

STATE OF MICHIGAN
COURT OF APPEALS

SIGRID BREAK, Personal Representative of the
Estate of John Break, Deceased,

UNPUBLISHED
May 7, 1999

Plaintiff-Appellant,

v

OWENS-CORNING FIBERGLAS
CORPORATION,

No. 203289
St. Clair Circuit Court
LC No. 94-001385 NP

Defendant-Appellee.

Before: White, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Plaintiff brought this products liability action against defendant, alleging that its failure to warn about the asbestos-related hazards of one of its insulation products, Kaylo, resulted in injury and death to her husband, John Break. Following trial, the jury unanimously found defendant negligent but, by a majority vote, rejected plaintiff's claim that defendant's negligence was the proximate cause of Break's death. Plaintiff appeals as of right from the judgment. We affirm.

Plaintiff first argues that the lower court should have granted its motion for a "partial directed verdict concerning evidence of exposure to asbestos-containing products not produced by defendant," a motion that apparently pertained to the proximate cause element of plaintiff's case. Plaintiff asked the lower court to "instruct the jury as a matter of law that they should not consider the other exposure that have been put in this case" because defendant had not submitted evidence sufficient to support a finding that these other products were a substantial factor in producing Break's injuries and death. We review de novo a trial court's decision to grant or deny a party's motion for a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Id.*

In an asbestos injury case, a plaintiff must show that he was exposed to an asbestos-containing product for which the defendant is responsible, and that the defendant proximately caused the plaintiff's injury. *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 247; 477 NW2d 133 (1991). A plaintiff

need not offer evidence that positively excludes every other possible cause; it is enough that a plaintiff established a logical sequence of cause and effect, notwithstanding the existence of other possible theories. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). A defendant cannot escape liability for its negligent conduct simply because the negligence of others may have also contributed to the injury suffered by a plaintiff. *Id.* at 401-402. When a number of factors contribute to produce an injury, one actor's negligence will be considered a proximate cause of the harm if it was a "substantial factor" in producing the injury. *Id.* at 401-402.

In general, a motion for a directed verdict asserts that the opposing party's proofs have not created a sufficient factual basis for a jury to find in the opponent's favor and, accordingly, that the court should resolve the claim as a matter of law in favor of the moving party. 3 Martin, Dean & Webster, Michigan Court Rules Practice, p 218. Indeed, a directed verdict technically orders the jury to find no cause of action. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 601; 552 NW2d 523 (1996). In making its motion for a partial directed verdict in this case, plaintiff argued that the evidence of Break's exposure to other asbestos-containing products should have been excluded because defendant had not proffered sufficient evidence to persuade that those products could have been a "substantial factor" in producing Break's injury. Nevertheless, the evidence of exposure to other asbestos-containing products, taken with testimony that mesothelioma is irreversible and that any exposure to asbestos may cause injury and disease, was sufficient to permit reasonable jurors to conclude that the other exposures defeated plaintiff's claim that Kaylo was a substantial factor in causing plaintiff's disease. Therefore, the lower court's decision to deny plaintiff's motion for a directed verdict on this matter was entirely proper.

Also, to the extent that plaintiff argues that the evidence presented at trial was sufficient for the court to find that Kaylo was a substantial factor in producing Break's injury, defendant correctly asserts that plaintiff did not preserve this argument for our review. Grounds for sustaining a directed verdict that were not articulated to the trial court will not be considered on appeal. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995). As we have already indicated, plaintiff's arguments below concerned only a reiteration of plaintiff's earlier evidentiary arguments, which the court had rejected, about whether the jury should consider the other asbestos-containing products to which Break may have been exposed.

Next, plaintiff argues that the lower court abused its discretion in refusing to allow plaintiff to impeach a defense witness' testimony. The witness testified about the labeling of the boxes of Kaylo, including the 1972 label stating that Kaylo was asbestos-free. Plaintiff wished to impeach the testimony with that of another of defendant's employees who would have stated that for several years after 1972 he continued to remove asbestos dust from the vacuum cleaners at defendant's plants and put it back into the mixture from which defendant was producing the allegedly asbestos-free Kaylo. Defendant argued that the impeachment testimony was irrelevant because plaintiff had not established whether plaintiff's employer ever ordered or received the asbestos-free Kaylo. The court agreed and declined to admit the impeachment testimony.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). An abuse of discretion is found only if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). Here, plaintiff failed to establish any connection between the proffered impeachment testimony about asbestos-free Kaylo and plaintiff's theory that asbestos-containing Kaylo was a substantial factor in producing Break's injury. See MRE 401. Thus, the lower court did not abuse its discretion in deciding to exclude the testimony.

Plaintiff's remaining assignments of error, which include more alleged errors about the exclusion of testimony and evidence at trial, were disposed of by the verdict in plaintiff's favor finding negligence on the part of defendant. It is well established that the exclusion of evidence on an issue found for the party complaining is harmless error. See, e.g., *Knoper v Burton*, 383 Mich 62, 67-68; 173 NW2d 202 (1970); *Griggs v Saginaw & Flint Rwy Co*, 196 Mich 258, 261-262; 162 NW 960 (1917); *Michigan State Highway Comm v Westerman*, 52 Mich App 623, 625; 217 NW2d 907 (1974). Accordingly, we decline to review the merits of these issues.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra