COURT OF APPEALS
DECISION
DATED AND RELEASED

September 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0745

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NANCY KOSLOSKE, individually and as Special Administrator of the ESTATE OF RAYMOND J. KOSLOSKE, JR.,

Plaintiffs-Respondents,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant-Third Party Plaintiff-Appellant,

KEENE CORPORATION, GAF CORPORATION, FIBREBOARD CORPORATION, PITTSBURGH-CORNING CORPORATION, A.P. GREEN INDUSTRIES, INC., UNITED STATES GYPSUM COMPANY, SPRINKMANN SONS CORPORATION, Jointly and Severally,

Defendants,

MANVILLE PERSONAL INJURY SETTLEMENT TRUST,

Third-Party Defendant.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Eich, C.J., and Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

EICH, C.J.[1] Owens-Corning Fiberglas Corporation, a manufacturer of asbestos, appeals from a judgment awarding substantial damages to the estate of Raymond Kosloske, a boiler operator and inspector, who incurred—and later died of—an asbestos-related cancer which he claimed was caused by his exposure to a product manufactured by Owens-Corning. Kosloske originally sued several other asbestos manufacturers and suppliers, all of whom settled prior to trial. Kosloske died during the pendency of the action, and it was continued by his wife, Nancy Kosloske, both individually and as the special administrator of his estate.[2]

Owens-Corning's appeal presents the following issues: (1) whether the trial court erred in ruling that the company failed to adduce sufficient evidence to go to the jury on its claim that Kosloske was contributorily negligent; (2) whether admission into evidence of a deposition of a former Owens-Corning employee violated § 908.045(1), STATS. which states that in order to be admissible, deposition testimony given in another proceeding must have been offered either at the instance of or against a party "with motive and interest similar to those of the party against whom [it is] now offered";[3] (3)

---

[1] This case, originally taken under submission by the court in March 1995, was reassigned to the author for preparation of the opinion in August 1996.

[2] For ease of exposition, we will refer to Raymond Kosloske as the plaintiff in the action (and the respondent on this appeal).

[3] Section 908.045(1), STATS., provides an exception to the hearsay rule for

> [t]estimony ... in a deposition taken in compliance with law in the course of another proceeding at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom [it is] now offered.

whether Kosloske's purported knowledge of the dangers of asbestos warrants a determination that, as a matter of law, there could be no causal relation between Owens-Corning's alleged failure to warn and Kosloske's damages; and (4) whether the cumulative effect of the trial court's rulings warrants a new trial. We reject Owens-Corning's arguments and affirm the judgment and the order.

Kosloske worked as a boiler operator and inspector for the Wisconsin Electric Power Company (WEPCO) between 1962 and 1972. In 1991, Kosloske was diagnosed with malignant mesothelioma, a cancer caused by exposure to asbestos. He claimed in his lawsuit that an Owens-Corning asbestos product called "Kaylo" was used at the WEPCO plant as insulation and to cover pipes and boilers. Seeking to recover on theories of negligence and strict products liability, he alleged that Owens-Corning failed to adequately warn Kaylo users of the product's dangers. Owens-Corning claimed, among other things, that Kosloske was contributorily negligent in failing to take adequate precautions against asbestos exposure. After all the evidence was in, the trial court ruled that there was insufficient evidence to go to the jury on Owens-Corning's claim of contributory negligence. After seven days of trial, the jury returned a verdict finding Owens-Corning 51% negligent and apportioning the remaining negligence among the several other defendants who had settled out of the case. The jury awarded Kosloske damages in the sum of $838,601.76.[4]

Owens-Corning filed several motions after the verdict, raising many of the arguments it advances on this appeal, which the trial court denied. Owens-Corning appeals from the judgment and from the court's order denying its postverdict motions. Other facts will be referred to in the body of the opinion.

