



NOT FOR OFFICIAL PUBLICATION

ORIGINAL

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAY 14 2021

JOHN D. HADDEN
CLERK

KIM FOX-JONES as Personal Representative
of the Estate of BRENNAN JAMES ATKESON,
deceased,

Plaintiff /Appellee,

vs.

NATIONAL OILWELL VARCO, L.P., UNION CARBIDE
CORPORATION and MONTELLO, INC.,

Defendants/Appellants.

Case No. 118,290
(consol. w/118,295)

APPEAL FROM THE DISTRICT COURT OF
PONTOTOC COUNTY, OKLAHOMA

HONORABLE STEVEN KESSINGER, JUDGE

Rec'd (date)	5-14-21
Posted	<i>PK</i>
Mailed	<i>PK</i>
Distrib	<i>PK</i>
Publish	yes ☒ no ☐

AFFIRMED

Lisa W. Shirley,
Benjamin D. Braly,
DEAN OMER BRANHAM SHIRLEY, LLP,
Dallas, Texas,

George W. Braly,
William W. Speed,
BRALY, BRALY, SPEED & MORRIS, PLLC,
Ada, Oklahoma,

For Plaintiff/Appellee,

Harvey D. Ellis,
Andrew E. Henry,
Lauren Kiefner,
CROWE & DUNLEVY, A PROFESSIONAL CORPORATION,
Oklahoma City, Oklahoma,

James M. Hall, Jr.,
Judith A Meyer,
Linda Jean Broocks,
KEAN MILLER, LLP,
Houston, Texas,

For Defendant/Appellant
National Oilwell Varco L.P.,

Sharon T. Thomas ,
THE RUDNICKI LAW FIRM,
Oklahoma City, Oklahoma,

For Defendant/Appellant
Union Carbide Corporation,

Laura S. Rahman,
WILSON ELSEER MOSKOWIT EDELMAN & DICKER LLP,
Houston, Texas,

Andrew D. Silverman,
ORRICK, HERRINGTON & SUTCLIFFE, LLP,
New York, New York,

For Defendant/Appellant
Montello, Inc.

Opinion by Bay Mitchell, Judge:

¶1 This is an appeal from a jury's verdict in a "take-home" asbestos case.¹ After a thirteen-day trial, the jury entered an eight-million-dollar verdict for the plaintiff. All three defendants appeal. They each argue that there was insufficient evidence to

¹ In such cases, a plaintiff (or his or her estate, as is the case here) does not allege asbestos exposure at work or through some other primary exposure. Rather, the exposure occurs second-hand, when a member of the plaintiff's household brings asbestos fibers into the home, thereby causing a plaintiff to become exposed.

support the jury's verdict as to causation and that the court should have directed a verdict in their favor. Alternatively, all three defendants argue that the trial court's pretrial ruling forbidding each defendant from blaming third parties not named in response to the plaintiff's interrogatory seeking the identity of such parties, if any, deprived them of a fair trial. Finally, one defendant argues that the trial court erred in refusing certain jury instructions. We affirm.

BACKGROUND

¶2 Between 1980 and 1985, while he was between two and seven years old, Brennan Atkeson lived with his mother, Kim Fox-Jones, and his stepfather, Ronnie Pratt, in rural Oklahoma. Ronnie worked for his father's drilling company — Jim Pratt Drilling — as both a driller and derrick-hand. Ronnie was allegedly exposed to asbestos dust via the defendants' products, which each contained or incorporated asbestos. At the time, the defendant and appellant Union Carbide Corporation manufactured a product named "Super Visbestos," which was nothing more than fifty-pound bags of 100% asbestos pellets used as a drilling mud additive to increase the mud's viscosity. Super Visbestos was exclusively marketed and distributed by defendant and appellant Montello, Inc. The defendant and appellant National Oilwell Varco L.P. ("National") manufactured drawworks for oil rigs. A drawworks is a large piece of machinery responsible for raising and lowering the drilling assembly in and out of the wellbore.

Drawworks require very large brakes to function. At the time, and up and until 1989, National drawworks used asbestos-lined brakes and clutches.

¶3 In February 2016, at the age of 38, Brennan was diagnosed with stage four mesothelioma. In March of that same year, Brennan and his wife of just two weeks, Khaliliah Smith Atkeson, filed this suit against fifteen named defendants. In an amended petition, National and three other defendants were added. Brennan alleged that he had been exposed to asbestos via his stepfather's work clothing. Brennan further alleged that this exposure caused his mesothelioma and the defendants were thereby liable, under both negligence and products liability theories for Brennan's damages.

¶4 In August of 2016, Brennan died from mesothelioma. Ms. Fox-Jones, Brennan's mother and personal representative of his estate, was substituted as plaintiff and the litigation proceeded. Brennan's parents and his daughter of a prior marriage each added claims for loss of companionship. Prior to trial, all defendants other than the appellants were voluntarily dismissed.

¶5 Numerous pretrial motions were filed, including as relevant here, the plaintiff's motions for partial summary judgment on certain of the defendants' affirmative defenses. In relevant part, the motions sought to prevent the defendants from presenting any evidence or argument on their affirmative defense that Brennan's mesothelioma was caused by a third party, such as a company not present at trial or

one of Ronnie Pratt's former employers. Although the motions were based in large part on the defendants' lackluster responses to the plaintiff's interrogatory seeking the identity of any entities the defendants would seek to blame for Brennan's death, they were filed as motions for summary judgment, wherein the plaintiff alleged that the defendant could not identify any evidence in the record supporting their defense of third-party liability. The thrust of the plaintiff's argument was that the defendants, who appeared to be marshaling a defense based on the theory that Brennan's mesothelioma was not caused by asbestos exposure at all, should be prevented from blaming third parties at trial because they failed to timely answer, or supplement their answers, by naming the specific parties they intended to blame at trial.²

² To provide the fullest possible background, we set forth here the specific interrogatory at issue, the defendants' initial answers, their supplemental answers, and the relevant timing. Although the briefing below and the trial court's order targets both interrogatories five and six, we view the sanction imposed as relating only to interrogatory five. We will, therefore, limit our discussion to interrogatory five. In that interrogatory, propounded in October of 2018, the plaintiff asked:

INTERROGATORY NO. 5: If you claim that the negligence o[r] fault of a person or entity other than the party answering this request was a legal cause of Brennan Atkeson's malignant mesothelioma, please identify all evidence in support of your claim, including the identities of those other persons or entities.

National initially responded as follows:

ANSWER [NO. 5]: [National] objects to this interrogatory on the grounds that it seeks to reverse the burden of proof posed by Oklahoma law: it is the Plaintiff's burden, not [National's] to prove causation by each party she seeks to hold responsible.

Subject to these objections, and to any supplementation or amendment, which [National] reserves the right to make, Plaintiff has asserted that Mr. Atkeson's injury was the result of the acts or omissions of various manufacturers, suppliers,
(continued...)

