Filed 9/10/18 Hake v. Allied Fluid Products Corp. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GERALD HAKE, Plaintiff and Appellant, v. ALLIED FLUID PRODUCTS CORP. et. al., Defendants and Respondents.	A150366 (Alameda County Super. Ct. No. HG15794044)

I.
INTRODUCTION

Appellant Gerald Hake appeals the trial court's order granting a nonsuit in favor of Honeywell International Inc. (Honeywell)[1] in the trial of his asbestos exposure from Bendix brakes in Kansas between 1953 and 1962. Hake argues the trial court erred in applying Kansas law on the issue of causation rather than Washington law, even though Hake requested the court apply California law. He further asserts that the trial court incorrectly concluded Hake could not prove causation under Kansas law. Finally, Hake argues the trial court erred in granting summary adjudication in favor of Honeywell on his claim for punitive damages.

[1] Allied Fluid Products Corporation is now known as Honeywell. Bendix brakes was acquired by Allied Signal which is also now Honeywell.

We conclude Hake has waived the conflict of law issue by failing to raise it properly before the trial court. The trial court did not err in granting Honeywell's motion for nonsuit. Finally, we need not reach the issue of punitive damages. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Hake was born in Kansas in 1943 and lived in Cawker City, Kansas until he joined the Navy in 1962. Beginning in 1953, his family owned the Hake Standard Service Station. Hake worked at the station after school, on weekends, and during the summer beginning at age 10 until he joined the Navy at age 19. During that time period, he assisted his father in replacing drum brakes and clutches. He would help clean the dust out of the brakes. He was present for two to three brake jobs each month. They primarily used Bendix brakes.

In the Navy, he served on the USS Haleakala in Japan, then the USS Oriskany which was initially dry docked and then sent out to sea. On the Haleakala, he was a gunner's mate technician apprentice. On the Oriskany, he was nuclear weapons specialist.

From 1966 to the present, Hake has lived in Washington.

In October 2015, Hake was diagnosed with mesothelioma. Mesothelioma is an incurable cancer in the lining of the lungs. Exposure to asbestos causes mesothelioma. The more asbestos you inhale, the more likely you will develop mesothelioma.

Dr. Barry Horn testified that individuals who worked as auto mechanics were exposed to free asbestos fibers that caused asbestos related diseases. Sanding brakes was a significant contributing factor to developing mesothelioma. Dr. Horn testified that asbestos related diseases are cumulative. "They are all dose dependent." There is no way to determine which of Hake's exposures played a role in his disease. Dr. Horn could not reconstruct the intensity, frequency, and length of exposure or "dose" from Bendix brakes. Dr. Horn testified that he could not say with medical certainty that asbestos fibers from Bendix brakes caused Hake's cancer. "There's no way I can say with

certainty that any specific asbestos fiber, no matter where it came from, actually caused a specific change in DNA[.]" However, Dr. Horn testified that Hake's exposure to Bendix brakes was "a significant part of bringing about his [mesothelioma.]"

The amosite Hake was exposed to in the Navy, even in small doses, also causes mesothelioma. Hake was on board a Navy ship while it was being overhauled. While below decks, all crew members were breathing asbestos. Hake spent time at the Bremerton Naval Shipyard in Washington which was contaminated with asbestos.

Philip John Templin, an industrial hygienist, testified Hake's predominant exposure to asbestos was at the service station. Hake's work with brakes and clutches released asbestos into the air. Templin testified that given Hake's assignments in the Navy, he was not where most of the asbestos on board ships would be located.

Templin testified, based on the literature, how many asbestos fibers would be released by the removing brake shoes from a box and the sanding of brakes. Templin testified that Hake's exposure onboard ship was lower than his exposure at the service station. His exposure while conducting brake or clutch work was 100 to 10,000 times higher than his exposure onboard ship.

B. Procedural History

1. Hake's Complaint and Trial

Hake filed a complaint alleging negligence and strict liability against Honeywell, and numerous other defendants. The case went to trial against Honeywell and codefendant BorgWarner Morse TEC, LLC (BorgWarner).[2]

2. Honeywell's Motion for Summary Adjudication of Punitive Damages

Honeywell filed a motion for summary adjudication of Hake's claim for punitive damages. Honeywell argued pursuant to Code of Civil Procedure section 437c, subdivision (f)(1),[3] Hake had failed to produce evidence to support a punitive damage

[2] During trial, Hake settled his claims against BorgWarner.

[3] All subsequent references are to the Code of Civil Procedure unless otherwise identified.

claim. Specifically, Hake failed to produce any evidence that Honeywell had actual knowledge of any harms related to asbestos use prior to 1962.

