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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001595-MR

MICHAEL HUDSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 03-CI-008385

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Michael Hudson appeals from a jury verdict and judgment of the Jefferson Circuit Court in favor of CSX Transportation, Inc. Hudson filed suit against CSX under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, claiming that he had sustained a permanent brain injury as

[1] Senior Judge Michael L.Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

a result of his exposure to various industrial solvents and cleaners during his employment with CSX. On appeal, Hudson claims that the trial court erroneously excluded evidence, including expert testimony, relating to his alleged exposure to the solvent trichloroethylene. After our review, we affirm.

The following facts were testified to at trial. Hudson began his career with the railroad in 1973 as a machinist apprentice at the Louisville & Nashville Railroad Company, a predecessor to CSX, and worked at that location until 1988. He began his employment at the company's South Louisville Locomotive Repair & Maintenance Shops and eventually became a journeyman machinist in 1978. Hudson's job duties included cleaning locomotives and their parts, working on lathes, rebuilding injectors, and tuning up engines. To clean this equipment, Hudson used a solvent that railroad employees referred to as "Dowclean," "Dowcleaner," or "L&N #3" – which the record reflects was composed of the chlorinated hydrocarbons 1,1,1 trichloroethane and perchloroethylene – along with mineral spirits and alkaline soaps. According to Hudson, he regularly removed Dowclean out of a drum or vat with a bucket and used it to clean motor parts.

Hudson testified that when using Dowclean, he became dizzy and lightheaded and would get headaches. Because of this, he stayed in an area where Dowclean was being used no longer than necessary and routinely went outside to get fresh air and to clear his head. Other railroad employees experienced similarly adverse symptoms when they used the solvent. Hudson also recalled working near vapor phase degreasers – machines that were heated and used to clean engine parts.

He testified that he would breathe in fumes when he had to remove something from the degreaser, but he did not know what chemical was used in the machine.

Hudson testified that he generally took an aspirin to alleviate any headaches that he experienced and got on with his work because he wasn't a "complainer." He could not recall ever going to a shop nurse, medical officer, or other health care provider with complaints about any of his symptoms while he worked for the railroad. Hudson also indicated that he had no idea that his use of chemical solvents in his work might have a long-term detrimental effect on his health. However, he testified that as early as the mid-to-late 1980s, he began having memory problems, sleep issues, and more chronic headaches. He also began having trouble focusing on a single task or otherwise concentrating. Years after leaving the company for another job, Hudson was diagnosed with "chronic toxic encephalopathy," a somewhat controversial diagnosis that is typically characterized as a form of permanent, irreversible brain injury characterized by short-term memory loss, depression, anxiety, and diminished mental function. It was also suggested that this injury was the result of overexposure to dangerous chemicals and solvents while Hudson was employed at CSX.

On September 24, 2003, Hudson filed suit against CSX in Jefferson Circuit Court and sought relief pursuant to FELA. He claimed that during the course of his employment with CSX, he was regularly overexposed to toxic solvents, chemicals, fumes, mineral spirits, lye soaps, and other cleaners and solvents – including 1,1,1 trichloroethane – due to the negligence of CSX. Hudson

alleged that this overexposure had resulted in various permanent injuries, including chronic toxic encephalopathy.

After extensive discovery, the case was tried before a Jefferson County jury from July 15, 2008, through July 25, 2008. Seventeen witnesses testified in all, with the majority of those being expert witnesses and other physicians. Following its deliberation, the jury voted 9-3 in favor of CSX and concluded that the company had not been negligent by failing to provide Hudson with a reasonably safe place to work. Thus, CSX was found not liable for any claimed injuries suffered by Hudson during the course of his employment with the company – including toxic encephalopathy. Hudson subsequently filed this appeal.

On appeal, Hudson argues that the trial court erred by excluding evidence, including expert opinion testimony, relating to his exposure to the chemical solvent trichloroethylene while he was employed at CSX and how that exposure contributed to his injuries. Prior to trial, CSX filed a motion *in limine* seeking to exclude any testimony relating to chemicals other than those to which Hudson was exposed and to which he testified. During his depositions, Hudson specifically mentioned only Dowclean, mineral spirits, and lye as cleaners to which he had been exposed. Because of this fact, CSX contended that evidence as to which chemicals had caused Hudson's alleged injuries should be limited to these items. CSX also argued that Hudson's experts had limited their causation opinions only to Hudson's exposure to Dowclean, mineral spirits, and possibly

perchloroethylene; thus, CSX contended that the trial court should exclude evidence that Hudson was exposed to any other solvents – including trichloroethylene – because of a lack of expert testimony linking that possible exposure to Hudson's injuries. CSX notes that although many of Hudson's experts provided broad disclosures relating to a number of chemicals and solvents, their deposition testimony focused on Dowclean and excluded other solvents, including the chlorinated solvent trichloroethylene. Hudson argued in response that although he had not personally mentioned all of the solvents to which he had been exposed, that testimony would be produced by his former coworkers at the railroad; therefore, CSX's motion should be denied.

