the circumstances of the case at hand, we believe the fiber-drift theory and the frequency-regularity-proximity test merely present two competing theories of causation. The Court cannot choose which theory to adopt; rather, as hereinbefore explained, such choice is for the jury.

In reaching this decision, we rely upon the evidence that NARCO's asbestos-containing materials were mixed at the plant which, of course, released asbestos fibers into the air. It is uncontroverted that appellants all worked at Armco during the time NARCO admitted selling asbestos products to the plant. According to Dr. Frank's theory, once released into the air these asbestos fibers could travel for long periods of time and substantial distances. Dr. Frank further opined that the asbestos-containing materials were a substantial contributing factor to appellants' diseases. As such, we are of the opinion that material issues of fact exist as to whether NARCO's asbestos products were, indeed, a substantial factor in causing appellants' alleged asbestos-related illnesses.

Thus, we hold that the circuit court committed error by entering summary judgments in favor of NARCO against appellants.

Bailey v. North American Refractories Co., Ky. App., 95 S.W.3d 868, 871-3 (2001)(footnotes omitted)(emphasis original).

Comparing the evidence in the present case to that above quoted, we find that the Johnsons' proof falls short of that necessary to establish causation. The affidavits of Johnson and his co-workers who were used to establish exposure to asbestos said that they worked around the appellees' asbestos insulation products, and that, "This process of cutting, removing and installing asbestos insulation products was a very dusty process. I (or 'Daniel Johnson and I') breathed the dust created by Triangle's use and installation of asbestos insulation products."

The expert proof of causation is totally insufficient to withstand the motions for summary judgment. Appellants' brief indicates that three physicians "***will*** (emphasis added) each testify that <u>each and every exposure</u> to asbestos contributes to the development of asbestos disease." Unfortunately for appellants, what some witness might testify in the future is of no help at this stage. It is what is in the record at the time the summary judgment motion is submitted for the trial court's decision that is important.

> Finally, under both the Kentucky and the federal approach, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there

> is a genuine issue of material fact for trial.

Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). The appellants have produced no such evidence. It would not have been difficult to have testimony such as in *Bailey* placed in the record; the medical reports relied upon by appellants, however, do not suffice to establish causation under that case.

Having ruled in this manner, we find it unnecessary to reach the questions concerning appellants' response to orders of the trial court, and its power to enforce its orders.

The judgment of the McCracken Circuit Court is affirmed.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Kenneth L. Sales
Joseph D. Satterley
Sales, Tillman & Wallbaum
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Joseph D. Satterley
Sales, Tillman and Wallbaum
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE GARLOCK, INC.:

John K. Gordinier
Pedley Zielke & Gordinier
Louisville, Kentucky

BRIEF FOR APPELLEE TRIANGLE ENTERPRISES, INC.

Kathy P. Holder
Robert L. Steinmetz
Joseph B. Myers, Jr.
Frost Brown Todd LLC
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE
TRAINGLE ENTERPRISES

Kathy P. Holder
Frost Brown Todd, LLC
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE JOHN CRANE, INC.:

Max S. Hartz
McCarroll, Nunley & Hartz
Owensboro, Kentucky