The trial court granted summary adjudication finding that Hake had not demonstrated Honeywell management "actually knew of and consciously disregarded health risks associated with asbestos in their brake products during the time that Plaintiff allegedly was exposed to asbestos from Defendant's products (1953 to 1962.)"

3. Honeywell's Motion for Nonsuit

At the conclusion of Hake's case, Honeywell moved for nonsuit pursuant to section 581c. Hake stipulated at the start of trial that he was not pursuing claims of negligence and strict liability based on failure to warn and was only proceeding on a claim of strict liability based on design defect. The court granted Hake's request to reopen his case to present additional evidence.

After considering all the evidence, the court granted Honeywell's motion for nonsuit and entered judgment in favor of Honeywell.

4. Hake's New Trial Motion

Hake filed a motion for new trial arguing the trial court misapplied Kansas law on causation requiring him to prove "but for" causation. The court incorrectly applied Kansas law rather than Washington law on the issues of noneconomic damages and causation. Hake argued that Kansas had no apparent interest in having Kansas law applied while Washington's interest was compelling.

Honeywell opposed the motion arguing that Hake had presented no new facts or law warranting reconsideration of the court's choice of law rulings. Hake failed to request the court apply Washington law to the issue of causation and repeatedly argued California law should apply. It was incumbent on Hake to request the application of Washington law prior to the court ruling against him on the issue of the application of California law.

The court denied the new trial motion.

III.

DISCUSSION

A. Conflict of Law

1. Factual Background

a. BorgWarner's Motion on Causation

BorgWarner filed a motion to apply Kansas law to determine causation. California and Kansas have conflicting laws regarding causation in asbestos cases. BorgWarner argued that all of the claimed exposure occurred in Kansas. California had no interest in having its law applied.

Hake filed an opposition arguing the court should apply California law. Hake argued he may have been exposed to asbestos while in the Navy in California. BorgWarner has its principal place of business in Michigan and distributes products throughout the United States so it has no interest in Kansas.

On June 17, 2016, the court denied the motion on the ground it was made "in the abstract" and was premature.

b. Honeywell's Motion on Noneconomic Damages

During trial, Honeywell filed a motion to apply Kansas law to noneconomic damages. Honeywell argued that Hake is not a California resident and his only exposure to Honeywell and BorgWarner products occurred in Kansas prior to 1963. Kansas sets a cap on noneconomic damages of $300,000 while California has no cap. California has no interest in applying its law to a case involving a Washington resident who was exposed to injury in Kansas.

A state "ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders [citations]." (*McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, 97-98.) Hake's exposure to Bendix brakes occurred in Kansas when he was a Kansas resident. California may have an interest in affording recovery to residents who suffer asbestos exposure, but Hake is not a California resident.

c. Honeywell's Motion on Causation, Noneconomic Damages, and Apportionment of Fault

Honeywell subsequently filed a motion requesting the court apply Kansas law to causation, noneconomic damages, and the apportionment of fault. Honeywell requested that Hake's experts be prohibited from testifying each and every exposure contributed to the development of mesothelioma as allowed under California law.

The court held a hearing on the applicability of Kansas law on August 12, 2016. Honeywell argued Kansas law should apply to causation, joint and several liability, and noneconomic damages because these three areas were drastically different than California law. Honeywell asserted there was no dispute that California and Kansas adopted different causation standards. The California standard is whether the defendant's conduct was a substantial factor in *increasing the risk* of developing mesothelioma. The Kansas standard is whether the defendant's act was a substantial factor in *causing* the disease. California law allows joint and several liability, Kansas does not. Kansas also places a cap on noneconomic damages.

Honeywell argued Kansas should be able to regulate conduct within its borders. Hake has been a resident of Washington for 50 years and all the conduct at issue here occurred in Kansas, so California had no interest. Neither defendant is based in California.

Hake argued the California and Kansas causation standards were "not very different." Kansas had adopted a de minimis rule from the *Lohrmann v. Pittsburgh Corning Corp.* (4th Cir. 1986) 782 F.2d 1156 (*Lohrmann*). Kansas had no interest in having its law applied because the cause of action arose in Washington, yet Hake argued that California law should apply. At the end of his argument, Hake stated if the court was contemplating applying California law, why not apply Washington law? Washington has the greatest interest on the issue of damages.

The court stated that the injury at issue here occurred in Kansas. Kansas has an interest in people who are injured in the state. The court found: "this is a Kansas case . . . . I don't think it is even a close call."

