

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP2614

Cir. Ct. No. 2008CV2109

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**CATHERINE SINGER , INDIVIDUALLY AND AS SPECIAL
ADMINISTRATOR ON BEHALF OF THE ESTATE OF
JOHN D. PENDER,**

PLAINTIFF-RESPONDENT,

V.

PNEUMO ABEX, LLC,

DEFENDANT-APPELLANT,

**BRAKE SUPPLY COMPANY, INC., SCAN-PAC MFG. INC.,
STANDCO INDUSTRIES, INC. AND KELSEY-HAYES COMPANY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Pneumo Abex, LLC, appeals from a judgment entered after a jury found that Abex negligently exposed John Pender to asbestos and that Abex's negligence was a substantial factor in causing Pender's injury and death. Catherine Singer, Pender's daughter and special administrator for his estate, was subsequently awarded almost \$1.5 million in damages and statutory costs.

¶2 Abex's arguments on appeal are numerous. It submits that the trial court erred when it: (1) denied Abex's motion for summary judgment; (2) denied Abex's motion for judgment notwithstanding the verdict; (3) failed to instruct the jury on Abex's sophisticated-user defense; (4) failed to instruct the jury on Pender's employer's duty; (5) denied Abex's motion for a directed verdict; (6) permitted Singer to state a strict-products-liability claim; and (7) excluded Abex's expert testimony. Because we conclude that the trial court erred in denying Abex's motion for summary judgment, we need not address the remainder of its claims. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the narrowest possible ground.).

BACKGROUND¹

¶3 From 1952 through 1993, Pender was employed as a painter and glass setter for P&H Mining, f/k/a Harnischfeger Corporation. On or about

¹ Because we conclude that the trial court erred in denying Abex's motion for summary judgment, in our background section, we set forth only those facts in the record at the time of summary judgment; we do not set forth additional facts raised by the parties at trial.

May 2006, Pender was diagnosed with malignant mesothelioma, an incurable condition likely caused by exposure to asbestos. Pender died on May 20, 2006.

¶4 Singer, on behalf of Pender's estate, brought this action against numerous product manufacturers, including Abex, alleging that they each supplied asbestos-containing products to Harnischfeger during Pender's employment. The operative complaint set forth claims against the product manufacturers for negligence, strict products liability, and risk contribution.² Only Singer's claims against Abex are at issue on appeal.

¶5 All of the product manufacturers filed motions for summary judgment. In Abex's motion, it did not contest that the brake shoes that it sold to Harnischfeger during the years in question contained asbestos; rather, Abex asserted that Singer had not produced sufficient evidence upon which a reasonable factfinder could conclude that Pender was ever exposed to the brake shoes Abex sold to Harnischfeger. The following evidence was before the trial court on motion for summary judgment.

¶6 Harnischfeger was a crane manufacturer with thousands of employees and numerous plants in and around Milwaukee, as well as outside of the State of Wisconsin; Harnischfeger had at least ten different plants in 1980. Pender worked in several different buildings at Harnischfeger's National Avenue plant in Milwaukee, including Building 65 and Building 10, but he worked primarily in Building 35. The National Avenue plant consisted of as many as forty or fifty buildings and took up several city blocks.

² The operative complaint also named a number of other defendants, in addition to the product manufacturers, who are not relevant to Abex's appeal.

¶7 Abex's sales invoices, produced at summary judgment, showed that Abex supplied brake shoes to Harnischfeger between mid-December 1976 and the beginning of December 1982. According to the invoices, the majority of the brake shoes were delivered to Harnischfeger's Orchard Street plant in Milwaukee; none of the invoices placed any of Abex's brake shoes at the National Avenue plant where Pender worked. Several employees who worked at the National Avenue plant testified at their depositions that they never saw any materials identifying Abex as the manufacturer of the brake components installed at Harnischfeger's National Avenue plant.

