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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002005-MR

LINDA MANNAHAN, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF HERSHEL W. MANNAHAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CI-002070

EATON CORPORATION; PALMER
PRODUCTS CORPORATION; AND
ARVIN-MERITOR, INC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND JONES, JUDGES.

ACREE, JUDGE: Hershel Mannahan, after having been exposed to asbestos in the workplace, contracted malignant mesothelioma, a rare form of lung cancer. Hershel and his wife, Linda Mannahan, filed suit in Jefferson Circuit Court against

appellees Palmer Products Corporation, Eaton Corporation, Arvin-Meritor, Inc. (Rockwell),[1] and eleven other corporate defendants.[2] The complaint alleged defendants manufactured and/or sold asbestos-containing brake products, and that Herschel was exposed to those products over a period of years while working for Peabody Coal Company. The circuit court entered summary judgment in favor of the appellees, finding the evidence failed to establish a probable causal link between Hershel's exposure and the particular products supplied by the appellees. We agree with the circuit court that there is no genuine issue as to any material fact regarding causation and that the appellees were entitled to judgment as a matter of law. Accordingly, we affirm.

FACTS AND PROCEDURE

Hershel worked for Peabody Coal from 1967 to 1986. He held many positions over the years, including: laborer, driller, oiler, truck driver, mechanic, and welder. Peabody Coal had ten different mine locations during the 1960s, 70s, and 80s. Hershel worked at five of those mines: Mecco, Lynnville, Eagle, Vogue, and Riverview. Most relevant to his claims was the period of time in 1968 when Herschel worked as a laborer at the Lynnville Mine constructing a brand new model 5900 shovel, and deconstructing and moving a model 5561

[1] All claims asserted against Arvin-Meritor relate to products manufactured and sold by the former products subsidiary of Rockwell International Corporation, liabilities for which now reside with Arvin-Meritor. For ease of reading, we will refer to Arvin-Meritor as Rockwell throughout this opinion.

[2] In addition to the three appellees in this appeal, nine corporate defendants were named in the original complaint. Two additional corporate defendants were added by way of a first amended complaint. The appeal before us involves only Palmer, Eaton, and Rockwell.

shovel; both processes involved working with the machines' brake systems. Hershel also worked as a welder at Vogue Mine from March 1974 until February 1977, and at Riverview Mine from May 1977 until June 1978. He alternated between welding and mechanic work at Vogue Mine from June 1978 until he retired in February 1986.

While employed as a welder/mechanic,[3] Hershel performed brake repairs and replacements on haul trucks, dozers, road graders, draglines, shovels, and other complex mining equipment. As part of the brake-repair process, he was often required to sand and grind asbestos-containing brake parts, clear debris out of brake units with compressed air, and hammer brake pads and drums into place, all of which sent asbestos-filled dust particles into the air.

Hershel was diagnosed with mesothelioma in November 2011 and passed away as a result of that disease three years later.[4]

Before his death, Hershel brought the underlying tort action, alleging claims against the appellees for strict liability and negligence. Hershel claimed his exposure to asbestos-containing friction products manufactured and/or sold by the named defendants had contributed to his illness. Linda also brought a claim in her individual capacity for loss of consortium.

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[3] Hershel testified in deposition that his job duties remained relatively the same despite alternating between his roles as welder and mechanic.

[4] Hershel died while this matter was pending on appeal. Linda Mannahan, Hershel's spouse, in her capacity as Executrix of Hershel's Estate, substituted as party plaintiff and the action was revived. For ease of reading, we will continue to refer to the Appellant as Hershel.

Following extensive discovery, each appellee moved for summary judgment, arguing Hershel failed to produce evidence from which a jury could reasonably infer a probable causal link between the appellees' specific asbestos-containing brake products and his disease. The circuit court granted each appellee summary judgment. Hershel appealed. We will discuss additional facts as needed.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). We must "view the evidence in the light most favorable to the nonmoving party," and we will sustain the circuit court's grant of summary judgment only "if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). "[S]ummary judgments involve no fact finding[.]" *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Our review is *de novo*. *Id.*

ANALYSIS

Hershel argues it is not impossible for him to submit evidence at trial from which the jury could reasonably infer that he was exposed to the asbestos-containing products supplied by Palmer, Eaton, and Rockwell and that such exposure was a substantial factor in contributing to his development of

mesothelioma. He asserts the circuit court violated Kentucky's stringent summary-judgment standard by weighing and evaluating the evidence, and substituting its own judgment for that of the jury as to numerous material facts. We disagree.