On July 8, 2008, the trial court entered an order granting CSX's motion. That order stated as follows:

> Testimony relating to chemicals other than those to which Plaintiff was exposed and to which he testified. CSX seeks to prohibit testimony that Plaintiff was exposed to chemicals other than lye, "Dow Cleaner," and mineral spirits; Plaintiff's experts have concluded that his brain damage is a result of exposure to "Dow Cleaner." Assuming the other chemicals Plaintiff wishes to have presented at trial are not contained in the product which allegedly caused Plaintiff's permanent injury, introduction of those other chemicals is minimally relevant at best. The prejudice to CSX is obvious – it knew of and/or subjected its employees to other chemicals; i.e., prior bad acts. This potential prejudice far outweighs any peripheral relevance and will not be admitted. KRE [Kentucky Rules of Evidence] 402, 403, and 404. CSX's motion is GRANTED.

Thus, the trial court precluded any testimony or evidence relating to solvents or chemicals used in the South Louisville shops unless it was shown through Hudson's experts that those items contributed to his brain injuries. This ruling ultimately prevented Hudson from presenting evidence specifically relating to his alleged exposure to trichloroethylene and how it may have contributed to his injuries.[2]

Hudson claims that this decision flew in the face of a plethora of deposition testimony and documentation that had conclusively established that he had been exposed to trichloroethylene while employed at CSX. In response, CSX contends that the exclusion of evidence relating to Hudson's alleged exposure to trichloroethylene was appropriate in light of the fact that his experts failed to causally relate his toxic encephalopathy specifically to his being exposed to trichloroethylene. CSX further argues that – unlike the evidence of Hudson's exposure to Dowclean – there was no direct testimony produced indicating that Hudson was exposed to trichloroethylene or that exposure to trichloroethylene caused him any acute symptoms of dizziness or lightheadedness or any long-term chronic injury. Instead, there was only the suggestion that the solvent could be found in locations where Hudson worked. CSX also maintains that the exclusion of this evidence did not hinder Hudson's ability to establish that his injuries were caused by overexposure to chemical solvents.

[2] The record reflects, however, that the trial court did allow some testimony relating to the toxicity of chlorinated solvents in general, including trichloroethylene. A former coworker of Hudson's was also allowed to testify about the use of the solvent in vapor-phase degreasers and how those machines produced a very strong smell and fumes.

We review a trial court's decision as to the admittance or exclusion of evidence under an "abuse of discretion" standard. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004). This standard also applies as to the admissibility of expert testimony. *Burton v. CSX Transp., Inc.*, 269 S.W.3d 1, 6 (Ky. 2008). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). An abuse of discretion exists only when we are "firmly convinced that a mistake has been made." *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003) (citation omitted).

Hudson argues that the record – including avowal testimony produced at trial – supports his position that he was exposed to trichloroethylene during his employment with CSX. Al Fritts, a former general manager of safety, general manager of risk management, and chief safety officer for CSX, testified in his deposition that he believed that trichloroethylene was used in the South Louisville shops in the 1970s while Hudson was an employee with the company. Larry Elmore, Hudson's former coworker, testified at trial that trichloroethylene was used as a degreasing agent in many areas throughout the South Louisville shops, including those in which Hudson worked. Elmore indicated that trichloroethylene was a key ingredient used in vapor-phase degreasers of the type referenced by Hudson in his testimony. Such degreasers were located throughout Shop 1 of the South Louisville shops in particular, and CSX employees did not like to work near

them because of the fumes they produced. J.C. Kelly, another coworker of Hudson's, gave additional avowal testimony that he and other CSX employees had used trichloroethylene. Based on this evidence, there is certainly cause to believe that Hudson was exposed to the solvent during his employment with the railroad. The fact that Hudson himself did not mention this solvent by name should not have necessarily precluded evidence of his exposure to it from being introduced.

This conclusion alone, however, does not end the discussion. Hudson's alleged exposure to trichloroethylene in this case is only relevant if sufficient evidence is produced identifying that exposure as a cause of his claimed injuries. "It is beyond dispute that causation is a necessary element of proof in any negligence case." *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 124 (Ky. 1991). Moreover, it is well-established that "evidence of causation must be in terms of probability rather than mere possibility[.]" *Id.* This latter rule is of particular importance here.

