2011 IL App (4th) 100805-U

Filed 12/23/11

NOS. 4-10-0805, 4-10-0806, 4-10-0807 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of MERLON DUKES,	)	Appeal from
Deceased,	)	Circuit Court of
DORIS DUKES, Special Administrator,	)	McLean County
Plaintiff-Appellee,	)	No. 04L79
v. (No. 4-10-0805)	)	
HONEYWELL INTERNATIONAL, INC.,	)	
Defendant-Appellant.	)	
----------	)	
In re: the Estate of JOHN WATKINS,	)	No. 05L08
Deceased,	)	
RUTH WATKINS, Special Administrator,	)	
Plaintiff-Appellee,	)	
v. (No. 4-10-0806)	)	
HONEYWELL INTERNATIONAL, INC.,	)	
Defendant-Appellant.	)	
----------	)	
In re: the Estate of ROBERT BLESSING,	)	No. 05L158
Deceased,	)	
JUDY BLESSING, Special Administrator,	)	
Plaintiff-Appellee,	)	
v. (No. 4-10-0807)	)	Honorable
HONEYWELL INTERNATIONAL, INC.,	)	Scott Drazewski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was insufficient to establish brake lining manufacturer entered into an agreement with other coconspirators to knowingly assert it was safe for people to be exposed to asbestos. Therefore, defendant was entitled to judgment notwithstanding the verdict.

¶ 2 The wives of three factory workers brought civil conspiracy suits against the

successor to a brake lining company, alleging the company conspired to falsely assert it was safe to be exposed to asbestos while the husbands were working at the manufacturing plant during the 1950s and 1960s. Following a consolidated jury trial, judgment was entered by the trial court in favor of the wives. Defendant brake lining manufacturer appeals the denial of its motion for judgment notwithstanding the verdict, certain evidentiary rulings, the giving or denial of jury instructions, the viability of loss of consortium claims and assert the verdict in favor of plaintiffs was against the manifest weight of the evidence. The record contains no evidence defendant entered into an agreement with any other corporation to falsely assert asbestos was safe or to keep quiet about the dangers of asbestos, although the record contains evidence defendant, on its own, did those things. We reverse the trial court's denial of defendant's motion for judgment notwithstanding the verdict.

¶ 3 I. BACKGROUND

¶ 4 Three separate plaintiffs brought tort actions against defendant, Honeywell International, Inc., successor, by merger, of The Bendix Corporation, a brake lining manufacturer. It is undisputed Merlon Dukes, John Watkins, and Robert Blessing contracted mesothelioma while employed by Union Rubber & Asbestos Company (UNARCO) in Bloomington, Illinois, which used asbestos in its manufacturing processes. All three original plaintiffs died prior to their cases coming to trial and were replaced as plaintiffs by their widows as special administrators of their estates–Doris Dukes, Ruth Watkins, and Judith Blessing, respectively. Former UNARCO employees testified they never received any warning from UNARCO about the toxicity of asbestos, and UNARCO did little or nothing to protect them from the asbestos.

¶ 5 UNARCO is not a defendant in this case. Instead, plaintiffs sued Honeywell on a

theory of civil conspiracy. It is undisputed defendant never employed plaintiffs' decedents nor supplied any of the asbestos making them sick. However, plaintiffs contended defendant conspired with UNARCO, Johns-Manville Corporation, Raybestos-Manhattan, Inc., Owens Corning Fiberglass Corporation, Abex Corporation, Owens-Illinois, Inc., and/or Metropolitan Life Insurance Company to suppress information about the harmful effects of asbestos. Each plaintiff contends this conspiracy began in the 1930s and continued into at least the early 1970s, covering the period during which each plaintiff's decedent worked at UNARCO. The jury was convinced by plaintiffs' theory of conspiracy and, on October 22, 2009, awarded damages in the amount of: $2,100,000 to Doris Dukes as special administrator and $301,000 for loss of consortium; $1,700,000 to Ruth Watkins as special administrator and $160,000 for loss of consortium; and $1,235,000 to Judith Blessing as special administrator and $68,000 for loss of consortium.

¶ 6 Defendant has appealed, and although it raised several issues, we need only address the first issue–the trial court's denial of its motion for judgment notwithstanding the verdict–as that is dispositive of the appeal.

¶ 7 II. ANALYSIS

¶ 8 A. Motion for Sanctions Taken With the Case

¶ 9 Prior to getting to the issues analysis, we address plaintiffs' motion for sanctions against defendant. Plaintiffs complain the record on appeal, when received by them, had pages out of order, pages missing, and pages of volumes switched and mixed up with each other. Plaintiffs claim defendant violated Illinois Supreme Court Rule 372 (eff. Feb. 1, 1994), which states a party on appeal is responsible for the safekeeping of the record while in its custody. The

record may be unbound for copying purposes but it must be restored to its original condition. Ill. S. Ct. R. 372 (eff. Feb. 1, 1994). Supreme Court Rule 375 states when a party fails to comply with appellate rules, sanctions may be imposed ranging from barring defendant from presenting a claim to entering judgment on an issue for plaintiffs to striking parts of defendant's brief to dismissing the appeal. Ill. S. Ct. R. 375 (eff. Feb. 1, 1994). Plaintiffs request this court impose sanctions on defendant.

