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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000006-MR

TIFFANY LANDRETH, AS EXECUTRIX
OF THE ESTATE OF BOBBY JOE VICKERY — APPELLANT

APPEAL FROM CALDWELL CIRCUIT COURT
v. HONORABLE CLARENCE A WOODALL, III, JUDGE
ACTION NO. 12-CI-00211

BRAKE SUPPLY COMPANY, INC.;
PNEUMO ABEX, LLC;
EATON CORPORATION; AND
ARVINMERITOR, INC. — APPELLEES

AND NO. 2015-CA-000140-MR

PNEUMO ABEX, LLC — CROSS-APPELLANT

CROSS-APPEAL FROM CALDWELL CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CI-00211

GENUINE PARTS COMPANY; AND
TIFFANY LANDRETH, AS EXECUTRIX

OF THE ESTATE OF BOBBY
JOE VICKERY CROSS-APPELLEES

AND NO. 2015-CA-000141-MR

BRAKE SUPPLY COMPANY, INC.;
AND PNEUMO ABEX, LLC CROSS-APPELLANTS

CROSS-APPEAL FROM CALDWELL CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CI-00211

FORTNER L.P. GAS COMPANY, INC.;
AND TIFFANY LANDRETH, AS
EXECUTRIX OF THE ESTATE OF
BOBBY JOE VICKERY CROSS-APPELLEES

OPINION
AFFIRMING IN APPEAL
NO. 2015-CA-000006
AND DISMISSING
IN CROSS-APPEALS NOS.
2015-CA-000140 & 2015-CA-000141

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

MAZE, JUDGE: Tiffany Landreth, as Executrix of the Estate of Bobby Joe Vickery ("the Estate") appeals from summary judgments by the Caldwell Circuit Court which dismissed its asbestos-related claims against Pneumo Abex, LLC ("Abex"), Brake Supply Company, Inc. ("Brake Supply"), Eaton Corporation

("Eaton"), ArvinMeritor, Inc ("Arvin-Meritor"). Abex and Brake Supply filed protective cross-appeals to preserve their potential rights of apportionment who were also granted summary judgment but who are not parties to the Estate's appeal.

On the direct appeal, we first find that the trial court did not abuse its discretion by appointing a special commissioner to make recommendations on discovery issues. Furthermore, we agree with the trial court that the Estate failed to present sufficient evidence that the decedent was exposed to asbestos dust manufactured or sold by the defendants, or that such exposures were a substantial cause in causing the decedent's injury. Therefore, the trial court properly granted summary judgment for Abex, Brake Supply, Eaton, and Arvin-Meritor. As a result, the issues raised in the cross-appeals are moot. Hence, we affirm in Appeal No. 2015-CA-000006-MR, and we dismiss Cross-Appeals Nos. 2015-CA-000140-MR & 2015-CA-000141-MR.

In August 2012, Bobby Joe Vickery was diagnosed with malignant mesothelioma, a form of lung cancer caused by asbestos exposure. On November 8, 2012, he filed this action against a number of manufacturers and suppliers of asbestos products, alleging that his exposure to these products caused his mesothelioma. Vickery died on June 16, 2013, from respiratory failure due to mesothelioma according to his death certificate. Subsequently, his Estate was substituted as a party to this action.

The Estate's claims arise from Vickery's exposure to asbestos from a variety of different sources and over a period of years. For purposes of this appeal, the following facts are relevant. Vickery was born on July 26, 1948, and was a lifelong resident of Caldwell County. Between 1966 and 2003, Vickery worked for approximately fifty employers. In his original and amended complaints, Vickery alleged that he was exposed to asbestos dust during the course of three of those jobs.

First, Vickery worked at Coleman Auto Parts ("Coleman"), an auto parts store in Princeton, Kentucky, during 1969 and 1970. As part of that job, Vickery would pick up new parts from the NAPA[1] distribution center in Memphis, Tennessee and deliver them to regional NAPA stores. He also hauled used brake parts ("cores") from Coleman and other NAPA-affiliated stores to the Rayloc facility in Memphis. Vickery testified that, in addition to handling the cores, he also swept out the truck bed. Vickery further alleged that he was exposed to asbestos dust from 1966 to 1990 while replacing the brakes on his personal vehicles. He testified that he always bought the replacement parts from Coleman.

