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NO. 70309-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RALMA EHLERT, individually and as Personal Representative of the
Estate of ROBERT S. EHLERT; and TAMARA JONES, as Personal
Representative of the Estate of JAMES A. JONES,

Appellants/Cross-Respondents,

v.

BRAND INSULATIONS, INC., et al.,

Respondent/Cross-Appellant.

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. PLAINTIFFS LACKED EVIDENCE OF CAUSATION

A. Brand Did Not Appeal the Trial Court's Denial of its Summary Judgment Motion

Plaintiffs spend much of their brief on Brand's Cross Appeal discussing an issue which is not even before the court. Contrary to Plaintiffs' characterization of Brand's appeal, Brand is not appealing from the trial court's denial of its summary judgment motion. While Brand believes it was clear error for the trial court to not grant its summary judgment motion, its assignments of error relate only to the court's failure to grant its motion for directed verdict after presentation of the plaintiff's case and after presentation of all of the evidence. (See Assignments of Error, Brand's Brief on Cross Appeal at Pages 3-4) A discussion of the summary judgment motion appears in Brand's brief solely to insure that the basis for Brand's post-evidence motions is clear to this Court. The issue presented was extensively briefed at the summary judgment motion, that briefing is included in the clerk's papers, and the factual basis for Brand's post-evidence motion brought at the end of the plaintiff's case was essentially the same as the factual basis for its summary judgment motion. Dr. Hammar's testimony did not change between the time of the summary judgment motion and the conclusion of plaintiffs' case. The evidence was different with respect to Brand's motion at the close of all evidence. At the close of all evidence, there was not simply a failure of

proof by plaintiffs, but there was also affirmative proof from Brand's industrial hygienist, Mr. Joseph Holtshauser, that Dr. Hammar's threshold for attributing substantial factor causation had not been met.

B. Plaintiffs' Evidence Was Insufficient to Create a Jury Question on Causation

The law is clear, and the facts relevant to a resolution of Brand's Cross Appeal are simple and uncontroverted. In order to recover in an asbestos case in Washington, the plaintiff must demonstrate that the asbestos exposure for which the defendant allegedly bears responsibility was a substantial factor in the development of his disease. *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 245, 744 P.2d 605 (1987); *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052 (2011). In order to prove substantial factor causation involving complex issues of medical causation, the plaintiff must present expert medical evidence. *Fabrique v. Choice Hotels Int'l., Inc.*, 144 Wn. App. 675, 183 P.3d 1118 (2008). Moreover, "[t]he opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to a jury." *Theonnes v. Hazen*, 37 Wn. App. 644, 681 P.2d 1284 (1984); *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.* 106 Wn.2d 391, 400, 722 P.2d 787 (1986); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144,

164, 106 P.2d 314 (1940). “The opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation.” *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990).

Plaintiffs’ sole causation expert witness was Dr. Hammar. The only information he had regarding the alleged asbestos exposures at the ARCO Cherry Point facility was what Mr. Bergman, plaintiffs’ lawyer, had told him.

At trial, Dr. Hammar testified to the following propositions:

- a. He had testified in the past that, in order for him to testify to a reasonable degree of medical certainty that a particular exposure is a substantial contributing factor for the development of mesothelioma, that exposure has to be at least .15 f/cc years. RP 443-44.
- b. That was his opinion at the time of this trial. RP 443-44.
- c. He had not been provided a dose reconstruction calculating the exposures of either Mr. Ehlert or Mr. Jones for which Brand bore responsibility. RP 444.
- d. The only thing he knew about the claimed exposures at the Cherry Point ARCO facility is what Mr. Bergman had told him. RP 444.

Against this framework of evidence, plaintiffs make three arguments in their appellate briefing. First, they argue that Mr. Ehlert’s

and Mr. Jones' Cherry Point exposures were sufficient to cause their respective diseases.¹ Second, plaintiffs argue that this court can ignore the fact that Dr. Hammar has an established threshold of cumulative exposure that must be exceeded before he can testify to a reasonable degree of medical certainty that a particular exposure is a substantial factor in the development of a plaintiff's disease. Plaintiffs assert that Dr. Hammar never testified that he required industrial hygiene data to express an opinion on causation. Unfortunately, that is exactly what Dr. Hammar has been testifying to for the past 10 years, and it is exactly what he testified to in this case. RP 443-44.

