STATE OF MICHIGAN

COURT OF APPEALS

IRENE FARLEY, Personal Representative of MANLEY FARLEY,[1] Deceased,

Plaintiff-Appellee,

v

OWENS-CORNING FIBERGLAS,

Defendant-Appellant.

UNPUBLISHED
February 18, 1997

No. 175156
St. Clair Circuit Court
LC No. 91-003108-NP

Before: Reilly, P.J. and White and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant appeals from the order of judgment and amended order of judgment in favor of plaintiffs entered following a jury trial in this asbestos exposure product liability case. The jury found that defendant's negligence was a proximate cause of plaintiff's lung cancer, and reduced the award to plaintiff by twenty percent for fault attributed to plaintiff. We affirm.

Defendant became a distributor of Kaylo, an asbestos-containing insulation product, around 1953. In 1958, defendant purchased the Kaylo division from Owens-Illinois, and thereafter manufactured asbestos-containing Kaylo until 1972. Plaintiffs argued that defendant had reason to know and actually knew that Kaylo was dangerous, and breached its duty to warn of the product's dangers, resulting in plaintiff's injuries. Defendant's theory was that plaintiff's lung cancer was not caused by asbestos exposure, but rather by plaintiff's cigarette smoking.

At trial, plaintiff testified that he was seventy years old, worked for Detroit Edison in the Marysville and St. Clair power plants from 1946 until the late 1980s, and was diagnosed with lung cancer in 1989. Plaintiff further testified that part of his left lung was removed August 1989, and that in May 1993, a spot was found on his right lung, and later tests revealed terminal cancer in both lungs. Plaintiff testified that he was never a heavy smoker, that he smoked around six to eight cigarettes a day maximum, and quit smoking in 1969.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff testified that from 1953 to 1958, he worked as a pipefitter helper repairing steam valves. His duties included helping in the removal of insulation from steam pipes. Plaintiff testified that carpenter knives were used to cut and tear the insulation off, and that the insulation dropped to the floor. Plaintiff explained that during this process, the pipes would be very dusty and dust was visible in the air and on the floor. Plaintiff was responsible for cleaning up the insulation on the ground, and did so by picking up the bigger chunks and placing them in a wheel barrow. He swept the smaller pieces into a shovel, creating dust. Plaintiff testified that when the pipe coverers placed new insulation around the pipes, he could be within ten or twelve feet of them, and that the air was very dusty. The pipe coverers used a hand saw to cut the new material to size and the pieces fell on the floor and remained there until the job was done. Plaintiff also worked as a boiler maker helper, and at times would work directly below the insulators, who were covering the pipes above him while he was working below. Plaintiff testified that the Marysville Plant had gratings rather than floors and work being done above filtered down. Plaintiff testified that the environment was very dusty.

Plaintiff testified that there were numerous times when he saw boxes of insulation, some new, some used, some left by the pipe coverers, and that he never saw a label or warning on any of the boxes. In 1958, plaintiff was transferred to the St. Clair plant, as a coal and ash handler. During that time, the pipe coverers repaired the steam lines' insulation about once a month for two to three days, and plaintiff was in their vicinity. Subsequently, plaintiff was in the proximity of insulators when they performed other repairs. In 1969, plaintiff was promoted to foreman, and was again in the vicinity of insulation repairs every few months.

I

Defendant first argues the trial court abused its discretion by denying its motion for continuance. We disagree.

Nine asbestos product liability cases, including the instant case, were set for trial. All of the plaintiffs had been employed by Detroit Edison. The day before the assigned trial date, the court heard plaintiff's motion to consolidate the nine cases. Plaintiff's counsel argued that plaintiff's case should not be tried separately because of the time it would take, because plaintiff had had a recurrence of lung cancer and was terminally ill, and if the case were not tried soon, he may be dead. Plaintiff's counsel argued that plaintiff, like the other plaintiffs, had asbestosis, worked at the same places, and had been exposed to asbestos in the same fashion as the others. Defense counsel argued that the instant case should be tried separately, after the other cases, or that the defense should get a continuance, stating that he had just learned for the first time that plaintiff had a recurrence of cancer. Plaintiff's counsel responded that plaintiff had testified at deposition four months earlier regarding a recurrence,[2] and that several weeks before trial one of plaintiff's attorneys telephoned one of defendant's attorneys and discussed the matter with him. The defense denied any such telephone communications.

The trial court concluded:

All right. I appreciate both of your comments.