In our recent opinion in *Combs v. Stortz*, 276 S.W.3d 282 (Ky. App. 2009), we addressed a situation in which the plaintiff's treating physician offered a medical opinion that the plaintiff "might possibly" require neck and/or shoulder surgery. The trial court excluded this opinion as speculative and that decision was appealed to this Court. We agreed with the trial court's decision and held that "the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Id.* at 296, quoting *Schulz v. Celotex Corp.*, 942 F.2d 204,

209 (3rd Cir. 1991). Thus, where a plaintiff's expert couches his opinion only in terms of "possibility" as opposed to "probability" or "certainty," it is not error to disallow that opinion from being admitted as evidence because of its speculative nature. *See id.*, quoting *Schulz*, 942 F.2d at 208-09; *see also Young v. L.A. Davidson, Inc.*, 463 S.W.2d 924, 926 (Ky. 1971).[3]

After reviewing the disclosures, deposition testimony, and trial testimony produced by Hudson's experts, it is clear that none of them linked Hudson's alleged toxic encephalopathy directly to trichloroethylene in anything more than a speculative manner that touched only on "possibility." For example, Dr. George C. Rodgers, Jr., a professor of pediatrics, pharmacology, and toxicology at the University of Louisville and an expert witness in toxicology, testified in his deposition that "[t]he solvents that we're dealing with here are trichloroethane, perchloroethylene, mineral spirits, perhaps trichloroethylene. That one always gets argued. Those are the organic solvents that are at issue." Dr. Rodgers concurred with the diagnosis of others that Hudson suffered from toxic encephalopathy, but he declined to render his own diagnosis. At trial, Dr. Rodgers

[3] We note that this opinion should not be viewed as an overturning of our decision in *Sakler v. Anesthesiology Associates, P.S.C.*, 50 S.W.3d 210 (Ky. App. 2001), in which we held that "defendants in medical malpractice actions may introduce expert witness testimony to rebut a plaintiff's expert witness testimony couched in terms of 'reasonable medical probability,' even though the defendant's expert witness's testimony is couched only in terms of 'possibility.'" *Id.* at 213. The difference between the levels of certainty required by a plaintiff's expert's opinion as opposed to a defense expert's opinion in terms of causation can be explained by the fact that plaintiffs bear the burden of establishing causation. In contrast, defendants are not required to "disprove" causation. Instead, they must only produce "credible evidence which tends to discredit or rebut the plaintiff's evidence" so as to "convince the trier of fact that the alleged negligence was not the legal cause of the injury." *Id.* at 214, quoting *Wilder v. Eberhart*, 977 F.2d 673, 676 (1st Cir. 1992).

testified that he believed that Hudson developed a permanent brain injury as a result of his exposure to solvents – specifically trichloroethane and perchloroethylene – while employed by CSX. However, he ultimately produced no opinions directly linking Hudson's injuries to the particular solvent trichloroethylene within a reasonable degree of probability.

Dr. Edward L. Baker, an occupational medicine expert and the Director for the Institute of Public Health at the University of North Carolina-Chapel Hill, did not identify trichloroethylene as a solvent that served as a basis for his opinion in his expert disclosure. Like Dr. Rodgers, he also offered only equivocal testimony during his deposition on the subject of trichloroethylene:

> Q. Is it fair to say that as you sit here today, your opinions are that his exposures are related to Dow Clean and mineral spirits because you can't name other ones for me?
>
> A. Well, I will simply say that at this facility, trichloroethylene was used at one point. However, I don't have evidence that relates to his particular work and how that might have linked to this particular chemical. That's why I can't say with more specificity about exposure to that particular solvent. But in general terms, I believe that he could well have been exposed to trichloroethylene.
>
> ***
>
> Q. Do you have any opinion, sir, within a reasonable degree of medical probability that Mr. Hudson's work or alleged work with trichloroethylene, TCE, may have or did, in fact, cause the problem he's having?
>
> A. Again, I don't have an opinion on – as it relates to your specific question, because I would have to go back

> again and ascertain whether or not there's evidence in the record specifically that relates to trichloroethylene. As I said earlier, it's my view that it was used at this facility over time.

At trial, Hudson introduced avowal testimony from Dr. Baker seeking to causally relate Hudson's exposure to trichloroethylene to his toxic encephalopathy. Again, however, Dr. Baker was equivocal in his answer. He was asked:

> Q. And so do you have an opinion within the realm of medical probability whether trichloroethylene in this – would have contributed to the cause of his solvent-induced toxic encephalopathy?
>
> A. Well, it would be my view that he was exposed to a number of chlorinated hydrocarbon solvents that all have similar structures and similar toxicities. Trichloroethylene is one of them. *If* he was exposed to trichloroethylene significantly, it would have contributed to this problem.