On August 17, 2016, the court issued an order granting Honeywell's motion to apply Kansas law to the issues of causation, noneconomic damages, and the apportionment of fault.

At a hearing after the order was issued, Hake argued that there was a misunderstanding by cocounsel at the August 12, 2016 hearing that the court had already decided whether Kansas or Washington law should apply. Counsel argued that the issue of Washington law had not been raised. The court stated that at the hearing when counsel stated, "if not Kansas then maybe Washington, that was the first time that the issue of whether Washington law is in play was really brought to my attention." Hake's counsel agreed, stating there had not been any motion to apply Washington law to the issues of causation and noneconomic damages. Counsel asked for the opportunity to brief the issue.

The court responded that it would not stay its decision to apply Kansas law and there was currently no properly filed section 1008 motion for reconsideration.

d. Hake's Motion to Apply Washington Law to Noneconomic Damages

On August 26, 2016, Hake filed a motion to apply Washington law to noneconomic damages. Hake argued Washington's interest outweighed Kansas in this case. Hake has been a Washington resident for 50 years and all his treatment and care occurred in Washington. Kansas has a $300,000 cap on noneconomic damages, but Washington places no cap on damages.

Honeywell opposed the motion. Honeywell argued Hake's motion was an improper attempt to seek reconsideration of the issue of noneconomic damages. Hake previously argued California law applied and having lost that motion, now argued Washington law applied even though he elected to file his lawsuit in California.

At a hearing on August 31, 2016, Hake argued the issue of Washington law had never been properly litigated. Hake's counsel stated:

"I understand the causation standard is something that the Judge has already ruled on . . . . I do not believe it would be appropriate at this juncture for the Court to change

its ruling on causation because that is a substantive issue that is before the jury." Counsel then argued extensively about the application of Washington law to the cap on damages.

Honeywell argued Hake's motion was seeking reconsideration of the court's prior ruling. Honeywell asked the court to apply Kansas law, to the exclusion of other state's law, to the issue of causation, damages, and apportionment of fault and the court ruled on that request. Hake had presented no new law or facts as required under section 1008.[4]

The court ruled that Hake's motion was "an unsupported [section] 1008 motion for reconsideration" because the court had already ruled on this issue. On the merits, the court ruled again that Kansas law applied.

2. *Hake Has Waived Any Argument Washington Law Applies to the Issue of Causation*

On appeal, Hake argues the trial court should have applied Washington law rather than Kansas law on the issue of causation. Honeywell counters that Hake has waived this argument. We agree.

"[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state." (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 581.) Here, Honeywell moved for the application of Kansas law and Hake requested California law. Hake failed to timely raise the application of Washington law on the issue of causation. The failure to properly raise a point before the trial court waives the issue on appeal. (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468–1469 [where appellants failed to seek a governmental interest analysis on the choice of law issue, they cannot raise the issue on appeal].)

Until his motion for reconsideration, Hake never argued that Washington law should apply to the issue of causation. He specifically argued that California law should apply.

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[4] Section 1008 limits the right of a party to move for reconsideration. Within 10 days after entry of the order, a party must present an application to the court to reconsider its order based on "new or different facts, circumstances, or law." (§ 1008, subd. (a).)

Hake claims on appeal that he "repeatedly suggested" that Washington law should apply. This is an inaccurate representation of the record. Hake cites to portions of the record involving the application of Washington law to damages for medical expenses only—not causation. Honeywell filed a motion in limine to limit evidence and damages for medical expenses actually paid or incurred pursuant to *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Hake filed an opposition arguing Washington law should apply to the issue of the amount of damages for medical bills and expenses. Hake, however, did not argue Washington law should apply on the issue of causation.

In Hake's written response to Honeywell's motion to apply Kansas law rather than California law to the issue of causation, Hake argued that California law should apply and never raised the issue of Washington law. At the hearing, Hake argued the court should apply California law. Hake only raised the issue of Washington law, in passing, at the conclusion of his argument in regard to noneconomic damages:

". . . I do think we did make a motion on the issue of noneconomic damages to apply Washington law . . . . But I think if the Court is contemplating applying Kansas versus California law, I think the question does arise why not Washington law? Washington, where the state that has the most interest of any state when it comes to damages."

Hake then argued again that California law should apply to causation.

Even at the August 17, 2016 hearing where Hake requested the court apply Washington law, he admitted that up until that date: "As to the issue of noneconomic damages and causation, there has not been a motion on applying Washington law." At a hearing on August 31, 2016, where the court addressed Hake's motion to apply Washington law, Hake again admitted that they had never sought to have Washington law applied to the issue of causation. Hake's counsel stated: "I understand the causation standard is something that the Judge has already ruled on . . . . I do not believe it would be appropriate at this juncture for the Court to change its ruling on causation because that is a substantive issue that is before the jury."

