

## TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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### IN THIS ISSUE

*This article examines the recent Fourth District Appellate Court of Illinois decision in Krumwiede v. Tremco, 220 IL App (4th) 180434, Jan. 21, 2020 (4th Dist.). The case involved claims that a window glazier had been exposed to two asbestos-containing products manufactured by Tremco. Mr. Liljestrand explains the appellate court's application of the "frequency, regularity and proximity" test, and its holding that Tremco was entitled to a judgment notwithstanding the verdict.*

## Plaintiffs Fail to Supply Sufficient Asbestos Evidence to Keep Verdict

### ABOUT THE AUTHOR



**Craig T. Liljestrand**, a partner at Hinshaw & Culbertson LLP, has experience in toxic tort litigation. He practices in the areas of asbestos, silica, welding fumes, lead paint, chemical and occupational disease claims. His client base includes Fortune 500 companies in which he has defended various industrial product and equipment manufacturers, contractors and premises owners in numerous toxic tort cases throughout the country. He is also the regional counsel for a major industrial manufacturer. He can be reached at [cliljestrand@hinshawlaw.com](mailto:cliljestrand@hinshawlaw.com).

### ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



**Craig T. Liljestrand**  
Vice Chair of Newsletters  
Hinshaw & Culbertson LLP  
[cliljestrand@hinshawlaw.com](mailto:cliljestrand@hinshawlaw.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Plaintiffs filed suit against Defendant Tremco alleging that it had manufactured and sold asbestos containing products that decedent used or was exposed to while working as a window glazier. *See Krumwiede vs. Tremco*, 220 IL App (4<sup>th</sup>) 180434 – January 21, 2020 (4<sup>th</sup> Dist.). Specifically, Plaintiffs complained of decedent’s exposure to two asbestos containing products, “440 tape” and “Mono caulk.” Both products were manufactured using chrysotile type asbestos fibers. An autopsy showed that decedent had malignant mesothelioma consistent with industrial exposure of asbestos.

Plaintiffs presented the testimony of Dr. Arthur Frank, who testified that in the United States, mesothelioma is virtually only caused by exposure to asbestos. He further stated that there is no known safe level of exposure to asbestos, and that there is no scientific way to determine which exposure to asbestos caused a person to develop a disease. Dr. Frank opined that when a person is exposed to respirable asbestos fibers in their work, that exposure is “above background” and that all such exposure would have contributed to decedent developing mesothelioma.

Plaintiffs also presented the testimony of Dr. John Migas, who had treated decedent during his lifetime for colon cancer. He testified that he had treated approximately 50 cases of mesothelioma during his career. While all of the cases involved exposure to asbestos, some patients had long-standing exposures as a result of employment while

others had much shorter periods of exposure. Plaintiffs’ counsel asked Dr. Migas to assume that decedent worked as a window glazier from 1956 until 1991; from the 1950s to the 1980s he worked daily with asbestos containing tapes and caulk; and he worked around other “construction trades” performing their duties, including insulators. Based on those facts, Dr. Migas opined that these factors could all be implicated as a risk that could have potentially caused mesothelioma. However, on cross-examination he admitted that he had only treated the decedent for his colon cancer and not for anything related to mesothelioma. He further agreed that he did not hold himself out as an expert in the field of asbestos medicine and had not done any research in that area.

After Plaintiffs rested, Tremco moved for a directed verdict, arguing that plaintiffs failed to meet their burden of establishing that decedent was exposed to asbestos fibers from its products or that such exposure was a substantial factor in causing decedent’s mesothelioma. The trial court denied the motion.

Tremco presented the testimony of Dr. Michael Graham, a forensic pathologist. According to Dr. Graham, while decedent may have been exposed to amosite asbestos from working around pipefitters and insulators, “decedent’s work with Tremco’s products had ‘nothing to do’ with his development of mesothelioma.” While he admitted on cross-examination that he was

not a researcher in the area of asbestos or asbestos disease, he opined that Tremco's products "wouldn't release any significant amount of fiber" and certainly not enough to cause an asbestos related disease. Tremco also presented the testimony of Dr. William Longo, the president of Material Analytical Services. Tremco provided the products and Dr. Longo was personally involved in the testing and analysis of those products. He opined that air sample testing did not detect any measurable amounts of asbestos fibers in the 440 Tape or the caulk.