¶8 Harnischfeger's material specifications chart, also produced on summary judgment, set forth the material specifications for brake parts supplied by at least seven different vendors. Abex was listed as one of those vendors. The material specifications chart did not indicate which vendor's brake shoes were used at each of Harnischfeger's numerous plants.

¶9 A 1986 internal memorandum from Harnischfeger listed nine different vendors from whom Harnischfeger purchased brake shoes from 1966 through 1986. Abex was listed as one of the nine vendors. Again, the memorandum did not set forth which plants utilized which vendor's brake shoes.

¶10 Gerald Kottke testified at his deposition that he worked with Pender in Building 35 on "rare occasions" from 1966 until 1976. While working in Building 35, it was Kottke's job to place brake shoes onto truck cranes. Part of that job involved grinding the brake shoes, which created dust. Kottke believed that all brake shoes contained asbestos at that time, although he never saw anything on the brake shoes themselves stating that they contained asbestos. Kottke's work made the cranes dirty with grease, weld splatter, and brake dust

residue. Kottke testified that it was Pender’s job, as a painter, to clean up the cranes before painting them, by sanding them and then blowing them off with an air hose.

¶11 Following a hearing on all of the product manufacturers’ motions for summary judgment, the trial court first dismissed Singer’s risk-contribution claims as to each product manufacturer, calling the claims the “crux” of Singer’s case.³ The trial court then dismissed all of Singer’s negligence and strict-products-liability claims with respect to all of the product manufacturers but Abex. Relying primarily on Abex’s sales invoices and Kottke’s deposition testimony and affidavit, the trial court concluded that Abex was the “only [product manufacturer] that we can say for sure is involved” and that Kottke “said that in the next line over within [Building 35] ... they were grinding [brake shoes].”⁴

¶12 The case went to trial, with Abex as the sole defendant, and was submitted to the jury under the theories of negligence and strict products liability. The jury found Abex liable on both theories.⁵ Abex filed a motion for judgment

³ In her summary judgment brief, Singer admitted that she was “unable to identify which brand of brake linings ... Mr. Pender worked in proximity to at a particular date and time.” Her admission supports the trial court’s assertion that Singer’s focus on summary judgment was her risk-contribution claims, which were ultimately dismissed, as opposed to her negligence and strict-products-liability claims. Wisconsin’s risk-contribution theory of product liability protects injured persons, by lowering the plaintiff’s burden of proof with respect to causation, in situations where, by nature of the industry, all manufacturers and marketers of a particular fungible product contributed to the risk causing injury. See *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 193-95, 342 N.W.2d 37 (1984); see also *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶27, 285 Wis. 2d 236, 701 N.W.2d 523.

⁴ The trial court partially granted Abex’s motion for summary judgment, dismissing Singer’s risk-contribution claims and her demand for punitive damages.

⁵ We note that, at trial, Singer offered additional evidence to support her negligence and strict-products-liability claims against Abex that she did not produce at summary judgment.

notwithstanding the verdict, which the trial court denied. The trial court ordered judgment against Abex in the amount of \$1,487,653.21, plus statutory costs. Judgment was entered accordingly, and Abex appeals.

DISCUSSION

¶13 Abex argues that the trial court erred as a matter of law when it failed to dismiss all of Singer’s claims against Abex on summary judgment. Abex submits that there was no evidence in the summary judgment record on which a reasonable factfinder could infer that Abex’s brake shoes were ever in Harnischfeger’s National Avenue plant, much less in any of the buildings where Pender worked, thereby prohibiting a reasonable inference that Abex’s brake shoes were a cause of Pender’s death. We agree.

