IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JAMES T. BUTLER and KATHLEEN BUTLER, Appellant/ Cross-Respondent, v. AMTICO INTERNATIONAL INC.; ASARCO INCORPORATED; ASBESTOS CORPORATION LIMITED; ATLAS TURNER, INC.; BARTELL'S ASBESTOS SETTLEMENT TRUST; BELL ASBESTOS MINES LTD.; C. BLACKSTOCK LUMBER CO., INC. dba BLACKSTOCK LUMBER CO., INCO.; C.A. NEWELL/TILE DISTRIBUTORS, L.P.; CONGOLEUM CORPORATION; DOMCO PRODUCTS TEXAS, L.P.; DOWMAN PRODUCTS, INC.; DUNN LUMBER CO., INC.; FRYER-KNOWLES, INC.; GATKE CORPORATION; GEORGIA-PACIFIC CORP; H.B. FULLER COMPANY; KENTILE FLOORS, INC.; LAKE ASBESTOS OF QUEBEC, LTD.; MAJOR BRANDS; MANNINGTON MILLS, INC.; MORTRUDE FLOOR COMPANY; METROPOLITAN LIFE	)	NO. 58552-5-I (Consolidated with NO. 58553-3-I and NO. 58554-1-I) UNPUBLISHED OPINION

INSURANCE COMPANY; MOHASCO CORPORATION; MURRAY B. MARSH COMPANY, INCORPORATED; PNEUMO ABEX CORPORATION; QUIGLEY COMPANY, INC; SEA-PAC SALES COMPANY; SEARS ROEBUCK & COMPANY; SOUND FLOOR COVERINGS, INC.; TARKETT, INC,; FLINTKOTE COMPANY, THE; TILE COUNCIL OF AMERICA, INC.; UNION CARBIDE CORPORATION; UNIROYAL, INC.; WANKE PANEL COMPANY; and FIRST DOE though ONE HUNDREDTH DOE,

Defendants,

and

KENTILE FLOORS, INC., MANNINGTON MILLS, INC.,

Respondents,

and

DOMCO PRODUCTS TEXAS, L.P.,

Respondent/ Cross-Appellant.

FILED: February 19, 2008

BECKER, J. — Appellant James Butler died from mesothelioma, a fatal form of lung cancer. Before he died, he and his wife sued Domco Products, claiming that exposure to asbestos tile manufactured by Domco's predecessor was a cause of his illness. Domco successfully moved for summary judgment. Because Butler raised a reasonable inference that he worked with older generation tiles that released asbestos fibers when cut, and also established that

his illness was caused by cumulative exposure to asbestos, the order dismissing his claim is reversed.

FACTS

This suit originally involved 32 named defendants. Domco is the only defendant involved in this appeal. Domco's predecessor, Azrock Industries, Inc, manufactured vinyl asbestos tile. Butler testified that he used Azrock tiles during his career as a floor installer. In this appeal from the order dismissing Butler's claim against Domco on summary judgment, the primary question is whether Butler's evidence is sufficient to prove that his use of Azrock tile exposed him to asbestos. If so, a second issue is whether the evidence is sufficient to prove that the exposure was a substantial factor in causing his injuries.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court. We will affirm an order granting summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In reviewing summary judgment orders, we consider supporting affidavits and other admissible evidence that is based on the affiant's personal knowledge. A party may not rely on mere allegations, denials, opinions, or conclusory statements but, rather must set forth specifics indicating material facts for trial.

The party moving for summary judgment has the initial burden of establishing the absence of an issue of material fact. If the moving party meets

this burden, in order to withstand summary judgment, the nonmoving party must set forth specific facts establishing a genuine issue for trial. The evidence and all reasonable inferences must be examined in the light most favorable to the nonmoving party to determine if there are genuine issues of material fact for trial. Allen v. Asbestos Corp., LTD, 138 Wn. App. 564, 569, 157 P.3d 406 (2007).

