Circuit Court for
Case No. 024X16000052R00

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2709

September Term, 2016

MACK TRUCKS, INC., ET AL.

v.

CHRISTOPHER COATES, SR.

Eyler, Deborah S.,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 11, 2018

A jury in the Circuit Court for Baltimore City found Mack Trucks, Inc. ("Mack") and Ford Motor Company ("Ford"), the appellants, liable in negligence for failure to warn Christopher Coates, Sr., the appellee, about the presence of asbestos in the linings of brakes they supplied to Coates's employer, Ralph Marcantoni & Sons Construction ("Marcantoni"). It found Mack and Ford not liable in strict liability failure to warn. Coates was awarded $72,000 for past medical expenses and $5 million in non-economic damages. The jury returned a verdict for CertainTeed Corporation ("CertainTeed"), a settling co-defendant, on cross-claims by Mack and Ford.[1] Mack and Ford's motions for new trial and judgment notwithstanding the verdict ("JNOV") were denied. Mack and Ford noted timely appeals.[2]

Mack and Ford present six overlapping issues for review,[3] which we have combined, reworded, and rephrased as follows:

[1] Mack and Ford also cross-claimed against Navistar, Inc., formerly known as International Harvester Company. The jury also found in favor of Navistar. Because Mack and Ford have not challenged that verdict, we shall restrict our discussion to the cross-claims against CertainTeed.

[2] Coates did not note a cross appeal as to the verdict against him on strict liability failure to warn.

[3] The questions as posed by Mack are:

> 1. Did the Circuit Court err in denying Mack's motions for judgment where:
>
> a. Coates failed to present sufficient evidence that he performed brake work on any Mack trucks using asbestos-containing brakes?

(Continued…)

(…continued)

b. He failed to present sufficient evidence that he was frequently, regularly, and proximately exposed to asbestos-containing brakes attributable to Mack, and that such exposures were a substantial factor in causing his injuries?

c. No expert testified that these exposures were the specific cause of his injuries beyond a minimal contributory effect of increased risk?

d. He neither looked at the warnings that were given nor challenged their sufficiency at trial?

2. Did the Circuit Court err in denying Mack's motion for a new trial where:

a. The jury found Mack liable for negligent failure to warn but not strictly liable, even though the two claims contain the same elements?

b. The Circuit Court did not instruct the jury that Mack's alleged failure to warn had to proximately cause the injuries but did so instruct as to CertainTeed?

3. Did the Circuit Court err in denying Mack's motions for judgment, JNOV, or new trial regarding its cross-claim against CertainTeed where:

a. No reasonable jury could find that Coates' exposure to CertainTeed was not a significant factor in causing his injuries?

b. The Circuit Court admitted a legal memo as substantive evidence?

The questions as posed by Ford are:

A. Did the Circuit Court err in refusing to grant a new trial where the jury's finding that Ford is liable for negligent failure to warn is inconsistent with its finding that Ford is not liable for strict liability failure to warn?

B. Did the Circuit Court err by: (1) instructing the jury regarding causes of action that Plaintiff did not pursue; (2) failing to instruct the jury that Plaintiff is required to prove that Ford's alleged failure to warn caused his injuries; (3) failing to instruct the jury concerning the definition of substantial contributing factor causation or medical causation; (4) permitting the jury to hold Ford liable for Plaintiff's exposure to products manufactured by others?

C. Did the Circuit Court err in denying Ford's motion for judgment notwithstanding the verdict on its cross-claim against CertainTeed where the evidence and Plaintiff's own admissions establish that CertainTeed failed to warn Plaintiff, that Plaintiff was exposed frequently, regularly, and

(Continued…)

Mack & Ford:

> I. Were the appellants entitled to a new trial because the verdicts on Coates's claims were irreconcilably inconsistent?
>
> II. Did the trial court commit reversible error by giving erroneous jury instructions and refusing to give other requested jury instructions?
>
> III. Did the trial court err by denying the appellants' motions for JNOV on the verdict in their cross-claim against CertainTeed or, in the alternative, are they entitled to a new trial on their cross-claim?