Rayloc is the manufacturing arm of Genuine Parts Company ("GPC"). The Estate presented evidence that Abex manufactured 99% of the brake linings sold to Rayloc during the time period at issue. Charles Coleman, the owner of Colman, testified that he exclusively sold Rayloc brakes. Rayloc brakes were also

[1] The National Automotive Parts Association, also known as NAPA Auto Parts, is a division of Genuine Parts Company and distributes automotive replacement parts, accessories and service items to affiliated stores in North America.

extensively distributed to other NAPA-affiliated stores where Vickery delivered parts.

In addition, GPC maintained a "core exchange program," which allowed customers to return discarded parts to a NAPA store. The function of the core exchange program was to encourage NAPA merchants to sell Rayloc components to their customers and to return the discarded products from those same customers to a Rayloc facility where they would be remanufactured and redistributed through the NAPA supply chain. The components returned through the core exchange program included brakes and other automobile parts. And while most of the components returned through the core exchange program were Rayloc products, there was evidence that components from other manufacturers were also accepted into the program.

Second, Vickery worked for Riley Trucking Company as a mechanic's assistant for ten months in 1976. Vickery testified that he assisted in replacing brakes on Chevrolet tandem trucks, GMC trucks, Mack trucks, and International-Harvester tractor trucks owned by Riley Trucking. He further testified that he was regularly exposed to asbestos dust in the course of this work. However, the Estate was unable to present any direct evidence regarding his exposure to brakes or brake linings by specific manufacturers.

During the time period at issue, Eaton and Rockwell International Corporation ("Rockwell") each manufactured original equipment for medium and heavy trucks. That equipment included asbestos-containing brake assemblies and

linings used on Mack trucks, GMC trucks, and International-Harvester tractor trucks, including the models used by Riley Trucking. Arvin-Meritor subsequently acquired the assets and liabilities of Rockwell.

Brake Supply is a distributor of friction materials, and Riley Trucking was one of its customers during the time period at issue. It also provided a "relining service" in which it would pick up from its customers fully assembled brake shoes or bands with worn-out brake pads. Brake Supply would remove the old friction materials and affix new friction material and send the fully assembled part back to its customer. Brake Supply also resold packaged components including friction materials manufactured by others, including Rockwell, Eaton, and Abex.

Finally, Vickery alleged that he was exposed to asbestos by Fortner LP Gas Co., Inc. ("Fortner"). First, he asserted that he was exposed to asbestos through his employment with Fortner installing blown insulation from 1970-1975 and again from 1980-1983. And second, Vickery alleged that he was exposed through the purchase and installation of blown insulation in his home.

With respect to the latter claims, Fortner argued that any claims arising from Vickery's employment would be precluded under the exclusive remedy provisions of the Workers' Compensation Act. Fortner also presented evidence that there was no asbestos contained in the insulation which was installed in Vickery's home. The trial court found that the Estate's claims would be

precluded on these grounds, and consequently granted Fortner's motion for summary judgment.

Brake Supply, GPC, Abex, Eaton and Arvin-Meritor each moved for summary judgment. On August 29, 2014, the trial court entered separate orders granting all of the motions for summary judgment. In each of those orders, the trial court found that the Estate failed to present sufficient evidence showing a reasonable probability to show that Vickery was actually exposed to asbestos products which were manufactured or sold by the respective defendant. The trial court concluded that the absence of such evidence would preclude a finding that the defendants' conduct was the legal cause of Vickery's injury. This appeal and cross-appeals followed.

