

[Cite as *Welsh v. Ford Motor Co.*, 2011-Ohio-448.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94068

SYLVIA WELSH, ETC.

PLAINTIFF-APPELLEE

vs.

FORD MOTOR COMPANY, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-631528

BEFORE: Boyle, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 3, 2011

ATTORNEYS FOR APPELLANT

Shana A. Samson
Robert C. McClelland
Rademaker, Matty, McClelland & Greve
55 Public Square, Suite 1775
Cleveland, Ohio 44113

Timothy J. Krantz
Workers' Compensation Counsel
Ford Motor Company
5600 Henry Ford Boulevard
Brookpark, Ohio 44142

ATTORNEYS FOR APPELLEE

For Sylvia Welsh, etc.

Shawn M. Acton
Matthew A. McMonagle
Kelley & Ferraro, LLP
2200 Key Tower
127 Public Square
Cleveland, Ohio 44114

For Bureau of Workers' Compensation

Mike DeWine
Ohio Attorney General
Mary Ann Rini
Assistant Attorney General

State Office Building
12th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Ford Motor Company, appeals a jury verdict finding that plaintiff-appellee, Sylvia Welsh, is entitled to participate in the Ohio Workers' Compensation Fund as a result of the occupational exposure to asbestos sustained by her deceased husband, James Welsh ("Welsh"), resulting in his death from colon cancer. We affirm.

Procedural History and Facts

{¶ 2} Plaintiff commenced the underlying case as an appeal, pursuant to R.C. 4123.512, after the Ohio Bureau of Workers' Compensation denied her request for widow's benefits of her late husband, Welsh. She alleged that Welsh contracted asbestos-related colon cancer as a result of his job duties at Ford and that his asbestos-related colon cancer was the direct and proximate cause of his death. Ford denied that Welsh's colon cancer was asbestos related and denied that he contracted it as a result of his employment at Ford's facility. The case proceeded to a jury trial where the following evidence was presented.

{¶ 3} Welsh's career with Ford spanned over 46 years. He began working for Ford in 1955 at its Walton Hills facility and continued working there until December 2001. Welsh died of colon cancer on January 24, 2002.

{¶ 4} Donald Brown, a former coworker of Welsh's, testified that he first met Welsh in 1963 at Ford when they both worked as "stock chasers" together. He explained that this position entailed locating items in the facility and bringing them to the lines where they were needed. Both Brown and Welsh continued in this position until 1987. During Welsh's tenure as a stock chaser, "he worked right across the aisle" from Brown.

{¶ 5} According to Brown, both he and Welsh were exposed to "lots of asbestos" at Ford. He testified that every day, "[Welsh] would have to squeeze through these pipes covered with asbestos." Brown stated that he knew the pipes were covered with asbestos because the wrappers indicated as much. He further stated that the asbestos wrapping on the pipes were often broken so "once you rubbed up against it, you would get asbestos on your clothes," which would remain there through the long work shift.

{¶ 6} At trial, plaintiff also presented two experts in support of her claim that Welsh contracted an asbestos-related disease during the course of his employment with Ford. Dr. Laxminarayana Rao testified that he is board certified in internal, forensic, and pulmonary medicine, and that he is

also a “B-reader,” which means that he has specialized training to read chest x-rays for the detection of occupational-related lung disease. He is one of approximately 26 B-readers in Ohio.

{¶ 7} According to Dr. Rao, “with reference to the lung, there are at least four different conditions that’s associated with asbestos exposure and inhalation-related lung injury: (1) interstitial fibrosis, which is also called asbestosis; (2) pleural fibrosis; (3) lung cancer; and (4) mesothelioma. Dr. Rao further stated that “asbestos is known to relate to multiple other cancers, including cancer of the larynx, cancer of the esophagus, cancer of the stomach, colorectal cancer, and bladder cancer.” He further indicated that the presence of asbestosis indicates that someone has been exposed to a significant amount of asbestos.

{¶ 8} Dr. Rao reviewed a single chest x-ray of Welsh, taken on July 26, 2000, and found scarring in the lower portion of James’s lungs, which he indicated is consistent with mild asbestosis. In his opinion, Welsh “has bilateral interstitial fibrosis due to asbestosis.” Relying on the assumption that Welsh was exposed to and breathed in a significant amount of airborne asbestos dust during his long tenure with Ford, Dr. Rao further opined that the “inhalation of respirable asbestos dust while employed at Ford” was the cause of James’s asbestosis.

