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'Substantial factor' makes asbestos cases a little different in one state

In a recent diversity action, the 6th U.S. Circuit Court of Appeals held that the "every exposure" theory is inconsistent with Kentucky's "substantial factor" test for causation in asbestos cases.

The case is *Stallings v. Georgia-Pacific Corp., et al.*

William Stallings, the original plaintiff, served in the Navy for four years, working aboard the destroyer USS Waller. Stallings worked daily on the ship's valves, pumps, boilers and turbines, all while breathing in the asbestos-laced dust that the insulation and other coatings allegedly gave off.

After leaving the Navy, Stallings worked as a drywall finisher for three years. In that time, Stallings would regularly encounter asbestos-laden materials, this time in the form of the "mud" that he and his fellow finishers used to cover the separation in drywall panels. The finishing material was later sanded, stirring up asbestos-tainted dust.

Stallings would later identify one of the materials he used on those jobs as Bestwall, a product of the Georgia-Pacific Corp. Several years later, Stallings used a Georgia-Pacific product — a drywall mix containing asbestos — while finishing two rooms in his home and for two weeks or so inhaled the dust that the dried mixture produced when sanded.

Stallings was diagnosed with mesothelioma in September 2011. He filed suit a year later in Kentucky state court against Georgia-Pacific and the other manufacturers of the asbestos-containing product he had been exposed to decades earlier, seeking punitive damages under theories of strict liability and negligence.

The case was removed to federal district court and proceeded there until September 2013 when Stallings died of complications related to his mesothelioma. His wife, Carol, filed an amended complaint as the surviving spouse and as executrix of Stallings' estate. In addition to the original charges, she added a wrongful-death claim.

The remaining defendants, including Georgia-Pacific, moved for

summary judgment. The district court noted that for the claims against Georgia-Pacific to survive a motion for summary judgment, Stallings would have had to provide evidence that the company's products were probably, rather than possibly, a "substantial cause" of her husband's mesothelioma.

Stallings experts could testify only "that any exposure to asbestos qualifies as a substantial exposure," offering no more precise an estimate of how much of the exposure was due specifically to Georgia-Pacific's products.

As to the claims against Georgia-Pacific, the court found that Stallings had failed to establish that the company's products were a substantial factor in bringing about Stallings' cancer. Accordingly, the district court dismissed the claims against Georgia-Pacific; Stallings appealed.

The 6th Circuit affirmed the district court's grant of summary judgment. Under Kentucky law, the court noted, Stallings "must show that Georgia-Pacific's products were a substantial factor in bringing about Stallings' disease rather than just a factor."

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The 6th Circuit noted that the court's precedent forecloses the theory at the heart of Stallings' case for causation: That any further exposure to asbestos would have been a substantial factor in bringing about an asbestos-related disease like mesothelioma. Citing *Martin v. Cincinnati Gas & Electric Co.*, 561 F.3d 439 (6th Cir. 2009), and *Moeller v. Garlock Sealing Technologies, LLC*, 660 F.3d 950 (6th Cir. 2011), the court noted



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that the "any" or "every exposure" theory of causation cannot satisfy Kentucky's "substantial factor" standard, as that theory would "make every incidental exposure to asbestos a substantial factor," rendering that standard, and its substantial requirement, all but meaningless.

The court further reasoned that such testimony is too sparse to satisfy Kentucky's "substantial factor" test, especially given William Stallings' considerable daily exposure to asbestos aboard the Waller.

Stallings was decided 2-1 with Judge John M. Rogers writing for the majority and Judge Karen Nelson Moore dissenting. Disagreement among the judges centered on the significance of *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010), a Kentucky Supreme Court decision that was never mentioned by either party until the court requested supplemental briefing to address it.

The majority noted that its

decision in *Stallings* is not inconsistent with *CertainTeed* for two reasons. First, *CertainTeed* simply did not evidence the Kentucky Supreme Court's adoption, or intent to adopt, the "every exposure" theory.

According to the majority, "[T]he Kentucky Supreme Court at most determined that, under a clearly erroneous scope of review, the district court had found enough evidence of causation to get to a jury in a case where two doctors relied on an 'every exposure' theory, but another doctor testified in favor of causation without relying on such a theory, and plaintiffs' opening statement — asserting causation — 'further compelled' deference to the trial court's determination."

Second, *Martin*, which rejected the "every exposure" theory, was decided a year before *CertainTeed*. One year after *CertainTeed*, the 6th Circuit applied *Martin*'s holding in *Moeller*, without mentioning the ruling in *CertainTeed* and what effect, if any, it had on *Martin*'s rejection of the "every exposure" theory.

Therefore, the reaffirmance of *Martin* in *Moeller* would raise a difficult issue of stare decisis if the Kentucky Supreme Court had adopted the "every exposure" theory in *CertainTeed*.

In her dissent, Moore rejected the majority's interpretation of *CertainTeed*, noting, "[T]he Kentucky Supreme Court made clear in [*CertainTeed*], that the 'any' or 'every exposure' theory is an acceptable theory of causation that can satisfy Kentucky's 'substantial factor' standard."

Even accepting the majority's interpretation of *CertainTeed*, however, Moore would still have held Carol Stallings established legal causation under Kentucky law based on the medical testimony and statements made in the depositions of Stallings, a Georgia-Pacific representative and a doctor.

As to the majority's point of failing to consider or mention *CertainTeed* in *Moeller*, "There is nothing to suggest that the failure to mention the case ... was anything more than an oversight."