

STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED
May 7, 1999

Plaintiff-Appellant,

v

No. 203289
St. Clair Circuit Court
LC No. 94-003185 NP

OWENS-CORNING FIBERGLAS
CORPORATION,

Defendant-Appellee.

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

WHITE, P.J. (concurring).

I agree that the judgment should be affirmed. I write separately to address areas of disagreement with the majority.

The majority does not address several arguments because it concludes they were disposed of by the jury's finding of negligence. I agree that that is the case with plaintiff's arguments that the trial court erred 1) by excluding evidence of plaintiff's safety-conscious behavior and habits,¹ and 2) by excluding brochures of defendant's that represented that Kaylo was "non-toxic" and "non-irritating."

However, I agree with plaintiff that the alleged errors regarding the "state-of-the-art" portion of the jury instructions and testimony could have affected the jury's proximate cause determination as it related to the issue of when defendant's breach of duty occurred. Nevertheless, I conclude that when taken as a whole, the jury instructions were not inaccurate, confusing and prejudicial, and sufficiently focused attention on what the manufacturer actually knew or had reason to know.

Plaintiff also challenges state-of-the-art testimony of an industrial hygienist defendant presented to the effect that in the 1950s and 1960s exposure to asbestos within five million particles of threshold limit values (TLV's) was considered safe and that the average exposure of insulators was less than five million particles. Plaintiff argues that the witness had no knowledge of plaintiff's level of exposure, or any knowledge whether defendant relied on TLV figures in deciding whether or not to warn, and therefore his testimony was irrelevant. However, the trial court properly admitted the testimony as

relevant to the state-of-the-art. Plaintiff also argues that this testimony went to the putative negligence of Detroit Edison for failing to contain exposure to its workers within established TLV's, and that the trial court had already precluded exploration of employer negligence. In this regard, the jury was instructed that if it decided that defendant was negligent and that such negligence was a proximate cause of the occurrence, "it is not a defense that the conduct of John Break's employer may have also been a cause of this occurrence." I conclude that plaintiff has failed to demonstrate any error requiring reversal.

Plaintiff also argues that the trial court erred by excluding evidence that defendant continued to put asbestos in Kaylo even after the product supposedly became "asbestos free" in 1972. Plaintiff argues that defendant's claim that Kaylo was free of asbestos bore directly on the proximate cause issue because, if false, plaintiff's exposure to Kaylo would have been longer and thus more "substantial." However, plaintiff does not dispute the basis of the trial court's exclusion of evidence - - its finding that the internal memorandum of defendant that plaintiff sought to introduce to establish this point related to a product different from the Kaylo at issue. Under these circumstances, I conclude that the trial court did not abuse its discretion in excluding the memorandum.

/s/ Helene N. White

¹ The jury was instructed that because Mr. Break had died and could not testify, it could infer that Mr. Break exercised ordinary care for his own safety and for the safety of others at and before the time of the occurrence.