2018 WL 8899281 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Seventh Judicial Circuit
Spartanburg County

Jerry Howard CRAWFORD, et al.,
v.
CELANESE CORPORATION, et al.

No. 2017CP4204429.
October 22, 2018.

Order Denying in Part and Granting in Part Plaintiff's Motion for Judgment Notwithstanding the Verdict and for New Trial Absolute

Jean H Toal, Judge.

*1 In this asbestos case, Plaintiff Jerry Howard Crawford moves for relief from the jury's July 19, 2018 verdict in favor of Covil Corporation ("Covil"). For the reasons set forth below, Plaintiff's motion for judgment notwithstanding the verdict is DENIED, but Plaintiff's motion for new trial absolute is GRANTED.

I. The Evidence at Trial

Plaintiff Jerry Crawford worked around asbestos at the Hoechst Fiber (Celanese) plant in Spartanburg, South Carolina, from 1970 to 1974. He worked at three locations within the plant: the poly building, the continuous line building and the warehouse. Daniel Construction constructed an addition to the continuous line building during the period Mr. Crawford worked there. Daniel installed insulation on the new lines in this area. Mr. Crawford testified that he saw them cut insulation for steam pipes, which created "a good bit of dust." Daniel Construction also repaired the insulation in the poly building. Don Buck, representative for Daniel Construction, testified that Daniel Construction was at the facility every year between 1970 and 1974.

Harley Neelands worked as an insulator for Daniel Construction and insulated pipe at the Celanese plant. Daniel used Kaylo half-moon insulation, "mud" insulation, and Kaylo block insulation. This work generated so much dust that their clothes were covered with white chalky dust at the end of each day.

Mr. Neelands testified that Covil supplied the insulation used at the Celanese plant. This is confirmed by a Daniel vendor list from the Celanese project that lists Covil as a supplier on that project. Plaintiff's Ex. 822.4.

Covil, through its representative Robert Glenn, has admitted that it sold Kaylo brand asbestos-containing insulation. Covil sold insulation to industrial contractors. Covil agreed that Daniel Construction was one of its largest customers. Covil agreed this relationship with Daniel Construction began in the early 1960s. Daniel Construction, through its representative, acknowledged that it did business with Covil as an insulation supplier and insulation subcontractor. Dwaine Waters, a former Covil employee, testified that if Daniel had the maintenance contract, Covil did the insulation work.

When Mr. Glenn was asked about his search for documents reflecting Covil's sales to the Spartanburg Celanese plant, he

testified that he performed a word search of Covil's documents and found nothing regarding that plant. He also stated that a fire occurred in 1973, thereby causing Covil to lose all sales information from 1973 and beforehand. This was contradicted by a Covil employee, Machen Carpenter, who testified that Covil's office complex was protected by a fire wall and the office complex was not destroyed by the 1973 fire. Covil's documentation was kept in a vault which would not have been destroyed by the 1973 fire either. Mr. Carpenter testified that the documents were likely destroyed by means other than the fire.

Covil pointed to the lack of record evidence of its involvement at Celanese. Covil maintained that its records generated after the May 1973 fire did not establish any work by Covil at Celanese. Covil also relied on testimony that Celanese did not have a record of Covil providing any services to the plant. Despite Daniel's vendor list that included Covil, Covil also contended that Daniel's records did not show Covil as an insulation supplier on the Celanese project.

*2 The evidence established that the insulation supplied by Covil to Celanese contained asbestos. Bruce Bowyer testified on behalf of CNA Holdings, the entity now responsible for Celanese. He said the plant specifications called for amosite asbestos-containing insulation. Mr. Bowyer also referred to a plant survey conducted in 1995 which shows the quantity of asbestos-containing insulation removed from various areas of the plant, the area where Mr. Crawford worked, over 77,749 lineal feet of insulation was removed and 90% of that insulation contained asbestos. Further, Covil, through its corporate representative Robert Glenn, admitted that Kaylo insulation contained asbestos during the relevant time period.

Covil admitted that it knew as of 1965 that asbestos was hazardous and that exposure to asbestos could be fatal. Covil first saw warning labels on asbestos-containing products in 1968.. Nevertheless, Covil continued to sell asbestos-containing insulation until at least 1973 and an invoice admitted into evidence showed that it sold asbestos-containing Thermobestos until at least 1974:

Covil did nothing to protect end users and bystanders like Mr. Crawford. Covil never had a research department, a medical director, or an industrial hygienist. Covil never placed a warning on its boxes of asbestos-containing products. Even though Covil told its own employees to wear respirators since the 1950s, it never put that information on any of the boxes that it sold. Mr. Glenn testified that Covil made a "business decision" to not warn about the asbestos-containing products that it sold.

Plaintiff introduced causation testimony from two expert witnesses—Dr. Arnold Brody and Dr. John Maddox. Dr. Arnold Brody, an expert qualified in the areas of cell biology and experimental pathology, testified about how asbestos gets into the body and how it causes disease. Dr. Brody explained that asbestos causes cancer in that it either displaces genes necessary for the normal distribution of chromosomes or it damages DNA. He was not cross-examined by Covil.

