

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2019-000164
Circuit Court Case No. 2015-CP-46-3456

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JUN 18 2019
SC Court of Appeals

Timothy W. Howe, Individually and as Personal Representative of the Estate of
Wayne Erwin Howe, Deceased, and Jeanette Howe **Respondents,**

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to
Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding
Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.;
Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation;
Black Clawson Converting Machinery LLC, Individually and as a
subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware
corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, A
Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation;
CGR Products, Inc. f/k/a Carolina Gasket and Rubber Company;
CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation
f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest
to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.;
Crown Cork & Seal Company, Inc.; Daniel International Corporation;
DavisStandard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-APCO
Willamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell
Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to
Durco Pumps; Fluor Enterprises, Inc. f/k/a Fluor Daniel, Inc.; Fluor Daniel Services
Corporation; Foster Wheeler Energy Corporation; General Electric Company; The
GormanRupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company;
Linde, LLC f/k/a The Boe Group, Inc. f/k/a Airco, Inc.; Marsulex Environmental
Technologies Corporation, Individually and as successor-in-interest to Buell
Engineering Co.; Marsulex Environment Technologies, LLC, as Successor-in-
Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A

wholly owned subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc. f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries.....**Defendants,**

Of whom

Cleaver Brooks, Inc. **Appellant.**

APPENDIX II TO RECORD ON APPEAL

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In addition to the material designated previously by Appellant and Respondent to be included in the Record of Appeal, Respondents designate the following:

1. Portion of Dr. Arnold Brody trial testimony...1614-15
2. Portion of Dr. Edwin Holstein trial testimony...1616-24
3. Portion of Sarah Kennerly Lustig trial testimony...1625
4. Portion of Wende Howe Myers trial testimony...1626-27
5. Portion of discussion with court during trial ...1628

The undersigned, an attorney in this matter for the Respondent, certifies pursuant to Rule 209(c), SCACR, that this designation contains no materials that are irrelevant to the appeal.



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ATTORNEYS FOR RESPONDENTS

June 14, 2019

Columbia, South Carolina.

1 people would have it is not something you feel or smell and
2 that type thing.

3 Q And all three fiber types you just went over, the
4 chrysotile, amosite and crocidolite, are all of those fiber
5 types carcinogen?

6 A That right. They all have been classified by a number
7 of different agencies as complete carcinogens, so that means
8 that's all you need. And by -- I'm talking about the
9 International Agency for Research on Cancer, the
10 Environmental Protection Agency, whatever agency has looked
11 at the issue of whether or not all of the fiber types cause
12 all of the diseases, they all come down on the consensus
13 opinion that all of the asbestos varieties cause all of the
14 diseases.

15 Q So they all cause disease, but are there difference in
16 potency?

17 A Well, for the cancer mesothelioma, yes, not for
18 asbestosis, not for lung cancer. But for the cancer
19 mesothelioma the fiber types amosite and crocidolite are
20 more potent on a fiber per fiber basis for causing
21 mesothelioma. Now, that means that you -- if all you're
22 exposed to is crocidolite or amosite you don't need as much
23 to cause the mesothelioma. They all cause mesothelioma. If
24 all you're exposed to is chrysotile that can cause
25 mesothelioma. If all you are exposed to is crocidolite or

1 amosite you don't need as much, those cause mesothelioma.
2 And if you have a mixture, which a lot of people do, they're
3 exposed to different kinds of fibers through their working
4 life, they are all contributing, and by the same mechanism
5 and I am going to show you, crocidolite and chrysotile and
6 amosite all cause cancer by the same cellular pathways.