EXPOSURE

To have a cause of action arising from exposure to asbestos, the plaintiff must identify the particular manufacturer of the product that caused the injury. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 247, 744 P.2d 605 (1987). In Lockwood, a shipyard worker with asbestosis presented evidence that the manufacturer's asbestos-containing product was among a number of brands used on the ship where he worked as a rigger. Insulators created dust both when they tore out the old product and when they applied new insulation. Experts testified that after asbestos dust is released, it drifts in the air so it can be inhaled, even by persons who do not work directly with the asbestos containing product. The Supreme Court held that this evidence was sufficient to establish a reasonable inference that the plaintiff was exposed to asbestos from the defendant's product. Lockwood, 109 Wn.2d at 247-48.

Both parties in the present case rely on the testimony of industrial hygienist Kenneth Cohen, an expert retained by Butler. Cohen differentiated between old and new generation vinyl asbestos tile. Cohen stated that exposure to asbestos resulted when the friable older generation tile was cut, while the

cutting of newer generation tile left the asbestos fiber bundles intact and resulted in no exposure. The change over in the manufacturing process, according to Cohen, occurred sometime during the 1960's:

> Q: With respect to his alleged exposure to asbestos from installing floor tiles . . . do you have any opinion as to the amount of asbestos he would have been exposed to? . . . .
>
> . . . .
>
> A: The . . . vinyl asbestos tile poses a unique dichotomy exposure potentials. The generations of asbestos vinyl tile that existed in the 1950's and '60s were different than those that existed in the '70s, '80s and '90s, based on my experience. The 1960s were a more difficult time period because the manufacturing process changed in vinyl asbestos tile.
>
> If I may refer to the older generation and the newer generation of vinyl asbestos tile, I would separate them in my opinions.
>
> The older generation was not a complete amalgamation of vinyl with the asbestos fiber bundles, in that, if you cracked a tile, if you cut a tile, if you broke a tile, the tile would reveal on the broken or cut edge available unencapsulated asbestos fiber bundles.
>
> In the new generation of vinyl asbestos tile, from the middle 1960s on through the current date, or whenever asbestos was no longer incorporated into the vinyl tile, it was almost impossible to expose an individual to the intact fiber bundle because of the completeness of the incorporation of vinyl.
>
> . . . .
>
> Q: Are you aware of any studies of floor tile and sheet products and the specific asbestos exposure either generate?
>
> . . . .
>
> A: I have conducted a number of studies on the new generation vinyl asbestos tiles and have been unable with abrasive sanding or rigorous physical activity to the tile, to release any free asbestos material that could be identified.
>
> I have also done stereomicroscopy of older generation tiles and demonstrated free and available fiber bundles at the surface of a tile break or tile cutting.[1]

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[1] Clerk's Papers at 1373-74 (Cohen Deposition) (emphasis added by Domco).

Cohen testified that the newer generation vinyl asbestos tiles began to appear in the market in the late 1960's:

> Q: Am I correct that you are ruling out the newer generation of tile products as you described them as a substantial source of exposure to Mr. Butler?
> A: Absolutely.
> Q: And did those newer generation of products begin to appear in the market in the '60s?
> A: In the late '60s and beyond, yes, sir.[2]

Cohen testified that "absent evidence of a scrupulous asbestos abatement or industrial hygiene control procedure," exposure to old generation vinyl asbestos tile would have resulted in a substantial exposure to asbestos.[3]

Butler submitted evidence establishing that Azrock's tiles were among the various brands of vinyl asbestos tile he used between 1965 and 1969. He testified that he installed floors in the evenings and on the weekends from 1965 to 1967. Installation of floors often involved tearing out old flooring and cutting new tiles. In 1967 Butler opened his own flooring business. He ran the business by himself and performed all of the company's floor installation work from 1967 to 1969. Butler did less installation work after 1970. In 1974 or 1975 Butler sold the business and he did not do any more installation projects after that.

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[2] Clerk's Papers at 1375 (Cohen Deposition).
[3] Clerk's Papers at 1373 (Cohen Deposition).

Domco acknowledges the evidence that Butler used at least a small amount of Azrock vinyl asbestos tile between 1965 and 1969, but maintains there is insufficient evidence that the Azrock tiles he used were of the older generation.

