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Asbestos verdict finds for plaintiff despite testimony from co-workers

A Missouri Court of Appeals recently held that a defendant was partially responsible for the post-death loss of consortium damages from an electrician's asbestos exposures. *Urbach v. Okonite Co.*, No. ED 104393, 2017 WL 1151067 (Mo. Ct. App. March 28, 2017).

Plaintiff Jean Urbach brought claims of negligence, strict liability, willful-and-wanton misconduct and loss of consortium against the Okonite Co. claiming that the defendants' products caused her husband, Keith Urbach, to be exposed to asbestos fibers during his career as an electrician.

Jean Urbach alleged her husband's inhalation of asbestos fibers from the defendants' products caused Keith to develop mesothelioma which caused his death. Specifically, Jean alleged Okonite-brand asbestos lighting fixture wire contributed to Keith's death.

Okonite denies selling any asbestos-containing fixture wire or any other type of asbestos-containing wire that would be used for lighting fixtures.

Keith died before he was able to testify about his exposure to asbestos-containing products. Therefore, Jean introduced evidence of exposure through the videotaped depositions of two of Keith's co-workers/union brothers. Although Okonite objected to this testimony as being speculative and expert testimony by a lay witness, the trial court admitted the videotapes.

The co-workers worked with Keith primarily at the University of Wisconsin hospital, but also several other job sites. The testimony primarily contained the two co-workers discussing use of what they called "asbestos fixture wire" at several job sites.

One co-worker identified Okonite as a brand he had used

during his career. Importantly, one co-worker directly testified Keith used Okonite-brand asbestos fixture wire during his work at the University of Wisconsin Hospital.

Prior to the case being submitted to the jury, Okonite filed a motion for directed verdict, which the trial court denied. The jury returned a verdict in favor of Jean in the amount of \$4,165,000, including \$1,825,000 for loss of consortium. The jury apportioned 5 percent fault to Okonite, resulting in a total jury verdict against Okonite in the amount of \$208,250.

Following the verdict, Okonite filed a motion for judgment notwithstanding the verdict, arguing Jean failed to present competent evidence for causation.

Further, Okonite argued the damages should be reduced in accordance with Wisconsin's comparative fault statute and damages cap. Okonite also filed a motion to compel assignment of Jean's asbestos bankruptcy trust claims.

The trial court denied all of Okonite's motions; Okonite appealed.

Issues

(1) Did the trial court err by denying Okonite's motions to strike and by allowing Jean to introduce opinion testimony by lay co-worker fact witnesses?

(2) Did the trial court err when it denied Okonite's motion for directed verdict and for judgment notwithstanding the verdict because the plaintiff's evidence was insufficient under Wisconsin law to establish causation?

(3) Did the trial court err when it entered a judgment that failed to reduce damages for post-death loss of consortium in accordance with Wisconsin's statutory cap?

(4) Did the trial court err by failing to require Jean to assign

TOXIC TORT TALK



CRAIG T. LILJESTRAND

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

to Okonite all future rights or claims she had or may have against an asbestos bankruptcy trust, as required by Wisconsin law?

Analysis

(1) The appellate court found that admitting the testimony of the co-workers was not an abuse of discretion. Although Wisconsin law applies substantively to

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the case, Missouri law governs the admissibility of the evidence as this is a procedural matter.

The appellate court reviews decisions of admissibility with an extremely high level of discretion and only will reverse when " ...

clearly against the logic of the circumstances ... and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."

The appellate court found the co-workers testimony was not an abuse of discretion because the testimony consisted almost entirely of their personal experience performing electrical work, sometimes doing the same jobs as Keith Urbach. Although the co-workers occasionally opined as to whether Keith would have used the same products or would have performed the same tasks, this testimony is not so prejudicial that it tends to lead the jury to decide the case on some basis other than the established propositions in the case.

(2) The appellate court found there was sufficient evidence to support causation. The test for causation in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result. Wisconsin law requires a plaintiff to prove that the defendant's asbestos-containing product was a cause, not the cause, of the decedent's asbestos-related disease.

Okonite argued that the mere possibility Urbach was exposed to Okonite-brand asbestos fixture wire was not enough for causation. The appellate court relied on two Wisconsin cases in which the court found that a jury's reasonable inferences based on testimony could conclude the decedent was in contact with the defendant's product.

Here, the jury could make the reasonable inference that Keith Urbach was exposed, in part, to asbestos contained in an Okonite product based on the testimony of the co-workers. Specifically, one co-worker testified that he used and worked with Okonite-brand asbestos

fixture wire while Urbach was present.

(3) The appellate court ruled the trial court correctly applied the Wisconsin damages cap on loss of consortium. The total amount of damages for loss of consortium was \$1,825,000 and \$91,250 of this was attributed to Okonite.

Okonite argues the total amount should have been reduced to \$350,000 and then apportioned accordingly. The trial court instead held that it did

not need to apply the Wisconsin damages cap because the loss of consortium judgment against Okonite was below the \$350,000 cap.

The appellate court affirmed because the Wisconsin Supreme Court previously held that a trial court must first apportion liability between the plaintiff and defendant, and then apply the cap if necessary. Further, the Wisconsin Supreme Court previously held that only the total recovery was limited by the

statutory maximum. Therefore, the court affirmed the \$91,250 in loss of consortium damages.

(4) The appellate court ruled the trial court did not err when it did not require Jean Urbach to assign to Okonite all future rights or claims she has or may have for a personal-injury claim against an asbestos bankruptcy trust before collecting any amount of the judgment.

The main issue is whether Wisconsin law requiring this assignment was procedural or sub-

stantive. If substantive, the court must follow Wisconsin law. However, if the statute is procedural in nature, Missouri law applies. Missouri law does not require assignment of future claims.

The court found the rule was procedural because it was merely a “procedural hurdle” and not a substantive right that Okonite may enforce against the plaintiff. Accordingly, the court found Jean was not required to assign all future claims to Okonite before collecting damages.