I. Contributory Negligence

[4] In light of the ***Pierringer*** releases obtained by the settling defendants, and Wisconsin's law on contribution among joint tortfeasors, the trial court concluded that Owens-Corning was responsible for 97% of Kosloske's damages. *See* ***Pierringer v. Hoger***, 21 Wis.2d 182, 124 N.W.2d 106 (1963). Owens-Corning has not appealed that portion of the judgment.

There is no question that contributory negligence is a matter of proof for the defendant. ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 639, 273 N.W.2d 233, 238 (1979). Nor is there any dispute that the apportionment of negligence is ordinarily a matter for the jury, not the court, to determine. It is also the rule, however, that the trial court "`may withdraw a case from the jury whenever the jury could not reasonably find the [party's] conduct to be negligent.'" ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 733, 275 N.W.2d 660, 665 (1979) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 37, at 205 (4th ed. 1971)). Thus, Owens-Corning must produce evidence of Kosloske's lack of care in order to be entitled to a contributory negligence instruction. ***Gish v. CSX Transp., Inc.***, 890 F.2d 989, 992 (7th Cir. 1989); *see also* ***Birchem v. Burlington N. R.R. Co.***, 812 F.2d 1047, 1049 (8th Cir. 1987) (it is error to instruct on plaintiff's negligence when defendant fails to produce evidence of lack of care).

Owens-Corning argues that the evidence justified such an instruction, pointing to Kosloske's testimony in a pretrial deposition that, while he "had heard that asbestos materials might have a potential health problem" and was aware that asbestos had been used "somewhere" in the WEPCO plant, sometimes he would not wear a face mask or respirator at work. Based on that testimony, Owens-Corning argues that a reasonable jury could find Kosloske contributorily negligent for his own safety. The trial court disagreed, as do we.

We have read relevant portions of Kosloske's deposition and we agree with him that it can lead to only one conclusion: Kosloske, following his employer's safety instructions, would wear a mask or respirator whenever conditions in a particular area of the plant called for it, and if none was available, he would not go into the area.[5] And he followed those instructions in all of his work at the plant, including the occasional times when he would be in an area where other employees were working with insulation.[6]

---

[5] He said, for example, that he and the other employees were instructed by WEPCO to wear the protective devices when working under dusty conditions in the boilers or elsewhere in the plant, and that he followed those instructions—noting that it would be "dumb" not to. If no protective devices were available, Kosloske and the other employees would not go into a dusty area.

[6] With respect to asbestos, Kosloske testified that he understood some of the insulation

What Owens-Corning's argument boils down to is that, in the context of a four-and-one-half-hour deposition, admitted into evidence as part of a seven-day trial, Kosloske's affirmative response to a single question—whether he sometimes would and sometimes would not wear a respirator while in an area where insulators were working—warrants submission of a question on his contributory negligence. Taken in context of his responses to questions in the preceding few pages of the deposition transcript, it is apparent that this was simply a restatement of his repeated testimony that, as instructed by his employer, he wore protective devices when and where the conditions in the plant required—specifically when there was any dust in the area where he was working.

On this record, we believe the trial court could properly rule that Kosloske's testimony provides no reasonable basis for a jury finding that he was negligent for his own safety.

II. Former Testimony

As indicated, Kosloske claimed that Owens-Corning failed to adequately warn of the dangers presented by Kaylo. Witnesses for Owens-Corning testified at trial that it was the company's routine practice to place warning labels on all Kaylo containers. In rebuttal, Kosloske offered the transcript of the deposition of a former Owens-Corning employee, Ronald Hill, taken in a New Jersey case in which Hill sued Owens-Corning, claiming that his exposure to raw asbestos used in the manufacture of Kaylo caused him to contract an asbestos-related disease. In his deposition, Hill testified that Owens-Corning did not place warning labels on Kaylo containers.