¶ 10 Supreme Court Rule 375(a) provides for the imposition of sanctions where a party or its attorney has *willfully* failed to comply with appeal rules. Ill. S. Ct. R. 375(a) (eff. Feb. 1, 1994). Sanctions under Rule 375 should only be imposed in the most egregious circumstances. *Janisco v. Kozloski*, 261 Ill. App. 3d 963, 968, 634 N.E.2d 1104, 1107 (1994).

¶ 11 In this case, there are no allegations or proof of willfulness on the part of defendant. There is no showing of prejudice to plaintiffs. Although they allege their attorney had to go through the record page by page to look for missing documents, they also state their brief was written and counsel was merely putting in cites to the record when the problem was noticed. Plaintiffs' motion does not identify how any missing pages are relevant to the issues raised on appeal. The pages identified as missing are exhibits to a posttrial motion filed in the original 2007 trial involving John and Ruth Watkins, and plaintiffs have made no argument how those missing exhibits have prejudiced them in responding to defendant's appeal from a later 2010 trial. The motion is denied.

¶ 12 B. Judgment Notwithstanding the Verdict

¶ 13 The trial in this case was not the first time plaintiffs had appeared before a jury on these claims. On October 3, 2005, Doris Dukes initially obtained a jury verdict against defen-

dant. On October 29, 2008, the judgment was reversed and the case remanded for a new trial in *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 900 N.E.2d 1128 (2008) (*Dukes I*). On November 27, 2006, Judith Blessing obtained a jury verdict against defendant but, in light of the decision in *Dukes I*, defendant's motion for a new trial was granted on May 4, 2009. Likewise, on December 19, 2007, Ruth Watkins obtained a jury verdict against defendant but, in light of the *Dukes I* decision, defendant's motion for a new trial was also granted on May 4, 2009. The cases were consolidated for retrial.

¶ 14 *Dukes I* was reversed and a new trial granted on the basis of the trial court's errors in admitting certain evidence which resulted in depriving the defendant of a fair trial. *Dukes I*, 386 Ill. App. 3d at 443, 900 N.E.2d at 1143. In addition, this court found the defendant's motion for judgment notwithstanding the verdict was properly denied based on the remaining evidence properly introduced. *Dukes I*, 386 Ill. App. 3d at 445-46, 900 N.E.2d at 1144.

¶ 15 After the verdicts were entered in these consolidated cases on October 29, 2009, this court considered an appeal from another case alleging the same conspiracy theory against the defendant. In *Rodarmel v. Pneumo Abex*, 2011 IL App (4th) 100463, 2011 WL 4336923, we held *Dukes I* was wrongly decided as to the issue of the denial of the motion for judgment notwithstanding the verdict. *Rodarmel*, 2011 IL App (4th) 100463, ¶ 118. The same evidence was used in *Dukes I*, *Rodarmel*, and this case to prove plaintiffs' theory of conspiracy. The analysis used in *Rodarmel* is applicable to this case. We agree with our analysis in *Rodarmel* and find *Dukes I* was wrongly decided as to the issue of the denial of defendant's motion for judgment notwithstanding the verdict.

¶ 16 Plaintiffs argue the evidence in this case was the same as that in *Dukes I* plus

some extra evidence and, therefore, there is no grounds on which to find differently than we did in *Dukes I*, where we concluded "the evidence, when viewed in a light most favorable to plaintiff, does not so overwhelmingly favor defendant that the jury's verdict in favor of plaintiff could never stand." *Dukes I*, 386 Ill. App. 3d at 446, 900 N.E.2d at 1144. Defendants point out an internal inconsistency in the *Dukes I* decision which they argue should allow us to revisit our decision there.

¶ 17 In *Dukes I*, we discussed the fact when attempting to prove a conspiracy, evidence as to the activities of alleged coconspirators, which would be hearsay, was admissible only where there is some independent evidence apart from the hearsay evidence itself to establish a conspiracy although that evidence establishing conspiracy could be circumstantial. *Dukes I*, 386 Ill. App. 3d at 439, 900 N.E.2d at 1139. Defendant objected in *Dukes I* to admission of such hearsay evidence as to the activities of the alleged coconspirators absent nonhearsay evidence of an agreement between the defendant and the alleged coconspirators to misrepresent or suppress information about asbestos. We held, taken together, the surrounding facts and circumstances, which we noted included a long-time business relationship between defendant and alleged coconspirators, common trade-organization memberships and common directors with alleged coconspirators, were not enough to support proof of a conspiracy. We noted these facts did not constitute independent proof of a conspiracy. *Dukes I*, 386 Ill. App. 3d at 439, 900 N.E.2d at 1139. Later, when we discussed defendant's appeal of the trial court's denial of defendant's motion for judgment notwithstanding the verdict, we concluded, based on the same evidence, that evidence "when viewed in a light most favorable to plaintiff, does not so overwhelmingly favor defendant that the jury's verdict in favor of plaintiff could never stand." *Dukes I*, 386 Ill.