Plaintiff counsel did not provide Dr. Hammar with any evidence that the plaintiffs' alleged exposures for which Brand allegedly bore responsibility exceeded his threshold for attributing substantial factor causation. RP 444. Plaintiffs' failure to demonstrate that Dr. Hammar's threshold for attribution of substantial factor causation was the basis for Brand's motion at the end of the plaintiff's case. Following denial of that motion, Brand presented its case. Brand's evidence included testimony from Mr. Joseph Holtshauser, a certified industrial hygienist. Mr.

¹ It will be discussed below why "Cherry Point" exposure is a completely irrelevant inquiry, since both plaintiffs allegedly sustained multiple additional exposures at Cherry Point, none of which would have been Brand's responsibility.

Holtshouser testified that Dr. Hammar's threshold for attribution was not met by exposures attributable to Brand.

Dr. Hammar was candid in his response to the question of what exposure evidence he had been provided. He testified that the only thing he knew about the claimed exposures of both plaintiffs was what the plaintiffs' lawyer, Mr. Bergman, had told him. By his own admission, Dr. Hammar's "opinion" was not based upon testimony or facts elicited in the case as required by Washington case law. No Washington authority permits an expert to express an opinion at trial (or anywhere else) based solely on information derived from hearsay statements provided to him by the lawyer who retained him.

How did plaintiff counsel at trial attempt to finesse this complete absence of evidence against Brand? He did so by couching his questions to Dr. Hammar in terms of "exposures to asbestos sustained by plaintiffs at the ARCO Ferndale refinery." RP 360, 393. Not once in the trial did plaintiffs' counsel ask Dr. Hammar if exposures attributable the defendant Brand were a substantial factor in the development of either plaintiff's mesothelioma. We know from plaintiffs' Responses to Style Interrogatories and Appendices A to those interrogatories that there were multiple claimed sources of exposure at the ARCO facility for both men and Brand was not one of the claimed sources identified on the respective

Appendices A. CP 462-489, 487; 507-536, 534. Plaintiffs' Appendices A listed the following as sources of exposure at ARCO Ferndale: Metalclad, Pryor-Giggey, C.H. Murphy, Riley Stoker, IR (Ingersoll Rand), Cooper Heat, Pryocrete (Carboline), UCC (Union Carbide Corp.), GE, Westinghouse, Yarway, Lonergan Valves, Garlock, PABCO, Carver Pumps, Durco Valves, Davidson Pumps. Brand does not appear on either plaintiff's Appendix A.

While the causation questions asked by plaintiffs' counsel of Dr. Hammar may have had relevance were ARCO the defendant, and it could be established that ARCO had some overarching duty to provide a safe place to work for Parsons' employees, the questions posed by Mr. Bergman and Dr. Hammar's responses were completely irrelevant as to Brand. Brand bore no liability for the conduct of the entities identified as alleged sources of asbestos exposure at ARCO Cherry Point, and no suggestion has been made that it did. At no point in the trial was plaintiffs' causation expert asked whether or not exposures for which Brand would have borne responsibility constituted a substantial factor in causing these plaintiffs' diseases.

In the final analysis, plaintiffs' failed to obtain any causation testimony in the trial which implicated Brand. Plaintiffs' counsel never asked Dr. Hammar if Brand's conduct was a substantial factor in the

development of the plaintiffs' mesotheliomas. Even had the proper question been asked, plaintiffs also failed to establish that Dr. Hammar's threshold for attribution of substantial factor causation had been exceeded by alleged exposures attributable to Brand. There was a complete absence of the proof required by Washington law.