Mack:

> IV. Did the trial court err by denying Mack's motions for judgment and for JNOV because Coates failed to present sufficient evidence of his exposure to asbestos attributable to Mack?

We hold that the trial court erred by giving a jury instruction on negligence that was not generated by the evidence. Although we hold that Mack and Ford did not preserve for review their inconsistent verdicts argument, we conclude that the verdicts were illogical, likely as a result of the improperly given instruction. Therefore, Mack and Ford were prejudiced by the instructional error. We further hold that the evidence against Mack was legally sufficient to support the negligence verdict against it. Accordingly, we shall reverse the judgments against Mack and Ford and remand for further proceedings on the negligence claims against them not inconsistent with this opinion.

(…continued)

> in close proximity to asbestos from CertainTeed cement pipe, and that those exposures caused Plaintiff's mesothelioma?

Mack and Ford both adopted and incorporated by reference each other's arguments, to the extent not inconsistent with their own arguments.

We also hold that the trial court erred by admitting into evidence a reply memorandum filed by CertainTeed in support of its motion for summary judgment and that Mack and Ford's cross-claims against CertainTeed were prejudiced as a result. We shall reverse the judgments against Mack and Ford on their cross-claims against CertainTeed as well, and remand for further proceedings on the cross-claims not inconsistent with this opinion.

FACTS AND PROCEEDINGS

Until it closed in 1989, Marcantoni was a Baltimore-based general construction contracting company that specialized in highway and utility work for local governments in the greater Baltimore area. Its headquarters was located on Broening Highway at its intersection with Holabird Avenue, in southeast Baltimore.[4,5]

The Marcantoni property consisted of an approximately 18,000 square foot office complex on about 5 acres, surrounded by storage sheds and parking for trucks and other heavy equipment. There were three mechanic bays at the back of the office complex, two with 14-foot overhead doors for truck repairs and one with a 10-foot overhead door for equipment repair. This area was known as the "shop." It had picnic tables, where workers often ate their lunches, and a restroom**.**

[4] It relocated to that location in 1970.

[5] Marcantoni changed names in 1986 and continued to operate under its new name until 1989.

Coates was employed by Marcantoni from 1974 until 1989.[6] For the first three to four years, he worked as a pipe layer, digging trenches and cutting and laying cement pipe. He cut the cement pipe with a diamond-blade saw, creating a "dust storm." When he wasn't personally cutting the pipe, he was working in the immediate vicinity of others cutting the pipe.

Around 1978, Coates began working as a dump truck driver for Marcantoni. Marcantoni's fleet of trucks included four or five single-axle Ford dump trucks; between six to eight Ford pick-up trucks; and several other Ford vehicles. Coates drove a Ford dump truck for about four years. The friction lining in the brake components in the Ford vehicles contained chrysotile asbestos, as well as very small amounts of tremolite asbestos.[7]

In the late 1970s to early 1980s, Marcantoni sold its Ford dump trucks and replaced them with four R-600 double-axle Mack trucks. Coates drove a Mack dump truck for three to four years. Mack did not manufacture the brakes used in its dump trucks. Rather, it purchased them from one of two suppliers. Until at least the late 1970s, those brakes also contained chrysotile asbestos.

[6] Coates also worked for Marcantoni briefly in 1967 and again in 1972. His claims do not arise from those periods of employment.

[7] Chrysotile asbestos is in the serpentine family, whereas tremolite asbestos is in the amphibole family. It is generally understood that amphibole asbestos is more carcinogenic than chrysotile asbestos due to characteristics of the fibers.

During the more than ten years that Coates drove trucks for Marcantoni, he spent time in the shop nearly every work day, usually before and after his shift. He was not a mechanic but would socialize with the mechanics. He also helped in the shop on rainy days when he wasn't driving. During that time, he routinely assisted the mechanics with unskilled tasks. One such task was using a brush to clean off the brake shoes prior to a brake replacement and then blowing out the brake wear dust with a pressurized air hose. This took about 15 minutes per wheel. The process created "large amounts of dust" that "fill[ed] the shop up."