After entry of the summary judgment orders, the Estate and GPC entered into a settlement of all remaining claims. Upon being notified of the settlement, the trial court entered an order dismissing the Estate's claims with respect to GPC. Consequently, GPC is not a party to the Estate's direct appeal. However, Abex filed a cross-appeal from that order, arguing that it would be entitled to apportionment against GPC in the event that this Court sets aside the summary judgment order. Similarly, the Estate does not appeal the trial court's summary judgment dismissing Fortner, but Brake Supply and Abex have cross-appealed to protect their potential rights of apportionment against Fortner.

In its direct appeal, the Estate first argues that the trial court improperly delegated discovery issues to a special commissioner, and that the

commissioner's rulings on disputed discovery matters amounted to an abuse of discretion. On May 30, 2013, the trial court appointed Serieta Jaggers as special commissioner to preside over all discovery disputes. Pursuant to CR[2] 53.01, Chief Justice Minton approved the trial court's order appointing Jaggers.

Thereafter, the Estate filed motions to compel the appearances of Eaton's and Arvin-Meritor's corporate representatives for depositions. The commissioner recommended that the motions be denied until the Estate identified specific Eaton and Rockwell products to which Vickery was exposed. The trial court subsequently adopted the commissioner's recommendations.

The Estate argues that the trial court cannot abdicate its constitutional fact-finding and decision-making authority to a third party. We find no error or abuse of discretion in this case. CR 53.02(3) authorizes the circuit court to appoint a commissioner in special cases "due to complexity of issues, damages which are difficult to calculate, a multiplicity of claims the priority of which must be established, matters of account involving complex or numerous transactions, or similar exceptional circumstances." The trial court's appointment of Jaggers was approved by the Chief Justice, as required by CR 53.01. Thus, the trial court was clearly within its authority to appoint Jaggers as a special commissioner to handle discovery matters in this case. [3]

[2] Kentucky Rules of Civil Procedure.

[3] The Estate cites to *Campbell v. Campbell*, No. 2006-CA-001803-MR, 2010 WL 391841 (Ky. App. 2010), as holding that a court may not delegate its decision-making authority to an arbitrator or commissioner. However, *Campbell* turned on the application of KRS 23A.120, which abolished domestic relations commissioners in circuits which have adopted a family court.

The Estate also contends that the trial court failed to properly vet Commissioner Jaggers for any conflicts of interests. The Estate moved to disqualify Jaggers after presenting evidence that she previously represented officers of Coleman and Fortner. Jaggers had also previously represented Traveler's Insurance, which was a potential insurer of Arvin-Meritor. The trial court granted the motion to recuse, but did not set aside any of Jaggers's prior recommendations. While the Estate argues that the trial court should have inquired into other potential conflicts of interest, it does not identify any other specific conflicts which would cast doubt on the integrity of Jaggers's recommendations.

Moreover, we note that the parties submitted all of the commissioner's recommendations to the trial court for review. The trial court retained the ultimate decision-making authority on the discovery issues, and that review vitiated any potential conflict of interest on Jaggers's part. While the propriety of those rulings may affect our review of the summary judgment, we cannot find that the trial court abdicated its role in this case, or that its appointment of a special commissioner exceeded the scope of CR 53.02.

The Estate primarily argues that the trial court erred by granting summary judgment on its claims against Brake Supply, Abex, Eaton, and Arvin-Meritor. The standard of review governing an appeal of a summary judgment is

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The Court in *Campbell* took the position that a family court lacked jurisdiction to appoint an arbitrator or commissioner to engage in a fact-finding role. *Id.* Slip Op. at 8-11. But see *Maclean v. Middleton*, 419 S.W.3d 755, 760 (Ky. App. 2014), holding that a family court's appointment of a commissioner is not a jurisdictional defect compelling reversal even when the issue is not preserved for review. *Campbell* is clearly not applicable because the current case does not involve either a family court or a domestic relations commissioner.

well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

The movant has the burden of demonstrating that there are no genuine issues of material fact in the record, while the party opposing the motion "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." S*teelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Additionally, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* at 480. The Court in *Steelvest* also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Id.* Even if the trial court believes that the party opposing the motion has little chance of success at trial, summary judgment is inappropriate if there are any issues of material fact that remain. *Id.*