Proving causation is a requirement of each claim Hershel brings. *See Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970) (whether sounding in negligence or products liability, "the product [must be] a legal cause of the harm"). Kentucky utilizes the substantial factor test, adopted by our Supreme Court in *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), to establish causation. This standard requires the plaintiff to prove that the defendant's conduct was a substantial factor in bringing about the plaintiff's harm. *Id.* at 143. Substantial-factor causation analysis takes into account the likelihood of multiple causes, as is the case when a claimant has been exposed to multiple sources of asbestos fiber. *See Bailey v. North American Refractories Co.*, 95 S.W.3d 868, 871 (Ky. App. 2001).

The proof difficulties in asbestos claims, particularly related to causation, are well-known. As one learned scholar has observed, "factual causation has proven to be the most durable, controversial, and intractable difficulty in toxic tort cases." Steve C. Gold, *Drywall Mud and Muddy Doctrine: How Not to Decide A Multiple-Exposure Mesothelioma Case*, 49 Ind. L. Rev. 117 (2015). "In some industries, many different asbestos-containing products have been used, often including several similar products at the same time periods and worksites. Not uncommonly, plaintiffs have been unable to prove direct exposure to a given

defendant's product." *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1218 (Cal. 1997). Wherever courts address claims of liability due to asbestos exposure, they are faced with the difficult task of balancing the "needs of the plaintiff, by recognizing the difficulties of proving contact, with the rights of the defendant – to be free from liability predicated upon guess work." 63 Am.Jur.2d *Products Liability* § 74 (2008).

To combat these difficulties, courts nationwide have fashioned various exposure causation tests, including: (1) the "exposure to risk" test, *Rutherford*, 941 P.2d at 1218; (2) the "defendant-specific-dosage-plus-substantial-factor" test, *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); (3) the "fiber drift theory" test, *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3rd Cir. 1990); and (4) the "frequency, regularity, proximity" test, *Lohrmann v. Pittsburg Corning Corporation*, 782 F.2d 1156 (4th Cir. 1986).[5] These tests generally evaluate "whether a plaintiff's or decedent's [disease or injury] is sufficiently caused by exposure to a defendant's products." *Holcomb v. Georgia Pacific, LLC*, 289 P.3d 188, 193 (Nev. 2012).

The development of asbestos-exposure causation theories, however, has not resulted in the abandonment of the basic principles of causation. Exposure causation is simply ancillary to substantial factor causation. *See, e.g., Rutherford*, 941 P.2d at 1219 (holding "plaintiffs may prove causation in asbestos-related

[5] Most "jurisdictions apply a *Lohrmann* or *Lohrmann*-like test." Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for A Solvent Bystander,"* 23 Widener L.J. 59, 72 n.79 (2013).

cancer cases by demonstrating that the plaintiff's [or decedent's] exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer"); *Flores*, 232 S.W.3d at 773 (to establish causation, the plaintiff or decedent must identify "[*d*]*efendant-specific* evidence relating to the approximate dose to which the plaintiff [or decedent] was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease")(emphasis added); *Lohrmann*, 782 F.2d at 1162 (finding the "frequency, regularity, proximity" test to be "a reasonable rule when one considers the Maryland law of substantial causation and the unusual nature of the asbestosis disease process"). Exposure causation provides helpful evaluative guidance "for determining whether a defendant's product was a substantial factor in causing the plaintiff's" or decedent's disease. *Holcomb*, 289 P.3d at 196. The standards – substantial-factor proof of causation and asbestos-exposure proof of causation – are harmonious.

Unlike most other states, Kentucky has declined to recognize a particular exposure causation test in asbestos cases. *Bailey*, 95 S.W.3d at 872 (declining to adopt either the "fiber drift" theory or the "frequency, regularity, proximity" test as "the" test of legal causation in asbestos litigation). However, regardless of the associated exposure-causation standard, the threshold question in every asbestos case is whether the plaintiff was exposed *at all* to the defendant's asbestos-containing product. *See Lohrmann*, 782 F.2d at 1162 (the plaintiff is

required to prove exposure to a "specific product" attributable to the defendant); *Anderson v. Motorola Solutions, Inc.*, No. 2013-CA-001350-MR, 2015 WL 5308091, at *4 (Ky. App. Sept. 11, 2015) ("In an asbestos case, what is minimally required is proof (either circumstantial or direct) that the plaintiff and the defendants' asbestos-containing products were in the same place at the same time and that plaintiff inhaled asbestos fibers which inhalation was a substantial factor in causing plaintiff's disease."). Simply put, the plaintiff must prove that the defendant supplied the product that caused the plaintiff's disease or injury.

How does a plaintiff go about proving causation? Kentucky case law supplies an answer.

Direct evidence of causation is rare in asbestos cases. Therefore, circumstantial evidence is commonly used to establish the causal link between the defendant's asbestos-containing product and the plaintiff's disease. *Holbrook*, 458 S.W.2d at 157. "To find causation, the jury naturally draws inferences from circumstantial evidence." *Bailey*, 95 S.W.3d at 873. However,

> [w]hile reasonable inferences are permissible, a jury verdict must be based on something other than speculation, supposition or surmise. The type of evidence that will support a reasonable inference must indicate the probable as distinguished from a possible cause. There must be sufficient proof to tilt the balance from possibility to probability.

