SUPREME COURT OF OHIO

Horton v. Harwick Chemical Corp.

73 Ohio St. 3d 679 (Ohio 1995) · Decided September 13, 1995

OPINION

PFEIFER, J.

Pfeifer, J. We are asked in this case to set forth the appropriate summary judgment standard for causation in asbestos cases, and specifically, whether Ohio *683courts should adopt the Lohrmann test. While this court is aware of the docketing problems that may exist with asbestos-exposure cases, we will not cause plaintiffs in such cases to carry a greater summary judgment burden than other personal injury plaintiffs.

In our view, the Lohrmann standard casts judges in an inappropriate role, is overly burdensome, and is unnecessary. We are also asked in this case to adopt alternative liability as a possible theory for recovery. This court has recognized the viability of alternative liability in the past, but we find it inappropriate in the cases at hand, since there is no evidence that the defendants' products created a substantially similar risk of harm.

I In Pang v. Minch (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313, paragraph five of the syllabus, this court held that "[w]here a plaintiff suffers a single injury as a result of the tortious acts of multiple defendants, the burden of proof is on the plaintiff to demonstrate that the conduct of each defendant was a substantial factor in producing the harm." In the asbestos cases, the plaintiff also has the burden of proving exposure to asbestos-containing products.

Goldman v. JohnsManville Sales Corp. (1987), 33 Ohio St.3d 40, 42, 514 N.E.2d 691, 693. The Lohrmann test purports to be a tool for determining whether a plaintiffs evidence of causation, i.e., whether a particular product was a substantial factor in producing the plaintiff's injury, is sufficient to withstand summary judgment.

However, the test creates less a legal standard than a medical or scientific one. Under Lohrmann, a product cannot possibly cause an injury unless a plaintiff has worked in close proximity to the product on a regular basis for an extended period of time. By employing the Lohrmann test, the trial judge usurps the traditional role of the medical or scientific expert, establishing a mechanistic test regarding causation which no contrary expert testimony can overcome.

The Lohrmann test puts trial judges in the position of having to find, for instance, that sporadic, intense exposure to asbestos over an extended period of time cannot cause asbestos-related disease. In effect, the Lohrmann test requires judges to take judicial notice that an asbestos-

containing product can cause injury only when someone works in close proximity to the product on a regular basis over an extended period of time.

Evid.R. 201(B) describes the kind of facts which may be judicially noticed: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *684We certainly cannot say that there is no reasonable dispute as to what level of exposure can cause asbestos-related diseases.

In refusing to adopt the Lohrmann test in Schultz v. Keene Corp. (N.D.Ill.1990), 729 F.Supp. 609, 615, the court wrote: “[The] rule * * * flies in the face of evidence which indicates that short periods of exposure — from one day to three months — can cause significant damage to the lungs. See Workplace Exposure to Asbestos: Review and Recommendations, U.S. Dep’t of Health and Human Servs. and U.S. Dep’t. of Labor, DHHS (NIOSH) Publication No. 81-103, at 3 (Nov.

1980).” Medical science suggests that very limited exposure to asbestos can cause mesothelioma, perhaps the worst of asbestos-related diseases. See, e.g., “Mesothelioma: Has Patient Had Contact With Even Small Amount of Asbestos?,” 257 JAMA 1569 (Mar. 27, 1987); New York Academy of Sciences, Cancer and the Worker (1977) 50, cited with approval in Hardy v. Johns-Manville Sales Corp. (E.D.Tex.1981), 509 F.Supp. 1353, 1355, reversed on other grounds, 681 F.2d 334 (C.A.5, 1982).

The temporal aspects of the Lohrmann test are scientifically dubious. “The length of time that an individual was exposed to asbestos does not in itself determine how serious the injury will be. Several factors, including individual idiosyncrasy, the intensity of the exposure, and the nature of the contaminant all play a part in the development of the disease.” Schultz, supra, 729 F.Supp. at 615, citing Zurich Ins.

Co. v. Raymark Indus., Inc. (1987), 118 Ill.2d 23, 37, 112 Ill.Dec. 684, 690, 514 N.E.2d 150, 156. The proximity aspect of the Lohrmann test also chooses sides in a scientifically disputed area. In these cases, Dr. Kenneth S. Cohen, a registered professional engineer, certified industrial hygienist, and asbestos inspector who holds a PhD in occupational health, testified through affidavit that asbestos fibers can travel significant distances through the air, resulting in substantial asbestos exposure even to employees who are not working directly or in close proximity to any product containing asbestos.