² (...continued)

contractors, and premises owners, including other defendants, bankrupt entities, third party defendants, and unknown persons. Such parties are those identified in the depositions taken of Terry Archer, Gregory Atkeson, Kim Fox-Jones, and Brennan Atkeson, the discovery responses of the plaintiff and the other defendants, and the expert testimony of the Plaintiff's expert witnesses and other expert witnesses. Defendant does not have independent knowledge or expertise to support the claims of exposure to products of such parties or their respective negligence or fault.

By making this answer, [National] does not contradict or waive any argument that Mr. Atkeson's exposures to [National's] products were insufficient to establish causation regarding [National], nor does [National] intend to contradict or waive its position that asbestos-containing friction products are not capable of causing mesothelioma.

[National] further responds that information responsive to this request is set forth in the discovery of responses of and documents produced by the parties, and the testimony offered or to be offered by fact and expert witnesses, including Plaintiff's expert witnesses.

[National] further responds that i[t] reserves the right to rely on this and any other defense asserted in its Answer to the Second Amended Petition.

In February 2019, National amended its responses to some of the plaintiff's interrogatories, but its response interrogatory five remained unchanged.

On April 24, 2019, after the close of discovery and while the plaintiff's motion for summary judgment on this issue was pending, National filed its second amended discovery responses. National did not include that response in the record on appeal, however, from the transcript it appears that National did list by name fifteen other companies it wished to point the finger at during trial. All of the named companies were former defendants in the case that the plaintiff had voluntarily dismissed.

Union Carbide's response was as follows:

Union Carbide incorporates its General Objections as if fully set forth herein. Union Carbide further objects that this Interrogatory purports to require Union Carbide to marshal its proof or the proof that it intends to offer at trial. Furthermore, Union Carbide objects that this Interrogatory is inappropriate, because it seeks the invasive disclosure of the mental impressions, conclusions, opinions and legal theories of Union Carbide's legal counsel. Additionally this Interrogatory requests information more properly elicited through deposition testimony, including testimony from Plaintiff's and co-defendants' fact and expert witnesses.

Subject to and without waiving these objections, Union Carbide states that discovery is ongoing and Union Carbide's investigation continues. Union Carbide

(continued...)

¶6 After a hearing on the motions, the trial court declined to grant the plaintiff summary judgment on the issue, but found that the defendants' discovery responses were so inadequate that relief was appropriate. Specifically, the trial court ordered that because of their "failure to identify alternative sources of exposure or alternative causes of Mr. Atkeson's mesothelioma in response to a direct discovery question requiring them to do so" all of the defendants would be "estopped from presenting any

² (...continued)

reserves the right to supplement its Answer to this Interrogatory as discovery in this matter continues. Further responding, Union Carbide refers to Plaintiff's counsel to the depositions taken or to be taken in this matter and exhibit lists to be filed.

Montello responded identically to Union Carbide, changing only the company name.

On the same day the plaintiff filed her motion for summary judgment, Montello and Union Carbide each amended the second paragraph of their response to plaintiff's interrogatory five. Montello's response then read as follows:

Subject to and without waiving these objections, Montello's position is that Brennan Atkeson's mesothelioma was not caused by asbestos exposure and, more specifically, was not caused by exposure to any product for which Montello is responsible. Plaintiff has taken the position that Brennan Atkeson's mesothelioma was the fault of other parties, both current and prior defendants in this case, and has presented experts for deposition in support of that position. If Plaintiffs present evidence that Brennan Atkeson's mesothelioma was caused by exposure to asbestos, Montello may argue that, in the event the jury accepts that position, certain exposures claimed by Plaintiff in pleadings and through discovery were the cause of or contributed to the cause of Brennan Atkeson's mesothelioma. In that event, Montello may assert that the employers of Brennan Atkeson's father and step-father were responsible for maintaining a safe working environment and failed to do so, that exposures of Brennan Atkeson's father and step-father to asbestos through their work on draw-works and brakes, as well as their exposures to drilling mud additives provided by Drilling Specialties, CP Chem, and Johns Manville, caused or contributed to Brennan Atkeson's mesothelioma. Montello also refers Plaintiff's counsel to the depositions taken in this matter and exhibit lists to be filed.

Union Carbide's modified response was identical, save the company name.

evidence or arguments at trial suggesting that any other person or entity caused, contributed to the cause, or is otherwise to blame for Brennan Atkeson's mesothelioma and death." R. at 4464 and 4466.

¶7 Trial was held over thirteen days in May of 2019. On the seventh day of trial, after the close of plaintiff's evidence, each defendant demurred to the plaintiff's evidence. The court denied each motion, and the defendants each presented their evidence. Each defendant then moved for a directed verdict, but the motions were denied. The jury returned a verdict for the plaintiff under both negligence and products liability theories, assessing damages at \$7,978,026. Per the special verdict form, the jury allocated \$5 million to Brennan's daughter, \$1 million to each of Brennan's parents, \$500,000 for pain and suffering, and \$478,026 for financial losses. The jury also found that the plaintiff proved by clear and convincing evidence that each defendant acted "with reckless disregard"; however, they awarded nothing for punitive damages.

¶8 The plaintiff elected to seek judgment only on the jury's manufacturer products liability findings. A judgment for a total of \$8,093,115.03 was entered, which included \$115,089.03 in prejudgment interest. Each defendant appealed, although Union Carbide and Montello filed jointly. The two appeals were consolidated and assigned to this court for resolution.

ANALYSIS

The "Estoppel Order"

¶9 All defendants argue that the trial court's pretrial order preventing them from offering any evidence or argument regarding the liability of third parties, entered as a sanction for the defendant's failure to timely supplement their answers to the plaintiff's interrogatory five, was reversible error requiring a new trial. This claim of error is properly reviewed for abuse of the trial court's discretion.³ *Barnett v. Simmons*, 2008

³ National contends that the *de novo* standard is appropriate here. We disagree. It argues that the trial court had no authority to enter sanctions in the first instance because the plaintiff had not filed a motion to compel and there was no discovery order in place, the violation of which would allow for sanctions. However, the plaintiff rightly notes that there are two sources for the imposition of discovery sanctions under Oklahoma law. No doubt, discovery sanctions may be issued for violations of discovery orders under 12 O.S. §3237 and the imposition of sanctions under that section requires a motion to compel and order so compelling, neither of which were ever filed here. However, in addition to its authority under §3237, Oklahoma trial courts are endowed with "inherent authority to impose sanctions for abuse of the discovery process." *Barnett v. Simmons*, 2008 OK 100, ¶ 14, 197 P.3d 12, 18. No motion or order compelling discovery is required to issue sanctions pursuant to this inherent authority. *Id.*

The policy behind allowing such authority is made evident by situations such as these, where a party is not dissatisfied with an opposing party's answers to discovery but rather seeks to *rely* on them for purposes of narrowing the issues to be tried. A plaintiff has no reason to file a motion to compel in such instances. *Moore's Federal Practice* § 126.131[3] (Matthew Bender 3d ed.) ("The duty to supplement and correct disclosures and responses is a continuing duty and no motion to compel further supplementation is required.... A party may not escape the burden of full compliance with the rules of discovery by placing a duty of repeated requests on its adversary.").