Huffman v. SS. Mary and Elizabeth Hospital, 475 S.W.2d 631, 633 (Ky. 1972). The burden to prove causation always resides with the plaintiff. *Id.*

Tying these concepts together, to prove causation in an asbestos-induced mesothelioma case, the plaintiff or decedent's estate must show, for each defendant, through direct or circumstantial evidence, that: "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing" the plaintiff's or decedent's disease. *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005). In many asbestos cases, the first hurdle – exposure to defendant's product – is easily cleared and the claim turns on whether that exposure was a substantial factor in causing the plaintiff's injury. That is not the situation here.

In this case, we must determine whether the trial court erred as a matter of law in finding that Hershel failed to produce sufficient circumstantial evidence from which a jury could infer that he was exposed, *at all*, to any of the appellees' asbestos-containing products.

We will first consider the circuit court's specific rulings as to each of the Appellees before us. Then we will address each of the Appellant's arguments regarding each ruling. As will be seen, we conclude that the circuit court did not commit reversible error by granting summary judgment in favor of the Appellees in this case.

As to Appellee Eaton, the circuit court concluded there was proof that asbestos-containing products manufactured by Eaton were incorporated into some equipment of some certain manufacturers and that a smaller number of those manufacturers provided some of their equipment to Peabody for use where

Herschel worked. However, and significantly, the court found "there is virtually no evidence linking these transactions to any occupational exposure suffered by" Herschel. That is, there was no proof that any specific equipment supplied to and used by Peabody contained an asbestos-containing product manufactured by Eaton. The Court went on to say that "the inferences generated by circumstantial evidence must lead to inferences that amount to more than mere speculation or guesswork, which is what the evidence in this case would require . . . . [T]here is nothing of an evidentiary nature in the record upon which a jury could rely to conclude [Herschel] was exposed to Eaton asbestos other than his mere presence at a Peabody mine."

Regarding the claim against Appellee Palmer, the circuit court said: "At best, the evidence cited by [Herschel] establishes that asbestos-containing materials likely made it to Peabody sites, but evidence as to the use of specific parts on machines [Herschel] encountered points only to the possibility of exposure rather than the probability."

Finally, with regard to Appellee Arvin-Meritor, the initial focus was on its predecessor-in-interest, a Rockwell subsidiary, which sold asbestos-containing products to the same equipment manufacturers for use as original parts. But there was no testimony "that Arvin-Meritor's predecessor was the manufacturer of the asbestos containing parts at the Vogue Shop at the time [Herschel] worked there." Furthermore, said the circuit court: "Even if [Herschel] could produce evidence that the trucks at the Vogue Site were originally outfitted with Rockwell parts, the

deposition testimony establishes that by the time [Herschel] began working for Peabody, the trucks at the Vogue shop were close to ten years old and the original brake parts on the trucks had long since been replaced . . . . [T]he Court cannot allow the case against Arvin-Meritor to reach a jury on speculative circumstantial evidence."

Our task here is not to weigh the evidence or determine credibility. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). We must resolve whether the plaintiff produced sufficient evidence creating a genuine issue of material fact as to whether Herschel was exposed to any of the appellees' products. We conclude that Hershel failed to meet his burden in this case.

To facilitate our review, and so as to assure we consider the matter in a light most favorable to Hershel, we assume certain facts, some of which were, and remain, contested. First, each appellee manufactured or supplied brake components containing asbestos-containing friction materials during the time period that Hershel worked for Peabody Coal. Second, Hershel performed brake repairs or replacements on Peabody Coal mining equipment, which disturbed asbestos-containing friction material, thereby releasing asbestos into the air. Third, Hershel's exposure to asbestos while working at Peabody Coal contributed to his development of mesothelioma. Fourth, asbestos is the only established cause of diffuse malignant mesothelioma.

The pivotal question that remains, and upon which this appeal turns, is whether Hershel has pointed to sufficient material facts from which a reasonable jury could infer that he was exposed to asbestos-containing brakes manufactured or supplied by these particular appellees. Stated differently, the issue is whether the asbestos-containing products manufactured by these appellees could have caused Hershel's disease.

> Where, as here, there is more than one supplier of the asbestos-containing products, the injured party must prove that exposure to the products made or sold by that particular defendant was a substantial factor in causing the injury. This fact-specific inquiry begins with the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the work place and of the relationship between the activities of the direct users of the product and the bystander plaintiff.

Holcomb, 289 P.3d at 197 (citations and internal quotation marks omitted). We will address separately each of Herschel's arguments as they relate to each appellee.