Hake argues that its new trial motion was "essentially a motion for reconsideration of the trial court's in limine ruling" on the choice of law. He cites *Chen v. L.A. Truck Centers*, *LLC* (2017) 7 Cal.App.5th 757 (*Chen*) to argue the trial court should have considered Washington law.

In *Chen*, Chinese nationals brought a products liability suit against a California tour bus company to recover for injuries and deaths from a bus rollover accident in Arizona. (*Chen*, *supra*, 7 Cal.App.5th at p. 760.) The tour bus was manufactured by an Indiana company and both the bus manufacturer and the bus dealer requested the court apply Indiana law. (*Id.* at pp. 761, 762.) No party argued for the application of either Arizona or Chinese law. (*Ibid.*) In response to a motion in limine a year prior to trial, the trial court concluded Indiana law should apply. (*Id.* at pp. 764, 768.)

Prior to the start of trial, the Indiana manufacturer settled with the plaintiffs leaving the California bus dealer as the only defendant. (*Chen*, *supra*, 7 Cal.App.5th at p. 764.) The plaintiffs sought reconsideration of the trial court's decision to apply Indiana law and the bus dealer opposed the motion as an improper motion for reconsideration. (*Ibid.*) The court denied the plaintiffs' motion both as procedurally improper and on the merits. (*Id.* at pp. 764–765.)

The appellate court held that the trial court's initial choice of law ruling was the equivalent of an in limine motion and "[i]n limine rulings are not binding; they are subject to reconsideration upon full information at trial. [Citation]." (*Chen*, *supra*, 7 Cal.App.5th at p. 768.) The court's ruling on choice of law occurred a year before trial started. (*Ibid*.) "Conflicts of law questions cannot properly be resolved until the actual issues are known." (*Id*. at p. 769.) The dismissal of the Indiana bus manufacturer altered Indiana's interest in the case and required reconsideration of the choice of law. (*Ibid*.)

In the case before us, unlike *Chen*, the trial court denied BorgWarner's initial motion on choice of law as premature when it was filed before trial. The court considered Honeywell's choice of law motion when the case was two months into trial and after BorgWarner had settled out of the case. The "actual issues" were known to the trial court. Unlike *Chen*, Hake's motion was not based on new facts, such as the

dismissal of a defendant, but rather it was based on Hake losing his argument California law should apply. Nothing that occurred during the trial altered Kansas's interest in having its law applied.

Hake has waived the issue and presented no reason why this court should consider the application of Washington law to causation for the first time on appeal. " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.) " 'Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.' (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)" (*Kashmiri v. University of California* (2007) 156 Cal.App.4th 809, 830.)

Here, where the issue of applying Washington law to causation was never properly presented to the trial court, it would "indeed be peculiar for us to determine here that the court abused discretion it was never given an opportunity to exercise." (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 592.)

The trial court did not err in applying Kansas law on the issue of causation.

B. The Trial Court Did Not Err in Granting Honeywell's Motion for Nonsuit

1. Factual Background

At the close of Hake's case, Honeywell moved for a nonsuit under section 581c. The court heard argument from both counsel and reviewed the Kansas statute and

Dr. Horn's testimony. The court stated it was inclined to grant the motion for nonsuit, but it would allow Hake to reopen his case to address the causation issue.

Both parties then filed written motions. Honeywell filed a motion for nonsuit because Hake failed to establish his exposure to asbestos from Bendix brakes was a substantial factor in causing his mesothelioma as required under Kansas law. Under California law, a plaintiff need only show that an exposure was substantial factor in contributing to the risk of developing mesothelioma and courts have held that any exposure that contributes to the risk of disease is a substantial factor.

Honeywell argued that Hake failed to show its product was the proximate cause of Hake's injury. Dr. Horn failed to testify that exposure to Bendix brakes was a substantial factor in causing Hake's mesothelioma or that exposure to Bendix brakes was necessary to the mesothelioma. Dr. Horn also failed to account for the proximity, frequency, and length of Hake's exposure. Dr. Horn's testimony was based on the "every exposure" theory that all exposures contribute to the risk of developing mesothelioma.[5]

Hake opposed the motion arguing Dr. Horn's and Mr. Templin's testimony established causation under Kansas law. Hake argued that Kansas has adopted the *Lohrmann* standard for frequency, proximity, and regularity of exposure. Hake's experts testified that he was exposed for approximately 10 years on a daily basis, he was within close range during the exposures, and nothing was done to mitigate the exposure.