App. 3d at 446, 900 N.E.2d at 1144. That verdict for plaintiff naturally included a finding defendant was part of a conspiracy with the other coconspirators to misrepresent or suppress information about asbestos. We sent the *Dukes I* case back for a retrial due to the erroneous admission of evidence intended to prove defendant was part of the conspiracy. We take the opportunity provided by the retrial and new appeal by plaintiffs, including Dukes, to revisit the issue.

¶ 18 1. *Standard of Review*

¶ 19 We review *de novo* a trial court's denial of a motion for a judgment notwithstanding the verdict. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257 (1999). We apply the same standard a trial court should apply, enunciated in *Pedrick v. Peoria & Eastern R.R. Co:* "verdicts ought to be directed and judgment *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand." *Pedrick*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967).

¶ 20 The evidence must be clear and convincing if a conspiracy is to be proved solely by circumstantial evidence. *McClure*, 188 Ill. 2d at 140-41, 720 N.E.2d at 261. This standard applies to judgments notwithstanding the verdict as well as directed verdicts. *Rodarmel*, 2011 IL App (4th), ¶100.

¶ 21 2. *Evidence*

¶ 22 Plaintiffs presented evidence of wrongful parallel conduct engaged in by other asbestos companies and argued this showed an agreement to take certain actions. This conduct included (1) knowledge asbestos could cause disease at the time they sold asbestos products, (2)

sale of these products without warning of these diseases, (3) failure to warn employees and consumers of these diseases, and (4) failure to adequately protect their employees from exposure to asbestos dust. These broad categories include the same actions of which plaintiffs accuse defendant in this case. The supreme court in *McClure* held this evidence of parallel conduct was *not sufficient* to prove by clear and convincing evidence a civil conspiracy existed between these companies. *McClure*, 188 Ill. 2d at 135, 720 N.E.2d at 259. Under the clear and convincing standard, if the facts and circumstances are as consistent with innocence as they are of guilt, a court should find conspiracy has not been proved. *McClure*, 188 Ill. 2d at 140-41, 720 N.E.2d at 261.

¶ 23 The plaintiff in *McClure* presented evidence in addition to the parallel evidence. The court in *McClure* went on to note that evidence, such as employees of the various companies were members of the same trade organizations, added to the parallel-conduct evidence, was not sufficient as a matter of law to support an inference of an agreement. See *McClure*, 188 Ill. 2d at 149, 720 N.E.2d at 266.

¶ 24 In this case, plaintiffs alleged defendant was in a civil conspiracy with other asbestos companies and they agreed among themselves to (1) "assert what was not true--that it was safe for people to be exposed to asbestos and asbestos-containing materials" and (2) "suppress information about the harmful effects of asbestos." These are the same allegations made in *Rodarmel*. In neither *Rodarmel* nor in this case did plaintiffs have any direct evidence Bendix entered into an agreement with any other company to do the things alleged and, thus, circumstantial evidence would be needed to prove the existence of the conspiracy by clear and convincing evidence. See *McClure*, 188 Ill. 2d at 134, 720 N.E.2d at 258.

¶ 25 The circumstantial evidence in this case in addition to the parallel conduct includes not only the same points raised in *Rodarmel*: (1) Bendix did not warn its employees about asbestos just like the other conspirators; (2) Bendix bought asbestos from Johns-Manville and Johns-Manville sent Bendix position papers and other communications regarding asbestos; (3) Bendix, like all other brake manufacturers, belonged to a trade organization, FMSI; and (4) in 1934 and from 1959 to 1963, Bendix shared a board of directors member with another alleged conspirator, but also these additional facts: (5) Bendix shared X-rays of employees exposed to pneumoconiosis-producing dust (silica) with Dr. A.J. Lanza, a doctor for Metropolitan Life in 1932; and (6) newly produced documents such as sales invoices in regard to purchases from Abex and rebranding documents existing between Bendix and UNARCO and Bendix and Raybestos. The first four areas of evidence were dealt with in *Rodarmel* in which this court found, contrary to any conclusion in *Dukes I*, this additional evidence did not satisfy the requirements of *McClure* as the additional evidence beyond parallel conduct needed to prove a civil conspiracy with only circumstantial evidence. See *Rodarmel*, 2011 IL App (4th) 100463, ¶¶ 106-117.