A. Palmer

Palmer manufactured asbestos-containing original and replacement friction products used for brakes on heavy-duty mining equipment including draglines and shovels manufactured by Bucyrus Erie. Hershel testified in deposition that he performed brake work on a Bucyrus Erie 1050 (a shovel/loader), a Bucyrus Erie 1260 (dragline excavator), a Bucyrus Erie 270 (shovel/loader), a Bucyrus Erie

5900 (a shovel), and a Bucyrus Erie 5561 (a shovel).[6] Hershel recalled working on the hoist brake of the Bucyrus Erie 270 one time; performing brake work on the Bucyrus Erie 1260 twice or possibly more; and working on the hoist brake of the Bucyrus Erie 1050 one time. He was also involved in the disassembly of a Bucyrus Erie 5561, and the construction of a Bucyrus Erie 5900. This work caused Hershel to encounter the braking systems of those machines. However, while he could identify the machine or vehicle, he could not identify the manufacturer of the brakes then installed on the machine or vehicle.

Unlike other cases that have come before Kentucky courts, *e.g.*, *Bailey v. North American Refractories Company*, 95 S.W.3d 868 (Ky. 2001), there is no direct evidence that Hershel encountered or was exposed to Palmer's products while at Peabody Coal. No witness, including Hershel, testified that a Palmer product was actually placed or located on the Bucyrus Erie equipment, or any other machines or trucks, serviced by Hershel. In fact, neither Hershel nor any of several of his former coworkers could identify the manufacturers of any brakes or friction materials used at Peabody Coal. This case survives, or not, on circumstantial evidence of exposure to Palmer's product. We recount that circumstantial evidence here.

There are two pathways by which a brake product manufactured by Palmer could have found its way onto a Bucyrus Erie machine upon which Hershel

[6] The record suggests the 5900 and 5561 shovels, identified by Hershel as Bucyrus Erie machines, were, in fact, Marion Power brand machines. Resolving all doubts in Hershel's favor, we will assume for purposes of this appeal that these machines were indeed manufactured by Bucyrus Erie.

performed brake work – either as factory-installed on the machine or vehicle, or as a replacement part.

First, Palmer sold original brake friction materials directly to Bucyrus Erie to be installed at the factory where that piece of mining machinery was manufactured and, therefore, Palmer might have manufactured the product Hershel worked on.[7] However, Palmer was not Bucyrus Erie's sole supplier of friction materials in the 1970s and 80s. Paul Huber, Bucyrus Erie's corporate representative, testified in deposition that, during that time period, Bucyrus Erie's other "main suppliers" of like-kind friction materials were Reddaway, Abex, Raybestos, and others. (Paul Huber Deposition, 4/16/2013, pp. 54-55).

The second way Herschel may have encountered a Palmer product was if it had been installed as a replacement part on an older machine. Palmer supplied wholesale replacement brake friction materials to Brake Supply Company, an Indiana-based business. When Peabody Coal needed to replace brake friction

[7] There are two types of friction materials involved in this case – pre-molded brake blocks and flexible friction lining. Paul Huber, Bucyrus Erie's corporate representative, explained the difference:

> And the [friction] lining is purchased in – in like a roll, and in our assembly plant at South Milwaukee the lining material would be cut to the length – the proper length. It would then be pressed onto the – onto the brake shoe, and it would be drilled and countersunk, and then the rivets and/or bolts would be attached in order to make that a complete brake shoe assembly. Other products that Bucyrus manufactured contained what was called brake shoes or brake pads, and those were molded individual pads that were factoried not at our factory but at the supplier's factory, drilled and countersunk, and then we received them as the finished product and we would then adhere those to the – our brake band or brake shoe for the – for the particular mining equipment that we were producing.

(Paul Huber Deposition, 4/16/2013, pp. 55-56).

parts, it would often acquire those parts from Brake Supply to replace original parts. This was done in two ways. Sometimes Brake Supply sold friction material directly to Peabody Coal, after which a Peabody Coal employee, such as Herschel, would reline the brake shoes at the mine site. At other times, Peabody Coal would send brakes to Brake Supply to be relined. In the latter instance, Brake Supply relined the brakes using friction material and then returned the relined brakes to Peabody Coal.

Mike Mann, Brake Supply's corporate representative, testified that Peabody Coal was one of his company's biggest customers. Mann and other former Brake Supply employees confirmed that Brake Supply sold Palmer's asbestos-containing friction materials to Peabody Coal between 1977 and 1986. Tom Ashby, Brake Supply's former president, described Palmer as Brake Supply's "perennial supplier" of friction materials for draglines and shovels and testified that Peabody Coal was Brake Supply's biggest customer in the 1980s. Other witnesses confirmed this testimony.