7 Q And when we talk about what diseases can be caused by
8 exposure to asbestos, what diseases are we talking about?

9 A So we're talking about asbestosis, which is scar tissue
10 in the lung from inhaling asbestos; lung cancer, which
11 typically develops in cigarette smokers. But if a person
12 smoke cigarettes and is exposed to asbestos the risk is
13 dramatically increased over cigarette smoke alone or
14 asbestos alone such that you don't just add the two effects,
15 you multiply the effects. And while how much you smoke or
16 how much you're exposed to dictates how big that
17 multiplication effect is, there still is a -- the effect is
18 greater than adding those two carcinogens, cigarette smoke
19 and asbestos. And then finally the cancer mesothelioma
20 caused by all of the asbestos fibers, but not by cigarette
21 smoke, cigarette smoking does not cause mesothelioma.

22 Q Can exposure to asbestos cause pleural plaques?

23 A So this is scarring. So asbestosis is scarring in the
24 lung, in the lung means where we're exchanging oxygen and
25 carbon dioxide. Let's say you take a breath and the oxygen

1 of years was working on boilers that involved insulated
2 material, that's the first thing I want to use, the second
3 is that they either firsthand and in addition to that were
4 around others doing the work I'm going to describe in a
5 moment. The third thing I would like you to assume is that
6 about how frequently they did this, and I want you to assume
7 that they did it every year for shut downs and in addition
8 did work every month for maintenance. Can you assume those
9 things for me?

10 A I will, yes.

11 Q Based on the studies that you've looked at about how
12 much asbestos is put in the air, if you're doing that
13 work -- and let's say we just focus on the first thing and
14 it involves putting in and taking out asbestos mud and let's
15 assume --

16 A Asbestos what?

17 Q Mud.

18 A Mud.

19 Q And that that's a chrysotile product, is that something
20 first of all that creates any risk in your mind for doing
21 dangerous work?

22 A Yes.

23 Q If you have a person like Wayne Howe who has
24 mesothelioma, and if we assume that work was done by him
25 between 1977 until at least 1981, can you tell me if that

1 was his only exposure, if nothing else would ever put him
2 around asbestos in his life, if that would be enough to
3 cause the disease mesothelioma by itself?

4 A With the schedule you said of once a year major shut
5 down or turn around and monthly maintenance on materials of
6 this sort, doing a job in the usual and customary manner and
7 doing it for four years on that schedule the answer is yes,
8 that all by itself would be enough to cause mesothelioma.
9 If I had a patient with that history and they develop
10 mesothelioma I would find absolutely nothing surprising or
11 unusual about it.

12 Q Slightly different set of facts. Same exact exposure
13 just like I did but now there are a bunch of other exposers
14 for many, many years both before and after. I want to ask
15 you a different question, would the exposure I described as
16 it related to the boilers be a substantial factor in
17 developing the disease mesothelioma if it was one of many
18 exposures?

19 A So if you start to add in other exposures it does not
20 change the scientific conclusion for the first scenario that
21 you asked me about, which is that exposure alone, the first
22 one would have been a substantial factor in causing the
23 person's mesothelioma. If you add in other exposers those
24 could be substantial factors too, maybe they are, maybe
25 they're not, it depends on the facts, the details. But the

1 conclusion about the first one from a scientific point of
2 view would still be true.

3 Q We heard a little bit about this, the concept of
4 cumulative dose. Can I ask you first, are you familiar with
5 that concept?

6 A I am.

7 Q Is asbestos related mesotheliomas cumulative dose
8 diseases?

9 A Yes.

10 Q Or disease?

11 A Yes.

12 Q Can you explain what that means?

13 A Yes. What it means is that the more exposure you get,
14 and dose and exposure mean about the same thing, we're
15 talking about breathing the dust, as the amount of dust that
16 you inhale increases -- or let me put it differently. Let's
17 imagine a group of 10,000 people, and as the amount of
18 asbestos dust that as a group they all inhale increases,
19 then the number of people who will get mesothelioma will
20 also increase. So now let's take that same concept and just
21 look at one of those 10,000 people, and of course this is
22 all hypothetical, it's all imaginary, but the principles
23 that I'm telling you are valid scientific principles, so now
24 I've talked about a group of 10,000 but let's focus on the
25 371st person in line and just that person. Unlike the

1 others there is an increasing amount of exposure of
2 asbestos, and as the amount of inhalation of asbestos
3 increases, then the odds that that particular person will be
4 one of the ones who gets mesothelioma goes up. So the risk
5 goes up for the group, it also goes up for the individual.
6 Now, does that mean that the person is fated to get
7 mesothelioma? Thank the Lord no, most of them still will
8 not get it but some will, and as the exposure goes up the
9 number who get it increases.