However, "the word 'impossible' is used in a practical sense, not an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest*, 807 S.W.2d at 481 (internal quotations and citations omitted). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

The central issue on appeal is whether the Estate presented sufficient evidence to support a finding that Vickery's mesothelioma was caused by his exposure to the Appellees' asbestos products. As the trial court noted, the Estate's claims of strict liability, negligence, and breach of warranty in the products liability field all require proof that the product was the legal cause of Vickery's injury. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). In *Deutch v. Shein*, 597 S.W.2d 141 (Ky. 1980), Kentucky adopted the standard for legal causation standard set forth in the *Restatement (Second) of Torts* § 431 (1965):§ 431, as follows:

> The actor's negligent conduct is a legal cause of harm to another if
> (a) his conduct is a substantial factor in bringing about the harm, and
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

In *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868 (Ky. App. 2001), this Court set out the burden of proof for legal causation under this standard.

> Generally, the existence of legal cause is a question of fact for the jury. It only becomes a question of law for the Court where the facts are undisputed and are susceptible of but one inference. *See Huffman v. S.S. Mary & Elizabeth Hospital*, Ky., 475 S.W.2d 631 (1972). The claimant has the burden to prove legal causation; however, it is well recognized that "legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." *Holbrook v. Rose*, Ky., 458 S.W.2d 155, 157 (1970). To find causation, the jury naturally draws inferences from circumstantial evidence. These inferences, however, must be reasonable, that is they must "indicate the probable, as distinguished from a possible cause." *Briner v. General Motors Corporation*, Ky., 461 S.W.2d 99, 101 (1970).

Id. at 872-73.

More recently, in *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), our Supreme Court quoted from comment (a) to § 431 of the *Restatement (Second) of Torts*, to explain the "substantial factor" element for determining legal causation.

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any

> happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Id. at 92.

In this case, the Estate presented expert testimony from Dr. Arthur L. Frank, stating that there is no safe level of exposure to asbestos, and that the likelihood of mesothelioma goes up with increased exposure to asbestos fibers. Brake Supply, Abex, Eaton, and Arvin-Meritor all argue that such evidence is insufficient as a matter of law to establish that Vickery's individual exposures to asbestos were a substantial factor in causing his mesothelioma. In *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950 (6th Cir. 2011), the Sixth Circuit, applying Kentucky law, held that where a plaintiff relies on proof of exposure to asbestos to establish that a product was a substantial factor in causing injury, "the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural." *Id.* at 954, citing *Lindstrom v. A–C Product Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005).

The court went on to reject Dr. Frank's opinion in that case that there is no safe level of asbestos exposure, and that every exposure to asbestos, however slight, was a substantial factor in causing the plaintiff's disease. The court concluded that such a standard would render the "substantial factor" test meaningless. *Id.* Consequently, the court concluded that the plaintiff must show a high enough level of exposure that an inference that the asbestos was a substantial

factor in the injury is more than conjectural. *Id.* at 955, *citing Lindstrom*, 424 F.3d at 493.

As an initial matter, we note that *Moeller* involved a directed verdict, rather than the summary judgment matter presented here. For purposes of summary judgment, we disagree that a single exposure to a known carcinogen can never be sufficient to establish legal causation. The sufficiency of the evidence supporting such an inference is a matter to be established by expert testimony, such as Dr. Frank. *See also CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 78-79 (Ky. 2010), holding that Dr. Frank's testimony was sufficient to establish a reasonable probability of causation by settling non-parties. Furthermore, the Estate presented other expert testimony to the effect that Vickery's multiple exposures to asbestos dust were of a sufficient level to substantially contribute to the later development of his mesothelioma.

The trial court found that the Estate had failed to present evidence showing that any particular exposure to asbestos was a substantial cause of Vickery's mesothelioma. Rather, the court took the position that each exposure was merely one possible contributing cause to the development of the disease. However, the mere existence of other possible contributing factors, or that Vickery's combined exposures were all substantial contributing factors, would not preclude the fact-finder from inferring liability as to any individual defendant. At the very least, that question is not properly presented on a motion for summary judgment.

