

Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—ASBESTOS—Ga. App.: \$4.2 million verdict upheld in asbestos exposure suit, (Mar. 31, 2015)

By Susan Lasser, J.D.

Objections by a manufacturer and supplier of dryer felts to a \$4.2 million jury verdict awarded to a worker who developed mesothelioma as a result of his exposure to asbestos-containing products were rejected by the Georgia Court of Appeals. The appellate court found that the trial court did not err in its evidentiary, expert testimony, and jury charge rulings, and that the evidence was sufficient to support the jury's finding of liability (*Scapa Dryer Fabrics, Inc. v. Knight*, March 30, 2015, McFadden, C.).

Background. Scapa Dryer Fabrics, Inc., a manufacturer and supplier of dryer felts, appealed a jury verdict finding that Scapa negligently exposed Roy Knight to airborne asbestos fibers and that this exposure was a contributing proximate cause of his development of malignant mesothelioma. Knight and his wife, Milva Knight (claiming loss of consortium), sued Scapa for negligence in product liability and premises liability actions. The Knights claimed that when Knight worked as an independent contractor doing sheet metal work at Scapa's plant between 1967 and 1973, he was exposed to airborne asbestos fibers contained in yarn used by Scapa to weave dryer felts at the plant, as well as to asbestos fibers contained in pipe and boiler insulation that Scapa maintained on the premises. It was these exposures, Knight asserted, that contributed to his development of mesothelioma, which was diagnosed in 2009.

The Knights also sued Union Carbide Corporation, claiming that Knight's mesothelioma was caused by his exposure to asbestos which Union Carbide had sold to non-party Georgia Pacific, LLC. The Knights alleged that Georgia Pacific had used the asbestos to manufacture a joint compound and that Knight was exposed to the asbestos during drywall installation at his house between 1973 and 1975.

Jury verdict. The jury considered evidence during the trial on these claims that Knight additionally was exposed during his life to asbestos fibers contained in multiple other products and considered whether 29 additional non-party entities associated with these products were at fault for Knight's development of mesothelioma, as provided by the Georgia statute concerning apportionment of damages. The jury determined that Knight's mesothelioma was proximately caused in part by the negligence of Scapa and Union Carbide and in part by the negligence of non-party Georgia Pacific. The jury assessed percentages of fault as follows: 40 percent to Scapa; 40 percent to Union Carbide; and 20 percent to Georgia Pacific. Based on the jury verdict's assessing 40 percent of the fault to Scapa, the trial court entered judgment against Scapa in the amount of \$4,187,068.95.

Scapa's arguments on appeal. Scapa challenged the sufficiency of the evidence supporting the jury's verdict of liability, the scientific reliability of an expert witness's testimony, the lack of a hearing prior to the admission of that expert testimony, the jury's failure to allocate fault to other non-parties submitted on the verdict form, and certain jury charge decisions and evidentiary rulings by the trial court. However, the court of appeals affirmed the verdict, finding that there was sufficient evidence to support the verdict, the expert witness's testimony was scientifically reliable, a hearing as to the admissibility of the testimony was not mandatory, the jury was not required to allocate fault to others, and there had been no showing of either harm or error as to any jury charge or evidentiary rulings.

Presumption in favor of the validity of verdicts. The appellate court noted that following a jury's rendering a verdict, "every presumption, inference, and all evidence must be construed most favorably toward upholding the verdict." Thus, neither a directed verdict nor a judgment notwithstanding the verdict (JNOV) can be granted when there is some evidence to support the verdict. Granting these motions when the evidence is in conflict is error, the court said. Only when no evidence supports the verdict can either a directed verdict or JNOV be granted.

Sufficiency of the evidence. Scapa argued that the trial court erred in denying its motion for a directed verdict because there was no evidence showing that Knight was exposed to asbestos while he worked at the Scapa plant or that Scapa had superior knowledge of the risk of the worker's exposure to asbestos. The court rejected this contention, concluding that there was sufficient evidence to support the jury's finding of liability. Thus, there was no error, the appellate court said, in the trial court's denial of Scapa's motion for a directed verdict on

liability.

The court found that the evidence showed that the worker was diagnosed in 2009 with malignant mesothelioma; that the disease was caused by inhalation of airborne asbestos fibers; and that the disease can occur decades after exposure to asbestos. Moreover, there was evidence that the worker was exposed to asbestos during periods from 1967 to 1973 when he worked at the Scapa plant, as well as evidence showing that from 1959 through the mid-1980s, Knight was exposed to asbestos while doing work unrelated to Scapa involving multiple asbestos-containing products in work involving sheet metal, plumbing, drywall, automobile clutches and brakes, and roofing and shingling. As to asbestos exposure attributable to Scapa, the Knights produced evidence that, while Knight worked at the Scapa plant, he was exposed to airborne asbestos fibers from: (1) asbestos-containing yarn used by Scapa to weave dryer felts at the plant and (2) asbestos-containing pipe and boiler insulation that was present when the insulation was removed. Evidence showed that, between 1967 and 1973, Knight worked at the Scapa plant on “several” or “multiple” occasions as an independent contractor. Knight was present at the Scapa plant in proximity to the weaving looms when the looms were using asbestos-containing yarn to weave dryer felts. During the weaving process, airborne asbestos fibers were scraped off the yarn, and asbestos-containing lint or dust was created in the process. There was evidence that Scapa knew or should have known about the health dangers of asbestos exposure as a result of the weaving process at its plant, but did not warn about the dangers or take any steps to protect plant workers from the dangers, prior to 1974.