The trial court granted Hake's request to reopen his case to present additional expert testimony from Dr. Horn.

Hake's counsel asked Dr. Horn the following question: "[I]f the exposure that Mr. Hake had to the airborne asbestos fibers from his work and his father's work

[5] At oral argument, Hake's counsel argued Dr. Horn's initial trial testimony was prior to the court's ruling on whether California or Kansas law applied to the issue of causation. This argument is not supported by the record. The trial court held a hearing on August 12, 2016 and ruled Kansas law applied to causation. Dr. Horn testified on August 15 and 16, 2016. The court's *written* order was issued on August 17, 2016. Dr. Horn's every exposure theory could therefore not be based on a misunderstanding that California law applied.

changing the brakes as I've described it with the fiber concentrations that I've given to you, if that was the only asbestos exposure that Mr. Hake ever had other than background, would you be able to say that that caused his mesothelioma?" Dr. Horn responded: "Yes." Dr. Horn further testified that due to Hake's young age at the time of exposure, it imposed a greater risk than if he was exposed as an adult. He testified that Hake's exposure to asbestos dust from Bendix brakes was his largest exposure. Counsel then asked if the inhalation of asbestos dust from Bendix brakes "causally participated in setting the stage for [Hake's] malignancy" and Dr. Horn responded: "yes."

On cross-examination, Dr. Horn agreed that he stated Bendix brakes "potentially caused" Hake's mesothelioma. Counsel then presented Dr. Horn with his earlier trial testimony where he stated he could not testify that Bendix brake fibers caused Hake's mesothelioma. Dr. Horn testified that he could not tell what "hit" to Hake's cells caused the cancer. Counsel stated: "You told the jury when you first testified that as you sit here today, you can't tell the jury that fibers from a Bendix Brake caused Mr. Hake's mesothelioma. That was your testimony, true?" Dr. Horn responded: "True." Dr. Horn testified he could not say that asbestos fibers from Bendix brakes caused the mutations that led to Hake's cancer. Defense counsel asked if Dr. Horn could state that exposure to Bendix fibers "actually caused damage to Mr. Hake's cells" and Dr. Horn responded he was certain that the exposure caused damage to Hake's cell that "contributed to the risk for him developing mesothelioma[,]" but he could not say it caused the mesothelioma.

Defense counsel asked Dr. Horn: "When [Hake's counsel] gave you that hypothetical you excluded all of his [] exposures. If we include all of Mr. Hake's exposure, the brake exposure, the clutch exposure, the naval exposure, you can't tell the jury in all of those exposures which exposure actually resulted in damage to Mr. Hake's cells which resulted in mesothelioma, true?" Dr. Horn responded: "Correct." Dr. Horn stated: "I cannot say that a specific fiber from Bendix actually caused the changes in DNA" that led to mesothelioma.

After the testimony, Honeywell filed a supplemental brief arguing Dr. Horn's additional testimony still did not satisfy the Kansas causation standard. Dr. Horn's

testimony was that the combination of all the exposures was a substantial factor in causing Hake's mesothelioma. Dr. Horn agreed that Hake's exposure to Bendix brakes "causally participated" or "set the stage" for malignancy, but he did not testify that it *caused* the injury.

On September 7, 2016, the court held a further hearing on the motion for nonsuit. Honeywell argued under Kansas law, Hake must show that exposure to Bendix brakes was a substantial factor in causing his injury. Hake must prove actual causation which is a difficult burden. Honeywell argued that contrary to Hake's assertions, the *Lohrmann* standard is not the standard in Kansas.

Honeywell asserted that Hake's proposed question to Dr. Horn asking him to assume hypothetically that Hake's only exposure was from Bendix brakes is not a fair application of the causation standard. Dr. Horn would need to testify that given all of Hake's exposures, the brake exposure was a substantial factor in causing the injury. The hypothetical questions Dr. Horn answered excluded consideration of Hake's exposure from BorgWarner clutches or the Navy. *If* Hake's only asbestos exposure in his life was from Bendix brakes, then Dr. Horn could say that Bendix brakes caused his disease; but that is not the reality in this case.

Honeywell contended Kansas does not allow for contribution: that the product, lumped together with other exposures, caused the disease, citing *Puckett v. Mt. Carmel Regional Medical Center* (Kan. 2010) 228 P.3d 1048. Dr. Horn testified that he could not say that the fibers from Bendix brakes *caused* Hake's mesothelioma.