Again, however, Palmer was not Brake Supply's only supplier of friction materials. Former Brake Supply machinist Kenneth Botsch clarified that, in addition to Palmer, Brake Supply used friction materials manufactured by other companies, such as Reddaway, Raybestos-Manhattan, and Fres-Le, to reline Bucyrus Erie equipment sent by Peabody to Brake Supply. When Brake Supply sold friction materials directly to Peabody Coal for use in on-site repair of mining equipment, that sale was not always of Palmer products, but products

manufactured by these other companies. Further, Botsch testified that the Bucyrus Erie 480W dragline and the Marion Power 7400 were the only two Peabody Coal machines he could recall that used Palmer friction materials, thus narrowing the possibility that Herschel was exposed to a replacement Palmer product. Botsch further stated that Brake Supply performed "hundreds" of brake realignments each week and conducted business with "thousands" of customers. (Botsch Deposition, 10/31/2012, pp. 109-110).

Additionally, while Peabody was Brake Supply's biggest vendee, Brake Supply was not Peabody's only vendor. Peabody also purchased brake friction materials from two of Brake Supply's competitors – Glen's Driveline and Madisonville Industrial Supply. The record appears not to indicate whether Brake Supply's competitors used Palmer products exclusively or multiple suppliers as did Brake Supply. The conclusion to be reached is that the product at issue, alleged to have caused Herschel's mesothelioma, could have originated with a fair number of vendors, at least four,[8] other than Palmer.

Based on this evidence, the circuit court concluded: "At best, the evidence . . . establishes that [Palmer's] asbestos-containing materials likely made it to Peabody sites, but . . . points only to the possibility of exposure rather than the probability." (R. 20893).

Hershel challenges the circuit court's inference that he was required to establish the *probability* of exposure under the summary judgment standard and

[8] The record indicates at least four – Reddaway, Abex, Raybestos, and Fres-Le – but the testimony also referred to "others."

emphasized that point at oral argument. In essence, he argued that even if the record had demonstrated that exposure was *improbable*, the summary judgment standard of *impossibility* still was not met.

Herschel does have a point. We have said: "Summary judgment is appropriate only when 'it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor' [and] impossibility is viewed in a practical sense – not an absolute one." *Jones v. Board of Educ. of Laurel County*, 295 S.W.3d 120, 121 (Ky. App. 2008) (quoting *Steelvest,* 807 S.W.2d at 480, and citing *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992)). But our concession here goes only so far as to agree with Herschel that better language could have been used to explain the ruling. However, we conclude the circuit court got the ruling right.

All courts, including this one, struggle when articulating the concept that this record demonstrates – the appropriateness of summary judgment in the absence of evidence that differentiates one of several possible tortfeasors from the rest who are not named as defendants. Herschel's effort to convince us he built a record that does so fails to reach its mark.

Citing evidence that Palmer had a substantial role in directly and indirectly supplying friction products to Peabody, Hershel argues that his selection of Palmer as the tortfeasor was correct. He argues that logic dictates that he contracted mesothelioma after and, therefore because of, the following sequence of events:

> (1) Hershel performed brake work on Bucyrus Erie draglines and shovel at Peabody Coal sites [which occurred after];
>
> (2) Palmer sold asbestos-containing friction materials to Bucyrus Erie for installation on its draglines and shovels, which were present at Peabody Coal sites [and after];
>
> (3) Palmer sold asbestos-containing friction materials to Brake Supply for replacement parts for Bucyrus Erie equipment; and [after which]
>
> (4) Peabody Coal purchased replacement friction products for its Bucyrus Erie draglines and shovels from Brake Supply.

(Appellant's Brief, pp.18-19).

We agree this evidence demonstrates that the *possibility* is certain that Palmer's asbestos-containing brake products were affixed to a piece of equipment on which Hershel performed brake-related work. However, the same record also demonstrates that the *possibility* is equally as certain that a Palmer competitor's product caused Herschel's disease. Herschel's reasoning does not change that equal possibility among the various manufacturers.

In part, his argument is based on the temporal relationship of events: Palmer products were installed on Peabody equipment he serviced, after which he contracted mesothelioma; therefore, a Palmer product caused him to contract mesothelioma. This logic is *post hoc*, *ergo propter hoc* fallacy. The phrase literally means "after this, because of this." Black's Law Dictionary 1186 (7th ed. 1999). It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship. The classic

example is that the rooster crows and then comes the sunrise; therefore, the rooster caused the sun to rise. This logical fallacy is an impermissible basis upon which to allow jurors to draw inferences.

Herschel seeks to bolster his *post hoc, ergo propter hoc* argument with evidence that, in the small market of Peabody Coal, Palmer was the biggest[9] supplier of friction products. Therefore, argues Herschel, the greater possibility is that Palmer supplied the part that caused Herschel's disease. Herschel offers us percentages, statistics, and market share.[10] That is, he argues that because Bucyrus Erie and Brake Supply were Palmer's biggest customers for original and replacement brake parts, respectively, and that they supplied those parts to Peabody, it is more likely that a Palmer product, and not a Palmer competitor's product, was incorporated in the machines on which Hershel performed brake work. In other words, the odds are with him. This argument fails, however, because it leaves too much to chance.