C. The Risk Model Developed by Peto and Endorsed by Dr. Hammar Predicts Zero Risk from Alleged Exposures at ARCO Ferndale

Brand's counsel questioned Dr. Hammar regarding Dr. Peto and his colleagues' risk model for predicting mesothelioma risk. Dr. Hammar stated that he agreed with the model and noted that one could actually find a discussion of the model in a text book that he authored. RP 439. He testified that he also agreed with Dr. Peto's statement that risk increases more slowly after 10 years of exposure and that there is little difference between continuing or ceasing exposure after 20 years. RP 440-441. Plaintiffs' appellate counsel accuses Brand of misinterpreting the text of the paper, claiming that the 20 years refers to a constant exposure. In fact, there is no reference in the cited section to constant exposures other than the fact that the risk exponent in Peto's equation for constant exposures is 4 and not 3. More importantly, plaintiff counsel's interpretation of the paper is irrelevant. Counsel had the opportunity to conduct a redirect examination of Dr. Hammar to further explore Dr. Peto's theory and Dr.

Hammar's adoption of that theory which, appears from his testimony, to be without reservation. Moreover, plaintiffs' counsel had the opportunity to cross examine Dr. Weir regarding his testimony about Dr. Peto's model and chose not to do so. Dr. Weir was asked the following question and provided the following answer regarding the Peto model:

Q: Doctor, according to the Peto model, an exposure that occurs 20 years after that individual's first exposed (sic) to asbestos, and assuming that exposure is sufficient to cause mesothelioma, does that exposure 20 years post increase the risk of developing the disease?

A. Clearly no.

RP 847-848.

The responses to style interrogatories executed by both plaintiffs clearly establish a long history of asbestos exposure prior to the claimed exposures at ARCO. In each case, those exposures commenced more than 20 years prior to the claimed ARCO exposures. Beyond providing their lawyer's interpretation of the Peto study which is not shared by the only expert who testified regarding its application to the present case, plaintiffs simply argue that the court can ignore this uncontroverted evidence that the ARCO exposures would not have contributed to the risk of disease because "ample evidence of causation" had been adduced at trial. In fact, no evidence of causation as it related to exposures allegedly attributable to Brand was presented at trial nor was such evidence even sought to be

presented at trial. Plaintiffs' counsel studiously avoided asking Dr. Hammar a Brand specific question on causation during his direct examination. Brand submits that the reason the question was avoided was that Dr. Hammar would have been forced to answer the question in the negative. He would have been forced to answer in the negative because he had not been provided the evidence he needed to determine whether or not those exposures were a substantial factor under his own specific criterion. This case presented a complete failure of proof on the issue of causation. There is no basis for overturning the jury's verdict as Brand's motions for directed verdict should have been granted.

II. CONCLUSION

Plaintiffs failed to present evidence at trial establishing that Brand's conduct was a substantial factor in the development of the plaintiffs' diseases. Plaintiffs failed to demonstrate that asbestos exposures, due to conduct for which Brand was responsible, exceeded plaintiffs' causation experts' threshold for attributing substantial factor causation. Moreover, plaintiffs' counsel failed to even ask Dr. Hammar whether or not Brand's conduct was a substantial factor in causing plaintiffs' diseases. These failures render plaintiffs' appeal of the trial court's decision to strike their Restatement (Second) of Torts § 402A claims irrelevant. The same causation standard would apply to a products

claim as to a negligence claim. Consequently, whether or not it was error for the trial court to dismiss plaintiffs' product liability claim is simply of no moment. The appellate court may affirm a trial court ruling, in this case the jury's verdict, on any ground supported by the record. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). An absence of proof on the fundamental issue of causation is such a ground.

RESPECTFULLY SUBMITTED this 30th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 30th day of April, 2014, I caused a true and correct copy of the foregoing document, "Reply Brief of Respondent/Cross-Appellant," to be delivered in the manner indicated below to the following counsel of record:

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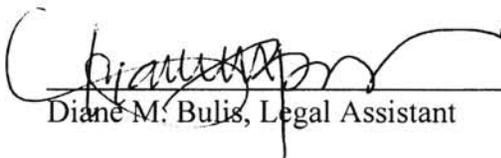
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DATED this 30th day of April, 2014, at Seattle, Washington.



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