The Federal Rules of Civil Procedure formally recognized this reality in 2000 by amending FRCP 37(c), which now clearly empowers the court to enter what orders are just when a party fails to supplement discovery without an adequate excuse. The amendment explicitly added failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1). However, even before this modification, the majority rule permitted courts the same power via its "inherent authority." See, e.g., *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) ("Few would question a court's inherent power to discipline breaches of Rule 26(e), even in the absence of a court order."). See (continued...)

OK 100, ¶23, 197 P.3d 12, 20–21 (“The standard of review for a trial court’s grant or denial of discovery sanctions is abuse of discretion.”). Under that standard, we will not overturn the trial court’s ruling unless the appellants show it was “contrary to the weight of evidence or to a governing principle of law.” *Id.* “An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶20, 987 P.2d 1185, 1194.

¶10 Having reviewed the relevant record, including the briefing below and the transcript of the relevant hearing, we cannot say the trial court abused its discretion in preventing the defendants from entering evidence or arguing third-party fault at trial.

We note the following posture of the case as it arrived before the trial court, just ten

³ (...continued)

generally, Wright & Miller, §2050, Pre–1993 Sanction for Breach of Duty to Supplement, 8A Fed. Prac. & Proc. Civ. § 2050 (3d ed.). In the absence of a modified §3237 tracking the changes to FRCP 37(e), we view the Oklahoma Supreme Court’s statements in *Barnett, supra*, and other cases, as recognizing the trial court’s inherent authority to issue discovery sanctions absent a motion to compel when the circumstances warrant. See, e.g. *West v. Cajun’s Wharf, Inc.*, 1988 OK 92, 770 P.2d 558 (ordering new trial for failure to supplement). Such exercises of discretionary authority are properly reviewed for abuse of the trial court’s authority.

Finally, we note that National contends, citing cases such as *Walker v. Ferguson*, 2004 OK 81, 102 P.3d 144, that reliance on inherent authority to issue sanctions always requires a finding of bad faith or oppressive behavior. The argument cannot be squared with either the trial court’s broad discretion in deciding pretrial discovery matters or cases such as *West v. Cajun’s Wharf, supra*, which ordered a new trial based on failure to supplement discovery absent any order compelling supplementation or a finding of bad faith or oppressive behavior. We view cases such as *Walker*, and others cited by National, as standing for the proposition that such a finding may be required in cases of severe, and especially *litigation-ending* sanctions. No such issue is present in this case.

days before the case was set to begin trial. First, the plaintiffs had posed a clear, or at least clear enough, question in interrogatory number five, some six months earlier. Each defendant, despite having all the information it needed at the time to answer this simple question, chose not to do so. See footnote 2, *supra*. Later, and seemingly prompted by the plaintiff's motion seeking to keep out such attempts at third-party finger-pointing, each defendant revised their answer by naming specific companies they *would* seek to blame at trial. The plaintiff objected to this late-breaking supplementation, arguing that, had she known the defendant was going to seek to blame the specifically named third parties, she would have concentrated her efforts in discovery to determine the relative fault of those parties, if any. If she had discovered the defendants were correct — that a named third-party was to blame — she could have perhaps amended her petition to include that party, or at least seek to mitigate that defense to the extent possible with information obtained in additional discovery. In contrast, if she discovered what she suspected — that there was no evidence that the named third party had anything to do with Brennan's mesothelioma — she could have sought summary judgment or a motion in limine as to any evidence or argument concerning that company's alleged fault.

¶11 At the hearing, another issue came into sharper focus. Namely, the focus shifted to what non-parties the defendants would seek to include on the verdict form at the close of trial. The plaintiff's attorney made his client's position clear:

[T]he heart of what we're moving on is that they failed to comply with their discovery obligations, we're entitled to rely on that, and they cannot now place blame on other parties on the verdict form that they have not identified in discovery as parties to whom they are going to place blame.

Tr. (4/26/2019), pg. 7. The defendants were equally clear that they would seek at trial, if permitted, to place blame on the previously unnamed third parties and add them to the verdict form if they could. Indeed, National submitted a proposed verdict form that included *fifteen* additional parties, the majority of which were prior defendants in the case that had been voluntarily dismissed without prejudice.

¶12 Given this context, we find no fault with the trial court's order preventing the defendants from seeking to prove, through evidence or argument, the liability of third parties. One of the primary purposes of modern discovery is to narrow the issues to be tried:

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978). 'The aim of these liberal discovery rules is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."' *Id.* Discovery by interrogatory requires candor in responding.

State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc., 2007 OK CIV APP 24, ¶ 17, 158 P.3d 484, 489. See also *City of Edmond v. Parr*, 1978 OK 70, 587 P.2d 56, 57 ("The purpose of modern discovery practice and procedure is to promote the

discovery of the true facts and circumstances of a controversy, rather than to aid in their concealment.”).

¶13 Absent some valid objection, Oklahoma’s rules of discovery require a party to answer an interrogatory “fully in writing under oath.” 12 O.S. §3233. The duty to supplement an answer is ongoing. 12 O.S. §3223(E). Here, the trial court found that the defendants failed in their duty to seasonably supplement their answers to interrogatory number five by letting the plaintiff know exactly what entities it intended to contend at trial were responsible for Brennan’s death. This failure was highly prejudicial to the plaintiff.⁴ The trial court’s order was permissible under the circumstances.

¶14 Finally, we note Montello and Union Carbide’s argument that “[t]he sanction order ballooned at trial far beyond the original sanction, with the court impermissibly excluding key evidence critical to the defense.” *Union Carbide and Montello’s Brief in Chief*, pg. 27. The companies argue that it was an independent error to exclude the referenced evidence because it did not fit within the trial court’s pretrial exclusionary rule. We review the trial court’s rulings on evidence at trial for “a *clear* abuse of

⁴ Additionally, we note that there was little, if any, harm to the defendants’ planned defense by the issuance of this order. The defendants’ argument at trial was primarily that Brennan’s mesothelioma was not caused by exposure to asbestos *at all*, much less by exposure to any of the defendants’ products. The argument that third-party exposure caused the harm was “basically an argument in the alternative,” to present to the jury in the event they did not accept the defendant’s primary, “spontaneous” mesothelioma theory. See Tr. (April 26, 2019), pg. 20 (argument of Montello and Union Carbide).

discretion.” *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶32, 980 P.2d 116, 132 (emphasis in original). We may only reverse upon “a showing that such exclusion resulted in a miscarriage of justice or constituted a substantial violation of the appellant’s rights.” *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289, 293.

¶15 In sum, the companies contend that the trial court improperly excluded its attempts to introduce evidence concerning the sophistication and knowledge of the purchasers of its products, as well as alleged “warnings” that they provided to those purchasing companies. They argue that because they were selling to sophisticated customers — drilling mud companies — and warned those companies of the dangers of their products, they were relieved of any duty to repeat those warnings to end users, such as on the bags of asbestos themselves. They wanted to introduce this evidence to argue that their “warnings” to their purchasers, coupled with the sophisticated nature of those purchasers, relieved them of any legal duty to warn otherwise.