If we envision each of the potential suppliers of the cancer-causing product placed on a roulette wheel with Palmer represented by all the black numbers and its competitors divided among the red, would the spin of the wheel be a sure means

[9] It does not appear that the relative portions of this small market are quantified, nor is it clear that Palmer had more than a minority share of the sales of friction products to Peabody.

[10] To be clear, however, Herschel is not arguing that we should replace traditional tort concepts of causation with market share liability. "Under market share liability, the burden of identification [of the tortfeasor] shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasor or tortfeasors, and that the plaintiff has joined manufacturers representing a 'substantial share' of the [product] market." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 379 F. Supp. 2d 348, 375 (S.D.N.Y. 2005). We are unaware of any jurisdiction that has adopted market share liability in the asbestos context.

of identifying the tortfeasor? Clearly not; the result of the spin would remain entirely random. What this record lacks is evidence that would eliminate that randomness.[11] The circuit court, perhaps unartfully, recognized that fact in its ruling.

The circuit court said the evidence "points only to the possibility of exposure rather than the probability" and "point[s] to the necessity of speculating about exposure to Palmer products." We interpret that ruling in the context of this record as meaning the evidence points to the possibility of Herschel's exposure to Palmer products, but no more so than it points to the equal possibility of Herschel's exposure to products of Palmer's competitors.

In the end, the courts are not odds makers. Every party defending an asbestos-based claim, like every other tort defendant, remains entitled to have a causative link proven between that defendant's specific asbestos-containing product and the plaintiff's disease or injuries. *Estes v. Gibson*, 257 S.W.2d 604, 607 (Ky. 1953) (absent connection between specific act and injury, there is no legal liability). That necessary link is absent in this case. Even viewing the evidence in a light most favorable to Hershel, the circuit court concluded, after extensive discovery, that it was *impossible* for Hershel to prove that causative link. We agree. Pure speculation is the only method by which a jury could conclude, on this record, that Herschel's disease was caused by a Palmer product rather than that

[11] Herschel's argument would not require this step of eliminating the randomness. Without it, our ruling would penalize free market success by putting the market leader at risk to answer for the tortious acts of all participants in that market.

of a different manufacturer. Herschel has pointed us to nothing in the record to contradict that conclusion.

Before leaving our discussion of Palmer's liability, we need to address Hershel's heavy reliance on *Bailey*, *supra*. There is a meaningful distinction between *Bailey* and the case before us.

The plaintiffs in *Bailey* argued that products manufactured by either or both of two different companies exposed them to asbestos, thus constituting the "legal cause" of their asbestos-related illnesses. 95 S.W.3d at 871. Identification of these two products, to the exclusion of others, as the only two possible legal causes meant that the case, unlike Herschel's case, had already moved past the point of deciding whether the plaintiff had been exposed to the defendants' products. They had. Consequently, *Bailey* became a battle of medical experts, each arguing a different theory of efficient or proximate cause – of how the asbestos of either or both companies' products transmitted to the workers' lungs to cause the disease. This Court indicated as much and held that when there are "two competing theories" as to the legal cause of an injury, "such choice is for the jury." *Id.* at 873.

In *Bailey*, there was no possibility that other products caused the workers' disease; in Herschel's case that is not so. We affirm the circuit court's grant of summary judgment in favor of Palmer.

B. Eaton

Eaton, like Palmer, manufactured asbestos-containing original and replacement brakes and brake components. Hershel claims circumstantial

evidence demonstrates he was exposed at Peabody Coal to asbestos-containing brakes manufactured by Eaton when he worked on Mack-brand trucks, and heavy mining equipment made by Bucyrus Erie, Marion Power, and Caterpillar.

In its essence, Herschel's argument regarding Eaton's liability is very similar to that described regarding Palmer. Consequently, our analysis as it relates to Palmer applies equally to Eaton. There is no direct evidence that Hershel encountered an Eaton product. No witness, including Hershel, could testify as to the manufacturer of any brake or brake components, including friction material, present at Peabody Coal mine sites.

The circumstantial evidence related to Eaton is clearly not stronger than it was in support of a claim against Palmer. The fact that Brake Supply sold asbestos-containing friction products manufactured by Eaton to Peabody Coal suggests it was possible that an Eaton product was located on a machine or truck upon which Hershel conducted brake work. But there is nothing from which a jury could directly or inferentially distinguish Eaton from any other manufacturer that supplied such products to Herschel's employer.