Owens-Corning objected to the admission of Hill's deposition on hearsay grounds, arguing that the "former testimony" exception to the hearsay

(..continued)

in the plant contained asbestos, and had heard generally that asbestos "could cause problems," but that "[a]t that time [he] did not know how detrimental that was." He said that his job duties did not include working with insulation, but he was sometimes in an area where others were working with it, and while in the area would sometimes wear a respirator and sometimes not, depending on whether "the environment was to the point where it was a dusty condition."

rule codified in § 908.045(1), STATS., *see supra* note 3, did not apply to the offered testimony because it did not meet the statute's requirement: To be admissible, the testimony must have been taken by or against a party who had the opportunity to examine the witness and who had a "motive and interest similar to those of the party against whom now offered."

The trial court ruled that the exception applied and overruled Owens-Corning's objection to admission of the testimony. The court gave the following reasons for the ruling:

> [E]ven though ... [Owens-Corning's attorney focused on immunity in the Hill deposition] ... certainly the opportunity was there to cross-examine, to ask Mr. Hill about ... his observations or lack thereof. The motive ... was there, because here was an individual testifying contrary to the position that [Owens-Corning] had taken, that is, that these Kaylo products did have the warning label on them, and here was an employee testifying that there were no such warnings that he saw; so I think that certainly an argument can be made that there was a motive to do so.[7]

Owens-Corning first urges us to review the trial court's ruling de novo, arguing that it involves interpreting a statute—§ 908.045(1), STATS.—which is traditionally considered to raise a question of law. *See* ***State ex rel. Sielen v. Milwaukee Cir. Ct.***, 176 Wis.2d 101, 106, 499 N.W.2d 657, 659 (1993). We decline to do so for, as we said in ***State v. Barksdale***, 160 Wis.2d 284, 287, 466 N.W.2d 198, 199 (Ct. App. 1991), the decision to admit or reject evidence under the hearsay exceptions—including § 908.045—is committed to the trial court's discretion. We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and "we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "And where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with

[7] The court's remarks came in its oral decision denying Owens-Corning's postverdict motion claiming error in admitting Hill's testimony.

applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted).

It is apparent from the record that the trial court exercised discretion in ruling on Owens-Corning's objection to Hill's testimony. Therefore, we must uphold that ruling if it is one a reasonable judge could reach—even though we disagree with it. ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).

Owens-Corning argues that the trial court could not reasonably rule that the "motive and interest" provisions of § 908.045(1), STATS., were met in this case. It is an argument that the court erred as a matter of law, and "we have never hesitated to reverse discretionary determinations where the exercise of discretion is based on an error of law." ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

Owens-Corning begins by pointing out that Hill claimed in his suit, among other things, that because of Owens-Corning's prior knowledge of asbestos hazards, it had committed an intentional tort against him by allowing him to be exposed to the product, and as a result, the provisions of the New Jersey worker's compensation law, which make employers immune from liability to employees, did not apply. While the case was pending, the New Jersey Supreme Court held that an employer's knowledge of the hazards of asbestos used in the workplace did not constitute an intentional tort so as to defeat the employer's immunity under the worker's compensation law. Owens-Corning contends that its attorney was only trying to establish the company's immunity in the Hill deposition; therefore, he did not need to go further in challenging Hill's testimony on other points. Thus, says Owens-Corning, it did not have a similar motive or interest in Hill's case and it was error for the trial court to admit the deposition testimony.

Owens-Corning's argument comes down to this:

> In [Hill's case] the attorney for [Owens-Corning] was trying to bolster the testimony indicating that Mr.

> Hill's only alleged exposure to asbestos products ... was while under the employment of Owens-Corning .... Counsel's job in ***Kosloske*** was dramatically different, however. In ***Kosloske***, [Owens-Corning] was trying to diminish the exposure to alleged asbestos-containing products manufactured by [it] and instead prove that he in fact was not exposed to any [Owens-Corning] products allegedly containing asbestos ....

We think Owens-Corning paints with too broad a brush. Hill's testimony was admitted in this case on the limited point of the existence or nonexistence of product warnings; we agree with Kosloske that "[r]egardless of the confines of the worker's compensation provision in New Jersey at that time ... [Owens-Corning] certainly had a motive and interest in refuting testimony that it failed to place warning labels on its packages." According to an affidavit filed in this case, Owens-Corning's counsel in the Hill case was representing the company in a large number of asbestos-related lawsuits, and his election, as a matter of strategy in that case, not to pursue Hill's charge that Owens-Corning had failed to warn users of the dangers of its product should not, in our opinion, provide a basis for declaring Hill's testimony inadmissible under the statute.