¶16 The defendants’ arguments in this regard fall short for several reasons. First, we view this evidence as falling within the trial court’s pretrial order disallowing evidence of third-party fault. Despite their claims that they sought to introduce this evidence in order to relieve themselves of the legal duty to give better warnings, it is clear that their effort was to relieve themselves of that duty *by passing it on to third parties*, such as Mr. Pratt’s employers or the drilling mud companies that purchased the asbestos products from Montello. The defense that “we warned the people that we sold it to” or

“the exposure level would have been such that the employers had an independent and regulatory obligation to protect its employees” necessarily implicates the purchasers and employers, and attempts to shift a legal duty to those parties. As discussed above, the trial court's order outlawing such blame-shifting was properly entered.

¶17 Second, we have reviewed the documentary evidence the companies sought to enter and find it is almost exclusively marketing materials that the companies provided to their customers in an effort to ensure those customers of the safety of the product. In no sense could these materials be considered “warnings” passed on to their customers that in turn, should have been passed down the line to end users. Their clear purpose was to sell the product and to sell it as safe. Additionally, the jury did hear significant evidence of the actual warnings supplied, which was contained on each bag of asbestos sold.⁵ Montello and Union Carbide were also unable to offer any evidence that any of this information was passed on to Ronnie Pratt's employers, but just that it was distributed generally to Montello's purchasers. The court specifically stated that he would allow such evidence if it existed. However, the defendants admitted they had no evidence making this connection or that Mr. Pratt's employers had special knowledge about the dangers of asbestos exposure. We do not see how the

⁵ The warning, mandated by OSHA at all relevant times, stated as follows: “Caution: Contains asbestos fibers. Avoid creating dust. Breathing asbestos dust may cause serious bodily harm.” The plaintiff introduced evidence that this warning, despite the OSHA mandate, was inadequate given the actual danger posed and the actual knowledge of both Union Carbide and Montello.

introduction of this marketing evidence would have made any difference to the jury in reaching its verdicts.

¶18 Having reviewed the offered evidence, we cannot say that the trial court's exclusion resulted in any miscarriage of justice, as it fell within the order prohibiting the blaming of third parties or would have otherwise been unhelpful to the jury.

Causation

¶19 Each defendant also contends that the plaintiff's proof was insufficient to establish causation as to their product in one or more ways. All defendants argue that the proof of exposure to their product was insufficient. Union Carbide and Montello also contend that the plaintiff failed to prove that the quantity of exposure was sufficient to cause mesothelioma, even if Brennan had been exposed to one of their asbestos products.

¶20 When reviewing each of these alleged errors, we must be ever mindful that we are reviewing a trial court's judgment entered upon a jury's verdict. We must affirm if there is "any competent evidence reasonably tending to support the verdict." *Florafax International, Inc. v. GTE Market Resources, Inc.*, 1997 OK 7, 933 P.2d 282, 287. Our duty is "not to weigh the evidence and determine which side produced evidence of greater weight." *Id.* Rather, when reviewing a jury's verdict in favor of the plaintiff for sufficiency, we must view as true all the plaintiff's evidence, as well as every inference reasonably deducible from that evidence, and reject all of the defendant's conflicting

evidence. *Id.* “We must affirm unless there is an entire absence of proof on a material issue.” *Ellison v. Campbell*, 2014 OK 15, ¶ 14, 326 P.3d 68, 73 (emphasis removed).

Proof of Exposure

¶21 Union Carbide and Montello contend that the plaintiff “failed to prove that Mr. Atkeson was exposed to Super Visbestos.” *Brief in Chief*, pg. 13. Their contention was based on the testimony of Terry Archer, who worked with Ronnie Pratt during the relevant time period. Mr. Archer recalled that he and Mr. Pratt worked with a product called “Visbestos.” Mr. Archer never specifically mentioned the product name “Super Visbestos” in his testimony, which was by video deposition. The companies also claim Mr. Archer’s description of the product was more consistent with Visbestos than Super Visbestos. It was uncontroverted that the product named Visbestos had been discontinued prior to the events at issue here; thus, if Terry Archer was in fact referencing Visbestos and not Super Visbestos, he must have been referring to a time period earlier than 1980.

¶22 Union Carbide and Montello’s argument in this regard reads the plaintiff’s evidence in the light most favorable to themselves, entirely discounts the testimony of the plaintiff’s industry expert, Edward Ziegler, and relies significantly on the opinion of their own expert, David Trumbo.

¶23 Mr. Ziegler confirmed as reasonable what is a seemingly obvious inference that follows from Mr. Archer’s testimony — namely that Mr. Archer’s references to “Visbestos” likely encompassed the similarly named product, “Super Visbestos.” Mr.

Ziegler confirmed the likelihood of this conflating of products in his testimony when he was asked the following questions and gave the following answers.

Q: [T]here's been reference to the fact that between 1980 and '85, Union Carbide's products that contained the name "Visbestos" was labeled Super Visbestos; you're aware of that?

A: Yes.... [I]n my experience, being out in the field, rig workers often use slang. They kind of refer to something maybe that they've used before, and use kind of common names. So, the fact that the names are slightly different or not exact doesn't surprise me. That's how I've heard workers in the field for many years refer to products and discuss things.

Q: Okay, So, that [Mr. Archer] didn't use the word "Super Visbestos" but rather just "Visbestos" doesn't lead you to conclude that he didn't use the Super Visbestos product at all, fair?

A: That's correct, yes.

Tr. (May 13, 2019), pg. 52-53. Further, Mr. Ziegler testified that Mr. Archer's description of Visbestos was consistent with Super Visbestos. He said that "the products look very similar" The combination of Mr. Archer and Mr. Zeigler's testimony was sufficient for a reasonable juror to conclude that Mr. Pratt used Union Carbide and Montello's asbestos product, Super Visbestos, during the relevant time period.

¶24 At trial, and now on appeal, Union Carbide and Montello attacked this supposition through the testimony of their own experts, especially Mr. Trumbo. Mr. Trumbo testified that asbestos was not generally used in the area in the 1980s, that the consistency of Visbestos and Super Visbestos were distinct, and offered a theory, that, if believed, would have indicated that Mr. Archer had stopped using asbestos on his rigs before 1980. The plaintiff countered each of these contentions with their own

evidence, including documentary evidence that Montello shipped hundreds of tons of Super Visbestos to Oklahoma between 1980 and 1985, as well as the testimony of Mr. Archer and Mr. Zeigler discussed in the prior paragraph. It is not appropriate for us to consider the defendant's evidence given our standard of review as set forth above. It was for the jury to weigh all this evidence and determine whose story to believe. Based on their verdict, it is clear they found the plaintiff's explanations more persuasive.

¶25 As to National's asbestos products, the company argues on appeal that the plaintiff "did not prove that Pratt Drilling's National 50 Drawworks contained asbestos replacement brakes between 1980 and 1985." *National's Brief in Chief*, pg. 23. Their argument is as follows. The drawworks in question — the National 50 — was only manufactured until the late 1950s. Although National concedes that the original brakes, which would have been installed but not manufactured by National, would have contained asbestos, the brakes required periodic replacement. By 1980, there seems to be no argument between the parties that the original brakes would have been replaced many times. National argues that there was insufficient proof that these replacement brakes were National branded brakes, or that they even contained asbestos, as during the relevant time period it was *possible* to purchase asbestos-free brakes.