{¶ 9} Next, plaintiff presented the testimony of Dr. Nasir Khan, a pathologist. Dr. Khan opined that Welsh died of colon cancer and that “a significant underlying cause for his colon cancer was his exposure to asbestos fiber inhalation of prolonged duration at Ford Company.” He further stated that the “exposure that Welsh acquired at Ford put him at a much higher risk” than the general population “because of his asbestos exposure to acquire a colon cancer.” Dr. Khan testified that he based his opinion on Welsh’s work history, Welsh’s medical records, and the medical literature connecting asbestos exposure to colon cancer. Dr. Khan further relied on Dr. Rao’s report that Welsh had mild asbestosis — a condition that arises only after significant exposure to asbestos.

{¶ 10} Dr. Khan acknowledged that he did not see any asbestos bodies in the slides of Welsh’s tissue that he reviewed. He stated, however, that the amount of tissue that was submitted for microscopic studies was not adequate. He further stated that he can diagnose an asbestos-related disease without asbestos bodies provided that he has an adequate history of the patient.

{¶ 11} Ford presented three experts in defense of its case: Dr. David Rosenberg, a board certified pulmonologist and occupational medicine specialist; Dr. Paul Wheeler, a radiologist; and Dr. John Murphy, an

oncologist. All three experts disputed plaintiff's claim that asbestos exposure causes colon cancer and testified that recent medical literature supported their opinion. And all three experts opined that Welsh's colon cancer was not asbestos related.

{¶ 12} Further, Dr. Rosenberg, also a B-reader, testified that there was no diagnosis of any asbestos-related lung disease or any evidence of respiratory problems in Welsh's medical records. He concluded that Welsh's x-rays and a CT scan did not show any evidence of asbestos-related disease. Dr. Wheeler likewise concluded that Welsh did not have any asbestos-related disease of the lungs. Finally, Dr. Murphy testified that Welsh had several risk factors for colon cancer and that his medical records failed to relate Welsh's colon cancer to asbestos exposure.

{¶ 13} The jury ultimately found in favor of the plaintiff, finding that Welsh's colon cancer was asbestos related and that he contracted it while working at Ford. The jury further found that plaintiff is entitled to participate in the Workers' Compensation Fund.

{¶ 14} Ford appeals, raising three assignments of error:

{¶ 15} "I. The trial court erred to the prejudice of the defendant-appellant, Ford Motor Company, in denying Ford's motion for directed verdict where plaintiff-appellee, Sylvia Welsh, presented no evidence

of injurious exposure to asbestos with Ford.

{¶ 16} “II. The trial court erred to the prejudice of the defendant-appellant, Ford Motor Company, in denying Ford’s motion for directed verdict where plaintiff-appellee, Sylvia Welsh, failed to satisfy her burden of proof at trial to show, by a preponderance of the evidence, that the alleged condition arose out of and in the course of employment or that a proximate causal relationship exists between the employment and the alleged condition.

{¶ 17} “III. The trial court erred to the prejudice of the defendant-appellant, Ford Motor Company, in denying Ford’s motion for judgment notwithstanding the verdict and/or new trial because the jury verdict was manifestly unjust and against the weight of the evidence.”

Elements of Plaintiff’s Claim

{¶ 18} Under R.C. 4123.68, plaintiff is entitled to widow’s benefits if she can demonstrate that her deceased husband’s death was caused by an occupational disease. Colon cancer is not a specified occupational disease included under the statute. Plaintiff therefore bears the burden of demonstrating that Welsh’s colon cancer meets the criteria for an occupational disease.

{¶ 19} The Ohio Supreme Court has set forth a three-part test for determining whether a disease meets the definition of an occupational disease as follows: (1) the disease is contracted in the course of employment; (2) the disease, by cause and characteristic of its manifestation or the condition of the employment, results in a hazard distinguishable from employment generally, and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally. See *State ex rel. Ohio Bell Tel. Co. v. Krise* (1975), 42 Ohio St.2d 247, 327 N.E.2d 756, syllabus. The General Assembly has codified the three *Krise* criteria in R.C. 4123.01(F).

{¶ 20} In this case, plaintiff had to prove that her husband contracted and died from an occupational disease as a result of an injurious exposure to asbestos in the course of and arising out of his employment. See *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415. This includes establishing a direct and proximate causal relationship between the employment and the condition alleged. See *Fox v. Indus. Comm. of Ohio, et al.* (1955), 162 Ohio St. 569, 125 N.E.2d 1, syllabus.

