LOIS J. WAGNER, ROBIN G. WAGNER and WENDE L. WAGNER, Individually and as Wrongful Death, Beneficiaries of ROBERT WAGNER, Appellant-Respondent, v. BONDEX INTERNATIONAL, INC., and SIMPSON TIMBER COMPANY, Respondent-Appellant, CONWED CORPORATION, Defendant.

DOCKET NUMBER WD72474 (Consolidated with WD72482, WD72619)

COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, DIVISION FOUR

368 S.W.3d 340*; *2012 Mo. App. LEXIS 840

June 19, 2012, Decided
June 19, 2012, Opinion Filed

PRIOR HISTORY: [**1]

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI. The Honorable Kathryn E. Davis, Judge.

COUNSEL: Brent Rosenthal, for Appellant-Respondent.

Kyle Roehler, for Respondent-Appellant Bondex International, Inc.

Mark Arnold, for Respondent-Appellant Simpson Timber Company.

Clayton Dickey, for Conwed Corporation.

JUDGES: Before Division Four: Lisa White Hardwick, Chief Judge, Presiding, Joseph M. Ellis, Judge and Victor C. Howard, Judge. All concur.

OPINION BY: Joseph M. Ellis

OPINION

[*345] Bondex International, Inc. and Simpson Timber Company appeal from a judgment of the Circuit Court of Clay County entered in favor of Lois, Robin, and Wende Wagner, the wrongful death beneficiaries of Robert Wagner, in the amount $4.5 million. Lois, Robin, and Wende Wagner cross-appeal that same judgment being reduced by $900,000.00 pursuant to *§ 537.060*.[1] For the following reasons, the judgment is affirmed in part and reversed and remanded in part.

1 All statutory citations are to RSMo 2000 unless otherwise noted.

In 2006, Robert Wagner was diagnosed with mesothelioma, a cancer that affects the pleural lining of the lungs. During the 1960s and 1970s, Wagner worked as a carpenter installing ceiling tile at project sites in the Kansas City area. Wagner [**2] worked primarily for two companies during that time period, Kansas City Natural Slate and United Acoustics. In 2007, Wagner died from mesothelioma, and his wife and children ("Plaintiffs") brought this wrongful death action. Plaintiffs claimed that Wagner's mesothelioma resulted from exposure to the asbestos-containing products manufactured by Bondex and Simpson Timber ("Defendants").

Bondex manufactured a joint compound that was commonly used on construction sites during the installation of drywall. From 1961 to 1977, Bondex joint compound contained asbestos.

Simpson Timber manufactured ceiling tiles. During the 1960s, Simpson Timber manufactured both asbestos-containing ceiling tile and non-asbestos-containing ceiling tile. Simpson Timber also purchased and resold ceiling tile from Conwed that contained asbestos.

At trial, several of Wagner's co-workers from Kansas City Natural Slate and United Acoustics testified about the ceiling tile installation process and the conditions carpenters typically encountered while installing ceiling tile. The co-workers also testified about the products they used or came in contact with at the various

work sites in which they installed ceiling tile [**3] with Wagner.

William R. Harris, who worked with Wagner at Kansas City Natural Slate and [*346] United Acoustics, testified that he and Wagner often installed ceiling tile while other individuals called "tapers" mixed, applied, and sanded joint compound in the same area. He further testified that the dust fell like snow "all the time" when they worked in close proximity to the tapers, stating you "couldn't get away from [the joint compound]" when it was being sanded. Harris also stated that he recalls Wagner being around while Bondex was being sanded and could remember Bondex joint compound being used at the Shawnee Mission South High School and Commerce Tower work sites. Harris also indicated that removing ceiling tile from its packaging and cutting it to fit the ceiling tile grid generated dust to the extent that it got into his hair and nose and covered his clothing. Harris recalled dropping Simpson Timber ceiling tile with Wagner. He could not remember, however, the specific job sites at which he and Wagner installed Simpson Timber ceiling tile.

Chester McGuire, who also worked at Kansas City Natural Slate, testified that it was common for ceiling tile workers to be present while tapers [**4] used and sanded joint compound, which would create dust that he and Wagner would have inhaled. McGuire further testified that he remembers Bondex joint compound being used in the 1960s on sites at which he and Wagner worked, specifically Shawnee Mission South High School and the Hallmark facilities project. McGuire also stated that he and Wagner cut and dropped ceiling tile manufactured by Simpson Timber during the 1960s at the Shawnee Mission South High School and Hallmark work sites. McGuire, however, was unable to recall if the Simpson Timber tiles used at those work sites contained asbestos.