10 Q Instead of looking at kind of what the risk is as the
11 exposure goes up I want to ask you kind of looking at a
12 different direction. If I want to know for a person that
13 comes to the hospital and finds out that he has
14 mesothelioma, what in his life going backwards in time was
15 the cause of that, is there any question in your mind that
16 it would be related to the cumulative exposure of asbestos?

17 MS. O'NEIL: Leading.

18 THE COURT: It is leading. Rephrase.

19 Q When you're trying to evaluate a cause of the
20 mesothelioma what are you going to look at?

21 A I want to find out if that -- the first thing I want to
22 know is has this person had significant exposures to
23 asbestos in his or her life, and I also want to know how
24 long ago did it happen. Did Dr. Brody explain the latency
25 period?

1 Q Yes.

2 A So I want to know how long ago it happened, because if
3 it happened yesterday it doesn't cause a mesothelioma today.
4 But if it happened 20, 30, 40 or 50 years ago and the amount
5 of it and frequency and duration are sufficient then with
6 that set of facts there isn't any doubt about what caused
7 that mesothelioma, it was caused by those exposures to
8 asbestos that I just described to you. This is a generally
9 accepted principle in my field of medicine, it's not a
10 matter of dispute. There was for instance a group called
11 the Helsinki Consensus Group, they happened to meet in
12 Helsinki, they were people who had done research on
13 asbestos, there was a group of 17 or 18 of them. Between
14 these 17 or 18 scientists they had written over 1,000
15 research articles about the effects of asbestos and they
16 wrote what I just told you very clearly, which is that if
17 you've got a person with mesothelioma and you look into
18 their past and you find a history that they have had an
19 exposure to asbestos that's long enough in the past and that
20 it satisfies certain elements of how often and how long it
21 lasted and so on, in other words a person didn't just walk
22 past a building with asbestos in it one time, that if those
23 conditions are met and you have a patient with mesothelioma
24 then you can with scientific validity say what is the cause
25 of that mesothelioma, it was those exposers to asbestos that

1 occurred in the past. And it's the same as cigarette
2 smoking. Cigarette smoking does not cause mesothelioma but
3 I use it because it's an example known to all of us.
4 Doctors very commonly, they'll say, "Well, the person smoked
5 three packs of cigarettes per day, they did it for 30 years,
6 now they have lung cancer, what caused the lung cancer? The
7 smoking did." You don't have to prove more than that for
8 scientists and doctors to accept that as a reasonable
9 scientifically based conclusion.

10 Q Let me try to make this more concrete to Mr. Wayne
11 Howe. I want you to assume that there's information that at
12 least by 1967 he was working around gaskets and packing,
13 will you assume that for me?

14 A That he started before '67 working with gaskets and
15 packing?

16 Q Maybe earlier by at least by that date.

17 A Okay. No later than 1967.

18 Q And you reviewed his medical records in terms of when
19 he was diagnosed with this cancer?

20 A Yes.

21 Q And did his own doctors make a diagnosis?

22 A Yes.

23 Q What was it?

24 A Meso -- well, pleural plaques but also mesothelioma.

25 Q When was he diagnosed with mesothelioma?

1 A 2015.

2 Q You mentioned a concept of latency saying if it
3 happened yesterday there's not been enough time, did I hear
4 that right?

5 A Correct.

6 Q How far back do we need to go before we have given
7 enough time for it to even be something to be thinking about
8 in terms of what caused his disease?

