

Chicago Daily Law Bulletin®

Volume 163, No. 184

Serving Chicago's legal community for 162 years

Expert's theories deemed shades of the same color, properly excluded

The 7th U.S. Circuit Court of Appeals recently held that the “cumulative exposure” and “each and every exposure” theories of causation in asbestos cases are the same and that these theories do not meet the standards required for proper expert testimony under Federal Rule of Evidence 702 and *Daubert*.

Charles Krik, the plaintiff in *Krik v. Exxon Mobil Corp., et al.*, No. 15-3112, 2017 U.S. App. LEXIS 16795 (7th Cir. 2017), worked aboard Navy vessels removing insulation produced by Owens-Illinois Inc. from 1954 to 1960. He later worked as an independent contractor at an Exxon Mobil refinery for two weeks replacing heaters he stated were insulated with asbestos.

Krik also smoked a pack and a half of cigarettes every day for 30 years. Krik was diagnosed with lung cancer and brought this action against Owens-Illinois Inc. and Exxon Mobil, alleging each company exposed him to asbestos fibers while he worked. A U.S. District Court jury found that cigarettes were the sole cause of Krik's cancer.

Krik appealed the decision, primarily arguing that the district court erred in excluding expert testimony regarding the “each and every exposure” theory of causation, and second, that he was denied a fair trial when a private investigator interviewed a juror to determine if the juror knew the defendant.

Before trial, the defendants moved to exclude Dr. Arthur Frank, an expert witness who would testify about the “each and every exposure” theory of causation. Frank's theory stated that any exposure to asbestos fibers, regardless of amount or length of exposure, constitutes a cause of injury.

The initial judge in the matter, Judge John Z. Lee, prohibited Frank from testifying to the theory at trial. Citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, Lee concluded that Frank did not establish that the theory was suf-

ficiently reliable to be admitted under Rule 702.

The case was transferred to another judge, Judge Manish Shah. At trial, Frank recast the “each and every” theory as a “cumulative exposure” theory. Frank's “cumulative exposure” theory stated that every minute of asbestos exposure adds to a plaintiff's cumulative exposure and is thus a contributing factor to the illness. Shah held a voir dire of Frank and determined that the “cumulative exposure” theory was not different from the “each and every exposure” theory prohibited by Lee.

Like Lee, Shah excluded Frank's testimony because the testimony was “still not tied to the specific quantum of exposure attributable to the defendants, but was instead based on his medical and scientific opinion that every exposure is a substantial contributing factor to the cumulative exposure that causes cancer.”

The 7th Circuit affirmed Lee's and Shah's decision to exclude Frank's expert testimony. On appeal, Krik argued that Shah errantly determined that the cumulative exposure theory was the same as the “each and every exposure” theory Lee had barred. The 7th Circuit concluded that Frank's testimony regarding the cumulative exposure theory was effectively the same as the “each and every exposure” theory.

The 7th Circuit further held that Frank's expert testimony was properly excluded because the testimony did not meet the standards required by Federal Rule of Evidence 702 and *Daubert*.

The 7th Circuit reviewed the lower court's rulings using an abuse of discretion standard and first affirmed the decision to prohibit Frank's testimony regarding the “each and every exposure” theory. The court noted that the law of causation in asbestos litigation requires a plaintiff to prove that a defendant's actions or products were a substantial contributing factor to a plaintiff's injury.

The court explained that an ex-

TOXIC TORT TALK



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pert must connect the nature of the asbestos exposure to a scientific practice admissible under *Daubert*. The court reviewed Lee's application of *Daubert* to Frank's testimony and concluded that the testimony was properly excluded.

Under *Daubert*, expert testimony is properly admitted when the principle behind the testimony is scientifically valid and properly applies to the facts of the case. Case law from the 7th Circuit has outlined guidelines to determine whether expert testimony is proper, including (1) whether the theory has been tested; (2) whether the theory is subject to peer review; (3) whether the theory has been evaluated for potential error rates; and (4) whether the theory is accepted in the relevant scientific community.

Applying this framework, Lee concluded that this theory “ignored fundamental principles of toxicology that illnesses like cancer are dose dependent.” Moreover, Lee noted that Frank's “each and every exposure” theory only provided general citation to scientific literature, did not identify any peer-reviewed articles agreeing with the theory and did not discuss an error rate. As such, the

7th Circuit held that Frank's testimony “each and every exposure” theory was properly barred.

The 7th Circuit next affirmed Shah's conclusion that the “cumulative exposure” theory was the same as the “each and every exposure” theory. The 7th Circuit noted that Frank's testimony conflated the “each and every exposure” and “cumulative exposure” theories together with such statements as these:

- “The cumulative exposure to asbestos from each and every product of any and all fiber types contributes to asbestos caused lung cancer.”
- “It is virtually never possible to know the exact dose from any product, but it is recognized that any exposure above zero is a contributing factor to the cumulative exposure.”

The 7th Circuit held that the “cumulative exposure” theory was no different than the “each and every exposure” theory because each states that it is impossible to determine which particular exposure caused illness. As such, Shah did not abuse his discretion in prohibiting Frank's testimony.

The court finally noted that the 6th and 9th Circuits — and more than 30 other federal and state courts — have held that “cumulative exposure” or “each and every exposure” theories of causation should be excluded.

The court stated that the “each and every exposure” and “cumulative exposure” theories improperly shift the burden of proof on the element of causation to the defendant, as the defendant will be forced to exclude potential causes of illness.

Such a shift would invalidate the substantial contributing factor test. The court held that Shah did not abuse any discretion in determining that the “cumulative” and “each and every exposure” theory were the same, and thus applying Lee's initial ruling prohibiting Frank's testimony. As such, Frank's testimony was properly excluded.