COURT OF APPEALS
DECISION
DATED AND RELEASED

July 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-1169

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ROXANA DERUS, as Personal Representative of the Estate of Erwin Derus,

Plaintiff-Respondent,

ROXANA DERUS,

Plaintiff,

v.

GARLOCK, INC.,

Defendant-Appellant,

THE ANCHOR PACKING COMPANY,
THE A.P. GREEN REFRACTORIES COMPANY,
ARMSTRONG CONTRACTING & SUPPLY COMPANY, a/k/a AC&S,
ARMSTRONG WORLD INDUSTRIES, INC.,
COLT INDUSTRIES,
n/k/a KOLTEZ INDUSTRIES, INC.,
GAF CORPORATION,
FIBREBOARD, FLEXITALLIC,
JOHNSON INSULATING COMPANY, INC.,
NATIONAL GYPSUM COMPANY,
OWENS-CORNING FIBERGLAS CORPORATION,
OWENS-ILLINOIS, INC.,
PITTSBURG CORNING,

SPRINKMANN SONS CORPORATION, TAYLOR INSULATION COMPANY, INC., and TURNER NEWELL, as agent of KEASBEY-MATTISON, INC.,

Defendants,

MANVILLE PERSONAL INJURY SETTLEMENT TRUST,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Garlock, Inc. appeals from a judgment in favor of Erwin Derus for damages resulting from asbestos exposure from the use of Garlock products. The issues involve the sufficiency of the evidence and the trial court's admission of Derus's expert pathology evidence in light of Garlock's inability to present counter evidence. We conclude that the evidence was sufficient to support the jury's verdict and that the trial court did not misuse its discretion in admitting the pathology evidence over Garlock's objection. We affirm the judgment.

Derus worked for forty-eight years as a shipyard steamfitter. During his career, Derus worked with and around a variety of materials containing asbestos, including gaskets, packing and pipe covering. He used Garlock gaskets which contained asbestos. He would cut the gasket to fit and remove gaskets by a scraping and chiseling process. Both tasks created dust which Derus would breathe without the use of a mask or respirator.

Derus sought damages from Garlock and other asbestos using manufacturers alleging that the cancer discovered in 1991 in his right lung was the result of his occupational exposure to asbestos. The jury determined that

Derus was exposed to asbestos by products manufactured by Garlock, that Garlock was negligent with regard to Derus's safety and that such negligence was a cause of the disease from which Derus suffered. It concluded that Garlock's products were not manufactured or sold in an unreasonably dangerous condition. Garlock was assigned six percent of the total negligence and judgment was entered against it for $26,218.43.

Garlock argues that there is no substantial evidence from which the jury could have concluded that Garlock was negligent and that such negligence was a substantial factor in causing Derus's injuries. We need not look for substantial evidence to sustain the jury's verdict. A jury verdict will be sustained if there is any credible evidence to support it. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). This is even more true when, as here, the trial court gives its explicit approval to the verdict by considering and denying postverdict motions. ***Radford v. J.J.B. Enters.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). Indeed, we need only consider that evidence which supports the verdict. ***Chart v. General Motors Corp.***, 80 Wis.2d 91, 106, 258 N.W.2d 680, 686 (1977).

In reviewing the evidence, we are mindful that the credibility of the witnesses and the weight afforded their individual testimony are left to the province of the jury. ***Fehring***, 118 Wis.2d at 305, 347 N.W.2d at 598. Where more than one reasonable inference may be drawn from the evidence, this court must accept the inference that was drawn by the jury. ***Id.*** at 305-06, 347 N.W.2d at 598.

Garlock first contends that it had no duty to Derus because there was uncontroverted evidence that there was virtually no risk of harm in the use of its products. Garlock gaskets contained between seventy-five and eighty percent asbestos by weight. For the purpose of litigation, Garlock's expert conducted tests on the asbestos emission of Garlock products. He testified that operations with Garlock products resulted in the release of less asbestos fibers than that contained in ordinary air.