{¶ 21} Plaintiff's burden of proof is a preponderance of the evidence, which is defined as "the greater weight of the evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence

opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed.” *Cawrse v. Allstate Ins. Co.*, 5th Dist. No. 09COA002, 2009-Ohio-2843, quoting 1 Ohio Jury Instructions (1994), Section 3.50, at 114-115.

Standard of Review

{¶ 22} In its first two assignments of error, Ford argues that the trial court erred in denying its motion for directed verdict. He further argues as part of his third assignment of error that the trial court erred in failing to grant his motion for judgment notwithstanding the verdict. Civ.R. 50 sets forth the standard of granting a motion for directed verdict:

{¶ 23} “When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to each party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.”

{¶ 24} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of N.Y. v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. We employ a de novo standard of review in

evaluating the grant or denial of a motion for a directed verdict or a motion for judgment notwithstanding the verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399. “The trial court does not weigh or consider the credibility of the witnesses, but rather, reviews and considers the sufficiency of the evidence as a matter of law.” *Siebert v. Lalich*, 8th Dist. No. 87272, 2006-Ohio-6274, ¶14 (citing a string of cases).

{¶ 25} With these foregoing principles in mind, we turn to Ford’s each stated assignments of error.

Asbestos Exposure

{¶ 26} In its first assignment of error, Ford contends that plaintiff failed to meet the initial threshold of establishing that Welsh was exposed to asbestos and had a greater risk of exposure than the general public.

{¶ 27} Ford argues that plaintiff’s failure to preserve any testimony as to Welsh’s specific job duties is fatal to her case. It contends that neither plaintiff nor any of plaintiff’s experts were familiar with Welsh’s job duties and therefore their testimony provided no basis to conclude that Welsh’s job duties exposed him to a greater hazard or risk and were causally connected to his colon cancer. And to the extent that Dr. Rao opined that Welsh had mild asbestosis, Ford claims that Dr. Rao failed to causally connect this diagnosis to Welsh’s job at Ford. Consequently, Ford contends that the trial court

should have granted directed verdict because plaintiff failed to satisfy her burden for a workers' compensation claim.

{¶ 28} We find Ford's arguments unpersuasive. First, plaintiff offered the testimony of Welsh's coworker, Donald Brown, who testified that Welsh was exposed to "lots of asbestos" at the Walton Hills facility. Notably, Brown, who shared the same job as Welsh for 24 years and worked "across the aisle" from him, testified as to their daily job duties as stock chasers, including that they would have to "squeeze through pipes with asbestos" on a daily basis. Given that Brown explained how he knew the pipes were covered with asbestos, Brown was clearly qualified to testify as to the existence of asbestos in the facility and Welsh's specific exposure to asbestos while employed as a stock chaser. See Evid.R. 602; *Shepard v. Grand Trunk W.R.R., Inc.*, 8th Dist. No. 92711, 2010-Ohio-1853.

{¶ 29} Second, Dr. Rao's testimony established that Welsh had mild asbestosis — a condition that arises only from significant exposure to asbestos. While Ford contends that this diagnosis was not causally connected to Welsh's job at Ford, we disagree. The record reveals that Welsh worked solely at Ford for the last 46 years of his life in a facility where asbestos was prevalent. Further, the record further reveals that Welsh was exposed to asbestos in his job duties as a stock chaser. Thus, although Dr.

Rao assumed that Welsh was exposed to a significant amount of asbestos based on the representations made by plaintiff's counsel, we find independent evidence in the record to support such a factual assumption.

{¶ 30} Finally, plaintiff submitted several documents generated by or for Ford that revealed the existence of significant amounts of asbestos at the Walton Hills facility. Specifically, in one report, titled "Clayton Report," the document revealed that miles and miles of asbestos-containing pipe covering were identified at the Walton Hills facility in a "snapshot" study performed by Clayton Environmental Services on April 18, 1989. The report further indicated that asbestos-containing materials were damaged or in poor condition throughout the Ford facility. Thus, this documentation, along with the other documentation revealing the prevalence of asbestos-containing products at the facility, further corroborates the testimony offered regarding Welsh's exposure to asbestos in the course and scope of his job duties.

{¶ 31} The first assignment of error is overruled.