> I'm not completely convinced that Defense doesn't have a certain practical argument that I think the Court should be sensitive to with bunching the Farley case in with the other cases, that that might not be a little bit of mixing apples and oranges and creating a—kind of a difficult potential prejudicial effect that—to the Defendants, that at least puts me in a position I ought to be sensitive to that.
>
> What I'm going to do in this case is I'm going to—I'm going to try the Farley case. We're going to start with that tomorrow. We're going to try that to its completion.
>
> The reason I'm doing that is I'm also sensitive to the fact that the Plaintiffs are concerned that if that one got put over, chances are, at least as far as the Plaintiff himself is concerned, that there might be not any—the [e]state might be interested in what happens, but it's not going to be him alive again. So I think that is a consideration where we don't necessarily have that as a pressing issue as it would relate to any of the other cases.

Adjournments of trial must be based on good cause. *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991); MCR 2.503(B)(1). This Court in *Rosellott v Muskegon County*, 123 Mich App 361, 371; 333 NW2d 282 (1983), noted that cases upholding a trial court's denial of a motion to adjourn have always involved some combination of the same facts: an extended trial, numerous past continuances, no showing of diligence by the movant, and a lack of injustice to the movant. The instant case involved an extended trial. Defendant did not show it had been diligent; plaintiff had testified four months before trial that he had just learned that he had a spot on his lung, and defendant had authorization to obtain plaintiff's medical records. Further, defendant does not dispute plaintiff's argument on appeal that defendant was provided with all available records on October 19, 1993, and that defendant's experts had sufficient time to examine these records, as the defense's case in chief did not begin until October 28, 1993.

Under the circumstances that defendant did not establish either diligence or prejudice, and in light of plaintiff being terminally ill, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a continuance. *Id.*

II

Defendant next argues that the trial court erred in denying its motion for a directed verdict as plaintiff failed to present any evidence other than his own testimony (that he was recently diagnosed as having cancer in both lungs) to establish a recurrence of cancer.

Defendant's claim on appeal is that plaintiff's testimony was inadmissible hearsay and thus was insufficient to establish the recurrence. This claim is not, however, preserved, defendant having failed to object to plaintiff's testimony on this basis at trial. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Defendant did not raise the issue in its first motion for directed verdict, made at the close of plaintiff's proofs, but did argue in its motion for directed verdict and motion to strike, made at the close of all the evidence, that no substantive evidence establishing that plaintiff had a recurrence of

cancer was presented and that plaintiff's and Mrs. Farley's testimony relating to his present condition and future damages should be stricken. Defendant stated:

> Certainly Mr. Farley's relating these communications from his doctors would be relevant as to his mental and emotional state and damages arising out of learning of such a condition and would not be objectionable for that reason. That does not, however, substitute as substantive evidence establishing that Mr. Farley does have the medical condition to which he testified

The second motion for directed verdict was made at the conclusion of all the proofs. Plaintiff's testimony regarding the recurrence of cancer had already been admitted, without limitation as to purpose, and without objection regarding hearsay or competence. The court did not err in rejecting defendant's belated effort to strike the testimony and revive the issue, notwithstanding the failure to object earlier, through the device of a second motion for directed verdict. Once plaintiff's testimony regarding the recurrence was admitted without limitation, there was evidence sufficient to support a denial of defendant's motion.

As to the future damage instruction, also challenged on appeal, we conclude that plaintiff presented sufficient evidence of future damages to permit an award of such damages. Plaintiff testified that he suffered shortness of breath, chest pains, tired very easily, did not go up and down stairs, had chest pains, was unable to participate in activities with his children and grandchildren, and that when he went shopping with his wife, he could only wait on a bench. Thus, we conclude that the jury could infer from this testimony that plaintiff's condition would continue into the future.

III

Defendant next argues that the trial court abused its discretion in allowing evidence that four other witnesses, also employees of Detroit Edison, had lawsuits pending in which they claimed asbestos-related disease, and that the probativeness of such testimony, if any, was outweighed by the danger of unfair prejudice.