Dr. John Maddox is a pathologist who was qualified to testify as an expert in the diagnosis and causation of asbestos-related diseases. Dr. Maddox testified that Mr. Crawford has a malignant mesothelioma of the biphasic type of his right pleura. Mr. Crawford's mesothelioma was asbestos-related. Assuming all of the relevant exposure facts about Mr. Crawford's work around asbestos-containing insulation supplied by Covil between 1970 and 1974, Dr. Maddox opined that this exposure was a substantial contributing cause in development of Mr. Crawford's mesothelioma. In his expert opinion, Mr. Crawford's mesothelioma will cause his death.

There was testimony about the medical treatments Mr. Crawford has endured, including chemotherapy and surgery to remove the lining of his lung. Mesothelioma is a very painful disease because of the accumulation of fluid in the lungs and the inability to breath. Weight loss and loss of appetite is common, and mesothelioma patients experience "air hunger" when struggling to breathe. Mr. Crawford's physical health has already declined significantly and he knows it is very unlikely he will survive this cancer. He was physically unable to attend trial and his testimony was presented via videotaped deposition taken in early February 2018. Dr. Maddox testified that, absent his cancer, Mr. Crawford's life expectancy, at age 72, would have been an additional 13 years.

II.Ruling on Motion for Judgment Notwithstanding the Verdict

On a motion for a directed verdict or a judgment notwithstanding the verdict (JNOV), this Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331-32, 732 S.E.2d 166, 171 (2012). A motion for a JNOV "requires a court to determine the sufficiency of the evidence." *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 81, 588 S.E.2d 87, 89 (2003). The Court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *See Strange v. S. C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *RFT Management Co. LLC v. Tinsley & Adams LLP*, 732 S.E.2d 166, 171 (S.C. 2012). JNOV can be granted only "if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

***3** For the reasons set forth at the hearing, the Court denies JNOV.

III. Ruling on Motion for New Trial Pursuant to the Thirteenth Juror Doctrine

South Carolina's thirteenth juror doctrine is a well-established standard for granting a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996). "Under the 'thirteenth juror doctrine,' a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 506, 579 S.E.2d 293, 306 (2003), quoting, *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715 (Ct. App. 1996) ("Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed."). Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003); see *also Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 1994) (stating the trial court may take its own view of the evidence). Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

"South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002) (quoting, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). In fact, as the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.* As the South Carolina Supreme Court explained in *Folkens:*

> The effect is the same as if the jury failed to reach a verdict....When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id.

With this standard in mind, the Court finds that the jury's verdict in favor of Covil is unsupported by the evidence presented during trial. Plaintiff presented overwhelming evidence to support each of his claims against Covil. Plaintiff's evidence conclusively established that Jerry Crawford worked at the Spartanburg Celanese facility from 1970 to 1974. While working at Celanese, Mr. Crawford was exposed to asbestos-containing insulation, which Plaintiff proved was supplied by Covil. Testimony from Plaintiff's medical expert, Dr. Maddox, confirmed that Mr. Crawford had mesothelioma and that his exposure to asbestos from Covil-supplied insulation was a substantial factor in causing his disease. Covil failed to present any evidence to the contrary. Despite receiving medical treatment, Mr. Crawford is expected to die from mesothelioma.

*4 Dr. Maddox also testified that it was known, at least by 1967, that some pipe insulation contained asbestos and that asbestos was hazardous. Covil failed to present any testimony challenging this evidence. In fact, Covil admitted that it received information regarding the hazards of asbestos from numerous sources beginning in the 1960s and by 1965 was aware that exposure to asbestos could be fatal. Despite this knowledge, Covil failed to take any measures to warn its customers or users of the hazards associated with the asbestos-containing products that it supplied. Covil continued to sell asbestos-containing insulation until at least 1974.

Covil's defense was that it did not supply the thermal insulation installed at Celanese, pointing only to the absence of sales invoices or records of sales to that facility. It was undisputed that Covil's sales records had been destroyed, however, and Mr. Carpenter's testimony supports the conclusion that the destruction was deliberate instead of the result of a fire, as Covil claims. The Court rejects Covil's contention that Daniel's records did not show Covil as the insulation supplier on the Celanese project: Plaintiffs admitted a Daniel vendor list with Covil's name on it, which confirmed Mr. Neelands's testimony that Covil supplied the insulation installed by Daniel at Celanese. Covil failed to present any evidence to contradict Plaintiff's evidence that Covil was the supplier of the asbestos-containing thermal insulation installed at Celanese. Moreover, Covil failed to present any evidence to contradict any of the testimony that Covil was one of Daniel Corporation's primary insulation suppliers, including from 1970 to 1974 when Daniel installed insulation at Celanese.

Given the overwhelming evidence against Covil on the issues of Mr. Crawford's exposure to Covil-supplied insulation, Covil's knowledge of the danger and failure to warn, and Mr. Crawford's injury and damages, the Court finds that the jury's verdict for Covil was contrary to the fair preponderance of the evidence. The Court exercises its discretion to act as the thirteenth juror, and, finding that the evidence does not justify the jury's verdict, the Court is persuaded that Plaintiff is entitled to a new trial.

Conclusion

The Court DENIES Plaintiff's Motion for Judgment Notwithstanding the Verdict but GRANTS Plaintiff's Motion for New Trial pursuant to the Thirteenth Juror Doctrine.

IT IS SO ORDERED.

Jean Hoefer Toal, Chief Justice of the South Carolina Supreme Court, Retired, Acting as Circuit Court Judge

October _____,2018

Spartanburg, South Carolina.

IT IS SO ORDERED.

s/Jean H. Toal #2758

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