Derus elicited testimony that the Occupational Safety and Health Administration Agency (OSHA) predicted asbestos exposure from various operations with gaskets to be higher than those reported by Garlock's tests. The

OSHA figures were based on the employee's use of a cheap respirator. Derus testified that he did not wear a respirator. Derus also gave details about the type of work he did with Garlock products and that his face was sometimes within a foot of the dust-producing item. He also indicated that while he was performing his tasks, other workers would be doing similar tasks or other procedures with asbestos products. The result was sometimes a cloudy haze in the work area. His description of the work environment contrasts with the testing environment utilized by Garlock's expert. From this evidence the jury was free to reject the expert's opinion that Garlock products posed no risk of unreasonable inhalation of asbestos. The jury could infer that Derus's exposure from Garlock products was greater than the OSHA figures or the test results of Garlock's expert. It could conclude that an unreasonable danger was created.

Further, there was evidence that by 1930 it was generally recognized that asbestos caused disease. Somewhat later it was recognized that asbestos caused lung cancer. Garlock's products contained asbestos and were used in such a fashion that asbestos fibers would be released. The jury could reasonably conclude that Garlock should have known about the dangers presented by its products. We conclude that credible evidence exists to support a verdict that Garlock did not perform its duty to warn about the dangers of asbestos in its products.

We turn to Garlock's contention that there was no evidence that asbestos exposure from Garlock products was a substantial factor in producing the disease. When a party seeks to change a jury's answers on causation, we must view the evidence in the light most favorable to the verdict. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 326, 417 N.W.2d 914, 918 (Ct. App. 1987).

Garlock tried to quantify the amount of exposure from its and other manufacturers' products. Its expert translated repeated exposure to asbestos fibers at the levels determined by Garlock's tests to "fiber years." He opined that it took approximately twenty fiber years to develop asbestosis or lung cancer. He calculated Derus's exposure from Garlock products to be, at most, the equivalent of .086 fiber years.

We reject Garlock's contention that the expert's testimony provided uncontroverted evidence that exposure to Garlock products was not a substantial factor in Derus's development of lung cancer. Just as the jury was free to reject the results of Garlock's tests regarding the release of asbestos from its products, it could reject the expert's opinion about fiber years based on those results. Further, the idea that Derus's disease resulted from exposure from other manufacturers' products as well as Garlock's was utilized in the apportionment of negligence. Garlock was only assigned six percent of the total negligence.

Derus was not required to prove that Garlock products directly caused his disease.

The phrase substantial factor denotes that the defendant's conduct

> has 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. The test has been described as one of significance rather than quantum. ... One who negligently creates a dangerous condition may be liable even though another cause is also a substantial factor in contributing to the result. There may be more than one substantial causative factor in any given case. The defendant's negligent conduct need not be the sole or primary factor in causing the plaintiff's harm.

Ehlinger v. Sipes, 155 Wis.2d 1, 12-13, 454 N.W.2d 754, 758-59 (1990) (citations and quoted sources omitted).

All that was necessary was that Garlock's *negligence*—its failure to warn—be deemed *a* cause of disease but not necessarily *the* cause. Evidence established that Derus's lung cancer was caused by asbestos. Derus's experts explained that the effects of asbestos in producing disease are cumulative and that there is no established threshold of exposure below which one will not develop cancer. There was no way of determining Derus's individual susceptibility to the disease. Garlock knew of the dangers but did not provide a warning. The jury could conclude that the cumulative effect of asbestos exposure renders Garlock's failure to warn a cause of Derus's disease. If some

warning had been given, the cumulative effect of exposure from Garlock products could have been minimized.

Garlock argues that Derus failed to establish that had a warning been given, he would have altered his behavior and the harm would have been avoided. Garlock cites two medical malpractice cases, ***Ehlinger***, 155 Wis.2d at 13-23, 454 N.W.2d at 759-61, and ***Fischer v. Ganju***, 168 Wis.2d 834, 857-862, 485 N.W.2d 10, 19-21 (1992), for the proposition that Derus was required to persuade the jury that had a warning been given the harm would have likely been avoided. These cases are not directly applicable because they are medical malpractice, not product liability, cases and the required proof that proper treatment would have avoided the injury is only part of the burden of production test used by the trial court in determining whether causation should be submitted to the jury. The test has nothing to do with the plaintiff's ultimate burden of persuasion regarding causation. ***Fischer***, 168 Wis.2d at 861, 485 N.W.2d at 21.