In ***In re Related Asbestos Cases***, 543 F. Supp. 1142, 1145 (N.D. Cal. 1982), the plaintiffs in a class-action asbestos suit sought admission of a deposition of the former medical director of one of the manufacturers, who had since died, in which he testified as to his awareness of the hazards of asbestos as early as the 1940s. The applicable rule, FED. R. EVID. 804(b)(1), is similar to § 908.045(1), STATS., in that it allows such evidence if the party against whom the testimony is offered, or its predecessor in interest, "had an opportunity and similar motive to develop the testimony in full." ***Id***. at 1146. The manufacturer, the Johns-Manville Corporation, argued that its interest in cross-examining the witness in the former proceeding was "not as intense" as in the present case, because the facts were different and because the witness's deposition was intended not for use at trial but only for discovery purposes.

The court rejected the argument, stating, among other things, that while the circumstances of the actions were dissimilar in several respects, "[s]ince plaintiffs presently seek to use only those portions of the depositions

which pertain to the notice issue, the additional issues in the [former] case[] do not preclude a finding that Johns-Manville's motive for cross-examining [the witness] in [that] case was similar to its motive in the instant case[]." ***Id***. at 1148. The court also noted that

> Johns-Manville ran a risk in failing to cross-examine [the witness] vigorously when it had the opportunity to do so. [The witness] is unavailable now. We refuse to exclude highly relevant testimony because Johns-Manville's failure to avail itself of an ample opportunity to cross-examine [the witness] turns out, in retrospect, to have been a tactical error.

Id.; *see also* ***Nabbefeld v. State***, 83 Wis.2d 515, 525-27, 266 N.W.2d 292, 298 (1978) (allowing preliminary hearing deposition of a now unavailable witness to be read into evidence at the trial under § 908.045(1), even though a preliminary examination has a different nature and purpose than a trial).

We recognize that ***Asbestos Cases***, like other federal court decisions, is not binding on state courts in Wisconsin or anywhere else. ***Thompson v. Village of Hales Corners***, 115 Wis.2d 289, 307, 340 N.W.2d 704, 713 (1983). We have elected to follow such cases, however, when we find their reasoning persuasive on a particular question, ***Streff v. Town of Delafield***, 190 Wis.2d 348, 356-57, 526 N.W.2d 822, 825 (Ct. App. 1994), and we believe it is persuasive in ***Asbestos Cases***. In this case, as in that one, the prior testimony sought to be admitted is quite limited in scope: It is confined to Hill's statements that Owens-Corning did not label its Kaylo products. As a result, the fact that the New Jersey proceedings and the instant trial were dissimilar becomes immaterial.

Nor are we persuaded by Owens-Corning's assertions that, given the immunity provisions of the New Jersey law, it had little incentive to question Hill about the absence of warning labels, and thus cannot reasonably be held to have any interest or motive in doing so. As we noted above, the evidence indicated that widespread asbestos litigation is a fact of life for Owens-Corning and other asbestos manufacturers. ***Asbestos Cases***, for example, lists approximately twenty-five members of the asbestos industry—including Owens-Corning—as defendants. We believe a reasonable trial judge could

conclude that Owens-Corning had an interest in refuting testimony that it had failed to place warning labels on its packages.

Because the trial court, in overruling Owens-Corning's objection to the admission of Hill's deposition, exercised its discretion in a manner that was neither unreasonable nor contrary to the facts of record or applicable law, we may not overturn its ruling. We conclude, therefore, that the trial court did not erroneously exercise its discretion in overruling Owens-Corning's objection to Hill's deposition.