According to Coates, about once every "five, six weeks a truck [would] be in there getting a brake job or something." He estimated that he assisted on hundreds of brake replacement jobs. He specifically remembered assisting on brake replacement jobs for Ford dump trucks and helping to clean up after a clutch replacement in a Ford truck. As we shall discuss, his memory was not as clear with respect to brake repair work on Mack trucks.

Coates did not recall ever seeing a warning about the presence of asbestos in the Mack or Ford brakes or brake components. He maintained that if he had known about the risks associated with exposure to asbestos during the brake repair jobs, he would have quit his job with Marcantoni.

In June 2015, at age 67 years old, Coates was diagnosed with malignant mesothelioma.

On October 6, 2015, Coates filed suit against Mack and Ford and more than thirty other defendants, stating claims in negligence and strict liability arising from his exposure to asbestos while employed by Marcantoni. Mack and Ford filed cross-claims for indemnity and contribution against other defendants, including CertainTeed. In the pre-trial period, many defendants settled and were dismissed.

On the eve of trial, Coates settled with CertainTeed.

The trial commenced on November 10, 2016, and continued through December 2, 2016. Coates testified and called ten witnesses: John Lake, a former coworker at Marcantoni; several family members; Jerry Lauderdale, C.I.H., an industrial hygienist; David Rosner, Ph.D., a professor of public health; James Millette, Ph.D., an environmental scientist; Arnold Brody, Ph.D., a cell biologist; John Maddox, M.D., a pathologist; and Murray Finkelstein, M.D., an epidemiologist. Coates's lawyer read into evidence excerpts from the depositions of employees of three of the defendants: Albert Rocker, a former Ford manager; Thomas Brown, a Mack engineer; and Louis Merz, a BorgWarner executive.[8]

Mack called Glenn Hinderliter, its corporate designee, to testify about the warning labels on the brake components it supplied and about the time frame for the conversion to non-asbestos containing brakes. Mack and Ford acting together called four expert

[8] Navistar was in the case until it settled during Coates's case-in-chief. BorgWarner Morse TEC, LLC, also was in the case but a motion for judgment was granted in its favor.

witnesses: Sheldon Rabinowitz, Ph.D., C.I.H., an industrial hygienist and toxicologist; David Garabant, M.D., M.P.H., an epidemiologist; Lucian Chirieac, M.D., a pathologist; and Dennis Paustenbach, Ph.D., C.I.H., an environmental toxicologist. Counsel for Mack and Ford also read into the record excerpts from Coates's responses to their requests for admissions concerning his exposure to asbestos from CertainTeed products, and an excerpt from his opposition to CertainTeed's motion for summary judgment. As we shall discuss, the court permitted Coates's attorney to read into the record an excerpt from CertainTeed's reply to Coates's motion for summary judgment. Mack and Ford's motions for judgment were denied.

On December 2, 2010, the case was submitted to the jury on a special verdict form. The jury returned its verdicts that same day. It found that Coates developed malignant mesothelioma as a result of his exposure to asbestos; that he was exposed to asbestos fibers from products or equipment manufactured, supplied, or sold by Mack and Ford, and that that exposure was a substantial factor in causing him to develop mesothelioma; that Mack and Ford were negligent in failing to warn Coates about the dangers of asbestos; that Mack and Ford were not strictly liable for failing to warn Coates about the dangers of asbestos; that Coates incurred $72,000 in past medical expenses and suffered $5,000,000 in non-economic damages; and that Coates's exposure to asbestos-containing products manufactured, sold, or supplied by CertainTeed was not a substantial contributing factor causing his mesothelioma.

Judgment was entered on December 27, 2016.