In response, Hake argued that Honeywell was setting up a requirement that he prove Bendix brake fibers caused malignancy on the cellular level and that is not the standard. Hake argued that his greatest exposure to asbestos was through Bendix brakes. Mr. Templin's testimony provided the dose, intensity, and frequency of exposure to asbestos fibers from Bendix brakes. Hake's exposure at the service station was several orders of magnitude higher than on board the Navy ship. Hake cited to Kansas jury instruction 128.18 which provides that in a products liability case: " 'The defect in the product was the cause or contributed to cause plaintiff's injuries and damages.' "

The court requested further briefing and copies of the relevant Kansas jury instructions by the next day and then held a further hearing. The court stated for purposes of a nonsuit, it would look at the evidence in the light most favorable to Hake. The court reviewed the Kansas jury instructions and cited to a strict liability case, *Miller v. Lee Apparel Co.* (Kan.App.Ct. 1994) 881 P.2d 576: " 'Regardless of the theory of recovery, proof that the defendant caused that the injury was a prerequisite to recovery.' "

The court held a further hearing on September 22, 2016 and granted Honeywell's motion for a nonsuit. The court stated that Hake had provided sufficient evidence that Bendix products could have been a "*substantial factor in increasing his risk of mesothelioma*" (the California standard), but "Honeywell is entitled to a judgment of nonsuit because Mr. Hake did not establish that his alleged exposure to asbestos from Bendix products was *a substantial factor in causing his mesothelioma* as required by the laws of Kansas." (Italics added.)

2. Standard of Review

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) "We will not sustain the judgment ' "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law." ' " (*Ibid*.)

"On appeal, we review a grant of nonsuit de novo. [Citation.] Reversal of a judgment of nonsuit is warranted if there is 'some substance to plaintiff's evidence upon which reasonable minds could differ . . . .' [Citation.]" (*McNair v. City and County of San Francisco* (2016) 5 Cal.App.5th 1154, 1168–1169.)

3. Kansas Law on Causation

In 2006, Kansas passed the Silica and Asbestos Claims Act (the Act), which provides:

"(a) In any civil action under this act, and amendments thereto, alleging an asbestos or silica claim, the party with the burden of establishing the claim or affirmative defense must show that the alleged exposure attributable to a given person or party was a *substantial factor in causing the injury*, loss or damages.

"(b) In determining whether any given claimed or alleged exposure was a substantial factor in causing the plaintiff's injury, loss or damages, the court shall consider, without limitation, all of the following:

"(1) The manner in which the plaintiff was exposed.

"(2) The proximity to the plaintiff when the exposure occurred.

"(3) The frequency and length of the plaintiff's exposure;

"(4) any factors that mitigated or enhanced the plaintiff's exposure."

(Kan. Stat. Ann. § 60-4907, italics added.)[6]

To date, no Kansas court has applied or interpreted the statute. We therefore must start with the plain language of the statute. The Kansas Supreme Court has held:

"[T]he most fundamental rule of statutory construction [is] that the intent of the legislature governs if that intent can be ascertained. [Citation.] [¶] We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. [Citation.] When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, we 'employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly . . . . [Citation.]" (*Ryser v. State* (Kan. 2012) 284 P.3d 337, 342.)

[6] This can be contrasted with California's standard which requires only that the plaintiff prove the "exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 982–983.)

Hake argues that the trial court disregarded the plain meaning of the Kansas statute. The statute requires the exposure is "a *substantial factor in causing the injury*." Under the statute, substantial factor is determined by the manner, proximity, and frequency of exposure. (Kan. Stat. Ann. § 60-4907, italics added.) Hake argues the evidence before the trial court was more than sufficient to prove causation and a nonsuit was improper. Hake established the manner of his exposure: working for 10 years at his father's service station. He established the proximity, frequency, and length of exposure through Mr. Templin's testimony that quantified the asbestos released from various activities at the station and Hake's level of exposure. Dr. Horn confirmed Bendix brake exposure by itself was sufficient to cause Hake's mesothelioma.

Hake contends this evidence was sufficient to establish causation and the trial court misapplied the Kansas statute and required him to prove "but for" causation—the Bendix exposure was "necessary to the injury." Hake argues this is an impossible showing because mesothelioma is a cumulative, dose dependent disease where every exposure contributes to the injury.