Further, our summary judgment standard teaches us that the moving party bears the initial burden of proving there is no genuine issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). To survive a defendant's summary judgment motion then, a plaintiff must respond to the attack and defend the targeted element by presenting evidence establishing a triable issue of fact. *Id.*

Here, Eaton successfully established no genuine issue of fact existed as to Hershel's exposure to an Eaton product located on a Bucyrus Erie or Marion machine (for which Eaton supplied only disc brakes) or a Mack vehicle (for which Eaton supplied a product used only on equipment Herschel did not work on). Hershel's response to Eaton's summary judgment motion failed to create a genuine issue as to those facts. We explain.

i. As to Bucyrus Erie and Marion Power machines

Eaton, through its Eaton Airflex Division, supplied original asbestos-containing brakes to Bucyrus Erie and Marion for use on newly manufactured shovels and draglines. The brakes made by Eaton Airflex were disc brakes.

Mike Mann testified that Brake Supply sold replacement Eaton Airflex disc brakes, not band brakes, to Peabody Coal. When asked to describe the Eaton Airflex product that Brake Supply would have sold to Peabody Coal, Mann stated: "Like on a dragline they can – they would replace a – a band brake assembly with an Airflex, an Eaton Airflex brake, which is a disc type brake."

Significantly, Hershel testified in deposition that the heavy mining equipment he worked on at Peabody Coal had band brakes, not disc brakes. Robert Petkash, Eaton's corporate representative, stated in a sworn affidavit that Eaton Airflex never manufactured or sold band brakes. Whether Eaton manufactured the kind of product Herschel worked on was a material fact. Eaton presented evidence that it did not manufacture such a product, and Hershel presented no evidence that would have created a genuine issue as to that fact.

The record is devoid of any evidence that Hershel encountered a disc brake located on a Bucyrus Erie or Marion dragline or shovel. Accordingly, there is no evidence from which a jury could reasonably infer that Hershel was exposed to an Eaton Airflex product affixed to Bucyrus Erie or Marion equipment which, in turn, caused him to contract mesothelioma.

ii. As to Mack Trucks

Hershel also claims Eaton supplied Mack Trucks with brake assemblies for Peabody's haul trucks upon which he performed service. In support of his position, Hershel points to a December 2, 1978, letter from Mack Trucks to another company, in which an Eaton representative stated, in part:

> During your visit of December 20, we covered the severe lining and drum wear problem on Mack trucks operating in the coal fields of Kentucky, Tennessee, and West Virginia. These trucks are equipped with Mack 55,000 and 65,000 lb. rated bogies. These bogies are equipped with Eaton 18 x 7 cam brake and the Rockwell 18 x 7 cam brake, respectfully [sic].

However, Roger Hobbie, Eaton's corporate representative, clarified that the trucks referenced in this letter were *highway* trucks. Hershel testified in deposition that he conducted brake work on Mack *off-road* haul trucks. He confirmed that the trucks he worked on were too large for highway use.

> Q. They [the Mack trucks] were on-road trucks, correct? They were on the road as -
> A. No, they was specifically off-road trucks.
> Q. I'm sorry?
> A. They was off-road trucks because they ain't no way you could put something like that on the road.
> Q. The Mack trucks?

A. Yeah.
Q. And what were they used for?
A. Hauling coal from the pit to the tipple.

Hobbie testified Eaton did not make a brake that fit off-road haul trucks, the kind of equipment Herschel worked on. Hershel did not counter this evidence.

Absent evidence from which a jury could reasonably infer that Hershel was exposed to Eaton asbestos-containing products, summary judgment in favor of Eaton was proper. We affirm the circuit court's grant of summary judgment in favor of Eaton.

C. Rockwell

Rockwell, like Palmer and Eaton, also manufactured brakes containing asbestos friction materials. The record indicates Rockwell did not manufacture the asbestos-containing friction material itself, but obtained it from a supplier and affixed it to its brakes, Rockwell then sold the brakes as a single unit under the Rockwell brand name.

Bruce Ketcham, Rockwell's corporate representative, testified Rockwell supplied original asbestos-containing brakes and brake products to Caterpillar, Mack Trucks, Bucyrus Erie and Euclid (a truck manufacturer) from the 1960s through the 1980s for use on the newly manufactured machines and trucks of those companies. Representatives from Caterpillar, Mack, and Euclid confirmed Ketcham's testimony.

Eugene Sweeney, Caterpillar's corporate representative, testified that, during this time frame, virtually every machine manufactured by Caterpillar had asbestos-containing brakes. Sweeney also testified that Rockwell's brake assemblies were the approved original equipment for the Caterpillar 777.

Thomas Brown, Mack's corporate representative, testified that Rockwell supplied Mack with asbestos-containing brake assemblies in the 1960s and 1970s. Brown testified that Rockwell obtained friction linings, placed them in its brake assemblies, and sent them to Mack for placement on truck axles.