Mack and Ford filed timely motions for JNOV or, in the alternative, for a new trial. As pertinent, Mack moved for JNOV on the ground that the evidence against it was legally insufficient. Mack and Ford moved for JNOV on their cross-claims against CertainTeed, arguing that the "evidence overwhelmingly proved that [Coates] suffered significant exposure to amphibole asbestos from CertainTeed cement pipes, which was a substantial contributing factor in causing [his] mesothelioma." In the alternative, they moved for a new trial on their cross-claims on the ground that the court permitted the introduction of "inadmissible hearsay evidence from a CertainTeed motion for summary judgment brief." Ford also moved for a new trial on the bases that the verdicts in favor of Coates for negligent failure to warn, but against him for strict liability failure to warn, were irreconcilably inconsistent; and that the court erred by giving certain jury instructions but refusing to give others.

By order entered on January 30, 2017, the court denied the motions for JNOV and for a new trial. These timely appeals followed.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Inconsistent Verdicts

(Mack & Ford)

Two causes of action went to the jury against Mack and Ford: strict liability failure to warn and negligent failure to warn. Before trial, the parties proposed special verdict sheets. In the one proposed by Mack and Ford, questions five and six read as follows:

> 5. Do you find, by a preponderance of the evidence, with respect to any of the following companies' asbestos-containing products, (1) the product was defective; (2) the product was unreasonably dangerous due to a failure to warn; (3) the company knew or should have known dangers associated with product [sic] such that a warning was required; and (4) that failure to provide a warning was proximate [sic] cause of Christopher Coates' disease.
>
> * * *
>
> Ford Motor Company, Inc. Yes ____ No ____
> Mack Truck Yes ____ No ____
>
> * * *
>
> [For any company that you answered no, cross that company out in question 6 & 7. If you answered no or crossed out all companies, stop, sign the verdict form and call the bailiff. If you answered yes to any company, proceed to question 6.]
>
> 6. Do you find, by a preponderance of the evidence, that any of the following companies were negligent in failing to warn Christopher Coates?
>
> [Do not respond for any crossed out company.]
>
> * * *
>
> Ford Motor Company Yes ____ No ____
> Mack Truck Yes ____ No ____

(Emphasis in original.) This proposed verdict sheet directed the jurors that if they found in favor of Mack and Ford on strict liability failure to warn, they would not deliberate on the claim of negligent failure to warn against those defendants.

Coates's proposed verdict sheet, in contrast, asked the jurors at question four whether they found that Mack, Ford, or the other then active defendants were "negligent in the manufacture, sale, supply, and/or distribution of their asbestos-containing products to which [the jurors already had found that Coates had been exposed]." It then instructed, "[r]egardless of your finding for question 4, you must answer question 5." Question five asked the jurors whether they found that Mack, Ford, or the other then active defendants were "strictly liable in the manufacture, sale, supply, and/or distribution of their asbestos-containing products to which [the jurors already had found that Coates had been exposed]." Thus, Coates's proposed verdict sheet allowed for a verdict in favor of Mack and Ford on strict liability failure to warn despite a verdict against them on negligent failure to warn.

The court decided to use its own special verdict sheet, which differed from both proposed verdicts sheets but was more similar to the one proposed by Coates in several significant respects. As pertinent, it asked the jurors:

> 5. Do you find by a preponderance of the evidence that any of the following companies was negligent in failing to warn the Plaintiff, Christopher Coates, Sr., of the dangers of asbestos?
>
> Ford Motor Company YES ___ NO ___
> Mack Trucks, Inc. YES ___ NO ___
>
> 6. Do you find by a preponderance of the evidence that any of the following companies was strictly liable for failing to warn the Plaintiff, Christopher Coates, Sr., of the dangers of asbestos?
>
> Ford Motor Company YES ___ NO ___
> Mack Trucks, Inc. YES ___ NO ___

> If your answer to Question #5 and Question #6 is "NO" to both companies listed, then your deliberations are concluded. Stop here. Please sign the verdict sheet and notify the clerk that you have reached a verdict.