Hake asserts the Kansas statute codifies the substantial factor test applied in many other states and in Kansas case law prior to 2006. Both before the trial court and on appeal, Hake argues Kansas uses the test from *Lohrmann*, *supra*, 782 F.2d at pages 1162–1163. *Lohrmann* sets forth the "de minimis rule" requiring proof of the frequency, proximity, and regularity of exposure. (*Id.* at p. 1162, italics omitted.) There is, however, no Kansas case applying the *Lohrmann* standard and in his brief Hake admits no Kansas court has expressly adopted the *Lohrmann* standard. Rather, Hake cites to a 2011 unpublished case from a Delaware superior court applying Kansas law. (*In re Asbestos Litigation* (Del.Super.Ct., Nov. 14, 2011, No. N10C-08-307 ASB) 2011 WL 5592586.) The Delaware court applied the *Lohrmann* standard to a motion for summary judgment involving asbestos exposure from steam traps in Kansas. "The Court was unable to find any Kansas case law interpreting this statute. However, the language of the Kansas statute closely tracks the 'frequency, regularity, and proximity' test established in the *Lohrmann* decision." (2011 WL 5592586, at *3.)

The other case Hake relies upon is *Burton v. R.J. Reynolds Tobacco Co.* (D.Kan. 2002) 181 F.Supp.2d 1256 (*Burton*). *Burton* has two immediate limitations: (1) it is a federal district court decision, and (2) it was decided before the Act was enacted. *Burton* was a products liability action brought by a smoker with peripheral vascular disease (PVD) against Brown & Williamson Tobacco Corporation (Brown & Williamson) and R.J. Reynolds Tobacco Company (R.J. Reynolds). (*Id.* at p. 1259.)

Burton primarily smoked Camel cigarettes manufactured by R.J. Reynolds but Lucky Strike cigarettes made by Brown & Williamson were his second choice. (*Burton*, *supra*, 181 F.Supp.2d at p. 1270.) Brown & Williamson brought a summary judgment motion arguing Burton could not demonstrate causation. (*Ibid.*) The federal district court in Kansas stated: "To prevail in a products liability case, a plaintiff must prove that the product is the actual and proximate cause of the plaintiff's injury. [Citation.] According to Kansas case law, an act or product is the actual cause of the plaintiff's injury if the act or product 'is a substantial factor in bringing about the harm [to the plaintiff].' [Citations.]" (*Ibid.*) The court found that although the evidence was "thin," Burton could show causation because there was a "dose-response relationship" between the number of cigarettes smoked and the risk of developing PVD. (*Id.* at p. 1271.) A reasonable jury could conclude that both Camel and Lucky Strike cigarettes caused or contributed to the development of Burton's PVD. (*Ibid.*)

The *Burton* court rejected Brown & Williamson's argument that the *Lohrmann* standard applied in Kansas. The court noted a "decision by a federal district court does not create binding Kansas precedent. Kansas courts have not, to date, followed or discussed the *Lohrmann* decision." (*Burton*, *supra*, 181 F.Supp.2d at p. 1272, fn. omitted.)

Under the analysis set forth in *Burton*, Hake could demonstrate causation by showing Bendix brakes were the actual cause of his injury if the Bendix exposure was " 'a substantial factor in bringing about the harm . . . .' [Citations.] " (*Burton*, *supra*, 181 F.Supp.2d at p. 1270.) Although *Burton* is not binding Kansas authority and it was decided before the Act was enacted, the Act contains similar language. The Act requires

Hake to show his exposure was "a substantial factor in causing the injury. . . ." (Kan. Stat. Ann. § 60-4907.)

The *Burton* court noted that Burton had demonstrated causation because there was a " 'dose-response relationship' "—the more cigarettes smoked, the greater the risk of disease. (*Burton*, *supra*, 181 F.Supp.2d at p. 1271.) The same dose-response relationship exists for asbestos exposure. Dr. Horn testified asbestos related diseases are cumulative and "dose dependent."

Honeywell counters that Hake failed to prove causation because his evidence was based on the theory that every exposure to asbestos contributes to the disease. Dr. Horn testified that "all of the exposures to asbestos, including the exposure to Bendix Brakes, was a substantial factor in causing [Hake's] mesothelioma."

Honeywell contends the every exposure theory cannot establish causation under Kansas law because it treats each exposure as increasing the risk of disease. The theory ignores the requirements of frequency, proximity, and length of exposure necessary to the substantial factor test. Honeywell then cites to numerous other states that reject the every exposure theory as satisfying the substantial factor test. (*Krik v. Exxon Mobil Corporation* (7th Cir. 2017) 870 F.3d 669, 677 ["more than thirty other federal courts and state courts have held that this cumulative/'any exposure' theory is not reliable"].) The every exposure theory permits "imposition of liability on the manufacturer of any [asbestos-containing] product with which a worker had the briefest of encounters on a single occasion.' [Citation.]" (*McIndoe v. Huntington Ingalls Inc*. (9th Cir. 2016) 817 F.3d 1170, 1177.) This is "precisely the sort of unbounded liability that the substantial factor test was developed to limit. [Citation.]" (*Ibid*.)