Otto Hutka, Euclid's corporate representative, indicated Rockwell was an approved supplier of friction lining kits for use on Euclid trucks.

In addition to supplying brakes for installation as original parts, Rockwell also supplied replacement parts through Brake Supply, including replacement parts for the Caterpillar 777. Brake Supply's Mike Mann testified that Brake Supply sold Rockwell replacement friction products and Rockwell asbestos-containing replacement brakes to Peabody Coal between 1977 and 1986. Notably, Rockwell produced engineering drawings indicating it sold Rockwell replacement parts to Brake Supply for the Caterpillar 12 and 16 road graders.

Hershel testified he performed brake work on both the 12 and 16 road graders. Ketcham also confirmed that Rockwell sold the following Rockwell products to Brake Supply between 1977 and 1986: (1) 29 lining kits with asbestos brake linings; (2) 35 asbestos brake linings; (3) 794 asbestos-lined brake shoes; (4) 109 brake overhaul kits with asbestos-lined brake shoes; and (5) 29 brake

assemblies with asbestos linings. The record does not include evidence that would indicate Brake Supply resold these products to Peabody Coal.

Hershel again makes the *post hoc, ergo propter hoc* argument to support his belief that, from the evidence that Rockwell supplied asbestos-containing material that could have made its way to Peabody Coal vehicles before he serviced them, a jury could reasonably infer Hershel was exposed to Rockwell's asbestos-containing brakes.

He bolsters that argument by noting asbestos-product market activity that, between 1977 and 1986, Rockwell sold asbestos-containing products to Brake Supply and Brake Supply sold asbestos-containing products to Peabody Coal. He notes the record also reflects Rockwell products were original parts on equipment brands Hershel worked on at Peabody Coal. But these facts fail to give rise to an inference of exposure to a Rockwell product. The connection is simply too tenuous. Again, not a single Peabody Coal employee, including Hershel, could testify that they ever saw or encountered a Rockwell product while at Peabody Coal. There is nothing except speculation placing a Rockwell product in the same place as Hershel, and even less evidence suggesting Hershel performed brake work on a Rockwell product.

The possibility that Herschel worked on equipment that still had original Rockwell parts is virtually nonexistent. Hershel himself testified that the trucks he encountered at Peabody Coal were "old, old, old" and almost certainly did not contain the original brakes. Therefore, Herschel would have worked on a vehicle

or machine with replacement brake parts that Peabody would have purchased from Brake Supply or one of Peabody's other suppliers. As to the possibility that such replacement parts originated with Rockwell, the circuit court said of the record that "there is no evidence that any Rockwell products sold to Brake Supply or Mack ever were present on a Peabody site[,]" that "Rockwell actually did very little business with Brake Supply[,]" and that there was no evidence that Rockwell "was the manufacturer of the asbestos containing parts at the Vogue shop when Mr. Mannahan worked there."

We must never lose sight of the applicable causation standard involving circumstantial evidence. To survive summary judgment, Hershel needed to present evidence to create a genuine issue of material fact that it was probable, as opposed to possible, that he was exposed to a Rockwell product and then he could address the issue whether such exposure was a substantial factor, *i.e.*, was the legal cause of his disease. All a reasonable jury could infer from this record is the possibility only that Herschel was exposed to a Rockwell asbestos-containing brake product.

In sum, Hershel has failed to identify evidence from which a jury could reasonably infer that he encountered a Rockwell product and not some other product while working at Peabody Coal. Absent such evidence, we agree with the circuit court that a jury would be left to resort to speculation as to exposure and causation. We affirm the circuit court's grant of summary judgment in favor of Rockwell.

CONCLUSION

The Jefferson Circuit Court's October 24, 2013 Order granting summary judgment in favor of Palmer, Eaton, and Rockwell is affirmed.

CLAYTON, JUDGE, CONCURS.

JONES, JUDGE, DISSENTING. Respectfully, I dissent. While we continue to cite to *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991), it seems to me that the proposition for which it stands, Kentucky's summary judgment rule is meant to be more leniently applied than its federal counterpart, is slowly eroding before our very eyes. I believe Appellant satisfied her burden under *Steelvest*, and is entitled to her day in Court.

The majority concedes on page twenty of its opinion that the Appellant demonstrated a *possibility* that the products at issue made their way into the worksite. Actual facts adduced by the parties during discovery allowed Appellant to demonstrate this *possibility*. It was not conjured out of thin air. In my opinion, Appellant produced actual, affirmative, albeit circumstantial, evidence placing the products at issue in her deceased husband's worksite. Was it the strongest evidence? Perhaps, it was not. But, it was evidence nonetheless; evidence I believe prevents a court from holding that it would be impossible as a matter of law for the Appellant to prevail at trial. It is evidence I believe should be weighed and evaluated by a jury of ordinary citizens chosen at random instead of three judges clothed in black robes. For this reason, I dissent.

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