9 A If the latency in a particular case has been less than
10 ten years, that will cast serious doubt on whether asbestos
11 caused it. If the latency period is 20 years or more,
12 there's a general acceptance that that exposure that
13 occurred 20 or more years ago to asbestos was the cause of
14 the mesothelioma. And there's no upper limit on that. If
15 the person lives long enough and it's been 60 years since
16 they were a teenager working with asbestos, if they worked
17 with it or not, now 60 years have gone by and they get
18 mesothelioma, 60 years is not too long, you still have the
19 same conclusion.

20 Q So to make this more concrete, if we're talking about
21 exposures on this time frame, and we'll kind of box from
22 1967 to the 1995 timeframe, will that be the time you would
23 want to look at to understand why Mr. Howe had mesothelioma
24 for sure?

25 A Well, apparently for Mr. Howe in 1967 is important, but

1 if I had a patient who was 1960 and had mesothelioma today
2 it would -- I would have the same conclusion. But '67 to
3 '95 we're going to be the most -- those are going to be --
4 most cases of mesothelioma that I will see today, they had
5 their exposures to asbestos in that time period that you
6 have blocked out there.

7 Q And if I have a repeated exposure involving insulation
8 and gaskets from here, right in that time frame, would that
9 be a substantial factor for the development of his disease
10 that was diagnosed later?

11 A That was what?

12 Q Diagnosed later in --

13 A Well, if it fits the description you gave me earlier
14 like a month major turn around -- I'm sorry, yearly major
15 turn around that typically lasts several weeks if not a
16 couple of months and then month smaller maintenance
17 activities, if those -- if all those hypotheticals would
18 still be true the answer is yes.

19 Q Okay. And even if we limit it to repeated exposure
20 again just to one product, I'm going to ask about gaskets in
21 a second, but the cement being done several times a year
22 over the course of years firsthand in a typical way, any
23 question that that's a substantial factor for why he got
24 here, meaning got the disease mesothelioma?

25 A So you're asking me to break it down by which

1 particular product it was.

2 Q I'm not going to say it was X boiler versus Y, you've
3 got a boiler, it has asbestos cement, it's removed in the
4 typical way, it's done several times a year over the course
5 of years firsthand and he's the one doing that. Based on
6 what you know, is that a substantial factor when it's done
7 in this period of time? And I'm pointing to the period of
8 time in the chart between '75 and '85 for Mr. Howe to have
9 gotten diagnosed with mesothelioma in 2015.

10 A So if you're talking just about the insulating
11 materials in the boiler I would have no problem saying yes,
12 that would be a substantial factor in the causation. If
13 you're asking me about the gaskets and only the gaskets I
14 would want to know a little bit more about what gaskets and
15 how often and so on, because in the turnaround maybe he does
16 one gasket or maybe he does 100 gaskets. So I would want to
17 know a little more if you're just going to ask me -- if
18 you're asking me to consider only the gasket.

19 Q There I was asking you to only consider one type of
20 insulating work, insulating cement.

21 A Insulating cement, okay.

22 Q Yeah.

23 A Well, there's a lot of insulating cement in a boiler,
24 so no, I wouldn't have any trouble reaching the conclusion I
25 already stated.

1 A Yes, that is correct.

2 Q And you prepared a preliminary life care plan on -- the
3 day was January 21st of 2018, does that sound correct?

4 A That is correct.

5 Q I'm going to put this up on the ELMO. Before I put it
6 up there, what is Mrs. Howe's chronic condition that she
7 suffers?

8 A She has moderate to severe dementia. Alzheimer's
9 dementia.

10 Q Thank you. Now, as you can see from the table, I just
11 want to back through the sections really quickly, not each
12 individual portion. Start at the top with kind of the
13 doctors visit, correct, and --

14 A That's right.

15 Q And explain how you came to those --

16 A She's going to require a primary care provider over and
17 beyond what is a normal annual visit for your health
18 conditions. For a patient with Alzheimer's they will need
19 to be seen more frequently for urinary tract infections,
20 upper respiratory infections, pain, that's not very easily
21 diagnosed. And then the neurology, of course, is to manage
22 her Alzheimer's, her neurological condition and to help with
23 the primary care provider manage the prescriptions needed to
24 help control her mood, behavior and cognition.