The substantial factor test seeks to root out harm that is not significant enough that it should result in legal responsibility. A court should not classify an exposure as a substantial factor if the injury could have occurred without it. Here, given Hake's exposure to asbestos from several other sources in additional to Bendix brakes, it is impossible to isolate that exposure and find the Bendix exposure was a substantial factor

in causing the injury based on the evidence presented at trial.[7] Dr. Horn testified based on a hypothetical question that Hake's exposure at the service station, if it was his only exposure, could have caused his mesothelioma. But based on the every exposure theory, each exposure in isolation could have caused the mesothelioma. For example, if the trial court had permitted defense counsel to inquire about Hake's naval exposure, Honeywell could have demonstrated that Hake's naval exposure, by itself, could have caused the mesothelioma.[8] However, based on the totality of Hake's exposure from various sources, Dr. Horn could not say that the Bendix exposure *caused* the disease. Dr. Horn's testimony that every exposure or the cumulative exposure caused the disease makes it impossible to discern which exposure was a substantial factor. Honeywell argued that Dr. Horn's testimony could not establish causation under Kansas law because Dr. Horn failed to testify that given *all* of Hake's exposures the Bendix exposure was a substantial factor in causing his injury. Dr. Horn's testimony was the Bendix exposure "contributed to the risk for [Hake] developing mesothelioma." The trial court found this was insufficient under Kansas law to prove Bendix brakes were a substantial factor in causing his disease.

After holding multiple hearings and allowing Hake to reopen his case to provide further evidence of causation, the trial court concluded Hake had failed to demonstrate causation. The court found Hake had proved Bendix products could have been a *substantial factor in increasing his risk of mesothelioma* (the California standard), but "Honeywell is entitled to a judgment of nonsuit because Mr. Hake did not establish that

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[7] As we have noted, under California law, the court could find it was a substantial factor in contributing to the risk of developing mesothelioma; but the Kansas standard is more stringent requiring it be a substantial factor in causing the disease.

[8] During Dr. Horn's testimony after recall, Honeywell sought to ask him if the naval exposure, by itself, could have caused the mesothelioma, but the court prohibited the testimony as not helpful to its decision on the nonsuit. The court stated that there could be more than one cause and whether other entities caused or contributed to the cause was an issue in the overall trial but not for the nonsuit.

his alleged exposure to asbestos from Bendix products was *a substantial factor in causing his mesothelioma* as required by the laws of Kansas." (Italics added.)

While the evidence of Hake's exposure to Bendix brakes contributed to his mesothelioma, the record simply does not support the inference it was a substantial cause of his mesothelioma. (See *Moeller v. Garlock Sealing Technologies, LLC* (6th Cir. 2011) 660 F.3d 950, 955 [granting summary judgment under Kentucky law because the plaintiff failed to prove causation based on exposure to asbestos from the defendant's product].) Given Hake's exposure to asbestos from multiple other sources, "there is simply insufficient evidence to infer that [Bendix brakes] probably, as opposed to possibly, were a substantial cause of [Hake's] mesothelioma. [Citations.]" (*Ibid*.)

While we conclude that the trial court's analysis is correct, we note the near impossibility of proving causation under the Kansas statute when an individual has been exposed to asbestos from multiple potential sources. The Kansas statute seems to conflict with the medical evidence available that mesothelioma is a dose dependent disease. Dr. Horn testified that it was medically impossible to state that one type of exposure or period of exposure was a substantial factor or the actual cause of the disease. The disease is cumulative and it is impossible to isolate which exposure caused the harm.

Our review of the legislative history of the Act does not further illuminate the issue. The only relevant reference provides: "The medical authority's diagnosis must indicate that the asbestos related cancer was proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history." (Kan. Legis. Summ., 2006 Reg. Sess. Sen. Bill No. 512.)

The trial court found Hake's evidence satisfied California law but was not sufficient to meet the higher burden required by Kansas law, so it properly granted Honeywell's motion for nonsuit.

C. Punitive Damages

Hake argues that the trial court erred in granting Honeywell's motion for summary adjudication of his punitive damages claim. Honeywell argues, and Hake concedes, that an affirmance of the trial court's nonsuit ruling moots our consideration of the punitive

damages issue. "There must be a recovery of actual damages to support an award of punitive damages. [Citations.]" *(Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 530.)

IV.
DISPOSITION

The judgment is affirmed.

SMITH, J.[*]

We concur:

STREETER, Acting P. J.

REARDON, J.

[*] Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.