The more significant issue is whether the Estate met its burden of showing that Vickery was exposed to asbestos dust manufactured by each of the defendants. With respect to Vickery's exposure to asbestos while employed at Coleman, there clearly was evidence that Coleman exclusively purchased Rayloc brakes from GPC. Likewise, GPC purchased the overwhelming majority of its brake linings from Abex. And Vickery was exposed to that asbestos-containing brake linings during the course of his employment with Coleman and when he purchased replacement brakes for personal use after his employment with Coleman.

Given this evidence, it seems likely that Vickery was exposed to asbestos sold by GPC. But since the Estate settled its claims against GPC, the question on appeal is whether the Estate's evidence established a reasonable probability that Vickery's exposure to Abex brake linings was a substantial cause in the development of his mesothelioma. However, there was also evidence that he was exposed to asbestos from other, unknown manufacturers while handling parts in the core exchange program.

Under these circumstances, it is equally as likely that Vickery's mesothelioma was caused by exposure to another manufacturer's asbestos product. Consequently, the Estate cannot show that Vickery's exposure to Abex's asbestos while working for Coleman was a substantial cause in causing his mesothelioma. Therefore, the trial court properly granted summary judgment to Abex on this claim.

With respect to the claims involving Vickery's exposure while working for Riley Trucking, there was no specific evidence concerning the make or manufacture of the brakes or brake linings on which Vickery worked. Vickery's brother, Dan, testified that, at various times, he and Vickery removed original brake equipment, but also removed and installed replacement brakes. Dan recalled seeing the name "Rockwell" on one of the parts which he worked on, but he could not remember whether it was a brake assembly.

James Riley testified that Riley Trucking purchased replacement brakes and lining from Brake Supply during the period at issue. Mike Mann, Brake Supply's corporate representative, testified that Brake Supply sold replacement brakes which were compatible with the types of trucks used by Riley Trucking. He stated that these would have included replacement parts and linings manufactured by Eaton and Rockwell. Brake Supply also sold a number of brake products manufactured by other companies, including Abex, Bendix, and Grey Rock. Finally, Mann stated that, while Eaton and Rockwell brakes were used as replacement parts, he had no way to determine what brake linings were used when those replacement brakes were sold to Riley Trucking.

There is no question that Brake Supply sold asbestos-containing parts to Riley Trucking during the time period when Vickery worked there. However, Brake Supply is not liable for products sold in their original manufactured condition unless it knew or should have known that the products were

unreasonably dangerous to the user or consumer. KRS[4] 411.340. The Estate makes no such claim in this case.

Brake Supply could potentially be liable for Vickery's exposure to asbestos provided through its relining service. But there was no evidence that new asbestos brakes would create a significant exposure to asbestos dust. It is possible that Vickery was exposed to asbestos dust while removing old brakes with linings provided by Brake Supply. Yet the evidence did not establish that possibility within a reasonable probability. Without such evidence, the Estate cannot show that the actions of Brake Supply were a substantial cause of Vickery's mesothelioma. Therefore, the trial court properly granted Brake Supply's motion for summary judgment.

Finally, the trial court correctly noted that the Estate must present evidence showing not only that Vickery was exposed to asbestos and that this exposure was a substantial cause of his mesothelioma, but also that his injuries were substantially caused by the actions of these particular manufacturers. At most, the Estate only presented evidence showing a mere possibility that Vickery was exposed to asbestos products manufactured by Eaton, Rockwell, and Abex while employed at Riley Trucking. However, there was no evidence, direct or circumstantial, that Vickery was actually exposed to any of their products. Furthermore, without additional evidence showing the makes and models of the trucks on which Vickery worked and the replacement parts used, further discovery

[4] Kentucky Revised Statutes.

would not increase the probability as to any particular manufacturer. Therefore, we must conclude that the trial court properly granted summary judgment as to these claims.

In light of this holding, Abex's cross-appeal against GPC is moot, as is Brake Supply's and Abex's cross-appeal against Fortner Gas. Likewise, we need not reach the merits of the motion by Fortner Gas to dismiss the latter cross-appeal.[5] Therefore, we will dismiss both cross-appeals.