(Emphasis added). Thus, Dr. Baker remained unable to opine within a reasonable degree of medical probability that Hudson had been exposed to trichloroethylene to such an extent that it helped cause his toxic encephalopathy.

Dr. Michael J. Ellenbecker, an expert in industrial hygiene, testified in a similarly speculative manner:

> Q. What basis do you have, sir, that Mr. Hudson was exposed to TCE [(trichloroethylene)]?
>
> A. Well, it is my recollection that other machinists at the South Louisville shop testified to specifically using TCE. Mr. Hudson did not recall, as I indicated earlier, the names of any of the other materials he used, but based on coworker testimony, I think it's at least possible that he was exposed to TCE.

> Q. Do you have an opinion within a reasonable degree of not possibility but probability as to whether Mr. Hudson was exposed to TCE?
>
> A. No.
>
> Q. So with regard to TCE, your opinion is just a possibility, correct?
>
> A. Yes.

Dr. Ellenbecker went on to testify that he could not state with a greater than 50 percent certainty that Hudson was exposed to trichloroethylene. He also offered no specific testimony as to whether that solvent had a causal effect on Hudson's toxic encephalopathy. At trial, however, he was allowed to testify generally as to the toxicity of trichloroethane, perchloroethylene, and trichloroethylene over CSX's objection.

Hudson's other expert witnesses also failed to specifically link Hudson's alleged exposure to trichloroethylene to his toxic encephalopathy. For example, Dr. R. Michael Kelly, a board-certified internal and occupational medicine physician and expert in occupational medicine, asserted in his deposition that "Dowclean" is a "mixture of Trichloroethane and Trichloroethylene"; however, the parties agree that the solvent identified as "Dowclean" in this case did not contain trichloroethylene and was instead composed of 75 percent 1,1,1 trichloroethane and 25 percent perchloroethylene. Moreover, Dr. Kelly offered no evidence in his deposition specifically connecting an exposure to trichloroethylene to Hudson's injuries.

Consequently, although there was perhaps sufficient evidence that Hudson was exposed to trichloroethylene while employed at CSX to justify putting evidence relating to that chemical before the jury, the fact that Hudson's experts could only tenuously, at best, link trichloroethylene to Hudson's toxic encephalopathy was a justifiable reason for the court to decline to do so. *See Combs*, 276 S.W.3d at 296, quoting *Schulz*, 942 F.2d at 208-09. Thus, we conclude that the trial court did not abuse its discretion in disallowing introduction of this evidence at trial.

The judgment of the Jefferson Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority on the analysis concerning the testimonies of the fact witnesses wherein the majority concludes that "Based on the evidence, there is certainly cause to believe that Hudson was exposed to the solvent [trichloroethylene] during his employment with the railroad."

I dissent because I disagree with the exclusion of the avowal testimony of Dr. Edward L. Baker. The introduction of Dr. Baker's testimony is certainly controlled by KRE 703 and our recent decision in *Combs v. Stortz*, 276 S.W.3d 282 (Ky. App. 2009). As the majority agrees, *Stortz* requires that the

testimony of a medical expert be couched in terms of medical probability or certainty as to whether a particular chemical would have caused a particular result.

In examining the avowal testimony of Dr. Baker contained in the majority opinion, I note that in response to the question "And so do you have an opinion within the realm of medical probability whether trichloroethylene in this – would have contributed to the cause of his [Hudson's] solvent-induced toxic encephalopathy?" Dr. Baker did not reiterate the word "probability" but did in fact state, quite unequivocally, "If he was exposed to trichloroethylene significantly, it would have contributed to this problem [toxic encephalopathy]."

No interpretation of Dr. Baker's response is needed, he spoke plainly. Dr. Baker said if Hudson was exposed significantly, the exposure would have contributed to Hudson's toxic encephalopathy. This is beyond probability and into the realm of certainty, as required by *Stortz*. Once Dr. Baker unequivocally linked the chemical trichloroethylene to Hudson's toxic encephalopathy, it was then a jury question based upon the factual evidence presented by Hudson whether significant exposure did in fact occur and the extent it contributed to Hudson's "problem."

I believe there is little doubt that the exclusion of Dr. Baker's testimony affected a substantial right of Hudson; it would have been the only medical testimony linking trichloroethylene with toxic encephalopathy. Therefore, pursuant to KRE 103, it was reversible error to exclude the testimony. I would reverse and remand for a new trial.

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