¶ 26 We need not repeat the court's reasoning here. A quick summary will suffice. The fact Johns-Manville was the exclusive supplier of asbestos fiber to Bendix for many decades (*Dukes I*, 386 Ill. App. 3d at 445, 900 N.E.2d at 1144) does not support the inference Bendix and Johns-Manville entered into an agreement to conceal the dangers of asbestos. *Rodarmel*, 2011 IL App (4th) 100463, ¶106-107. In addition, buying asbestos from Johns-Manville is already encompassed in parallel conduct. *Rodarmel*, 2011 IL App (4th) 100463, ¶107.

¶ 27 The second item of additional evidence in *Dukes I* is Johns-Manville "assisted

Bendix with a position paper on asbestos in the late 1960s." *Dukes I*, 386 Ill. App. 3d at 445, 900 N.E.2d at 1144. This was a paper prepared by Johns-Manville, not Bendix and Johns-Manville "assisted" Bendix by providing information on the adverse health effects of asbestos. *Rodarmel*, 2011 IL App (4th) 100364, ¶108. The court in *McClure* previously held a conspiracy could not be inferred from the sharing of information about asbestos. *McClure*, 188 Ill. 2d at 147, 720 N.E.2d at 265. Further, as we noted in *Rodarmel*, the companies alleged to have conspired together did not start issuing warnings about asbestos at the same time as might be expected if they were acting in concert. Evidence Bendix acted differently from Johns-Manville " 'prohibits an inference of agreement.' " *Rodarmel*, 2011 IL App (4th) 100364, ¶111 (quoting *McClure*, 188 Ill. 2d at 148, 720 N.E.2d at 265).

¶ 28 The third item of additional evidence in *Dukes I* was the fact Bendix and other alleged conspirators were members of the same trade organizations. However, a conspiratorial agreement cannot be inferred from membership in a trade organization as such is common in most industries (*McClure*, 188 Ill. 2d at 147, 720 N.E.2d at 265) and is as consistent with innocence as guilt. *Rodarmel*, 2011 IL App (4th) 100364, ¶113. Finally, the last item of additional evidence in *Dukes I* was a common director between Johns-Manville and Bendix. *Dukes I*, 386 Ill. App. 3d at 445, 900 N.E.2d at 1144. In both *Rodarmel* and this case, there was evidence Bendix also shared a director with Abex. However, we found in *Rodarmel* implying a conspiratorial agreement from a shared director would be speculation. *Rodarmel*, 2011 IL App (4th) 100364, ¶¶114, 117.

¶ 29 We note the same evidence discussed in *Rodarmel* was introduced for the same purposes in this case and is equally unsatisfactory to prove a civil conspiracy in this case. That

evidence is "as consistent with innocence as with guilt" as noted by the court in *McClure*.

¶ 30 As for the extra items of evidence submitted in this case, we do not find they satisfy the requirements of *McClure* to prove civil conspiracy. The fact Bendix shared X-rays of its employees taken by company physicians, with a doctor implicated in wrongdoing in regard to hiding the effects of exposure to asbestos at the behest of Johns-Manville, does not prove Bendix was part of that conspiracy. Dr. Lanza, according to plaintiffs' own witness Dr. Barry Castleman, was a leading authority on dust diseases and Bendix consulted him in regard to silicosis. It had nothing to do with the diseases of asbestosis or mesothelioma caused by exposure to asbestos. The fact Bendix consulted a noted expert on dust diseases does not lead to the inference it was involved in a conspiracy to hide the effects of exposure to asbestos. Such conduct is, again, just as consistent with innocence as with guilt.

¶ 31 Finally, plaintiffs point to other evidence introduced such as the sale of brakes by Abex to Bendix. Both companies were engaged in part of the brakes manufacturing and brake lining industry and it would not be unusual for them to do business with each other. The same rationale applies to business between Bendix and UNARCO and Raybestos. They were all in the same industry at the same time and the fact they did business with each other on occasion should not raise an inference of a wrongful conspiracy as it could just as easily raise the inference of ordinary commerce between companies in the same industry.

¶ 32 In summary, we will follow our decision in *Rodarmel; Dukes I* was wrongly decided; and we hold plaintiffs did not present sufficient additional evidence, over and above parallel conduct, justifying the denial of Honeywell's motion for a judgment notwithstanding the verdict in this case.

¶ 33 III. CONCLUSION

¶ 34 We find no evidence in this case Bendix agreed with other companies to suppress or misrepresent the health hazards of asbestos, nor did they specifically assert what was not true: it was safe for people to be exposed to asbestos and asbestos-containing materials, and to suppress information about the harmful effects of asbestos. For these reasons, we reverse the trial court's judgment.

¶ 35 Reversed.