Fred Divelbliss, a former Kansas City Natural Slate worker, also testified that he recalled Wagner working with Simpson Timber ceiling tiles. He was unable to remember if those tiles contained asbestos.

William Jay Harris, another Kansas City Natural Slate worker, testified that he believed they would have worked with Simpson Timber tiles at some point in the Kansas City area. Harris could not remember the specific Simpson Timber products used or whether the tiles used contained asbestos.

Two experts also testified on Plaintiffs' behalf, Dr. Arnold Brody and Dr. John Maddox. Dr. Brody's testimony [**5] consisted primarily of background information regarding asbestos and how mesothelioma develops. Dr. Brody testified that asbestos is the only known environmental cause of mesothelioma. He went on to explain that mesothelioma is a cancer that results from the accumulation of asbestos fibers in the pleural lining of the lungs that ultimately causes genetic errors in mesothelial cells. He explained it is the cumulative effect of a person's exposure to asbestos fibers and the subsequent genetic errors that cause mesothelioma. He further testified that it is impossible to identify the specific asbestos fiber that begins or causes the mesothelioma development process.

Dr. Maddox also testified that mesothelioma results from an individual's cumulative exposures to asbestos and that exposure to all types of asbestos above ambient, background levels can result in mesothelioma. Dr. Maddox was then asked a series of hypotheticals by Plaintiffs' counsel. Each hypothetical posited the specific asbestos qualities of each Defendant's respective asbestos-containing product and questioned whether a product containing such amounts of asbestos contributed to Wagner developing mesothelioma. To each hypothetical, [**6] Dr. Maddox answered that he believed, with a reasonable degree of medical certainty, [*347] that each Defendant's product was a substantial, contributing factor in the development of Wagner's mesothelioma and his subsequent death therefrom.

Prior to the case being submitted to the jury, Defendants each filed a motion for directed verdict. Those motions were denied except for Bondex's motion for directed verdict with respect to the issue of aggravated circumstances damages. On June 3, 2009, the jury returned a verdict in favor of Plaintiffs in the amount of $4.5 million. The jury apportioned fault as follows: 20% to Bondex, 35% to Simpson Timber, and 45% to Conwed Corporation.[2]

> 2 Conwed Corporation was another manufacturer of ceiling tile and was a named defendant in the action. Conwed appealed the judgment, filed briefs and participated in oral argument. After submission, Conwed and Plaintiffs jointly moved to dismiss Conwed's appeal and Plaintiffs? cross-appeal against Conwed. This Court entered its order sustaining the joint motion, and the appeal and cross-appeal were dismissed on May 16, 2012.

Following the verdict, each Defendant also filed a motion to delay the entry of judgment. Defendants' [**7] motions sought to delay the entry of judgment until Plaintiffs had made claims to bankruptcy trusts established by several bankrupt manufacturers of asbestos products to pay personal injury claims. These manufacturers were not named in the lawsuit. Defendants' motions also sought to reduce the judgment by other settlement agreements they believed Plaintiffs had already entered into or received. Defendants presented evidence

that Plaintiffs had entered into a settlement agreement with the T.H. Agriculture & Nutrition, L.L.C. ("THAN") personal injury bankruptcy trust for $900,000.00. THAN was originally included in the lawsuit but was removed when the manufacturer filed for bankruptcy. On July 7, 2009, the trial court entered its Judgment and Order reducing the judgment by the following amounts: (1) $525,000.00 for settlements agreed to and received by Plaintiffs and (2) $900,000.00 for a settlement agreed to and stipulated between Plaintiffs and THAN. Defendants each then filed motions for judgment notwithstanding the verdict ("JNOV"). All JNOV motions were denied.

Following the trial court's judgment, the parties appealed the judgment to this court. The appeal was dismissed, however, [**8] because the trial court did not address the remaining John Doe defendants named in the suit. Plaintiffs filed a motion to dismiss the John Doe defendants with prejudice. At that time, Plaintiffs also filed a motion to dismiss and for entry of amended judgment arguing that the settlement agreement between Plaintiffs and the THAN bankruptcy trust was deemed nonexistent by a federal bankruptcy court.