Accordingly, we affirm the summary judgments entered by the Caldwell Circuit Court in Appeal No. 2015-CA-000006-MR. Furthermore, we dismiss Appeal Nos. 2015-CA-000140-MR and 2015-CA-000141-MR as moot.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I do so, because I believe summary judgment was prematurely granted without providing the Estate a reasonable opportunity to conduct discovery and because the majority opinion does not fully address the causation standard to be applied in asbestos-induced mesothelioma cases.

The trial court terminated this action under Kentucky Rules of Civil Procedure (CR) 56.03, which permits a trial court to do so only when there is no

[5] We note, however, that a defendant has no right to appeal a co-defendant's dismissal simply to maintain that defendant in the action for apportionment of damages. *Jenkins v. Best*, 250 S.W.3d 680, 686 (Ky.App.2007). Although KRS 411.182 allows apportionment of liability between settling and non-settling defendants, the statute does not allow liability to be apportioned to parties who were dismissed because they were found not to be liable. *Id.* at 686–87.

genuine issue of material fact. A summary judgment is not to be used to prematurely terminate litigation. As stated in *Conely v. Hall*, 395 S.W.2d 575, 580 (Ky. 1965), "the court should be extremely liberal in allowing the parties to present additional material up until the matter is ripe for decision." As a practical matter, necessarily, the complexity of the factual and legal issues involved will often determine the length of time which is reasonable to afford an opportunity to conduct discovery and the scope of that discovery. Complex legal and factual cases require more time and a broader scope of discovery than a case of simple negligence where the source of the injury is apparent.

Asbestos-induced mesothelioma cases typically involve unique challenges in establishing legal causation and, therefore, are complex. As in Vickery's case, medical causation and injury are clear. Vickery was diagnosed with malignant mesothelioma caused by asbestos exposure and ultimately died as a result of that condition. Moreover, there is proof in the record that the defendants manufactured or sold products containing asbestos and Vickery was exposed to asbestos through some or all of those products. However, the majority denies the Estate potential recovery against the defendants because, to date, the Estate has not shown that each individual exposure was a substantial cause of his mesothelioma. I disagree with this conclusion.

To develop proof regarding legal causation, the Estate sought discovery pursuant to CR 30.01 and CR 30.02(6) by filing a motion to compel the appearance of Eaton's and Arvin-Meritor's (successor to Rockwell's assets and

liabilities) corporate representatives for deposition. The very purpose of the Estate's discovery was to gather evidence concerning the defendants' supply of asbestos-containing products to which Vickery was exposed. However, upon the recommendation of the special commissioner, the trial court denied the motions until the Estate identified specific Eaton and Arvin-Meritor's products to which Vickery was exposed. Essentially, the trial court required that the Estate meet a threshold level of proof before taking discovery.

Although the majority addresses the correctness of appointing a special commissioner and her potential conflict of interest, it does not address what I believe is the more problematic issue, the correctness of the trial court's ruling denying discovery. This issue becomes particularly significant because of the majority's holding that the Estate did not present sufficient evidence of legal causation to withstand summary judgment. Evidence of legal causation is precisely the reason for the Estate's motion to take the deposition of corporate representatives.

The denial of discovery is clearly erroneous as there is not a threshold level of proof required to conduct discovery. Indeed, gathering evidence is the very purpose of discovery. On this basis, I would hold summary judgment was premature and reverse and remand for further proceedings.

The second ground for my dissent is that I believe the Estate presented sufficient evidence to create a material issue of fact as to whether Vickery's mesothelioma was caused by his exposure to the individual defendant's asbestos

products. At the summary judgment phase, this was all the Estate was required to do. As explained in *Rowland v. Miller's Adm'r*, 307 S.W.2d 3, 6 (Ky. 1956) (citation omitted), the Estate was not required to establish causation at this phase but only that a material issue of fact exists.