25 Q Could you also explain to the Court and to the jury all

- 1 A Yes, we took turns.
- 2 Q Was that important to him having his family close?
- 3 A I think it was, but of course he told us to go home and
4 get rest but we didn't want him to be by himself.
- 5 Q Was he the type of man that didn't want to put others
6 out?
- 7 A Yes.
- 8 Q Were there any follow-up visits at Duke for the
9 surgery?
- 10 A Yes. I went to the last one, I believe, with him.
- 11 Q And what did the doctors tell your father at the last
12 follow-up at Duke?
- 13 A That he needed to stay positive and to come off of some
14 of the pain medicine and move as much as he could. And the
15 doctor kind of joked around about next time we're going to
16 do a lap around this hallway and dad kind of laughed with
17 him and said, "Yeah, next time we'll do that, I'm ready for
18 a run."
- 19 Q Was there ever another follow-up?
- 20 A No.
- 21 Q Your father passed away on your mother's birthday two
22 years ago; is that correct?
- 23 A That's correct.
- 24 Q Since that time have there been moments or days or
25 events that have happened where you have felt like, "I wish

1 I had my dad here to get some advice for him?"

2 A A lot.

3 Q Can you give us an example?

4 A Just different things that happened throughout life and
5 asked for advice, or even when my husband and I, we didn't
6 go places often, I'm just used to calling and saying we made
7 it home okay.

8 Q Is he kind of the person you report to?

9 A It's like that was my last person to check-in with.

10 MR. HOLDER: Thank you very much. They may have some
11 questions for you.

12 THE COURT: Mr. Pugh?

13 MR. PUGH: Ma'am, I don't have any questions for you but I
14 am sorry for your loss.

15 THE WITNESS: Thank you.

16 THE COURT: Thank you very much. Ms. Dean?

17 MS. DEAN: Your Honor, I think given the time constraints
18 this is it for today.

19 THE COURT: I think that Mr. Tim Howe's testimony will
20 probably be more lengthy, am I correct about that?

21 MS. DEAN: I would estimate about a half hour but I
22 wouldn't want to cut it close if people need to leave right at
23 4:30.

24 THE COURT: I understand. What we'll do is this: Ladies
25 and gentlemen of the jury, we'll let you go now, if 9:00 is

1 MS. DEAN: Two things quickly.

2 THE COURT: This is all off the subject of this proffer?

3 MS. DEAN: No, Your Honor.

4 THE COURT: I'm not going to take a whole lot of argument
5 about this proffer. I have ruled with y'all and the only
6 observation I've made is what I consider to be the pertinence
7 of tit for tat but I don't want to get into more tit for tat.

8 MS. DEAN: I do not either. Your Honor, Ms. McVey had
9 made a request on Friday that these actions were somewhat a
10 lynch pin of our case, fundamentally fact of how we approached
11 this trial. We want to seek -- I just want to make sure that
12 if we seek sanctions for costs or time after trial we haven't
13 waived anything.

14 THE COURT: You have already completely talked about how
15 fundamental it was to your case so forth and so on, that is
16 very well protected in the record as I view it.

17 MS. DEAN: And then the second thing is not related to the
18 proffer, but we seem not to be able to find a marked copy of
19 Exhibit 59, I found a second copy.

20 THE COURT: Which is that?

21 MS. DEAN: It is the internal correspondence from Johns
22 Manville on October 14th, 1975 regarding the labeling of raw
23 asbestos, I am just hoping we can remark this copy.

24 THE COURT: Just remark one of other ones you've got and
25 if you find the other one put it back there.