Dr. Cohen described in his affidavit the process of “re-entrainment,” by which the physical action of air movement, vibration, or physical trauma causes aerodynamically active asbestos fibers and particles to “take flight” and sail into the air. He stated that it was “more likely than not that some of the fibers and particles released in one corner of the [DTR] plant would travel on drafts and air

currents throughout the plant, including to its furthest opposite point." Dr. Cohen stated that the theory that a worker would only be exposed to asbestos released in the immediate vicinity of his workplace is a "scientific impossibility," due to the aerodynamic quality of the fibers and the plant's inevitable air turbulence.

Dr. Cohen stated that the plaintiffs "were more likely than not substantially exposed *685to asbestos and talc fibers and particles from all manufacturers whose asbestos and talc containing products were used in the [DTR] facility during the periods they worked there." It is not the province of the judge to immediately foreclose the validity of testimony such as Dr. Cohen's.

The case that appellee Chesterton cites as the leading case regarding the "fiber drift" theory, Robertson v. Allied Signal, Inc. (C.A.3, 1990), 914 F.2d 360, actually recognizes the theory's validity. While allowing the use of the theory only with evidence of frequency and regularity, Robertson does nonetheless accept that a worker not in close proximity to the actual product may still inh(ale the product's fibers: "The fiber drift theory can not stand alone; it must be supported by evidence showing the frequency of products' use and the regularity of the plaintiffs employment in an area into which there is a reasonable probability that the fibers drifted." Id. The true worth of testimony like Dr. Cohen's is determined in the jury room when weighed against competing testimony.

We are unwilling to close the door on the legitimacy of the "fiber drift" theory in every case in Ohio courts. Indeed, the Lohrmann test is the product of the attempts of Maryland federal courts to deal with claims brought by employees of shipyards, workplaces so large that fiber drift might seem impossible.

The Lohrmann court stressed the immensity of the shipyard in that case as a reason for affirming the district court's use of what later became known as the Lohrmann test: "[Wjhen one considers the size of a workplace such as Key Highway Shipyard, the mere proof that the plaintiff and a certain asbestos product are at the shipyard at the same time, without more, does not prove exposure to that product." Lohrmann, 782 F.2d at 1162.

We think it unwise to apply a rule designed for shipyards to workplaces of every size. More important, we think it unwise to apply a strict standard rooted in science when the science on the issue is unresolved. Lohrmann creates an all-knowing, trumping medical expert that disallows competing scientific viewpoints on the causes of asbestos-related diseases.

The Lohrmann test is the result of the law and public policy outstripping the science at the heart of the asbestos problem. Sometimes when a phenomenon grounded in science creates public concerns, policymakers cannot wait for the science to catch up with those concerns, and a public-policy-generated pseudoscience can be the result.

The Lohrmann test creates such pseudoscience in an arena where there is a long tradition of leaving science to the experts. *686Also, the Lohrmann test invites a trial judge into the domain of the jury. The temporal aspects of the test, frequency and regularity, are subject to an unlimited range of possibilities. How many exposures does it take to meet the acceptable level of frequency?

Can a judge be sure that one less exposure could not have caused asbestos-related disease? What is a regular basis? Does intense exposure over a shorter duration reduce the regularity requirement? In regard to proximity, how close to the product is close enough? Will a few feet make the difference?

The Lohrmann test does not call for simple responses which follow directly from a presentation of the evidence. Instead, the test involves a weighing of the plaintiffs evidence on the sliding scale of the test's three loosely defined criteria.

The inquiry by the trial judge should be whether there is evidence of exposure and evidence tying that exposure to the disease. Whether that evidence is strong enough to prove causation is an issue for the jury. Finally, the Lohrmann test departs from our standard regarding summary judgment. "Because summary judgment is a procedural device to terminate litigation, it must be awarded with caution.

Doubts must be resolved in favor of. the nonmoving party." Davis v. Loopco Industries, Inc. (1993), 66 Ohio St.3d 64, 66, 609 N.E.2d 144, 145. Plaintiffs in asbestos cases deserve that same degree of caution in their cases.