Other evidence showed that insulation on piping and boilers at the Scapa plant contained asbestos. Knight worked in proximity to the piping and boiler insulation when the insulation was removed releasing airborne dust from the insulation. The court found the evidence was sufficient to show that asbestos-containing products were used, produced, or maintained at the Scapa plant in a manner which released airborne asbestos fibers, and that the worker was at the plant in proximity to those asbestos fibers when they were released.

Expert testimony. The manufacturer/supplier also claimed that on the issue of specific causation, the testimony of the Knights’ expert, Dr. Jerrold Abraham, was founded on junk science and should have been inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court of appeals disagreed. In addition to proof that Knight was negligently exposed by Scapa to asbestos, the Knights were required to prove that these exposures caused his mesothelioma. In a case of multiple exposures to asbestos and involving multiple defendants, the Georgia Supreme Court has held that the plaintiff need not prove that “each individual tortfeasor’s conduct constitutes a ‘substantial’ contributing factor in the injury.” As such, because Georgia law contemplates differing degrees of culpability among joint tortfeasors, a plaintiff can establish proximate causation by proving that “the individual defendant’s tortious conduct had [been] a contributing factor in bringing about the plaintiff’s damages.” Thus, a de minimis exposure is not sufficient. The court of appeals did not find this to be a case of de minimis exposure. Rather, it found that Scapa was responsible for much more than de minimis exposure—that the testimony of Dr. Abraham established that the exposures for which Scapa was responsible were “substantial causes” of Knight’s mesothelioma. The jury’s finding Scapa substantially liable in the amount of 40 percent reflected this finding. The court said that this was a substantial exposure case, and that Dr. Abraham’s opinion about the exposure at issue was offered in response to a hypothetical that corresponded to the facts detailing Knight’s asbestos exposure attributable to Scapa. Dr. Abraham testified that the exposures would have been substantial causes for the worker’s mesothelioma. As such, case law involving de minimis exposure was irrelevant to the claim against Scapa, the court said. In addition, Dr. Abraham’s testimony that there was no *known* safe threshold for risk was very different from saying there was *no* safe threshold and was not controversial.

The appellate court, therefore, determined even as to the opinion about a hypothetical issue, Dr. Abraham’s methodology was founded on scientific investigation and was, thus, sufficient under *Daubert*. Moreover, that opinion was not central to his further opinion that the exposure for which Scapa was responsible was a substantial cause of Knight’s injury, according to the court. As such, the court ruled that the trial court did not err in admitting Dr. Abraham’s expert testimony, and that his opinion that Scapa was responsible for a substantial cause of that injury was more than sufficient under Georgia law.

Allocation of fault. The court of appeals also rejected Scapa’s contention that a new trial was necessary because the jury was “mandated by the evidence to allocate fault to other non-parties.” The court stated that

Scapa had the burden of establishing a rational basis for apportioning fault to a nonparty, and the jury could accept or reject, in whole or in part, the evidence submitted.

Strict liability jury charge. Because there was no strict liability claim, the court of appeals agreed with Scapa that the trial court erred to the extent that the jury charge included instructions related to a claim of strict liability. However, even assuming error, the appellate court found that a review of the charge as a whole showed that the error was harmless. Moreover, the term “strict liability” was never used in the jury charge. In addition, the trial court properly charged the jury on negligence, and there was nothing in the record to indicate that the jury may have based its verdict on an improper strict liability theory of recovery, the court of appeals concluded.

Punitive damages. The appellate court determined that the trial court did not err in submitting the claim for punitive damages to the jury because there was some evidence to support such a claim. The court found that there was evidence from which the jury could have found a want of care and conscious indifference to the consequences by Scapa.

Other objections. The court of appeals also rejected the manufacturer/supplier’s other objections, including certain statements made by Knight’s attorney during opening arguments, the admission of a document, the questioning of a Scapa representative, and certain testimony by Knight. The trial court did not err in these matters. Also, the court found that Scapa failed to show that the trial court’s jury charge as a whole did not fully and accurately apprise the jury of the applicable law or that the failure to give the requested charges was error. Finally, the appellate court found that Scapa failed to show it was harmed by the trial court’s limiting Scapa’s expert’s testimony.

Dissent. Presiding Judge Andrews dissented based on his findings that: (1) the Knights failed to produce reliable and admissible expert testimony to prove on the issue of specific causation that the worker’s exposure to asbestos at the plant was a contributing cause of his mesothelioma; (2) the trial court erred by admitting unreliable expert testimony on the issue of specific causation; (3) the erroneous admission of this expert testimony required that the judgment against Scapa should be reversed; and (4) the case should be remanded for a new trial.

The case is No. A14A1587.

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Companies: Scapa Dryer Fabrics, Inc.

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