

# Though tentative, testimony enough to sustain mesothelioma claim

The estate of Ronnie Startley filed a complaint against Welco Manufacturing Co. claiming that Startley contracted mesothelioma from asbestos in Welco products.

Welco unsuccessfully moved for summary judgment but later won its motion for directed verdict at trial on the basis that the sole witness, a co-worker, could not specify how often Startley used Welco products while working.

Startley's estate appealed that decision, and the appellate court reversed and remanded the case for trial after finding that the evidence was indeed sufficient to create an issue of material fact as to whether use of Welco's products caused Startley to develop mesothelioma.

In its motion for directed verdict, Welco pointed to the testimony of the co-worker, who named four different joint compounds that he and the decedent used on jobsites in Chicago in 1965, one of which was Welco's Wel-Cote.

He could not recall there being jobs that had one product versus another. He recalled the bags to be gray in color, but this testimony contradicted the exhibits presented, which did not show gray bags.

The trial court agreed with Welco's assertion that there was minimal product identification in this case and that there was no testimony to support the frequency of use of its product. The court also agreed that nothing indicated repeated exposure to Welco's product.

## Analysis

In the estate's appeal from the directed verdict, the appellate court reviewed that decision de novo. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 112 (2004). "A motion for directed verdict will not be sustained unless all of the evidence so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. All of the evidence must be reviewed in a light most favorable to the opponent of the motion." *Thacker*

*v. UNR Industries Inc.*, 155 Ill.2d 343,353-54 (1992).

Next, the court looked to *Thacker*, which held that if a plaintiff seeks to recover damages from a manufacturer because a worker has contracted an asbestos-related disease, the plaintiff must show the following: "(1) the injured worker regularly worked in an area where the defendant's asbestos was frequently used and (2) the injured worker did, in fact, work sufficiently close to this area so as to come into contact with the defendant's product."

The court then applied the frequency, regularity and proximity test from *Thacker* to the co-worker's testimony that said little about how often he and Startley used Wel-Cote. The witness recalled a light brown bag of joint compound, but he thought another brand came in the light brown bag. He made no guess as to the color of Welco's bags. He testified that he could not "recall there being more jobs that had one product versus the other."

In its analysis, the court acknowledged that courts from several jurisdictions have applied this frequency, regularity and proximity test to similarly vague testimony in a number of cases. This court specifically looked to *Georgia Pacific Corp v. Stephens*, 239 S.W.3d 304 (Texas Ct. App.2007), *Vaughn v. Ford Motor Co.*, 91

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S.W.3d 387, *Jackson v. Anchor Packaging Co.*, 994 F.2d 1295, 1304 (8th Cir. 1993), and *Holcomb v. Georgia Pacific LLC*, 289 F.3d 188 (Nev. 2012).

The case the court found most persuasive, however, was *Tragarz v. Keene Corp.*, 980 F.2d 411 (7th Cir. 1992). Henry Tragarz, a sheet metal worker, sued to recover damages related to mesothelioma.

## TOXIC TORT TALK



CRAIG T. LILJESTRAND

*Craig T. Liljestrand, a partner at Hinshaw & Culbertson LLP, has experience in toxic tort litigation. He practices in the areas of asbestos, silica, welding fumes, lead paint, chemical and occupational disease claims. His client base includes Fortune 500 companies in which he has defended various industrial product and equipment manufacturers, contractors and premises owners in numerous toxic tort cases throughout the country. He is also the regional counsel for a major industrial manufacturer.*

He testified that he sometimes cut Kaylo asbestos products and sometimes worked alongside insulators and pipefitters when they cut and installed Kaylo products.

He said he worked with Kaylo products "off and on, all over." No witness could name a jobsite where Tragarz worked with or near Kaylo products.

The *Tragarz* court applied the frequency, regularity and proximity test to the evidence and decided that the test was not a rigid test with an absolute threshold level necessary to support a jury verdict.

The court explained that the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases like mesothelioma, which can develop after only minor exposures to asbestos fibers.

This did not mean that the test was irrelevant when determining whether a plaintiff has proved that the exposure to defendant's

product was a substantial factor in causing the resulting disease; rather, it simply means that these factors become less critical when a party puts forth direct evidence of exposure to a defendant's products.

The court further explained that not only is the so-called frequency, regularity and proximity test less vital in cases involving direct evidence, but the test becomes even more flexible for purposes of proving substantial factor when dealing with cases in which exposure to asbestos causes mesothelioma.

The reasoning for this diminished importance is that mesothelioma can result from minor exposures to asbestos products.

Ultimately, the *Tragarz* court found the testimony sufficient to support a jury verdict in favor of plaintiff.

Here, Startley developed mesothelioma after repeated exposure to asbestos. Even though the co-worker could not testify as to how frequently he and the decedent used Wel-Cote, he did say they used it for some of the jobs.

He testified that Wel-Cote and one other brand were used more than the other brands. Adding to this was the estate's expert's testimony that relatively low levels of exposure contribute to causing mesotheliomas.

Therefore, here, as in *Tragarz*, a jury could find the exposures to Wel-Cote in Illinois constituted a substantial factor in causing the injury. Despite Welco's argument, the co-worker's testimony was sufficient to present a genuine issue of material fact as to whether exposure to Wel-Cote constituted a substantial factor in causing injury, thus precluding summary judgment.

## Conclusion

Ultimately, the appellate court found that the co-worker's testimony that he and Startley used Wel-Cote on jobs in Illinois was sufficient to create a genuine issue of material fact as to Wel-Cote products were a substantial factor in causing Startley to contract mesothelioma.