[Cite as *Werts v. Goodyear Tire & Rubber Co.*, 2009-Ohio-2581.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91403

BETTY WERTS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RONALD WERTS

PLAINTIFF-APPELLANT

vs.

GOODYEAR TIRE AND RUBBER CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-541869

BEFORE: Kilbane, P.J., Dyke, J., and Celebrezze, J.

RELEASED: June 4, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

John D. Mismas
Thomas W. Bevan
Patrick M. Walsh
Bevan and Associates, LPA, Inc.
10360 Northfield Road
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEES

John Crane, Inc.:

Stephen H. Daniels
Evan J. Palik
McMahon DeGulis LLP
The Caxton Building - Suite 650
812 Huron Road
Cleveland, Ohio 44115

Michael A. Pollard
Baker & McKenzie
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Betty Werts ("appellant"), individually and as Executrix of the Estate of Ronald Werts ("Ronald"), appeals three evidentiary rulings that preceded a jury verdict in favor of appellee, John Crane, Inc. ("John Crane"). For the following reasons, we affirm.

{¶ 2} On May 10, 2007, appellant filed her second amended complaint in which she alleged various products liability and negligence theories for the wrongful death of her husband, who succumbed to pleural mesothelioma on January 22, 2007. Pleural mesothelioma is an especially malignant type of cancer caused only by exposure to asbestos.

{¶ 3} On January 7, 2008, the case proceeded to trial. The parties stipulated that Ronald had been exposed to more than 40 asbestos-containing products from more than 40 entities, including gaskets and packing supplied by John Crane. At the conclusion of the trial, the jury found that Ronald had in fact been exposed to gaskets and packing supplied by John Crane at some point during his working career, which spanned the years 1953 through 1980, but that such exposure was not a substantial factor in causing the cancer which led to his death. This appeal followed.

{¶ 4} Because they are interrelated, we will address assignments of error together where appropriate. Appellant's first and second assignments of error read:

{¶ 5} Assignment of Error One:

> "The trial court committed prejudicial error by allowing defendant's experts to testify about the amount of asbestos fiber released in their studies."

{¶ 6} Assignment of Error Two:

> "The trial court committed prejudicial error by allowing defendant's experts to testify and rely upon studies that were not admitted into evidence."

{¶ 7} At the outset, we note that Loc.R. 21.1 governs the use of expert witnesses in Cuyahoga County Common Pleas Court. *Blandford v. A-Best Products Co.*, Cuyahoga App. Nos. 85710, 86214, 2006-Ohio-1332. "'Courts should favor the admissibility of expert testimony whenever it is relevant and the criteria of Evid.R. 702 are met.'" *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, at ¶23, quoting *State v. Nemeth*, 82 Ohio St.3d 202, 207, 1998-Ohio-376.

{¶ 8} An appellate court's standard of review concerning a trial court's ruling on a Loc.R. 21.1 question regarding the admission of expert testimony is abuse of discretion. An abuse of discretion involves a result which is so grossly and palpably violative of logic and fact that it shows not an exercise of will but rather a perversity of will, a defiance of judgment, and an exercise of passion or bias instead of reason. *Nash v. Kaiser Found. Health Plan* (1991), 76 Ohio App.3d 233.

{¶ 9} Appellant first argues that because John Crane's expert, chemical engineering professor Michael Matteson, Ph.D. ("Matteson"), could not specifically re-create the exact working conditions experienced by Ronald when working with the John Crane gaskets and packing, his experiments and related testimony should not have been admissible. Appellant further argues that Matteson improperly relied on those experiments and other inadmissible studies when testifying.

{¶ 10} In support of this contention, appellant cites *Blandford*, supra, *Miller v. Bike Athletic Co.* (1988), 80 Ohio St.3d 607, 687 and *Ball v. Consolidated Rail* (2001), 142 Ohio App.3d 748, 758, for the proposition that the court impermissibly allowed Matteson to testify about the amount of asbestos fiber released by the John Crane gaskets and packing, based upon conclusions he gathered from his own experiments and his collective knowledge of the subject. However, *Blandford* and *Ball* are distinguishable from the case sub judice, and each specifically allows expert testimony under *Miller*, even where, as here, re-creation of the exact working conditions of Ronald over a 30-plus-year time frame is not feasible.