Defense counsel did not object when plaintiff's counsel elicited from the first of the four witnesses that he had an asbestos lawsuit pending. Defense counsel then cross-examined the witness on the issue and elicited that plaintiff's counsel was representing the witness in the pending lawsuit. After direct examination, cross-examination, and redirect examination were completed, and defense counsel waived any recross, the court took a break. At this point, defense counsel for the first time challenged the propriety of plaintiff making inquiry regarding asbestos-related lawsuits on direct examination. The trial court indicated that it would permit the issue to be raised by plaintiff on direct examination to avoid an appearance of duplicity that might result if defendant were permitted to first elicit the testimony on cross-examination, and that it would entertain further objections when specific questions were asked. Thereafter, defense counsel voiced no additional objections, and cross-examined the other witnesses regarding their pending lawsuits, eliciting from two of them that plaintiff's counsel was representing them. Further, defense counsel argued in closing argument that only one witness testified for plaintiff "who wasn't a client of the attorneys." Defendant never represented that it would refrain from cross-

examining the witnesses regarding their relationship with plaintiff's counsel. The trial court admitted the evidence because of its relevance to the bias and credibility of the witnesses, not to establish that plaintiff was exposed to asbestos. Under these circumstances, we cannot conclude that the trial court abused its discretion in permitting plaintiff to elicit the testimony on direct. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994).

IV

Defendant next argues that the trial court erred in denying its motion for a directed verdict as plaintiff failed to make a prima facie case that Kaylo was a substantial factor in causing plaintiff's cancer. We disagree.

In reviewing the trial court's decision on defendant's motion for directed verdict, we examine the testimony and legitimate inferences which may be drawn therefrom in a light most favorable to plaintiff. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). If reasonable jurors could honestly have reached different conclusions, then neither this Court nor the trial court may substitute its judgment for that of the jury. *Id.* The threshold requirement of an asbestos case is proof that an injured plaintiff was exposed to an asbestos-containing product for which the defendant is responsible. *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 247; 477 NW2d 133 (1991). To create a factual issue regarding product exposure, a plaintiff must show that the product was used in the specific area where the plaintiff worked within the workplace. *Id.* at 248.

A number of employees at the plants where plaintiff worked testified that Kaylo was commonly used by insulators in those plants. George Sidun, an insulator, testified that Kaylo was used at the Marysville Plant between 1953 and 1958, and testified that insulators cut the insulation, which created dust. James Snover, a pipe-coverer since 1968, testified that he had used a lot of Kaylo, had seen it stored in various locations, and that the worker who was sawing the insulation usually asked for Kaylo. Patrick Sampson testified that Kaylo and a Johns-Manville product were the main insulations used at the St. Clair plant, and that others were used only occasionally. Donald Wehner testified that Kaylo was used by insulators at the St. Clair plant and that there was Kaylo insulation there all the time. William Carman testified that Kaylo was everywhere, that boxes of it were piled everyplace. Carman further testified that he "quite often" observed plaintiff waiting for insulators to finish their work near his equipment when they were cutting Kaylo, so that plaintiff could get his employees back in to put coal in the building.

Bernard Sopha testified that he had personal recollection of plaintiff working in the maintenance department with the boiler-repair "gang" around 1953, that he recalled seeing plaintiff between 1953 and 1958 working in the boiler room where Sopha worked, that he recalled seeing plaintiff there when insulators were repairing the steam pipes with Kaylo insulation, and that the insulators' work caused the air to be dusty in plaintiff's work area. Sopha also recalled seeing plaintiff working in the turbine room, and testified that he recalled seeing Kaylo in the turbine room, where it was used for insulating the steam piping. Sopha testified that he had seen Kaylo all over the plant.

We conclude that plaintiff adequately established that defendant's product was used in his workplace, and reject defendant's argument that plaintiff failed to establish a prima facie case. The trial court properly denied defendant's motion for directed verdict. *Barlow*, at 247-249.

V

Defendant next argues that the trial court erred in refusing to give defendant's proposed non-standard jury instruction on plaintiff's burden of proof, which was taken from *Barlow, supra*. We disagree.

When the standard instructions do not properly cover an area, a trial court is required to give supplemental jury instructions if they properly inform the jury of the applicable law. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995). The determination whether a supplemental instruction is accurate and applicable is within the trial court's discretion. *Bordeaux v Celotex*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). Defendant requested that the jury be instructed:

> Plaintiff must show that Kaylo was used in the specific area where Mr. Farley worked within the work place. Mere proof that Mr. Farley and the product Kaylo are in the work place at the same time does not prove exposure to that product.

We conclude that the standard instructions given regarding the burden of proof, the necessity of establishing proximate cause and the definition of proximate cause, while less specific than the instruction defendant requested, fairly and adequately presented the applicable law. The trial court did not abuse its discretion in ruling that the proposed instruction was covered by the standard jury instructions. *Koester, supra* at 664.