> There is a great difference between discovering whether there [is] an issue of fact and deciding such an issue. And, we may add, for the judge to take a case from the court before the evidence is heard is an order more delicate and one which requires greater judicial discernment than for the judge to take the case away from the jury after he has heard the evidence.

Here, summary judgment was not only premature but on the facts developed so far, improper.

As stated earlier, legal causation in asbestos-induced mesothelioma cases is often much more difficult than in a simple negligence case. As noted by the Court in *Holcomb v. Georgia Pac., LLC*, 128 Nev. Adv. Op. 56, 289 P.3d 188, 193 (2012) (quoting David E. Bernstein, *Getting to Causation in Toxic Tort Cases,* 74 Brook. L.Rev. 51, 55 (2008), "[g]iven the often lengthy latency period between exposure and manifestation of injury, poor record keeping, and the expense of reconstructing such data, plaintiffs in asbestos litigation typically are 'unable to prove with any precision how much exposure they received from any particular defendant's products."') To deal with the inherent difficulty of establishing legal causation where there are many possible sources of asbestos exposure, jurisdictions have fashioned different causation standards: "1) the California Supreme Court's

'exposure-to-risk' test of *Rutherford v. Owens–Illinois, Inc.,* 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203, 1206 (1997); (2) the Texas Supreme Court's 'defendant-specific-dosage-plus-substantial-factor' test in *Borg–Warner Corp. v. Flores,* 232 S.W.3d 765, 773 (Tex. 2007); and (3) the Fourth Circuit's 'frequency, regularity, proximity' test set forth in *Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156, 1163 (4th Cir. 1986)." *Holcomb,* 289 P.3d at 193.

Although our Supreme Court has not directly written on the subject, when given the opportunity to adopt any test to resolve the difficult issue of legal causation in asbestos-induced mesothelioma cases, this Court rejected the notion and, instead, conclusively held the question was one for the jury to determine. In *Bailey v. North American Refactories C*o., 95 S.W.3d 868 (Ky.App. 2001), this Court held that it is not for the Court to "chose which theory to adopt; rather … such choice is for the jury." *Id*. at 873. As the Court noted, "[g]enerally, the existence of legal cause is a question of fact for the jury. It only becomes a question of law for the Court where the facts are undisputed and are susceptible of but one inference." *Id*. at 872. Although the plaintiff has the burden to prove legal causation, the Court emphasized it may be proven by "a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." *Id*. at 872-73 (quoting *Holbrook v. Rose,* Ky., 458 S.W.2d 155, 157 (1970)).

In this case, there was sufficient circumstantial evidence to survive a motion for summary judgment as to each defendant. Vickery worked on his

vehicles for nearly twenty years using Rayloc brakes equipped with asbestos-containing linings and Vickery handled Rayloc brakes as an employee at Coleman Auto Parts. Brake Supply, the sole supplier of brakes to Riley Trucking during Vickery's employ contained asbestos. There was also evidence that Vickery was exposed to asbestos contained in products provided by Eaton. Finally, Arvin-Meritor supplied asbestos-containing brake assemblies and linings to the manufactures of trucks used by Riley Trucking.

I agree that it may be difficult to establish the legal cause of Vickery's condition. It may be that all, a few, one or none of the remaining defendants are at fault. Nevertheless, the Estate is entitled to additional discovery and, at trial, submit the issue to the jury.

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J. Christian Lewis
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ORAL ARGUMENT FOR PNEUMO ABEX, LLC:

Reagan Simpson
Houston, Texas

BRIEFS FOR APPELLEE/CROSS-APPELLANT BRAKE SUPPLY COMPANY, INC.:

Palmer G. Vance, II
Matthew R. Parsons
Lexington, Kentucky

ORAL ARGUMENT FOR BRAKE SUPPLY:

Palmer G. Vance, II
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR CROSS-APPELLEE FORTNER LP GAS CO., INC.:

Willard B. Paxton
Princeton, Kentucky

BRIEF AND ORAL ARGUMENT FOR GENUINE PARTS COMPANY:

Patrick W. Gault
Louisville, Kentucky