Construing Garlock's contention to be that Derus failed to meet his burden of production for submission of causation to the jury, we reject it. Although Derus had been a smoker for thirty-seven years and continued to smoke for several years after the Surgeon General's office issued its first warning about the link between smoking and lung cancer and heart disease, Derus quit upon the advice of his doctor in 1969. Derus's wife testified that after he had open heart surgery he faithfully followed his doctor's prescription for medication and regular check-ups. Derus also modified his diet and increased his exercise according to his doctor's advice. This evidence suffices as the "minimal quantum of evidence which must be produced from which a jury reasonably could infer that the negligence was a substantial factor in producing the injury." ***Id.***

The last issue pertains to the testimony of Dr. John Garancis, Derus's pathology expert. Garancis testified that review of tissue slides from Derus's lung indicated the presence of asbestosis. Garlock sought to exclude this testimony as based on an untimely report that did not provide Garlock with an adequate opportunity for rebuttal. The trial court denied the motion to exclude the evidence but indicated it would grant Garlock latitude in arranging for rebuttal evidence.

The chronology of events is important to this issue. In September 1993, Garancis's report was made available to the parties. Garlock contends that the report made no finding of asbestosis. Garancis's deposition was taken on December 9, 1993, at which time a new report was produced that upon additional review of the tissue slides, asbestosis was discovered. The record does not include any formal motion to exclude the testimony. The matter was discussed when motions in limine were taken up on the first day of trial, January 7, 1994. At that time, Garlock joined in the arguments made by another party to the action. Numerous requests were made to adjourn the trial as a remedy for the change in Garancis's opinion. The trial court denied an adjournment in recognition that Garancis's deposition could have been "taken earlier in the game" and that taking it closer to trial was "defense strategy." The trial court also noted that Garancis did not deliberately drag his feet in reexamining the slide.

As the trial progressed, Garlock's attempts to procure the opinion of a pathologist to rebut Garancis's opinion was discussed each morning. Garlock repeatedly sought an adjournment so that the deposition of its expert could be arranged before it was required to cross-examine Garancis. Garlock proposed the taking of a video deposition of its expert in Vermont or at the Vancouver airport while the trial continued. It also offered a substitute pathologist. The trial court denied Garlock's request for an adjournment because Garancis's deposition had been taken with time for follow-up with another expert and from the start of the action the slides were available to all parties for review. The court denied the proposal to take the expert's deposition at the Vancouver airport as "absurd" given the fact that Garancis's deposition had been taken in early December. Finally, it denied the use of a substitute expert who was unknown to the parties and not named as an expert.

The motions to exclude the testimony as a sanction for an untimely report and based on surprise, as well as the motions for adjournment and mistrial, are within the trial court's discretion. ***Schwab v. Baribeau Implement Co.***, 163 Wis.2d 208, 216, 471 N.W.2d 244, 247 (Ct. App. 1991) (continuance); ***Paytes v. Kost***, 167 Wis.2d 387, 393, 482 N.W.2d 130, 132 (Ct. App. 1992) (impose a discovery sanction); ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988) (mistrial). A discretionary decision will be sustained if the trial court has examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Paytes***, 167 Wis.2d at 393, 482

N.W.2d at 132. The party who alleges a misuse of discretion has the burden of showing it. ***Colby v. Colby***, 102 Wis.2d 198, 207-08, 306 N.W.2d 57, 62 (1981).

We conclude that the trial court did not erroneously exercise its discretion when presented with the objection to Garancis's testimony at the commencement of the trial. Garancis's testimony did not create the great "surprise" Garlock characterizes it to be. The complaint gives Garlock notice that Derus was claiming asbestosis. Slides were available from the medical clinic throughout the action. Although Garancis originally did not make the key diagnosis, his final conclusion was rendered one month before trial. We agree with the trial court's assessment that because a month remained before trial after Garancis's deposition, Garlock took a "calculated risk" in not earlier securing its own expert or timely procuring rebuttal testimony.

The trial court gave Garlock an attempt to arrange for the presentation of rebuttal evidence. The court's refusal to require the parties to depose the expert in Vancouver while the trial was proceeding was not unreasonable. Its was within the trial court's discretion to control the trial with economy of time and effort. *See* ***Rupert v. Home Mut. Ins. Co.***, 138 Wis.2d 1, 7, 405 N.W.2d 661, 663 (Ct. App. 1987). Additionally, Garlock was given latitude in permitting one of its experts to testify beyond the scope of his proposed testimony as reported in a pretrial witness list. Under the circumstances, there was no misuse of discretion in admitting Garancis's testimony.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.