VI

Defendant has cited no authority in support of its argument that the trial court erred in denying its motion for directed verdict because plaintiffs failed to submit evidence regarding what would constitute an adequate warning. Thus, the issue is abandoned. *Speaker-Hines v Treasury Dept*, 207 Mich App 84, 90-91; 523 NW2d 826 (1994). In any event, the standard applicable to the question whether a manufacturer has provided adequate warnings is reasonable care under the circumstances. *Taylor v Wyeth Labs*, 139 Mich App 389, 397-398; 362 NW2d 293 (1984). The reasonableness of a failure to warn and the adequacy of a warning are questions of fact for the jury. *Id.*

We reject defendant's related argument that the trial court erred in denying its motion for directed verdict because plaintiff failed to present evidence to establish that the lack of warning was a proximate cause of plaintiff's injuries.

The jury in the instant case heard evidence that no warning appeared on Kaylo packages until late December of 1966. Defense witness Jerry Helser testified that at that time, defendant began stamping Kaylo packages with a 2 ½by three inch message stating "[t]his product contains asbestos fiber. If dust is created when this product is used, avoid breathing the dust. If adequate ventilation is not possible, wear respirator approved by the U.S. Bureau of Mines." In 1970, more prominent

printed language was placed on the cartons stating "Caution-Product contains Asbestos Fiber. Inhalation of dust in excessive quantities over long periods may be harmful. Avoid breathing dust. If adequate ventilation is not possible, wear respirators approved by the U.S. Bureau of Mines for pneumoconiosis producing dust." Helser testified on cross-examination that it would be inappropriate to view the 1966 label, which remained on Kaylo packages until 1970, as a caution or warning.

In most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would have altered the plaintiff's behavior in response to a warning. *Bordeaux, supra* at 166. However, in certain circumstances the jury may infer this fact from the evidence presented. *Id.; Schutte v Celotex Corp*, 196 Mich App 135, 141; 492 NW2d 773 (1992); *Raney v Owens-Illinois, Inc*, 897 F 2d 94 (CA 2, 1990). In *Schutte*, this Court stated that where the consequences of the exposure are severe, the lack of warning is undisputed, and the person exposed is dead, the jury may be permitted to infer that a warning would have been heeded and that the failure to warn was a proximate cause of the injury. *Schutte supra* at 141. The *Schutte* Court, adopting the reasoning of *Raney*, noted that the *Raney* court held that under the circumstances of that case, the jury could reasonably infer that a warning would have been heeded, concluding that what an asbestos worker would have done if confronted with the danger of his work is within the range of reasonable dispute that makes the question appropriate for the jury. 196 Mich App at 141. The *Raney* court noted that in some circumstances it is not reasonable to draw an inference that a warning would have been heeded, listing as examples cases in which the evidence undisputedly shows that the injury would have been sustained even if a warning had been given, where the plaintiff had the same awareness of danger as a warning would have given, and where a warning is not required because the danger is obvious. *Id.* at 96. The *Raney* court did not predicate its holding on the plaintiff's having died:

> Ultimately, the issue is whether the facts and circumstances presented by the plaintiff in a particular case permit a jury reasonably to infer that a warning, reasonably required, would have been heeded. In this case, it was reasonable to infer that Raney would have heeded a manufacturer's warning. There was no evidence that Raney was aware of asbestos hazards, and they were not obvious. Though everyone might not agree that an asbestos worker would have sought other employment had he been warned of asbestos hazards, a prediction as to what a worker, alerted to the hazards, would have done is generally within the range of reasonable dispute that makes matters appropriate for submission to a jury. [897 F2d at 96.]

In light of the undisputed evidence that no warning of any kind appeared on Kaylo until late December 1966, the severe consequences of asbestos exposure, and given that plaintiff's case does not fall under any of the scenarios set forth by the *Raney* court as precluding the drawing of an inference that a plaintiff would have heeded a warning, we conclude that plaintiff presented sufficient evidence to permit the jury to find that the failure to warn was a proximate cause of plaintiff's injuries.

VII

Defendant next argues that the trial court abused its discretion in allowing plaintiff's expert, Dr. Oliver, to testify on rebuttal, and that Dr. Oliver's being an expert in a different field allowed plaintiffs to present significant evidence that defendant was not allowed to meet. We disagree.

