

RENDERED: JULY 29, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000636-MR

MICHAEL KILLEBREW and  
RANDA KILLEBREW

APPELLANTS

v. APPEAL FROM McCracken Circuit Court  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 98-CI-00659

NATIONAL SERVICES INDUSTRIES, INC.  
f/k/a NORTH BROTHERS COMPANY

APPELLEE

AND

NO. 2004-CA-000734-MR

WILLIS McCracken and  
DOROTHY McCracken

APPELLANTS

v. APPEAL FROM McCracken Circuit Court  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 98-CI-00648

NATIONAL SERVICES INDUSTRIES, INC.  
f/k/a NORTH BROTHERS COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: These appeals have been designated to be heard together because they involve identical issues as to whether the appellant in each case produced adequate proof of causation in the development of asbestos-related disease to withstand appellee's motion for summary judgment. We have therefore elected to dispose of both appeals in one opinion and affirm the summary disposition of the claim against appellee in each case.

Appellant Michael Killebrew worked as an electrician, in maintenance, and as foreman at several job sites including the Tennessee Valley Authority's Paradise plant in Drakesboro, Kentucky and its Shawnee plant in Paducah. He alleges that he was injured as a result of exposure to asbestos-containing products installed or sold by appellee North Brothers while he was employed at both the Paradise and Shawnee plants. Although Killebrew provided deposition testimony that he recalled working in the same area as North Brothers when it was performing work

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

at both plants, he was unable to specify that North Brothers' insulation work involved any asbestos-containing material at either site. Killebrew also introduced deposition testimony from several product identification witnesses, none of whom was able to establish whether the work they recalled North Brothers performing involved asbestos-containing materials.

Appellant Willis McCracken also spent a significant portion of his career working at numerous TVA job sites including Shawnee, in Paducah; Paradise in Drakesboro; New Johnsonville in Tennessee; and Widow's Creek in Alabama. McCracken testified by deposition that he was aware there were various types of asbestos products at the TVA plants where he worked but that he did not work hands-on with any of them and could not specifically identify any product or manufacturer to which he may have been exposed. McCracken also produced two product-identification witnesses. Kenneth Earle testified that while North Brothers was working in the Paradise plant at the same time as McCracken, he was unable to state that it had been working at the Shawnee plant at the same time as McCracken. With regard to the Paradise plant, Mr. Earle stated that North Brothers was frequently in the plant installing or removing insulating materials but he stopped short of being able to specifically identify whether the work involved asbestos-containing material.

Nathan Lewis, the other product-identification witness, stated only that he recalled seeing a North Brothers truck but could not specifically recall at which plant he had seen it or the type of work North Brothers would have been performing.

In each of these cases, North Brothers moved for summary judgment on the basis that the evidence failed to establish that either plaintiff had been exposed to an asbestos-containing product installed, sold, or distributed by North Brothers. A review of each appellant's response to the motion discloses that while they can place North Brothers in their plants during the course of their work life, they cannot specifically connect North Brothers' work to asbestos-containing material. Appellants do not dispute North Brothers's contention that in order to prove liability they are required to demonstrate that North Brothers' conduct was a substantial factor in causing their injury. However, relying upon the rationale set out in the recent opinion of this Court in Bailey v. North American Refractories Company,<sup>2</sup> appellants argue that issues of exposure and causation in asbestos-related disease cases constitute questions of fact that only a jury can resolve. Careful review of the evidence of record in each of these cases clearly distinguishes them from falling within the Bailey analysis.

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<sup>2</sup> 95 S.W.3d 868 (Ky. 2001).

At the core of the decision in Bailey is its discussion of legal causation:

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. SS. 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.<sup>3</sup>

The expert testimony cited by appellants as satisfying this element stands in stark contrast to the evidence before the Court in Bailey and is, in our opinion, entirely insufficient to withstand appellee's motions for summary judgment. Both Killebrew and McCracken point to the identification of Dr. Frank, the same expert who testified for the plaintiff in Bailey, stating that he would have testified at trial concerning

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<sup>3</sup> Id. at 872-73, emphasis added.

exposure to asbestos throughout their careers as a substantial contributing factor in the development of their asbestos-related disease, as well increased their risk of developing lung cancer or mesothelioma. Unfortunately for appellants, a mere statement as to what an expert might testify in the future is of little avail at this stage. It is the evidence contained in the record at the time the summary judgment motion stands submitted that is crucial to our review. Under both the Kentucky and federal approach, a party opposing a properly supported summary judgment motion cannot prevail without presenting at least some affirmative evidence demonstrating a genuine issue of fact for trial.<sup>4</sup> No such evidence has been produced in either of these cases and thus we find nothing in either record sufficient to bring the element of legal causation from the realm of mere possibility into probability.

Accordingly, because the trial judge did not err in granting appellee's motion for summary judgment in either case, the judgment in each action is affirmed.

ALL CONCUR.

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<sup>4</sup> Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 482 (Ky. 1991).

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