¶26 The defendant's argument unfairly minimizes the plaintiff's evidence that the replacement brakes used, more likely than not, were National brakes that contained asbestos. The evidence offered as to whether Mr. Pratt's company used National-

supplied, asbestos-containing replacement brakes was, at best, conflicting. Gary Henderson, National's corporate representative, testified via video that National sold asbestos brakes until 1989, and that, until at least 1984, all new National drawworks were supplied with asbestos brakes. Starting in 1984, a customer *could* special order non-asbestos brakes, but the standard offering remained asbestos brakes. Mr. Henderson agreed that "the brakes used on [Jim Pratt's drilling rigs] would in all certainty have been asbestos-containing during the time period that we are talking about." *Court's Exhibit 8*, pg. 34. This was because "asbestos is what just about all brakes were made of" during that time. *Id.* He admitted the same as to the clutches installed on the National's drawworks.

¶27 Mr. Archer, in turn, testified that he believed any replacement parts, including the clutches and brakes, for a National drawworks would have been National-supplied parts. He said directly: "I believe any brake that our company would have bought would have come from National." Tr. May 7, 2019, pg. 45. Mr. Zeigler, likewise, opined that using matching replacement brakes would have been industry practice, in order to ensure proper fit. From this evidence a reasonable juror could have concluded it was more likely than not that the National drawworks Ronnie Pratt operated used National-branded, asbestos brakes during the relevant time period. National's argument that such a conclusion could have only been based on speculation is without merit.

Proof of Sufficient Dose

¶28 Union Carbide and Montello make another, more technical, argument concerning the sufficiency of the plaintiff's evidence on causation. They argue that the plaintiff "failed to prove that the level of Mr. Atkeson's exposure was sufficient to cause his mesothelioma." *Union Carbide and Montello's Brief in Chief*, pg. 16.

¶29 Our review must start and end with the plaintiff's evidence. The plaintiff's expert on causation was Dr. John Maddox. Dr. Maddox testified that chrysotile asbestos, the type of asbestos at issue in this case, can cause mesothelioma on its own. He also testified that mesothelioma is a "signature disease" of asbestos exposure, meaning a disease that is "extremely closely associated with a certain cause." Tr. (May 8, 2019), pg. 83. Although there are other rare causes of mesothelioma, his review of the case ruled each alternative cause out. He disagreed with the defendant's theory that Brennan's mesothelioma was "spontaneous" — meaning that the disease had no discernable cause despite the fact that the patient was believed to have *not* had any exposure to asbestos — because once there is a "significant history of occupational, domestic or environmental exposure" its inappropriate to call a person's mesothelioma as spontaneous. *Id.* at 86. Furthermore, "spontaneous" mesothelioma occurrence is "very, very low ... probably in the neighborhood of 1%" of cases. *Id.*

¶30 How much asbestos Brennan was exposed to — that is, whether his history of exposure should be considered "significant" — was an issue considered by the plaintiff's expert, William Ewing, an industrial hygienist. Mr. Ewing performed a qualitative

analysis of Brennan's exposure, a practice that, according to Mr. Ewing was accepted in the industrial hygiene community when a quantitative analysis — meaning direct measurement at the time of exposure — is not possible. Based on Mr. Ewing's analysis, which relied on studies of work practices similar to Mr. Pratt's, Mr. Pratt's exposure level while using Union Carbide and Montello products was up to 4,800 times greater than the typical "background exposure" that all of us experience just living our daily lives. Of course, Brennan was not subjected to this exposure himself, as he was only exposed second-hand, to what Mr. Pratt brought back home with him. According to Mr. Ewing, studies have shown that take-home exposure is approximately 1% of the direct exposure. However, these studies were limited to take-home exposure related to clothing and did not include Brennan's exposure via Mr. Pratt's asbestos-contaminated hair, skin, or boots. This 1% figure also did not account for a process known as "re-entrainment." By that process, asbestos dust that settles in a home is launched back into the air each time there is any activity in the home that stirs it up, such as walking, vacuuming, or playing on the ground. The asbestos fibers do not dissipate over time, as levels are increased each time new sources of asbestos are introduced, while the prior contamination persists. Mr. Ewing concluded his testimony by offering his opinion that Brennan was exposed to levels of asbestos "orders of magnitude greater than the background rate." Tr. (Day 4 of 13), pg 85. Also significant was Dr. Maddox's testimony concerning the young age at which Brennan's exposure occurred. He testified that "it

is believed that children are probably more susceptible to the effects of asbestos fibers.” Tr. (May 8, 2019), pg. 91.

¶31 A reasonable jury was free to conclude from the combined testimony of Dr. Maddox and Mr. Ewing that Brennan’s mesothelioma was caused, at least in part, by the defendants’ products. Although the defendants offered their own expert evidence seeking to undermine these witnesses, we are not free to decide whose evidence was superior or even to consider defendants’ evidence because it conflicts with competent evidence of the plaintiff. The jury clearly found the plaintiff’s experts more compelling, a judgment we cannot disturb on appeal.

Jury Instructions

¶32 Finally, National contends that the trial court erred in refusing certain jury instructions it offered. The first allegation of error concerns the court’s duty to instruct regarding the parameters of National’s duty to warn regarding replacement parts. The second claimed error concerns National’s proffered instruction on a duty to warn non-users of a product. We review the denial of requested but refused jury instructions for “the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and above all, whether the probability arose that jurors were misled and reached a different conclusion due to an error in the instruction.” *Cimarron Feeders, Inc. v. Tri-Cty. Elec. Coop., Inc.*, 1991 OK 104, 818 P.2d 901, 902. We may not reverse a judgment based on misdirection of the jury unless we conclude that the error probably resulted in a miscarriage of justice. 20 O.S. §3001.1.

Duty to Warn Regarding Replacement Parts

¶33 Two of the requested and refused instructions concern National's duty to warn regarding replacement parts to be used in its drawworks. National offered two separate instructions in this regard, offered in the alternative. The shorter of these two requested instructions simply stated that: "A manufacturer has a duty to warn only on products it manufactures." The longer of these options read as follows:

DUTY TO WARN AS TO REPLACEMENT PARTS

A manufacturer has a duty to warn as to replacement parts under these circumstances: (1) the manufacturer directs that an asbestos part be incorporated into the equipment; (2) the manufacturer knows that this part will require replacement with a similar part; and (3) the product will be useless without that similar asbestos part.

National patterned this instruction, offered as an alternative to the shorter instruction, on the test recently adopted by the United States Supreme Court outlining a manufacturer's duty to warn under federal maritime cases. *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 203 L. Ed. 2d 373 (2019).

¶34 Instead of either of these two instructions, the trial court gave "the OUII instruction on warning," *National's Brief in Chief*, pg. 27, which tracks the first sentence of Oklahoma Uniform Jury Instruction Number 12.5, verbatim. The instruction was:

PRODUCT DEFECTIVE IF NO WARNING GIVEN

A product that involves a risk of harm to persons when it is used in a way that the manufacturer or seller could reasonably have foreseen is defective if:

1. The product does not have an adequate warning of its dangerous characteristics or adequate instructions for its safe use that are sufficient to inform an ordinary user of the risk of harm; and
2. The risk of harm is not one that an ordinary user would reasonably expect.