On the last day of trial, the court asked the parties if they had any objections to the special verdict sheet. Mack and Ford each voiced objections to aspects of the special verdict sheet but neither objected to the order of the questions or to the fact that the jurors were being permitted to decide the negligent failure to warn claim even if they found in Mack and/or Ford's favor on the strict liability failure to warn claim.

The jurors deliberated and returned their verdicts, answering "Yes" to question five as to both Mack and Ford, and "No" to question six as to both Mack and Ford. Mack and Ford did not object to the verdicts as rendered before the jurors were discharged. In a post-trial motion for new trial, they argued that the verdicts against them for negligence and in their favor for strict liability were inconsistent. The court denied the motion.

On appeal, Mack and Ford contend the trial court abused its discretion by denying their motion for new trial. Specifically, they argue that a cause of action for negligent failure to warn includes all the elements of a cause of action for strict liability failure to warn, plus one additional element; therefore, the verdict in their favor on strict liability failure to warn was irreconcilably inconsistent with the verdict against them on negligent failure to warn.

Coates responds that Mack and Ford waived this issue by failing to object to the submission of both claims to the jury and by failing to object to the verdicts immediately after they were returned before the jury was discharged. On the merits, Coates argues

that this Court's decision in *Eagle-Picher Industries, Inc. v. Balbos*, 84 Md. App. 10 (1990), *aff'd in part, rev'd in part on other grounds*, 326 Md. 179 (1992), compels the conclusion that the verdicts were not *irreconcilably inconsistent*.

In *Southern Management Corporation v. Taha*, 378 Md. 461, 488 (2003), the Court of Appeals held that "irreconcilably inconsistent jury verdicts in civil matters" cannot stand. (Emphasis omitted.) There, a former employee of an apartment complex sued the complex and two employees for malicious prosecution. The sole theory of liability against the complex was respondeat superior, *i.e.*, that it was liable for the wrongs of its employee defendants. At trial, the jurors were instructed that if they found the employees liable, the complex also would be liable. The special verdict sheet asked the jurors whether they found that the plaintiff was 1) "the victim of malicious prosecution by . . . [the complex]," 2) "the victim of malicious prosecution by . . . [employee number one]," and 3) "the victim of malicious prosecution by . . . [employee number two]." *Id*. at 473. The jurors answered the first question in the affirmative and the latter two questions in the negative.

In a post-trial motion for JNOV, the complex argued that the verdict against it was inconsistent with the verdict in favor of its employees. The court denied the motion. The complex noted an appeal, which ultimately reached the Court of Appeals. The Court reversed the judgment against the complex and directed that judgment be entered in its favor. The Court reasoned that because the complex only could be liable based on respondeat superior, and the "universe of responsible [complex] employees" was limited

to the two defendant employees, "the jury was to base its decision *only* on the conduct of [those two employees], who, the parties conceded, were the agents of [the complex]." *Id*. at 478 (emphasis in original). When "'the answer to one of the questions in a special verdict form would require a verdict in favor of the plaintiff and an answer to another would require a verdict in favor of the defendant, the verdict is irreconcilably defective.'" *Id*. at 488 (quoting *S & R, Inc. v. Nails*, 85 Md. App. 570, 590 (1991), *rev'd on other grounds*, 334 Md. 398 (1994)).[9]

In *Turner v. Hastings*, 432 Md. 499 (2013), by contrast, the Court held that what appeared to be an internally inconsistent jury verdict against a single defendant in an automobile tort case could be reconciled and therefore would be upheld. Hastings ran a red light and struck Turner's vehicle. Turner sued Hastings, and the case was tried to a jury. In a special verdict on Turner's negligence claim, the jury was asked whether Hastings was negligent; whether Turner was contributorily negligent; whether Turner