The Lohrmann test resolves doubts about causation mechanically in the favor of the defendant from the outset. It stacks the deck against plaintiffs by foreclosing all but one avenue of proof of causation. For each defendant in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant's product and that the product was a substantial factor in causing the plaintiff's injury.

A plaintiff need not prove that he was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury. Instead, we adopt the definition of "substantial factor" contained in Restatement of the Law 2d, Torts (1965), Section 431, Comment a: "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 a popular sense, in which there always lurks the idea of responsibility, rather than the so-called 'philosophical sense,' which includes every one of the great number of events without which any happening would not have occurred." Summary judgment is proper in an asbestos case in the same circumstances as in any other case, i.e., when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment

as a matter of law, and (3) it appears from the evidence, construed *687most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party.

Thus, we decline to establish a formulaic approach in an area which defies that kind of analysis, and therefore do not adopt the Lohrmann test. We therefore reverse the court of appeals and remand these cases to the trial court for a determination consistent with this opinion. II The theory of alternative liability originated in Summers v. Tice (1948), 33 Cal.2d 80, 199 P.2d 1.

In Summers, the plaintiff and the two defendants went hunting together. The defendants negligently fired their guns simultaneously in the direction of the plaintiff and a pellet struck him in the eye. Since the plaintiff could not identify the responsible defendant, the court shifted the causation burden to the defendants. Id. at 86-87, 199 P.2d at 4-5. Alternative liability had its Ohio genesis in Minnich v. Ashland Oil Co. (1984), 15 Ohio St.3d 396, 15 OBR 511, 473 N.E.2d 1199, syllabus, in which this court adopted the doctrine as set forth in 2 Restatement of the Law 2d, Torts (1965), Section 433B(3): “Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one caused it, the burden is upon each such actor to prove that he has not caused the harm.” In Minnich, the plaintiff was injured when ethyl acetate he was using to clean a printing press ignited.

The complaint alleged that two companies had supplied ethyl acetate to Minnich’s employer; the supplier of the actual ethyl acetate that ignited was unknown, since it had been transferred to an unmarked bottle prior to its use by Minnich.

Thus, this court applied alternative liability, since each of the defendants had allegedly supplied an identical, defective product to the plaintiff. This court first faced the issue of alternative liability in asbestos cases in Goldman, supra. This court in Goldman did not foreclose the possibility of the use of the theory in asbestos eases, but instead explained the limitations of its use therein.

In Goldman, the plaintiff could not identify any of the defendants as having supplied asbestos materials to his employer. Thus, Goldman could not demonstrate that each of the defendants had acted tortiously. As this court noted, while the theory of alternative liability relaxes the traditional requirement that the plaintiff prove that a specific defendant caused the injury, it applies only where the plaintiff shows that all the defendants acted tortiously.

Goldman, 33 Ohio St.3d at 46, 514 N.E.2d at 696. *688The factor which makes alternative liability inappropriate in this case was mentioned in dicta in Goldman. The present cases lack what was present in the seminal cases in this area: defendants creating a substantially similar risk of harm.

In Summers, for example, the defendants ' shot guns with identical ammunition in the direction of the plaintiff. In Minnich, both defendants allegedly supplied the same defective chemical to the

plaintiffs employer.

As this court stated in Goldman, "[a]sbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product." Goldman, 33 Ohio St.3d at 46, 514 N.E.2d at 697.

The records in these cases fail to demonstrate that the level of risk posed by each of the defendants' products is substantially similar. In the types of cases traditionally employing alternative liability, the plaintiff is unable even to differentiate between the possible responsible parties.

In the within cases, the plaintiffs can at least identify which products they were exposed to most, which contained the highest levels of asbestos, and which were used in a manner more likely to release fibers into the air. Alternative liability is a unique theory to be employed in unique situations. This court in Minnich limited application of the theory to "situations similar to the one at bar." Minnich, 15 Ohio St.3d at 397, 15 QBR at 512, 473 N.E.2d at 1200.

Alternative liability cannot apply if the defendants' products do not create a substantially similar risk of harm. Since there is no evidence that defendants' products created a substantially similar risk of harm, we will not apply the theory in the within cases.

We therefore agree with the appellate court on that issue. Judgments reversed and causes remanded. Moyer, C.J., concurs in part and dissents in part. Douglas, Resnick and F.E. Sweeney, JJ., concur in part and dissent in part. Wright and Cook, JJ., concur in part and dissent in part.