To support an inference that Azrock kept on manufacturing the older generation products until well past the time Butler stopped laying tile, Butler offered Exhibit G, a page from an interrogatory response that Domco submitted in an unrelated California case from several years ago. Part of the response read: "By October 4, 1982, complete reformulation of entire product line to eliminate use of asbestos fibers due to increasing market [. . . .]."[4] The sentence ends abruptly at the bottom of the page. The exhibit did not include the question asked, or the rest of the response. Domco filed a motion to strike Butler's reference to Exhibit G as unfairly prejudicial and therefore inadmissible under ER 403. The trial court did not make a ruling either granting or denying Domco's motion to strike. Domco has filed a cross-appeal, claiming that the trial court erred by refusing to grant the motion to strike. Butler responds that Domco waived any issue of admissibility of Exhibit G by failing to seek an explicit ruling on the motion to strike.

We examine the record de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Exhibit G is part of the record created in the trial court. We are unaware of any authority or good reason why a party should have

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[4] Clerk's Papers at 1365 (Exhibit G attached to Declaration of Zachary Herschensohn).

to obtain from the trial court an explicit ruling on a motion to strike, or why the failure to grant or deny a motion to strike should give rise to a cross-appeal. Our Supreme Court has stated that failure to make a motion to strike "waives deficiency," if any exists, in an affidavit submitted in connection with a motion for summary judgment. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 588 P. 2d 1346 (1979). In examining the federal case on which this statement rests, one finds that the point of a motion to strike is simply to raise an objection. "The declaration would have been subject to a motion to strike. Had appellees made such a motion or otherwise objected to the use of the declaration, the defect could have been remedied by appellants filing an affidavit in lieu of the declaration." United States v. Western Elec. Co., 337 F. 2d 568, 575 (9th Cir. 1964) (emphasis added), cited in Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 881, 431 P. 2d 216 (1967), cited in Lamon, 91 Wn. 2d at 352. The trial court's failure to rule is not at issue on appeal, because under Folsom we examine de novo all evidence presented to the trial court, conduct the same inquiry, and reach our own conclusion about the admissibility of evidence. We conclude Domco's motion to strike Exhibit G preserved its ability to argue on appeal that Exhibit G is inadmissible under ER 403.

A party cannot rely on inadmissible evidence to show the existence of material facts. Jones v. State, 140 Wn. App. 476, 494-95, 166 P.3d 1219 (2007). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the

issues. ER 403. While Exhibit G does suggest that Azrock's manufacturing process was not changed to eliminate asbestos fibers until 1982, the relevance is substantially outweighed by the danger of prejudice and confusion caused by the lack of context. An incomplete answer to an unknown question is insolubly ambiguous. Accordingly, we will not consider Exhibit G in our assessment of the evidence offered to prove that Butler was exposed to older generation Azrock tile.

We nevertheless conclude that Butler's testimony in combination with Cohen's testimony, when considered in the light most favorable to Butler as the nonmoving party, is sufficient to prove that the Azrock tile Butler used from 1965 to 1969 was of the friable, older generation type.

Domco argues that a jury would have to speculate that Butler worked with old generation tile because Cohen's testimony equally supports the inference that he did not. However, this is not a matter of "could have been." Viewing Cohen's statement about the "late 60's and beyond" in the light most favorable to Butler, a jury could reasonably infer that the newer generation tile did not even appear in the marketplace until 1969. Given the evidence that Butler's busiest period as an installer of vinyl asbestos tile, including Azrock brands, was from 1965 to 1969, it is reasonable to infer that the Azrock tile he was using was older generation more probably than not. We conclude Butler carried his burden on summary judgment to submit evidence that he was exposed to asbestos by use of Azrock products.

CAUSATION

A "substantial factor" test for causation is used when an asbestos plaintiff is unable to show that one event alone was a cause of the injury. Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 31, 935 P.2d 684 (1997). A plaintiff does not have to prove or apportion individual causal responsibility. See Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 91, 896 P.2d 682 (1995). A plaintiff need only establish that defendant's product was among other sources of asbestos exposure in the plaintiff's environment that cumulatively caused the disease. Lockwood, 109 Wn.2d at 245-47. Professor Keeton recommends this approach to causation. Mavroudis, 86 Wn. App. at 29-30. Keeton says,

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

W. Page Keeton, et al., *Prosser & Keeton on Torts* § 41, at 268 (5th ed. 1984).

Domco claims that Butler cannot show that Azrock tile was the proximate cause of his injuries because Butler admitted that he was exposed to only a "small" amount of Azrock tile. Domco emphasizes that Butler's cumulative exposure to asbestos included tile from many other manufacturers and that Butler did not present expert testimony that the Azrock tile was a substantial factor.