R. at 5234 (Instruction 21).

¶35 The trial court correctly refused National's requested instructions regarding replacement parts for two reasons. First, National ignores the significant evidence at trial suggesting that the replacement brakes used on the drawworks in question were supplied by National and not a third party. The jury was entitled to believe the plaintiff's evidence in this regard. This fact alone distinguishes this case from many of the authorities cited by National.⁶

¶36 Second, under preexisting Oklahoma law National could be liable for harm caused by its product — the drawworks — that incorporated asbestos brakes that it

⁶ See, e.g., *O'Neil v. Crane Co.*, 342, 266 P.3d 987, 991 (Cal. 2012) ("It is undisputed that defendants never manufactured or sold any of the asbestos-containing materials to which plaintiffs' decedent was exposed."); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495 (Wash. 2008) ("None of the defendants manufactured, sold, or otherwise supplied the asbestos insulation applied to their products."); *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331 (Md. 1998) (Plaintiff was "attempting to hold Ford liable for unreasonably dangerous replacement component parts that it neither manufactured nor placed into the stream of commerce.") (abrogated on other grounds). Other cases National cites are easily distinguishable in some other obvious way. In *Air & Liquid Systems*, for example, the Supreme Court made it abundantly clear that it was not seeking to re-write state products liability law. *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 995, 203 L. Ed. 2d 373 (2019) ("We do not purport to define the proper tort rule outside of the maritime context."). See also, *Braswell v. Cincinnati Inc.*, 731 F.3d 1081, 1091 (10th Cir. 2013) ("[A]n otherwise safe product is not made unreasonably dangerous if the manufacturer fails to prevent the replacement of a part with a *substandard* aftermarket part.") (emphasis supplied).

knew at the time of manufacture would need to be replaced periodically, and National itself supplied asbestos replacements at a time when National was aware of the potential harm caused by such replacements. See *Smith v. U. S. Gypsum Co.*, 1980 OK 33, 612 P.2d 251, 253 (“If warnings are unclear or inadequate to apprise the consumer of the inherent or latent danger, the product may be defective.”). See also Restatement (Second) of Torts § 388 (1965); *Duane v. Oklahoma Gas & Elec. Co.*, 1992 OK 97, 833 P.2d 284, 286 (adopting §388 of Restatement as “general rule as to a supplier’s duty to warn of known dangers in the ordinary use of its product”). The evidence in this regard, from National’s own corporate representative, was that the brakes required replacing every one to two years and “just about all” brakes, including replacement brakes, were made out of asbestos at the time period in question.

¶37 Requiring National’s requested long instruction, based on the *Air & Liquid Systems* case, would have done nothing more than inform the jury that they *could* hold National liable for failure to warn under the facts of the case. The preexisting OUJI instruction was sufficient in this regard, and failure to so instruct cannot be viewed as detrimental to National. Further, requiring the short instruction on this point would have relieved National of liability. Accordingly, the court did not err in denying either of National’s requested instructions on a manufacturer’s duty to warn regarding replacement parts under the particular facts of this case.

¶38 National also claims it was error for the trial court to refuse the following instruction:

MANUFACTURERS' PRODUCTS LIABILITY — FORSEEABILITY (sic)

A manufacturer of a product has no duty to warn of the dangers of a product unless the person claiming injury was a foreseeable purchaser or user of the product and was exposed to the product as a user or was present where the product was used.

Because this statement does not reflect Oklahoma law, it was properly rejected by the trial court.

¶39 The Oklahoma Supreme Court first recognized the independent legal theory of manufacturers' product liability in 1974. *Kirkland v. General Motors Corp.*, 1974 OK 52, 521 P.2d 1353. Although the plaintiff in *Kirkland* was a consumer of the product in question, having purchased the harm-causing car from the defendant, the Court did not limit its holding to consumers or purchasers. Rather, the court held that "[t]he doctrine of Manufacturers' Products Liability extends the liability for a defective product to any user or consumer using the product for its intended use, *and to any third party injured as a result of the defect.*" *Id.* ¶0, 1356 (emphasis supplied). Later cases have confirmed this reading. See, e.g., *Moss v. Polyco, Inc.*, 1974 OK 53, 522 P.2d 622, 626 ("[W]e now make it clear that [Manufacturers' Products Liability] also applies to bystanders.").

¶40 In their reply brief, National contends that they did not intend to argue that "nonuser third parties (or 'bystanders') are protected from product defects." However, this is exactly what the rule of law as set forth in their proposed instruction would accomplish. In a failure-to-warn case, the inadequacy of the warning *is* the defect. See

Restatement (Second) of Torts § 402A (1965) (comment j)). If a product is defective for inadequate warnings to foreseeable users, it is a defective product and all third parties injured by it will be able to recover if they succeed in proving their case to a jury.⁷ The trial court did not err in refusing the requested instruction.

¶41 For the reasons set forth above, the trial court's judgment, entered on the jury's verdict, is AFFIRMED.

PRINCE, J., concurs specially and GOREE, P.J., dissents.

PRINCE, J., concurring Specially:

¶1 I concur in the Opinion of the Court and write separately to address the legal basis and factual record that underpin the trial court's exercise of inherent authority with the entry of the Estoppel Order of May 1, 2019.¹ In *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12, the Court reversed a district court's decision to deny attorney fees as a sanction for failing to obey an order to compel the production of certain computer files. *Id.* ¶ 24. The *Barnett* Court compared the authority of a trial court to impose

⁷ To the extent the cases National cites in their briefs hold otherwise, see, e.g. *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992) and *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181 (10th Cir. 1995), we find those cases misstate Oklahoma law.

¹ See *Rogers v. Mercy Health Ctr., Inc.*, 2014 OK CIV APP 69, ¶¶ 40–41, 334 P.3d 426, 435 (where the Court identified, but did not resolve, what should be the appropriate sanction when a defendant has altered its affirmative defenses “at the eleventh hour,” when “it was too late in the pretrial process for [the Plaintiff] . . . to conduct further meaningful discovery.”); *Taliaferro v. Shahsavari*, 2006 OK 96, ¶ 33, 154 P.3d 1240, 1249 (explaining that “[i]t is the duty of the trial court to safeguard the rights of the litigants to a fair trial . . .”).

sanctions for failure to comply with an order compelling discovery and a court's authority to impose such sanctions (separate and apart from an order to compel) as part of a trial court's "inherent authority":

A trial judge is empowered by Oklahoma's discovery code to sanction parties or attorneys who violate discovery orders. Title 12 O.S. Supp. 2007 § 3237(B)(2) provides for sanctions to be imposed by the court for failure to obey an order to provide or permit discovery. **A motion to compel is a prerequisite to sanctions being imposed under § 3237.** Likewise, the § 3237 sanctions must be based upon the failure to obey an order of the court. **A trial court also has inherent authority to impose sanctions for abuse of the discovery process. That is, the trial court has the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made.).**