¶14 We review a trial court’s grant or denial of summary judgment *de novo*, owing no deference to the trial court. **Krier v. Vilione**, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Summary judgment is only appropriate “when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” **M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.**, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶15 Upon review of a trial court’s decision on summary judgment, we apply the same standards used by the trial court, as set forth in WIS. STAT. § 802.08 (2009-10).⁶ **Krier**, 317 Wis. 2d 288, ¶14. First, we must determine if the pleadings state a claim. **Green Spring Farms v. Kersten**, 136 Wis. 2d 304, 315,

⁶ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

401 N.W.2d 816 (1987). If the plaintiff has stated a claim and the pleadings show the existence of factual issues, then we must examine whether the party moving for summary judgment has presented a defense that would defeat the claim. **Lambrecht v. Estate of Kaczmarczyk**, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a *prima facie* case, the court examines the pleadings, affidavits, depositions, or other proof of the opposing party to determine whether there exists disputed material facts, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial. **Id.** Evidentiary facts, as set forth in the affidavits or other proof of the moving party, are taken as true if not contradicted by opposing affidavits or other proofs. **L.L.N. v. Clauder**, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997).

¶16 In a products liability action, both negligence and strict-products-liability claims require a plaintiff to prove that the alleged defect in the defendant's product was a cause of the plaintiff's injury or damages. **Morden v. Continental AG**, 2000 WI 51, ¶45, 235 Wis. 2d 325, 611 N.W.2d 659 (negligence); **Zielinski v. A.P. Green Indus., Inc.**, 2003 WI App 85, ¶8, 263 Wis. 2d 294, 661 N.W.2d 491 (strict-products-liability). When determining causation on summary judgment, a court must determine “whether the defendant's negligence was a substantial factor in contributing to the result.” **Zielinski**, 263 Wis. 2d 294, ¶16 (citation omitted). To be a “substantial factor,” requires “that the defendant's conduct ha[ve] such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.” **Id.** (citation and one set of quotation marks omitted). “A mere possibility of ... causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it

becomes the duty of the court to direct a verdict for the defendant.” *Id.* (citation and quotation marks omitted).

¶17 Although Singer acknowledged on summary judgment that she was “unable to identify which brand of brake linings ... Mr. Pender worked in proximity to at a particular date and time,” she nonetheless argues that a factfinder could reasonably infer that Pender was exposed to Abex’s brake shoes from the following evidence produced on summary judgment: (1) Abex’s sales invoices, which demonstrate that Abex supplied brake shoes to Harnischfeger between mid-December 1976 and the beginning of December 1982 (but did not place the brake shoes at the National Avenue plant); (2) Kottke’s testimony that he worked grinding brake shoes in Building 35, where Pender worked between 1966 and 1976 (the ten year period *prior to* Abex selling *any* product to Harnischfeger), but who testified that he never saw any markings indicating that the brake shoes he ground were manufactured by Abex; (3) Harnischfeger’s material specifications chart, listing Abex as one of at least seven different vendors supplying brake shoes to Harnischfeger; and (4) Harnischfeger’s internal memorandum, listing Abex as one of nine different vendors supplying brake shoes to Harnischfeger between 1966 and 1986.

¶18 From this evidence, Singer argues that a factfinder could reasonably infer that Abex’s brake shoes were present in the National Avenue plant during the time period that Pender worked there. We do not agree. We would have to pile inference upon inference in order to conclude that Pender was exposed to Abex’s brake shoes while working at the National Avenue plant. The evidence fails to take Pender’s alleged exposure outside the realm of speculation and conjecture. *See id.*

¶19 Our review of the summary judgment record shows the following with respect to Pender's exposure to Abex's brake shoes:

- From 1952 through 1993, Pender worked for Harnischfeger at its National Avenue plant, primarily in Building 35.
- The National Avenue plant consisted of between forty and fifty buildings.
- Harnischfeger had numerous plants in Milwaukee and outside the State of Wisconsin, as many as ten in 1980.
- Abex supplied brake shoes to Harnischfeger from mid-December 1976 through the beginning of December 1982, delivering them primarily to the Orchard Street plant.
- At least nine different companies, including Abex, supplied brake shoes to Harnischfeger between 1966 and 1986.
- According to Kottke, from 1966 through 1976, Harnischfeger employees ground brake shoes in Building 35, exposing employees to brake dust.