In Lockwood, the Supreme Court listed factors that a court should consider to determine if there is sufficient evidence that "exposure to a particular

defendant's asbestos product actually caused the plaintiff's injury." Lockwood, 109 Wn.2d at 248. These factors are: (1) plaintiff's proximity to the asbestos product when the exposure occurred, (2) the expanse of the work site where asbestos fibers were released, (3) the extent of time plaintiff was exposed to the product, (4) what types of asbestos products the plaintiff was exposed to, (5) how the plaintiff handled and used those products, (6) expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular, (7) evidence of any other substances that could have contributed to the plaintiff's disease, and (8) expert testimony as to the combined effect of exposure to all possible sources of the disease. Lockwood, 109 Wn.2d at 248-49. "Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case." Lockwood, 109 Wn.2d at 249.

In Lockwood, the evidence showed that the defendant's asbestos-containing insulation was among the insulation materials to which Lockwood was exposed over a number of years as a rigger in shipyards, inhaling dust released into his work environment when old insulation was torn out and new product installed. An expert testified that all exposure to asbestos has a cumulative effect in contributing to the contraction of asbestosis. Based on that showing, the Supreme Court held that the jury could reasonably find that exposure to the defendant's product was a proximate cause of Lockwood's illness. Lockwood, 109 Wn.2d at 247.

Butler's evidence is comparable to the evidence found sufficient in Lockwood because it supports an inference that his exposure to asbestos from Azrock tile was more than occasional, it was intense when it occurred, and it was part of the cumulative exposure that caused him to develop mesothelioma. When Butler was installing flooring, he was working in confined spaces in close proximity to the older generation asbestos-containing tiles. Cutting the tile and cleaning up after installation jobs exposed Butler to dust and particles containing asbestos. Butler also provided expert testimony from Dr. Brodkin, a specialist in occupational and environmental medicine, who said that Butler's mesothelioma was, with a high degree of medical certainty, "causally associated with occupational exposure to asbestos as a career flooring installer and construction laborer."[5] Dr. Brodkin examined the nature and extent of Butler's asbestos exposure, the clinical and biological evidence of Butler's mesothelioma, and the latency period between Butler's first exposure and the development of his disease. Dr. Brodkin concluded that Butler's work resulted in "substantial cumulative asbestos exposure, with peak exposures occurring between 1962 and 1974."[6] He also testified that Butler's asbestos exposure was the pre-eminent risk factor for the development of malignant mesothelioma. There were

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[5] Clerk's Papers at 1266 (Dr. Brodkin's Medical Evaluation of Butler).
[6] Clerk's Papers at 1267 (Dr. Brodkin's Medical Evaluation of Butler).

"no alternative exposures" that would have placed Butler at risk for clinical deterioration.[7]

Contrary to Domco's argument, it was not necessary for Butler to provide expert testimony that exposure to Azrock's tile, as distinct from other asbestos-containing products, was a substantial factor in causing Butler's injuries. Under Hue and Lockwood, it is enough that Butler has evidence to prove that asbestos-releasing Azrock products were in his work environment during the period of cumulative exposure that caused the injury.

Domco submitted declarations from two experts. An industrial hygienist concluded that Butler's exposure to Azrock products was "insignificant and did not constitute a substantial source of asbestos exposure."[8] A medical expert opined that Butler's exposure to Azrock tile was not a substantial factor in Butler's subsequent development of mesothelioma.[9] Butler objects to consideration of these declarations, but we need not address his objection because even if they are considered, they simply offer opinions that conflict with the evidence offered by Butler.

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[7] Clerk's Papers at 1270 (Dr. Brodkin's Medical Evaluation of Butler).
[8] Clerk's Papers at 1418 (Declaration of Douglas Fowler).
[9] Clerk's Papers at 1382 (Declaration of Noel Weiss).

Reversed.

Becker, J.

WE CONCUR:

Schindler, ACJ

Baker, J.