The jury returned a verdict in favor of plaintiffs and against Tremco. Tremco filed a posttrial motion, seeking a judgment *n.o.v.* or a new trial on all issues. The trial court denied these requests. On appeal, Tremco argued that it was entitled to a judgment *n.o.v.* because plaintiffs failed to prove causation. Tremco asserted that plaintiffs presented no competent or admissible evidence that its Mono caulk or 440 Tape released respirable asbestos fibers. Further, Tremco argued that even assuming its products did release respirable asbestos fibers, plaintiffs presented no competent evidence that decedent was exposed to those fibers with "such frequency, regularity, and proximity," that they could be viewed as a substantial factor in causing decedent's mesothelioma.

The Appellate Court stated that a motion for judgment *n.o.v.* should be granted only when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors a movant that no

contrary verdict based on that evidence could ever stand. In negligence actions, a necessary element of proof is that the defendant's asbestos was a "cause" of the decedent's injuries. The Illinois Supreme Court adopted the "frequency, regularity, and proximity" test for an asbestos plaintiff to prove more than minimum contact to establish that a specific defendant's product was a substantial factor in being a cause in fact of a plaintiff's injury. Under that test, the plaintiff must show that the injured worker was exposed to the defendant's asbestos through proof that: (1) he regularly worked in an area where the defendant's asbestos was frequently used and (2) the injured worker did, in fact, work sufficiently close to this area so as to come into contact with the defendant's product. Adoption of this test also rejects the argument that so long as there is any evidence that the injured worker was exposed to a defendant's asbestos containing product, there is sufficient evidence of cause in fact to allow the issue of legal causation to go to the jury.

The Appellate Court held that given Dr. Frank's testimony and Dr. Longo's acknowledgment that he could not rule out fiber release, there was sufficient evidence from which the jury could determine that Tremco's 440 Tape and Mono caulk were capable of releasing asbestos fibers. However, plaintiffs were also required to present evidence to show that decedent was exposed to asbestos from Tremco's products with such frequency, regularity, and proximity that the asbestos from those products could be viewed as a substantial

factor in causing the mesothelioma. The Court held that, even accepting that the products were capable of releasing respirable asbestos fibers, the evidence did not establish substantial factor causation. Specifically, there was no evidence showing when, and under what circumstances, Tremco's products released such fibers, and whether these circumstances were of the type that decedent regularly encountered when using the products, or whether the release of fibers was anything more than minimal.

The Court held that plaintiffs' evidence showed that decedent came into frequent, regular, and proximate contact with Tremco's products, and that they were capable of releasing asbestos fibers. However, no evidence established that the activities engaged in by decedent when working as a window glazier with Tremco's products caused the release of asbestos fibers or that the products released asbestos fibers in such amounts that decedent had more than de minimus, casual, or minimum contact with asbestos from Tremco's products. The Court stated that "relevant asbestos case authority dictates that plaintiffs must show more than a *de minimus* exposure to defendant's asbestos."

Finally, the Court held that Dr. Frank's opinion testimony was not contrary to Illinois law, as argued by Tremco. Tremco asserted that his opinions on causation were based on an "each and every exposure" theory, under which any exposure to asbestos fibers is a substantial factor in

causing asbestos-related disease. Plaintiffs countered that his testimony was that a disease like decedent's is caused by that person's total and cumulative exposure to asbestos. The Court agreed with Plaintiffs' characterization of Dr. Frank's testimony and held that it was not contrary to Illinois law. However, his testimony still did not satisfy the substantial factor test as required under Illinois law.

Accordingly, the Court held that Tremco was entitled to a judgment *n.o.v.*

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