{¶ 11} In *Miller*, the Ohio Supreme Court held that in order for an expert's testimony to comply with the requirements of Fed.R.Evid. 702(C), the expert's opinion must be reliable. *Miller* at 610-611. In making this determination, the *Miller* court stated that courts are to focus on whether the principles and

methods an expert employs to reach an opinion are reliable, not whether the conclusions are correct. Id. According to the court in *Miller*, to be admissible, the expert testimony must assist the trier of fact in determining an issue of fact or understanding the evidence. Id. at 614.

{¶ 12} With respect to the reliability of expert testimony, the *Miller* court held that evidence of experiments performed out of court, tending to prove or disprove a contention in issue, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute, and that dissimilarities, when not so marked as to confuse the jury, go to the weight rather than the admissibility of the evidence. Id. at 614, citing *St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio RR. Co.* (1935), 129 Ohio St. 401, 195 N.E. 861.

{¶ 13} Perhaps most important for purposes of the case sub judice, the *Miller* court also held that when an out-of-court experiment is not represented to be a re-enactment of the accident and deals with one aspect or principle directly related to the cause or result of the occurrence, the conditions of the accident need not be duplicated. *Miller* at 615. This conclusion is directly at odds with the conclusion appellant attempts to advance when citing *Miller*.

{¶ 14} Appellant submits that, under *Miller*, Matteson's experiment did not satisfy the four-factor test for reliability found in *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579. Under this test, scientific evidence

should be analyzed to determine: "(1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance." *Daubert* at syllabus; see, also, *Miller* at 611.

{¶ 15} Appellant argues that in reaching his conclusions, Matteson relied upon studies that were not peer reviewed, or in one instance, were barred by this court on a prior occasion.[1] Appellant also argues that the trial court abused its discretion and failed to follow the dictates of *Ball* and *Blandford* by allowing Matteson to testify about fiber release data from John Crane gaskets. This data was collected after the gaskets were artificially aged and then manipulated in an air chamber known between the parties as the "glove box" test. Because such conditions differ from those experienced by her husband Ronald, appellant claims they are inadmissible. We disagree.

{¶ 16} In *Ball*, this court cited the *Miller* decision when holding specifically that an experiment is admissible if it is relevant and helpful to one aspect or principle of the event at issue, even though it does not recreate the conditions of the event. *Ball* at 758. While it is true that in *Ball*, this court ruled that the trial court abused its discretion when it allowed the defendant's expert to testify as to

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[1]Specifically, appellant's counsel argues that Matteson's knowledge of a 1978 study on fiber release at the Bremerton naval yard by a Mr. Liukonen and barred in *Blandford* undermines his testimony and makes it inadmissible.

the amount of asbestos fiber released from a product, this was because "the experiment [performed by the expert] was not designed to show the level of asbestos exposure encountered by [the workers]," and that "[t]he testimony about these levels and the reference to them in closing argument was outside the express purpose of the experiment and beyond the permissible scope of testimony." Id. at 758-759. Such is not the case here.

{¶ 17} First, it is important to clarify that this court's holding in *Ball* does not stand for the proposition that experts in asbestos cases are forever barred from testifying about the level of asbestos exposure a plaintiff is alleged to have encountered with a given product. The import of the case is that, to the extent possible, the conclusions of the expert, as they relate to asbestos exposure, bear sufficient relation to the everyday conditions encountered by the plaintiff. If they do not, then the expert testimony is impermissible. Here, as in *Ball*, "the crux of [the] dispute is whether the experiment was sufficiently relevant to the events at issue to aid the jury." Id. at 758.

{¶ 18} Indeed, Matteson's "glove box" test was designed to show precisely how much asbestos fiber Ronald would have been exposed to when manipulating John Crane gaskets and packing. Matteson testified that he cut packing and gaskets, scraped gaskets, and formulated gaskets with a ball peen hammer; all activities that Ronald performed during his working career. The results of the tests were presented in numbers of fibers per cubic centimeter of air, time

weighted over an eight-hour workday. While admittedly not identical to the working conditions experienced by Ronald, according to the *Miller* court, they need not be. The results of these tests, and the testimony based upon them, do not run afoul of this court's holding in *Ball* or *Blandford* because they were designed to specifically determine what the inadmissible experiments in *Ball* were not: namely, the level of asbestos exposure encountered by Ronald when manipulating John Crane gaskets and packing.

{¶ 19} While appellant argues that the trial court ran afoul of this court's holding in *Blandford* by not barring the defense experts testimony, this case is factually distinguishable from *Blandford* and *Ball* precisely because the experiment at issue was designed to show the amount of asbestos released from John Crane products when manipulated in a manner consistent with the way Ronald handled these products. In *Blandford*, the gasket removal study relied upon by the expert involved work practices wholly removed from those performed by the plaintiff. Because that study did not quantify the percentage of asbestos released in the gaskets analyzed, it could not be compared with the amount of asbestos fibers the plaintiffs would have encountered. *Blandford* at ¶29-30. There was no evidence in *Blandford* that the conditions to which the gaskets in the study were exposed were similar to the conditions the plaintiff experienced. Id. The study was therefore inadmissible because the study was designed only to show fiber release, not quantify it.

{¶ 20} This differs from the case sub judice, in which Matteson's test mirrored those work practices of Ronald, and also quantified in detail the amount of asbestos fiber released from the same type of products Ronald identified he worked with.

{¶ 21} Further, the *Blandford* Court specifically stated that although under *Miller* the exact conditions of the event need not be recreated, any differences between the study and the actual condition must be acknowledged and cannot be used to mislead the jury. *Blandford* at ¶27.

{¶ 22} At no point in the record does it indicate that either the defense or Matteson failed to acknowledge the differences between working conditions and the studies he relied on in his testimony. Nor does it indicate that Matteson even testified about any studies other than those he conducted when attempting to re-create working conditions similar to those experienced by Ronald.

{¶ 23} While appellant argues that the results of Matteson's experimental aging and time-weighted average "glove box" tests do not accurately recreate the conditions Ronald was exposed to, we do not fully agree. While we are under no illusion that the exact working conditions encountered by Ronald when handling John Crane gaskets can ever be exactly duplicated, the law does not require them to be. See, e.g., *Blandford* at ¶27; *Miller*, supra; *Ball*, supra. As stated above, any differences in the studies must be acknowledged. *Blandford* at syllabus. Ultimately, those differences go to the weight of the evidence, not its

admissibility. *Leichtamer v. Am. Motors Corp.* (1981), 67 Ohio St.2d 456, 424 N.E.2d 568.

{¶ 24} In this case, the trial court did not initially allow any expert testimony regarding the amount of respirable asbestos fiber from John Crane materials. Then, six hours after its initial ruling, and after an oral hearing in which both sides participated, the trial court decided to allow the fiber release testimony of both Matteson (the defendant's expert) and Mr. Richard Hatfield (the plaintiff's expert) with respect to John Crane products, with the proviso that a proper foundation be laid, relating the testimony to Ronald and the products he was alleged to have worked with. The trial court indicated in its deliberations that the court was mindful of the holdings of both *Ball* and *Blandford*. It specifically tailored its ruling to the dictates of those cases when the court interpreted them as follows:

> "The part that bothers me with the *Blandford* decision is where the court writes: 'The manufacturer argues that the trial court misinterpreted this appellate court's holding in *Ball* which ruled that testimony concerning the amount of asbestos released in an experiment was inadmissible because the experiment was not designed to show the level of asbestos exposure allegedly encountered by plaintiff, and the experts should not have been allowed to testify concerning the amounts of asbestos released during the experiment. We further explained that the testimony about these levels and the reference to them in closing argument was outside the express purpose of the experiment and beyond the permissible scope of testimony.' So they do restrict *Ball* to the purposes of the experiment."

{¶ 25} At the end of the hearing, the trial court held:

> "I don't think there's any question that the tests, both tests I guess by Hatfield and *** Matteson, are designed to – were designed for fiber release. And my question is then, if they're designed for fiber release, are they designed with that plaintiff in mind and with the way that the plaintiff worked on these particular items? There has to be a foundation certainly before any evidence of fiber release is made. It flows from that. If that is satisfied – and I guess noone knows until such time as the evidence is presented about the conditions that are – I can't say identical, but very similar to the plaintiff's work habits, the way he worked, that is the foundation even for fiber release. To me, it follows that if those conditions are met, the person ought to be able to testify as to what the results are rather than just a blanket statement that it's over a certain threshold or below a certain threshold if, in fact, it's capable of being measured. So I think that will be my ruling in this case."

{¶ 26} On this record, and with the foundational evidence laid by both appellant and appellee in admitting their experts, we do not find that the trial court committed an abuse of discretion by admitting testimony from both experts on fiber release data as it pertained to the working conditions encountered by Ronald. Appellant states in her Reply Brief that under *Ball* and *Blandford*, neither expert should have been allowed to testify, yet could not show any prejudice by the introduction of this evidence because the trial court allowed both Matteson and appellant's expert, Hatfield, to testify specifically about fiber release levels as they pertained to Ronald's use of John Crane products.

{¶ 27} In such cases as this, where a proper foundation can be laid, the solution is not to bar evidence that would somehow assist the jury in reaching its conclusion, but "vigorous cross-examination, presentation of contrary evidence

and careful instruction on the burden of proof[.]" *Daubert*, supra. These "are the traditional and appropriate means of attacking shaky but admissible evidence." Id. The trial court did not abuse its discretion in allowing both appellant's and appellee's experts to testify about fiber release relative to John Crane products because, in both instances, proper foundations were laid providing fiber release data from these products relative to Ronald's use of them.

{¶ 28} Appellant further argues that the defense experts' opinions should have been barred because both defense experts Matteson and Dr. Peter Barrett, M.D. ("Barrett"), appellee's expert radiologist, admitted during discovery depositions that they relied, at least in part, on the works of others in forming their opinions for trial. Specifically, appellant's counsel argues that Barrett acknowledged relying, at least in part, on a 1978 study on fiber release from the Bremerton naval yard conducted by a Mr. Larry Liukonen, which was barred in the *Blandford* case. Appellant seeks to attribute Barrett's knowledge of the study as an undermining factor in the conclusions he reached in this case.

{¶ 29} However, the admissibility of the study in *Blandford* did not hinge on scientific principles, but on whether the conclusions it reached could be attributed to the plaintiffs in that case. *Blandford* at ¶27-29. For this reason, the inadmissibility of that study in no way taints the conclusions of the study itself. Therefore, acknowledgment by an expert that they are familiar with the study does not make their own subsequent opinion inadmissible.

{¶ 30} Appellant also attempts to discredit the admission of Matteson's testimony because he acknowledged referring to unpublished studies in his discovery depostion.

{¶ 31} In Ohio, experts have always been permitted to testify regarding information that forms the basis of their opinions, so long as that information contains "facts or data perceived by him." Evid.R. 703; see, also, *Steinfurth v. Armstrong World Indus.* (1986), 27 Ohio Misc.2d 21, 22. Information upon which an expert may rely includes a review of applicable treatises, formal classes, discussions with colleagues, books of science, and information gained from other experts in the field. *Limle v. Laboratory Corp. of Am.* (2000), 137 Ohio App.3d 434. An expert may also draw upon knowledge gained from other experts in the field, whether this knowledge was communicated orally or in writing. *State v. Echols* (1998), 128 Ohio App.3d 677. Though helpful, this knowledge need not always be peer-reviewed, published material. The Supreme Court in *Miller* spoke to this very issue when quoting *Daubert*, supra, wherein the United States Supreme Court stated "'***publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability ***.'" *Miller* at 613, quoting *Daubert* at 593.

{¶ 32} Moreover, appellant never attempted to elicit the supposedly improper basis for this testimony upon cross-examination or object to it at trial. As stated above, the proper remedy for the admission of such testimony is a

"vigorous cross-examination." *Daubert*, supra. Further, "'[f]ailure to object to evidence at trial constitutes a waiver of a challenge, regardless of the disposition made for a preliminary motion in limine.'" *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, quoting *State v. Wilson* (1982), 8 Ohio App.3d 216, 220. See, also, *State v. Maurer* (1984), 15 Ohio St.3d 239, 259-260.

{¶ 33} For these reasons, we cannot say that the trial court abused its discretion in allowing John Crane's experts to testify about the amount of asbestos fiber released in their studies or by allowing these experts to rely upon studies that were not admitted into evidence. Although not exact, the testimony specifically correlated Ronald's working conditions with the products he worked with, and the amount of asbestos fiber they released. The foundational requirements of the experts' opinions were properly laid, and the opinions themselves aided the jury in reaching its conclusion that exposure to John Crane products was not a substantial factor in causing Ronald's death from mesothelioma.