[9] The *Taha* Court recognized that its holding departed from its decisions upholding inconsistent verdicts in criminal cases but concluded that there was a difference between "inconsistent verdicts in criminal cases and *irreconcilably inconsistent jury verdicts* in civil matters." *Id*. at 488 (emphasis in original) (footnote omitted). Since *Taha* was decided, the Court has extended the prohibition against irreconcilably inconsistent verdicts to criminal cases, with some limitations. *See Price v. State*, 405 Md. 10 (2008) (holding that a verdict acquitting defendant of drug trafficking crimes but finding him guilty of possession of a firearm during and in relation to a drug trafficking crime was irreconcilably inconsistent and vacating that conviction). In *McNeal v. State*, 426 Md. 455 (2012), the Court held that a verdict acquitting a defendant of wearing, carrying, or transporting a handgun, but finding him guilty of possessing a regulated firearm after a prior conviction of a disqualifying crime, was *factually* inconsistent but not *legally* inconsistent, and thus was not subject to vacation.

suffered injuries as a result of the accident; and what damages Turner sustained. The jurors were directed to terminate their deliberations if they answered "No" to the first question; if they answered "Yes" to the second question; or if they answered "No" to the third question.

On the first three questions, the jury found that Hastings was negligent, that Turner was not contributorily negligent, and that Turner had not sustained any injuries as a result of the accident. Nevertheless, the jury went on to answer the fourth question, finding that Turner had sustained $325 in past medical expenses; $18,000 in lost income; $0 in non-economic damages; and $2,820 in property damage to her vehicle. The clerk did not read aloud the answer to the fourth question when the verdict was returned, and the fact that the jury had answered that question was not discovered until after the jury had been hearkened and the jurors had been dismissed. The court immediately went back on the record to hear argument from the parties. Ultimately, it concluded that the jury had "intended to award damages and . . . enrolled the verdict sheet" with the damages award. *Id*. at 504.

Before the Court of Appeals, Turner maintained that, unlike in *Taha*, where the verdicts in favor of the agents and against the principal could not be reconciled, here the verdict was merely inconsistent. The Court agreed, opining that courts should always strive to "reconcile a jury's answers because '[o]ur quest should be for a view of the case which would make the jury's findings consistent.'" *Id*. at 517 (quoting *Edwards v. Gramling Eng'g Corp.*, 322 Md. 535, 548 (1991). In *Taha*, that was not possible because

the jury's finding in favor of the employees "obliterate[ed] any basis" for its finding against the complex. *Id*. That was not so in Turner's case, because the jurors could have found that, although she did not suffer any injury to her person, it was reasonable for her to be examined and that she had suffered property damage to her vehicle and lost income because she could not use her vehicle (a taxi) when it was being repaired.

In a product liability claim for strict liability failure to warn, the plaintiff must prove that the defendant's product was unreasonably dangerous as a result of the defendant's failure to warn and that the plaintiff was injured as a proximate result of the failure to warn. *See Phipps v. General Motors Corp.*, 278 Md. 337, 344 (1976) (discussing the elements of a strict liability products liability action); *Mazda Motor of Am. v. Rogowski*, 105 Md. App. 318, 325 (1995) (explaining that a product is defective if the seller fails to warn about latent defects when the failure will "cause the product to be unreasonably dangerous as marketed"). A negligent failure to warn claim requires proof of those two elements and proof of an additional element—that the defendant had a duty to warn of dangers known to it or dangers that, in the exercise of reasonable care, should have been known to it, and breached that duty. *See* Am. Law of Prod. Liability 3d § 32:25 ("Generally, a manufacturer or seller of a product is negligent if it fails to warn of those dangers of which it knows or reasonably should know."). Knowledge of the danger of the product is a component of both claims. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 435 (1992) (holding that the knowledge component of an action for negligent failure to warn is applicable to a strict liability action). Mack and Ford maintain that in finding

them liable for negligent failure to warn, the jurors must have found the elements of strict liability failure to warn (and the additional breach of duty element), yet, in finding them not liable for strict liability failure to warn, they must have found that at least one of those overlapping elements was not proven. Therefore, the verdicts are irreconcilably inconsistent.