On May 25, 2010, the trial court entered its Order and Final Judgment, which dismissed the John Doe defendants, with prejudice. In that judgment, the court also reduced the verdict by the amount of $525,000.00 for the settlements Plaintiffs had agreed to and received and the $900,000.00 settlement agreement the court found existed between Plaintiffs and the THAN bankruptcy trust. Thus, the judgment for Plaintiffs was reduced by $1,425,000.00.

Both Defendants and Plaintiffs appeal from the judgment. Bondex brings five points on appeal, while Simpson Timber presents three points. Plaintiffs have one sole point on cross-appeal. Bondex's first two points, as well as Simpson Timber's first two points, generally assert the trial court erred in denying their motions for directed verdict and judgment [**9] notwithstanding the verdict because Plaintiffs failed to make a submissible case in that they failed to prove that either defendants' [*348] products caused Mr. Wagner's mesothelioma. Therefore, we first address whether Plaintiffs made a submissible case.

"The standard of review for the denial of a judgment notwithstanding the verdict is essentially the same as that for the overruling of a motion for directed verdict." ***Montgomery v. Wilson****, 331 S.W.3d 332, 335-36 (Mo. App. W.D. 2011)*. "A motion for judgment notwithstanding the verdict should be sustained only when all of the evidence and the reasonable inferences to be drawn therefrom are so strong against the plaintiff's case that there is no room for reasonable minds to differ." ***Poloski v. Wal-Mart Stores, Inc****., 68 S.W.3d 445, 448 (Mo. App. W.D. 2001)*. "To survive either a motion for directed verdict or a motion for judgment notwithstanding the verdict, the plaintiff must have made a submissible case." ***Montgomery****, 331 S.W.3d at 335*. "Whether the plaintiff made a submissible case is a question of law subject to *de novo* review." ***Moore v. Ford Motor Co****., 332 S.W.3d 749, 756 (Mo. banc 2011)* (internal quotation omitted) (italics added).

"To make [**10] a submissible case, the non-moving party must present substantial evidence establishing each element of the claim." ***Livingston v. Baxter Health Care Corp****., 313 S.W.3d 717, 724 (Mo. App. W.D. 2010)*. "Substantial evidence is competent evidence from which the trier of fact can reasonably decide the case." ***Id***. (internal quotation omitted). "Whether evidence is substantial and whether any inferences drawn are reasonable is a question of law." ***Poloski****, 68 S.W.3d at 449*. "We will not overturn a jury's verdict unless there is a complete absence of probative facts to support it." ***Id***. In determining whether a submissible case was made, "[e]vidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences." ***Fleshner v. Pepose Vision Inst., P.C****., 304 S.W.3d 81, 95 (Mo. banc 2010)*. "We do not, however, supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences." ***Poloski****, 68 S.W.3d at 449*.

Bondex and Simpson Timber attack the submissibility of Plaintiffs' case by asserting that Plaintiffs failed to prove causation. As in any other tort case, [**11] Plaintiffs were required to prove that each defendant's conduct was an actual cause, that is a cause in fact, of the injury or event of which they complain. ***City of St. Louis v. Benjamin Moore & Co****., 226 S.W.3d 110, 113 (Mo. banc 2007)*. "Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." ***Callahan v. Cardinal Glennon Hospital*** *, 863 S.W.2d 852, 862 (Mo. banc 1993)*. "Once actual causation has been established, the issue becomes one of legal cause -- also known as proximate cause -- that is, whether the defendant should be held liable because the harm is the reasonable and probable consequence of the defendant's conduct." ***Benjamin Moore****, 226 S.W.3d at 114*.

The parties argue at some length regarding whether the "but for" test or the "substantial factor" test for causation is applicable. These arguments suggest some confusion regarding these "tests." Plaintiffs rely on ***Hagen v. Celotex Corp****., 816 S.W.2d 667, 670 (Mo. banc 1991)*, where the Court stated that in order to recover from manufacturers in a wrongful death action, plaintiffs "must establish that that [manufacturer's] products [**12] directly contributed to the death." ***Id****. at 670*. It

further clarified that "[t]his requires evidence that the product of each [manufacturer] sought to be held liable was a 'substantial [*349] factor' in causing the harm." ***Id***. (citing ***Jackson v. Ray Kruse Constr. Co.****, 708 S.W.2d 664, 669 (Mo. banc 1986))*. Based on ***Hagen***, Plaintiffs argue that the "substantial factor" test applies in this case.