Causal Relationship

{¶ 32} In its second assignment of error, Ford argues that plaintiff failed to present sufficient evidence to establish that Welsh contracted colon cancer as a result of occupational exposure to asbestos and his death was the direct and proximate result of any injurious exposure to asbestos during the course

and scope of his employment. It contends that the medical expert testimony offered was wholly lacking because (1) Dr. Rao only opined as to Welsh's alleged condition of asbestosis — he rendered no opinion establishing a causal connection between Welsh's alleged exposure to asbestos and his condition of colon cancer; and (2) Dr. Khan's testimony amounted to mere speculation — he failed to establish a sufficient basis in science for his opinion. We disagree.

{¶ 33} Here, the record reveals that the plaintiff offered Dr. Rao's testimony for the purpose of establishing that Welsh had asbestosis — an indicator that he was exposed to a significant amount of asbestos. Although Ford contends again that Dr. Rao did not establish the causation for Welsh's alleged condition of asbestosis to Ford in any way because it relied on a factual assumption that the exposure to asbestos occurred at Ford, we have already found that such factual assumption was supported by the record.

{¶ 34} And although Ford now complains that Dr. Khan's opinion lacked any foundation in science, it never properly challenged him pursuant to *Daubert* or Evid.R. 702. See *White v. Center Mfg. Co.* (1998), 126 Ohio App.3d 715, 711 N.E.2d 281 (failure to timely object to the admission of expert's testimony on grounds that it lacked any basis was waived when appellant failed to raise objection below). Instead, Ford chose to attack Dr.

Khan's opinion below on the basis that he was not credible given its three experts refuting Dr. Khan's opinion that asbestos exposure causes colon cancer. This issue was therefore squarely before the jury, and the jury simply chose to believe plaintiff's expert over Ford's experts.

{¶ 35} As for Ford's claim that the absence of asbestos bodies in Welsh's colon tissues is fatal to Khan's opinion, we disagree. Dr. Khan testified that a finding of asbestos bodies is not a necessary prerequisite for diagnosing asbestos-related colon cancer. He further testified that chrysotile asbestos — an identified asbestos at Ford — typically cannot be identified in routine pathology specimens, such as the ones obtained by Welsh's treating doctors to diagnose Welsh's cancer. Here, Ford's argument again goes to the issue of credibility — an issue that Ford argued extensively at trial. And while Ford now claims that the presence of asbestos bodies is a necessary prerequisite to diagnose asbestos-related colon cancer, Ford failed to present any expert testimony in support of this claim at trial.

{¶ 36} Contrary to Ford's assertion, we find that Dr. Khan's opinion testimony was based upon facts shown by the evidence. See Evid.R. 703. Specifically, Dr. Khan was justified in relying on the assumption that Welsh was exposed to significant asbestos exposure at Ford. Thus, given Dr. Khan's testimony causally linking Welsh's colon cancer to his exposure to

asbestos while working at Ford, we cannot say that the trial court erred in denying Ford's motion for directed verdict.

{¶ 37} The second assignment of error is overruled.

Judgment Notwithstanding the Verdict and New Trial

{¶ 38} In its final assignment of error, Ford argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. Ford, however, relies on the same arguments stated above, arguing that plaintiff failed to present sufficient evidence to satisfy her burden of proof. Construing the evidence most strongly in favor of plaintiff, we find that plaintiff satisfied her burden as discussed above. Although Ford presented contradicting evidence, the jury chose to believe plaintiff's experts over Ford's — a matter that falls squarely within its province as the fact finder and weigher of credibility. Accordingly, we cannot say that the trial court erred in denying Ford's motion for judgment notwithstanding the verdict.

{¶ 39} Next, Ford argues that the trial court abused its discretion in denying Ford's motion for a new trial on the grounds that the jury verdict is against the manifest weight of the evidence.

{¶ 40} The decision to grant or deny a motion for new trial vests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307,

312, 1995-Ohio-224, 649 N.E.2d 1219. A judgment supported by some competent credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *Willet v. Felger* (Mar. 29, 1999), 7th Dist. No. 96-CP-40; *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226, 638 N.E.2d 533. Also, in considering whether a judgment is against the manifest weight of the evidence, we must be guided by the presumption that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 41} Further, if the evidence is susceptible to more than one interpretation, we must construe the evidence consistently with the trial court's judgment. *Gerijo*, 70 Ohio St.3d at 226.

{¶ 42} Here, the evidence was susceptible to more than one interpretation. Indeed, competing experts with opposite opinions were presented to the jury. Thus, given the evidence set out above and the presumption that the jury's findings of fact are correct, we cannot conclude that the jury's verdict was against the manifest weight of the evidence.

{¶ 43} The final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR