149 A.D.3d 1554
Supreme Court, Appellate Division,
Fourth Department, New York.

Nicholas DOMINICK and Lorraine J. Dominick, Plaintiffs–Respondents,
v.
CHARLES MILLAR & SON CO., Charles Millar Supply, Inc., Millar Supply, Inc., Pacemaker Millar Steel & Industrial Supply Company, Inc., Individually and as Successor–in–Interest to Charles Millar & Son Supply, Inc., Pacemaker Millar Steel & Industrial Supply of Binghamton, Inc., Pacemaker Steel & Aluminum of Binghamton Corp., Pacemaker Steel and Piping Co., Inc., Individually and as Successor to Charles Millar, Pacemaker Steel Warehouse Inc., Defendants–Appellants, et al., Defendants. (Appeal No. 2.).

April 28, 2017.

Synopsis

Background: Worker brought action against supplier, seeking damages for injuries he sustained from his exposure to asbestos. The Supreme Court, Oneida County, Charles C. Merrell, J., entered judgment upon a jury verdict finding that worker was exposed to asbestos from supplier's products, that supplier failed to exercise reasonable care by not providing a warning about the hazards of exposure to asbestos with respect to its products, and that supplier' failure to warn was a substantial contributing factor in causing worker's injuries. Supplier appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] jury's finding that asbestos in supplier's products was a substantial factor in causing or contributing to worker's injuries was supported by substantial evidence, and

[2] trial court acted within its discretion in precluding supplier from calling six of eight co-workers as witnesses.

Affirmed.

Attorneys and Law Firms

****234** Boies, Schiller & Flexner LLP, Albany (George F. Carpinello of Counsel), for Defendants–Appellants.

Belluck & Fox, LLP, New York City (Seth A. Dymond of Counsel), for Plaintiffs–Respondents.

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND SCUDDER, JJ.

Opinion

MEMORANDUM:

***1555** Plaintiffs commenced this action seeking damages for injuries sustained by Nicholas Dominick (plaintiff) from his exposure to asbestos. Plaintiff Lorraine J. Dominick abandoned her loss of consortium claim at the ensuing trial. Defendants-appellants (Millar defendants) appeal from a judgment entered upon a jury verdict finding that plaintiff was exposed to asbestos from products supplied by the Millar defendants, that they failed to exercise reasonable care by not providing a warning about the hazards of exposure to asbestos with respect to their products, and that their failure to warn was a substantial contributing factor in causing plaintiff's injuries.

[1] Contrary to the contention of the Millar defendants, the evidence is sufficient to establish that asbestos in products they supplied was a substantial factor in causing or contributing to plaintiff's injuries (*see Barnhard v. Cybex Intl., Inc.*, 89 A.D.3d 1554, 1555, 933 N.Y.S.2d 794). There is a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury based upon the evidence presented at trial (*see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145). Plaintiff testified that he was exposed to asbestos dust from asbestos boards and cement supplied by the Millar defendants that were used in the heat treat area of a pneumatic-tool making plant. The hypothetical question that plaintiff asked his expert was based on plaintiff's testimony or was otherwise "fairly inferable from the evidence" (*Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410, 414, 322 N.Y.S.2d 665, 271 N.E.2d 515; *see Czerniejewski v. Stewart–Glapat Corp.*, 269 A.D.2d 772, 772–773, 703 N.Y.S.2d 621).

[2] With respect to specific causation, the Court of Appeals held in (*Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 857 N.E.2d 1114, *rearg. denied* 8 N.Y.3d 828, 828 N.Y.S.2d 289, 861 N.E.2d 104) that the expert opinion must set forth that the plaintiff "was exposed to sufficient levels of the toxin to cause the [injuries]" (*see Sean R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 808, 28 N.Y.S.3d 656, 48 N.E.3d 937). However, as the Court of Appeals later wrote, "*Parker* explains that 'precise quantification' or a 'dose-response relationship' or 'an exact numerical value' is not required to make a showing of specific causation" (*Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 784, 986 N.Y.S.2d 389, 9 N.E.3d 884, *rearg. denied* 23 N.Y.3d 996, 992 N.Y.S.2d 762, 16 N.E.3d 1240). There simply " 'must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of [the] agent that are known to cause the kind of harm that the plaintiff claims to have suffered' " (*id.*). Here, plaintiff's expert opined that, if a worker sees asbestos dust, that is a "massive exposure ... capable of causing disease." Contrary to the Millar defendants' contention, the ***1556** expert's opinion, considered along with the rest of her testimony, was sufficient to establish specific causation (*see* ****235** *Matter of New York City Asbestos Litig.*, 143 A.D.3d 483, 484, 39 N.Y.S.3d 411; *Matter of New York City Asbestos Litig.*, 143 A.D.3d 485, 486, 39 N.Y.S.3d 130; *Penn v. Amchem Prods.*, 85 A.D.3d 475, 476, 925 N.Y.S.2d 28).

[3] We reject the Millar defendants' contention that Supreme Court abused its discretion in precluding them from calling certain witnesses. Plaintiff moved in limine to preclude the testimony of eight of plaintiff's former coworkers on the ground that the Millar defendants' disclosure of those witnesses was untimely. The court exercised its sound discretion in limiting the Millar defendants to calling just two of the witnesses inasmuch as the testimony of the remaining coworkers would be cumulative (*see Cor Can. Rd. Co., LLC v. Dunn & Sgromo Engrs., PLLC*, 34 A.D.3d 1364, 1365, 825 N.Y.S.2d 601). The court also properly denied the motion of the Millar defendants for leave to renew or reargue their opposition to the motion in limine inasmuch as they again failed to show that the testimony of the remaining coworkers would not be cumulative.

We reject the Millar defendants' contention that the jury's apportionment of fault is against the weight of the evidence (*see Matter of Eighth Jud. Dist. Asbestos Litig.* [appeal No. 4], 141 A.D.3d 1127, 1128, 35 N.Y.S.3d 615). Indeed, they "did not meet [their] burden of establishing the equitable shares of fault attributable to other tortfeasors in order to reduce [their] own liability for damages" (*id.*; *see Matter of New York Asbestos Litig.*, 28 A.D.3d 255, 256, 812 N.Y.S.2d 514). Finally, we reject the Millar defendants' contention that the award of $3 million for future pain and suffering for one year deviates materially from what is reasonable compensation (*see* CPLR 5501 [c]; *New York City Asbestos Litig.*, 143 A.D.3d at 483, 485, 39 N.Y.S.3d 411).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

All Citations

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