Bondex and Simpson Timber, on the other hand, point to ***Callahan v. Cardinal Glennon Hospital****, 863 S.W.2d 852, 861 (Mo. banc 1993)*, to support their contention that the "but for" test is applicable. In ***Callahan***, the Court stated that "'[b]ut for' is an absolute minimum for causation because it is merely causation in fact," and that "[a]ny attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant has nothing to do with." ***Id***. *at 862*.

In specifically addressing "but for" causation in the context of multiple tortfeasors, the Court emphasizes that "there is nothing inconsistent or different about applying a 'but for' causation test to a circumstance involving multiple tortfeasors." ***Id***. Thus, the Court held that, under Missouri law, "the [**13] 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury, i.e. the 'two fires' cases." ***Id***. *at 862-63*. "Two fires" cases involve situations in which "there are two independent torts, either of which by itself would have caused the injury."[3] ***Id***. *at 861*. Because the "but for" causation test fails to accurately test for causation in these situations, the substantial factor test becomes the means of establishing actual causation in "two fires" cases. ***Id***.

> 3 The Court in ***Callahan*** further explained the origin and significance of the "two fires" case as follows:
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> > The law school example of the ["two fires" case] is where two independent tortfeasors set fires on opposite sides of the mountain, the fires burn toward the cabin at the top, and either is sufficient to destroy the cabin. Under these circumstances, the "but for" test fails to accurately test for causation in fact because the absence of either fire will not save the cabin. Applying the "but for" causation test to fire number one results in the conclusion that the cabin would have burned even if fire number one had not occurred [**14] because fire number two would have burned the cabin. For the same reason, applying the "but for" causation test to fire number two leads to the conclusion that the cabin would have burned even if fire number two had not occurred because fire number one would have burned the cabin. Nevertheless, it is obvious that both fires are causes in fact.
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> ***Id***.

While Plaintiffs are correct that ***Callahan*** does not expressly overrule ***Hagen***, ***Callahan*** does set forth how to establish actual causation under Missouri law by clearly mandating that the "but for" causation test must be satisfied in all cases, including circumstances involving multiple tortfeasors, unless the facts of the case are such that the situation should be treated as a "two-fires" case. ***Id***. *at 861-63*. Moreover, the Court expressly stated that "[t]o the extent that ***Jackson v. Ray Kruse [Constr. Co****., 708 S.W.2d 664, 669 (Mo. banc 1986)]* and the cases discussed therein are contrary, they are overruled. And ***Hagen***, of course, relied on ***Jackson***.

Since ***Callahan***, Missouri appellate courts have repeatedly declared that "but for" causation is applicable in all tort cases except two fires cases. *See e.g.*, ***Benjamin Moore****, 226 S.W.3d at 114* ("In most [**15] cases, the plaintiff must establish actual causation by showing that the alleged harm would not have occurred "but for" the defendant's conduct. The only exception is for cases involving two independent torts, either of which is sufficient in itself to cause the injury." (internal citation omitted)); ***Sundermeyer v. SSM Regional*** [*350] ***Health Services****, 271 S.W.3d 552, 554 (Mo. banc 2008)* ("In wrongful death actions, plaintiffs must establish that, but for the defendant's actions or inaction, the patient would not have died."); ***Richey v. Philipp****, 259 S.W.3d 1, 8 (Mo. App. W.D. 2008)* ("'A defendant's conduct is the cause in fact of a plaintiff's injuries where the injuries would not have occurred 'but for' that conduct.'"); ***Poloski****, 68 S.W.3d at 449* ("In order to prove causation, a plaintiff must prove that 'but for' the breach of duty, the event would not have occurred."); ***Peterson v. Summit Fitness, Inc****., 920 S.W.2d 928, 936 (Mo. App. W.D. 1996)* ("Causation in fact is established if the plaintiff shows that 'but for' the defendant's conduct, the accident would not have occurred."). Thus, in light of ***Callahan*** and subsequent case law, Plaintiffs' argument that the "substantial factor" test is [**16] applicable in this case is unsustainable. The test for actual causation in fact in Missouri is "but for."