Id. ¶ 14 (citations omitted) (emphases added). The scope of a district court's "inherent authority" was discussed in *State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, 61 P.3d 234, as corrected (Dec. 26, 2002). *Tal* was a *qui tam* action in which the Court reversed the district court's award of attorney fees to the defendant to the extent that it was based on the inherent authority of the court:

City National Bank & Trust Co. v. Owens, 1977 OK 86, 565 P.2d 4, recognized the inherent equitable authority of a trial court to award attorney fees against a party **for bad faith litigation misconduct—conduct that is vexatious, wanton or engaged in for oppressive reasons.** The authority springs from a court's power to manage its own affairs to achieve the orderly and timely disposition of cases and is a necessary implicit element in the existence of a judicial system. *Owens'* progeny makes plain, however, the inherent authority exception to the American Rule recognized in *Owens* (1) is a narrow one; (2) should be applied with a degree of caution and restraint; and (3) was not intended to grant trial courts some broad, all-encompassing equitable authority to award

attorney fees. . . . Our review of the record convinces us the trial court applied his inherent authority broadly rather than narrowly, he did not employ the required amount of caution and restraint, his application of that authority in the circumstances evident here was irreconcilably at odds with the denial of monetary sanctions under § 2011, and no overriding considerations warranted the imposition of sanctions in the form of attorney fees.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), *reh. denied* 501 U.S. 1269, 112 S.Ct. 12, 115 L.Ed.2d 1097 (1991) the United States Supreme Court recognized that the inherent power of a court to impose sanctions is both broader and narrower than Rule 11, § 2011's federal counterpart. It is broader because its reach is more extensive in that it extends to the full range of litigation abuses [*id.*] and a written document, through filing or advocacy, does not necessarily figure into the equation. It is narrower, however, because a finding of bad faith conduct or willful disobedience of a court's orders is required, as opposed to Rule 11 where an objective standard of reasonable inquiry is imposed that does not require a finding of bad faith. *Id.* Furthermore, when there is offending conduct in the course of litigation that could be adequately sanctioned under § 2011, or similar statutory provision, a court should ordinarily rely on said statute rather than its inherent authority. *Chambers v. NASCO, Inc.*, 501 U.S. at 50, 111 S.Ct. 2123. Only if in the informed discretion of the lower court an applicable statute or rule is not up to the task should the court rely on its inherent power. *Id.*

Id. ¶¶ 26–27 (citations omitted) (emphases added); see also *Fentem v. Knox*, 2013 OK CIV APP 50, ¶ 11, 305 P.3d 1043, 1047 (“We recognize a trial court’s inherent authority to sanction a party or attorney for bad faith litigation misconduct.”).

¶2 *Dean Bailey Olds, Inc. v. Richard Preston Motor Co.*, 2000 OK 89, 32 P.3d 816, involved an appeal of an award of attorney fees that was granted under an inherent authority analysis and in which the district court had described the plaintiff’s conduct

as “onerous.” *Id.* ¶ 14. In affirming the award of attorney fees, the Court held that “the trial court’s characterization of [plaintiff’s] . . . conduct as ‘onerous’ was the functional equivalent of a finding that such conduct was ‘oppressive’” *Id.* ¶ 22 (emphasis added). The Court compared the terms “onerous” and “oppressive” as follows:

We note that the word ‘oppressive,’ which we used in *Owens* to describe the type of behavior that will support an award of an attorneys’ fee is a synonym of the word ‘onerous,’ used by the trial court to support its attorneys’ fee order. The Oxford English Dictionary (2d Ed. on CD-ROM) defines ‘onerous’ as, ‘Of the nature of a burden; burdensome; oppressive, troublesome.’ [emphasis added.]

Id. ¶ 16. In *Walker v. Ferguson*, 2004 OK 81, 102 P.3d 144, the Court reversed a district court’s award of attorney fees because there had been no finding “by the trial judge that counsel’s conduct constituted bad faith or oppressive conduct.” *Id.* ¶ 16. A mistrial had been granted there because of certain comments made by plaintiff’s counsel during his opening statement. *Id.* ¶ 4. However, the Court specifically noted that the trial court in *Walker* had specifically found that “he did not believe plaintiff’s counsel’s conduct was intentional.” *Id.* ¶ 17. In *Geyer Bros. Equip. Co. v. Standard Res., L.L.C.*, 2006 OK CIV APP 92, 140 P.3d 563, attorney fees had been awarded to the defendant following the entry of summary judgment in favor of the defendant on the basis of inherent authority. *Id.* ¶ 19 (citation omitted). In reversing the trial court, the Court stated, in part, that “[t]he trial court in the present case made no finding that Plaintiff’s action was oppressive, onerous, vexatious or the like, and this Court is

unwilling to so proclaim.” *Id.* (emphasis added). Based on these holdings, the law does not require the district court (in the exercise of its inherent authority) to express the sanction with an exact or explicit usage of the terms “bad faith” or “oppressive.” Instead, similar language—as in this case—may suffice.² As written by Justice Lavender in a dissent in *Dean Bailey Olds, Inc.*, “Owens calls for some inquiry into the subjective motivation(s) or reason(s) behind a plaintiff’s litigation conduct, or one must be able to say, based on the egregious nature of the misconduct involved, improper motivation may properly be presumed.” *Dean Bailey Olds, Inc.* ¶ 2 (Lavender, J., dissenting).

¶3 In this case, the trial court’s characterization of Appellants’ answer to Interrogatory No. 5 as “not valid” was the “functional equivalent” of a finding of bad faith or oppressive conduct. See *Dean Bailey Olds, Inc.* ¶ 22. The use of the phrase “not valid” was not an ordinary or common description of a litigant’s conduct.³ In light of the context of the trial court’s entry of the Estoppel Order, the trial court’s use of the phrase “not valid” to describe the Appellants’ conduct was a critical assessment of the Appellants’ conduct, representing a subjective critique of Appellants’ blatant refusal to identify, during the discovery phase of the case, the third parties that they intended to

² See *Beard v. Richards*, 1991 OK 117, ¶ 14, 820 P.2d 812, 816 (“[T]he meaning of ‘in bad faith’ is established by our American Rule jurisprudence. A ‘bad faith’ claim is strictly limited to mean oppressive, abusive or wasteful claims; that is, the claim is made for oppressive reasons such as delay . . . or in abuse of the judiciary and waste of public revenue . . .”).

³ The term “invalid” means, in part, to be “without foundation or force in fact, truth or law.” *Invalid*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/invalid>.

allege had caused or contributed to Brennan Atkeson's ("Atkeson") mesothelioma and death. It also was a harsher use of the phrase than might typically be intended in other contexts, such as in a breach of contract case. See, e.g., *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 2002 OK 99, ¶ 9, 72 P.3d 1, 3 & 6 (where one of the issues was whether the Citizen Potawatomi Tribe of Oklahoma was able to present evidence that the contract at issue there "was not valid").