On the first day of trial, plaintiff moved to exclude the expert testimony of three of defendant's doctors on the basis that their reports were not timely submitted pursuant to the trial court's discovery and scheduling order. The trial court allowed the defense experts to testify, but ordered that they be made available for deposition before testifying. The trial court allowed plaintiff forty-eight hours after the depositions to provide a rebuttal report. Plaintiff deposed Dr. Crissman and timely notified defendant of his intention to call Dr. Oliver in rebuttal. Defendant objected, arguing that plaintiff's expert, Dr. Parmar, already covered the matters. The trial court in ruling on this issue stated, citing *Sullivan Inc v Double Seal*, 192 Mich App 333, 348; 480 NW2d 623 (1991):

> Rebuttal evidence is evidence that explains, contradicts, or otherwise refutes a defendant's evidence. Its purpose is to undercut the defendant's case and not merely to confirm that of the plaintiff.
>
> . . . Accordingly, a plaintiff may not introduce during rebuttal new and independent facts competent as part of his testimony in-chief unless permitted to do so by the court. And to a certain degree it does lie within the discretion of the court.
>
> The Court also notes that—that the Court did make a rather liberal ruling due to the failure to give appropriate notice in accordance with—with what the Pre-Trial Orders had required, rather liberal ruling on behalf of the Plaintiffs to call a rebuttal witness after ruling against their motion to [dis]allow the testimony of –of the witnesses that – that had not been listed by the Defense. Maybe in doing so I opened the door a little bit more than in retrospect I might not [sic] now be willing to do, but I've got to make this ruling at this time in light of the rulings that we've made in relationship to the handling of this case and trying to treat both sides fairly.
>
> This Court is of the opinion that at least in relationship to the area of synergism, the theory, and asbestos in relationship to it with smoking, that to a great extent on the direct examination of the Defendant's expert . . . Dr. Crissman, that Mr. Foley [defense counsel] on Pages 35 . . . through Line 8 of 36, did cover that area to a certain degree in his presentation of his proofs in his case-in-chief.
>
> The Court is of the opinion that if one can keep the rebuttal down to the areas specifically covered by the Defendant's expert through Doctor Oliver, that the fact that she's of a different discipline should [not?] be the bar to that taking place, but I am going to tell you, try to ask that that be accomplished and I'll accept objections during her testimony --

Dr. Oliver is board certified in internal medicine and occupational medicine. Her testimony was properly admitted to contradict Dr. Crissman's testimony that plaintiff's lung cancer could not be related to asbestos. Dr. Crissman is a board-certified pathologist. He opined that asbestos exposure alone, without fibrosis, cannot cause lung cancer. He testified that based on his review of plaintiff's pathology material, he did not see any evidence of the diffuse scarring he would require to confirm that there was asbestos-related lung injury. Dr. Crissman opined that cigarette smoking contributed to the development of plaintiff's lung cancer and that in the absence of asbestosis, asbestos exposure and smoking do not act synergistically to cause cancer.

Dr. Oliver testified on rebuttal that she disagreed with the statement that asbestos exposure alone, without lung fibrosis, does not lead to lung cancer. She opined that asbestos exposure does lead to lung cancer and that fibrosis of the lung is not a necessary prerequisite to the development of an asbestos-related lung cancer. Dr. Oliver also testified that she disagreed with the statement that in the absence of lung scarring, asbestos does not act synergistically with smoking to cause lung cancer. She opined that asbestos alone, without asbestosis, and cigarette smoke act in a synergistic manner to dramatically increase the risk for lung cancer in exposed populations. Dr. Oliver also disagreed with the statement that plaintiff does not have lung cancer that can be related to his asbestos exposure because plaintiff had insufficient asbestos exposure while working at Detroit Edison to cause his lung cancer. Dr. Oliver opined that the most likely cause of plaintiff's lung cancer was his asbestos exposure with residual contribution from his cigarette smoking.

Dr. Oliver's testimony was limited to points Dr. Crissman addressed. Moreover, defendant has not countered plaintiff's argument that Dr. Crissman's testimony necessitated rebuttal because it raised for the first time the argument that plaintiff did not have fibrosis, i.e., lung scarring resulting from asbestos exposure. Under the circumstances presented here, we conclude that the trial court did not abuse its discretion in permitting, with limitations, Dr. Oliver's rebuttal testimony to contradict Dr. Crissman's testimony. *Sullivan, supra; Argenta v Shahan*, 135 Mich App 477, 486-487; 354 NW2d 796 (1984), rev'd on other grounds 424 Mich 83 (1985).

VIII

Defendant last argues that the trial court should have excluded correspondence between Saranac Laboratories and Owens-Illinois because there was insufficient foundation for admission. We do not address this argument beyond noting, as did the trial court, that the documents were admitted by stipulation at trial, and thus defendant may not claim error on appeal. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D. Schaefer

[1] Manley Farley has died since trial. Because of his status as plaintiff at trial, he is referred to as plaintiff in this opinion.

[2] As was clarified during motions in limine the day after the jury was sworn, plaintiff testified at deposition on June 18, 1993 that two weeks earlier he had been examined and told he had a spot on his right lung.