{¶ 34} Appellant's first and second assignments of error are overruled.

{¶ 35} Appellant's third assignment of error reads as follows:

> "The trial court committed prejudicial error by allowing certain settlement agreements into evidence."

{¶ 36} Appellant argues that the trial court committed reversible error by allowing a copy of a Babcock & Wilcox proof-of-claim form into evidence as

defendant's exhibit 126 after portions of it were read to the jury. In Ohio, it is well settled that evidence of offers to compromise are inadmissible. Evid. R. 408 states:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

{¶ 37} Appellant argues that its admission amounts to an "inadmissible settlement agreement" that requires reversal. While we agree that the document should not have been admitted, we disagree that its admission requires reversal.

{¶ 38} First, the mere fact that a document is titled a "proof of claim" form does not, of itself, make the document inadmissible. As Evid.R. 408 goes on to state, "[t]his rule also does not require exclusion when the evidence is offered for another purpose ***." Evid.R. 408. While John Crane argues that proof of claim forms of the type which were read to the jury by defense counsel have been ruled more akin to complaint forms than settlement demands, we do not agree. In support of this contention, John Crane cites *Volkswagen of Amer. Inc. v. Superior*

Court of San Francisco Cty. (2006), 139 Cal. App. 4th 1481, yet cites no other case, including no Ohio cases, on point.

{¶ 39} John Crane also argues that the document was clearly not read to the jury to show that appellant had settled or offered to settle with any party, and it was otherwise admissible under Ohio Evid.R. 401 because it assisted the trier of fact to decide the ultimate issue in the case: whether John Crane's products could have been a substantial factor in causing Ronald's illness.

{¶ 40} However, this is the very reason contemplated in Ohio Evid.R. 408 for excluding this evidence. The rule states that such evidence is clearly "***not admissible to prove liability for or invalidity of the claim or its amount." The admission of the proof of claim form on this basis was therefore error. Under Ohio Evid.R. 408, admission of evidence of settlements or settlement negotiations is prohibited when offered to prove liability, the invalidity of a claim, or the amount of a claim. *Owens-Corning Fiberglass Corp. v. American Centennial Ins. Co.* (1995), 74 Ohio Misc.2d 272, 274. While it is true the members of the jury could have used the documents to decide whether exposure to John Crane gaskets and packing was a substantial factor in causing Ronald's mesothelioma, the jury did not need a claim form to show them that, especially when the parties stipulated to Ronald's exposure to dozens of asbestos-containing products. The jury also had much more substantial and specific

evidence on which to rely: expert testimony. It is therefore inadmissible under Evid.R. 408.

{¶ 41} However, in this instance, the admission of this form was harmless error. Harmless error is one which does not affect the substantial right of the parties. *Knor v. Parking Co. of Am.* (1991), 73 Ohio App.3d 177, 596 N.E.2d 1059. An appellate court will not reverse a judgment on the basis of any error that is harmless. Id. A substantial right is a legal right that is enforced and protected by law. *City of Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 526, 1999-Ohio-285.

{¶ 42} Here, the parties stipulated that Ronald was exposed to dozens of asbestos-containing products over the course of his lengthy career. Evidence on a proof of claim form that he was exposed to Babcock and Wilcox products, in addition to what the jury deduced from John Crane products, does not change the jury's level of knowledge with respect to Ronald's exposure to asbestos. Nor can we say that appellant had a substantial right against having this proof of claim form admitted into evidence, because Evid.R. 408 permits the admission of like documents for reasons other than those argued by John Crane. The document itself is not proof of settlement, but rather an inference of it. Such an inference is impermissible unless obviously admitted for another reason under Evid.R. 408. Further, as John Crane argues, the document itself never made it to the jury room. There is therefore no direct evidence that the jury specifically

relied on it in reaching its verdict. The jury did not find John Crane liable, so it never reached the question of whether a verdict against it could be set-off.

{¶ 43} Appellant's third assignment of error is overruled.

{¶ 44} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., CONCURS IN JUDGMENT ONLY
FRANK D. CELEBREZZE, JR. J., CONCURS