¶4 The Appellants asserted, from the beginning stages of the case, that there were other entities that potentially should be assigned comparative fault for some or all of Atkeson's injuries.⁴ More specifically, in the separately filed answers by the Appellants (in mid-2016), they raised the affirmative defense that the injuries to Atkeson were caused by the acts and/or negligence of other parties over whom they had no supervision or control, and for whom they could not be held liable. In October, 2018 (approximately two years after the Appellants' Answers were filed), the Appellee issued her Supplemental Set of Discovery to all Defendants that included the Interrogatory at issue here (*i.e.*, Interrogatory No., 5), seeking, in part, to learn the identity of the specific persons or entities that the Appellants claimed were the "legal cause of [] Atkeson's malignant mesothelioma" The Appellants' answers to Interrogatory No. 5, as detailed in footnote 2 in the Opinion, included boilerplate objections and otherwise

⁴ Appellee filed her Petition on March 31, 2016.

contained very little information.⁵ Shortly thereafter, on December 18, 2018, a Scheduling Order was put in place that included a trial date of May 6, 2019. On the deadline for dispositive motions (April 8, 2019), Appellee filed her Motions for Partial Summary Judgment seeking partial summary judgment to the effect that there was no evidence in the record to support Appellants' defense related to the negligence of other entities. Both Appellants supplemented their answers to Interrogatory No. 5 subsequent to the date that Appellee filed her Motion for Partial Summary Judgment, and prior to the April 24, 2019, hearing.⁶ At the conclusion of the April 24, 2019, hearing, the trial court took the matter under advisement. Shortly thereafter, on May 1, 2019, the Estoppel Order was entered. Although barred by the Order of May 1, 2019, the Pretrial Conference Order filed on May 17, 2019, included the Appellants' expanded and thorough affirmative defense on the comparative fault defense that specifically named the persons and entities the Appellants claimed were responsible for Atkeson's injuries:

[Appellants] may argue that . . . the employers of Brennan Atkeson's father and step-father were responsible for maintaining a safe work environment and failed to do so, that exposures of Brennan Atkeson's

⁵ Montello/Union Carbide served their answer to Interrogatory No. 5 on or about December 6, 2018. National Oil served its answer to Interrogatory No. 5 on or about December 19, 2018.

⁶ See n. 2 in the Opinion of the Court for the substance of Appellants' supplemental answers to interrogatories. Montello/Union Carbide served their supplemental discovery responses on or about April 8, 2019. National Oil served its supplemental discovery responses on or about April 24, 2019.

father and step-father to asbestos through their work on draw-works and brakes, as well as their exposures to drilling mud activities provided by Drilling Specialties, CP Chem, and Johns Mansville, caused or contributed to Brennan Atkesons' mesothelioma.⁷

¶5 During the hearing before the trial court on April 26, 2019, counsel for NOV specifically stated that his client had “waited until all of the discovery was, in fact, closed and filed the supplemental responses the very next business day” April 26, 2019 Tr. at 19. Union Carbide and Montello stated in their Brief-in-chief that they “reserved the right to supplement their responses given that discovery was ongoing [and] . . . one business day after the last deposition concluded . . . [they] supplemented their discovery responses.” Union Carbide and Montello, Brief-in-chief at 25. The record, therefore, shows that the Appellants unilaterally determined in December, 2018, to not fully answer Interrogatory No. 5. In other words, the Appellants did not seek a Protective Order from the trial court to authorize their delay in answering Interrogatory No. 5 until after the discovery deadline. There also is no evidence in the record that the Appellant sought an agreement from the Appellee concerning the delay in responding. The record shows that the delay in supplementation was not the result of sheer neglect or oversight; rather, the Appellants appear to have made a strategic and intentional decision to delay supplementation of their answers to Interrogatory No.

⁷ The affirmative defense of Appellant NOV also added the names of Appellants Union Carbide and Montello in the list of other entities potentially responsible for the injuries at issue here. The supplemental answer to Interrogatory No. 5 by Appellant Union Carbide contained a list of potentially responsible entities that was identical to its list in the Pretrial Conference Order.

5 until after the discovery deadline had closed (on March 15, 2019, approximately three years after the lawsuit had been filed). Therefore, in light of record here, demonstrating the purpose for which the trial court used the phrase “not valid” and the facts that caused its usage, the phrase “not valid” was a subjective critique of Appellants’ misconduct upon which an “improper motivation may properly be presumed” and thereby justify the trial court’s reliance on its inherent authority. See *Dean Bailey Olds, Inc.* ¶ 2.

¶6 The Appellants’ eleventh hour supplementation of Interrogatory No. 5, after the discovery cutoff had passed, also made it impossible for the Appellee to file a motion and seek the relief that is statutorily available under the mechanisms of the discovery code. See 12 O.S. §§ 3226(C) & 3237(A). Section 3226E(2) requires all supplemental discovery responses to be “seasonably”⁸ made. The trial court properly found that the Appellants “did not supplement this information within the discovery period required by Oklahoma law.” Therefore, a motion to compel, at that stage of the case, would have been inadequate to address the issue facing Appellee.

¶7 Lastly, the Estoppel Order had been specifically requested by the Appellee, as a request for alternative relief, in her Motion for Partial Summary Judgment. Consequently, the Appellants were given an adequate opportunity to be heard on that

⁸ The term “seasonably” means, in part, “occurring in good or proper time.” *Seasonably*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/seasonably>.

matter. The relief granted in the Estoppel Order did not represent an abuse of discretion because such relief is specifically contemplated as an allowable sanction under § 3237(B)(2)(b) (*i.e.*, “an order refusing to allow the disobedient party to support or oppose designated claims or defenses . . .”).⁹

GOREE, P.J., dissenting:

¶1 I disagree that the district court acted within its inherent authority when it entered its order precluding the defendants from presenting evidence or argument that a non-party caused or contributed to Brennan Atkeson's mesothelioma and death.

¶2 Although the district court has inherent authority to impose sanctions for abuse of the discovery process, the trial judge must make a finding that the sanctioned party engaged in bad faith litigation misconduct. *Barnett v. Simmons*, 2008 OK 100, ¶14, 197 P.3d 12, 18; *Walker v. Ferguson*, 2004 OK 81, ¶14, 102 P.3d 144, 147 (“There must be a finding of bad faith or oppressive behavior where the trial court has imposed sanctions on the basis of its inherent or equitable power to do so.”).

¶3 The district court stated in its order that (1) defendants' discovery objections “are not valid discovery objections,” (2) the defendants “did not identify any person or entity” they considered to have caused Mr. Atkeson's mesothelioma and death, (3) defendants

⁹ See *Payne v. Dewitt*, 1999 OK 93, ¶¶ 8-9, 995 P.2d 1088, 1092–93 (where the Court discussed the required factors for issuance of a sanction pursuant to §3237B(2) and that a “sanction must be both fair and related to the particular claim (or defense) at issue in the discovery order.”)

“did not supplement this information within the discovery period as required by Oklahoma law,” and (4) the order was entered because of defendants’ “failure to identify alternative sources of exposure or alternative causes . . . in response to a direct discovery question requiring them to do so.”

¶4 In my opinion, the language of the order is not of the character required to authorize the court to act under its inherent equitable power – and I am doubtful the appellate court should undertake an evaluation of whether the facts could support such a finding where the trial court omitted to do so.