¶20 Notably, none of the evidence demonstrates that Abex's brake shoes were used in any of Harnischfeger's plants while Kottke worked in Building 35 at the National Avenue plant with Pender, or that Harnischfeger employees ever ground Abex's brake shoes at the National Avenue plant in Building 35 where Pender worked. In fact, the record shows that Singer provided no evidence on summary judgment linking Abex's brake shoes to the National Avenue plant, much less to Building 35. There was no evidence that:

- Any Abex product was ever, at any time, delivered to the National Avenue plant in general or to Building 35 in particular;
- Any of Abex's brake shoes were ever present at the National Avenue plant, nor specifically in Building 35;
- Any of Abex's brake shoes were ever ground or cleaned at the National Avenue plant or in Building 35;
- Any of Abex's brake shoes were used in the types of cranes Harnischfeger assembled at the National Avenue plant or in Building 35.

¶21 In order to create a genuine issue of material fact based on the evidence before the trial court at summary judgment, a factfinder must infer that Abex, who was one of nine possible vendors selling brake shoes to Harnischfeger during the relevant time period, supplied brake shoes to Harnischfeger's National Avenue plant, one of ten plants Harnischfeger had in operation. Speculation is not permissible. The causation inference, to be reasonable, must be based on more than a "mere possibility." *See id.* (citation and quotation marks omitted). A reasonable inference is one based on "credible evidence from which a reasonable person could infer that [the injured party] was exposed to [the defendant's] products." *Id.* Here, there is no evidence from which a reasonable person could infer that Abex's brake shoes were ever at the National Avenue plant.

¶22 In support of her reasonable-inference argument, Singer submits that this case is like *Zielinski*, in which this court reversed the trial court's denial of summary judgment after the trial court concluded that the evidence on summary judgment was "insufficient to establish that [George] Zielinski had been exposed

to any asbestos-containing products supplied by Firebrick” while working for Ladish Company. *See id.*, ¶¶1, 4. However, *Zielinski* is factually distinguishable from the case at hand in two significant ways. First, in *Zielinski*, one witness testified that Ladish’s vendor lists showed Firebrick’s asbestos-containing product was approved for purchase and another witness testified that Ladish had probably purchased Firebrick’s product during the time in question. *See id.*, ¶¶9-12. Second, in *Zielinski*, there was no evidence that Ladish operated any plant other than the one at which Zielinski worked. Thus, we concluded there was sufficient evidence supporting the singular inference, albeit disputed, that Ladish purchased Firebrick’s asbestos-containing product for use at the plant where Zielinski worked. *Id.*, ¶¶20-21.

¶23 Here, unlike the plaintiffs in *Zielinski*, Singer presented no evidence that Abex’s brake shoes were ever at the National Avenue plant where Pender worked. Nor did any witness testify that Abex’s brake shoes that were delivered to the Orchard Street plant ever made their way to the National Avenue plant. Thus, there is no evidentiary basis for the numerous inferences Singer asks us to draw.

¶24 Furthermore, because Singer only presented evidence that brake grinding occurred in Building 35 until some unspecified day in 1976, per Kottke’s testimony, and the sales invoices show that Abex began supplying Harnischfeger with brake shoes in the final weeks of 1976, the factfinder must also infer that Harnischfeger employees continued grinding brake shoes in Building 35 after Kottke transferred out of the building in 1976. Again, this is not a reasonable inference, given the lack of an evidentiary basis for it.

¶25 In sum, given the number of brake suppliers utilized by Harnischfeger (at least nine) and the number of plants Harnischfeger had in operation (at least ten in 1980), Singer had to produce something more to create a genuine issue of material fact regarding whether Pender was exposed to asbestos from Abex's brake shoes. The evidence presented to the trial court created only a "mere possibility" of causation, which is not enough to survive summary judgment. *See id.*, ¶16 (citation and quotation marks omitted). As such, we reverse and remand this case back to the trial court with directions to grant Abex's motion for summary judgment.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