III. Sufficiency of the Evidence of Cause

Owens-Corning next contends that the evidence was insufficient to permit the jury to find, as it did, that Kosloske's damages were caused by Owens-Corning's failure to warn of the dangers of its product. It argues, in essence, that because Kosloske's own deposition testimony "establishes that he knew of all dangers that [Owens-Corning] could have warned him about," there can be no causal connection between its failure to warn of those dangers and Kosloske's illness. The argument is based on: (1) the same evidence on which Owens-Corning relied in arguing that the trial court erred in declining to instruct the jury on Kosloske's contributory negligence; and (2) the assertion that Hill's deposition was erroneously admitted into evidence. We have, of course, held that the evidence did not warrant a contributory-negligence instruction, and that the Hill deposition was properly admitted.

In reviewing jury verdicts for sufficiency of the supporting evidence, we follow the rule that if there is any credible evidence, under any reasonable view, which fairly leads to an inference that supports the jury's finding, such finding may not be overturned. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985); § 805.14(1), STATS. "[W]e examine the record, not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court did make." ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977) (quoted source omitted); *see* ***In re T.R.B.***, 160 Wis.2d 840, 842, 467 N.W.2d 553, 554 (Ct. App. 1991). In doing so, we view the evidence in the light most favorable to the verdict; this is especially true when the trial court approved the verdict. ***York v. National Continental Ins. Co.***, 158 Wis.2d 486, 493, 463 N.W.2d 364, 367 (Ct. App. 1990). The

credibility of witnesses and the weight afforded their testimony are left to the jury's judgment, and "where more than one reasonable inference can be drawn from the evidence, we accept the inference drawn by the jury." ***Id***.

First, of course, is Hill's testimony regarding the absence of labels on Kaylo packages. Owens-Corning contradicted that testimony with other evidence, but, as we just indicated, resolving conflicts in the evidence is the jury's task, not ours; we look only to see whether any credible evidence exists to support the jury's verdict.

Second, it is true, as Owens-Corning asserts, that a manufacturer has no duty to warn members of a trade or profession about dangers generally known in that trade or profession. ***Shawver v. Roberts Corp.***, 90 Wis.2d 672, 686, 280 N.W.2d 226, 233 (1979). The record in this case, however—much of it in the form of internal Owens-Corning documents—indicates that since 1940 the company has become increasingly aware of the cancer-causing dangers of asbestos, and there is no evidence that Kosloske or other members of his trade were aware of the mortal threat posed by exposure to asbestos products. As we noted above, while Kosloske indicated his awareness that dust and other airborne contaminants—including asbestos—should not be internalized, he stated he had no idea how "detrimental" they were.

Finally, Owens-Corning contends there was no evidence that, had Kosloske been warned, he would have exercised any greater care for his own safety. It claims that without such testimony, no evidentiary basis exists for the jury's affirmative answer to the cause question. Again, we disagree.

Kosloske's deposition shows that he consistently took appropriate measures to protect himself from work-related dangers—including exposure to airborne contaminants—as he understood them. He recounted the safety meetings and instruction sessions held at the WEPCO plant and he testified that he followed those instructions by using respirators and other safety devices when warranted by conditions at the plant. The jury could reasonably infer that, had he been realistically apprised of the dangers of asbestos, he would have taken additional measures to ensure his safety. This is not a case, like those cited by Owens-Corning in support of its argument—notably ***Broussard v. Houdaille Indus., Inc***., 539 N.E.2d 360, 364 (Ill. App. Ct. 1989), and ***Overpeck v. Chicago Pneumatic Tool Co***., 823 F.2d 751, 755 (3d Cir. 1987)—where the

plaintiffs flouted safety procedures of which they were well aware. There simply was no such showing in this case.

Owens-Corning failed to establish that the jury's verdict on cause is unsupported by any credible evidence in the record. Nor, as we indicated, has the company persuaded us that the judgment and order appealed from are otherwise unsound.[8]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[8] It thus becomes unnecessary to separately consider Owens-Corning's final argument that the cumulative effect of the trial court's errors warrants a new trial.