Interesting as this issue is, we shall not address its substance because we conclude that it was waived, in two ways. First, the special verdict sheet prepared by the court did not preclude the jurors from finding the defendants (or any one of them) negligent for failing to warn, but not strictly liable for failing to warn, or vice versa. We recognize that the verdict sheet proposed by Mack and Ford would have precluded such a result, by instructing the jurors to decide strict liability failure to warn first and, if they found in a defendant's favor on that claim, not to decide negligent failure to warn for that defendant. Neither Mack nor Ford objected to the verdict sheet proposed by the court on the ground of inconsistency, however. Under Rule 2-522(b)(5), because that objection was not "distinctly" stated before the jury retired to deliberate, it was waived. By not objecting to the verdict sheet, Mack and Ford acquiesced in the case being submitted to the jurors with questions that permitted the very inconsistency they now complain about. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right.") (quoting *Gould v. Transamerican Assocs.*, 224 Md. 285, 294 (1961)).

Even if the issue were not waived under Rule 2-522(b)(5), it was waived when neither Mack nor Ford immediately objected to the verdicts on the ground of inconsistency. In *Givens v. State*, 449 Md. 433 (2016), the Court held that, in a criminal case, when the jury returns inconsistent verdicts, the defendant waives the issue of verdict inconsistency for appeal if he does not object to the verdicts or otherwise make his position known before the verdicts have become final, by polling or hearkening, and the jury is discharged. In that case, a little over an hour after the jury was discharged, the defendant filed a motion to strike the verdicts based on inconsistency. Five days later, he filed a supplemental memorandum in support of his motion. The trial court denied the motion on the basis of waiver.

The case reached the Court of Appeals, which affirmed. It stated, "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury." *Id.* at 472–73. The Court reasoned that the purpose of requiring timely objection to preserve issues for review is to give the trial court an opportunity "to correct any error in the proceedings." *Id.* at 473. "Where a jury reaches legally inconsistent verdicts, and the verdicts are not final and the jury has not been discharged, a trial court may correct the error in the proceedings by sending the jury back to deliberate to resolve the inconsistency." *Id.* Obviously, that cannot be done after the jury has been discharged.

The *Givens* Court observed that legally inconsistent verdicts usually are immediately recognizable, so there is no impediment to a defendant lodging an objection before the jury is discharged. The Court warned:

> The defendant may not stand mute and later complain about the verdicts [that] he [or she] did nothing to cure at the only time [that] a cure was still possible. . . . A defendant simply may not seek to exploit an alleged inconsistency without taking the necessary step to cure or resolve the inconsistency when it is still possible to do so.

Id. at 461 (quoting *Tate v. State*, 182 Md. App. 114, 135–36 (2008)) (alterations in *Givens*).

To be sure, *Givens* is a criminal case. The principle it applies is equally applicable in the civil context, however. When a jury returns a verdict that can be readily identified as inconsistent, the trial court should be given the opportunity to address any inconsistency and, potentially, to remedy it by directing the jurors to continue their deliberations. Here, the inconsistency Mack and Ford complain about would have been evident to them before the jury was discharged. By not objecting at that time, they deprived the court of the opportunity to remedy any inconsistency. It was incumbent upon them to object right then, and not to wait to file a post-trial motion in the hope of obtaining a new trial.[10]

[10] In *Taha*, the plaintiff argued that the complex had waived the issue of verdict inconsistency by not objecting after the verdicts were returned but before the jurors were dismissed. Relying upon a similar case decided by the United States Court of Appeals for the First Circuit, the Court of Appeals concluded that it would be "'procedurally fair'" to address the inconsistency on appeal, in part because the complex was not seeking a

(Continued…)

For these reasons, the verdict inconsistency issue is not properly before this Court to decide.

II.

Jury Instructions and Verdict Form

(Mack & Ford)

Mack and Ford contend the trial court erred by giving jury instructions about design and manufacturing defect claims that Coates did not pursue at trial; by giving legally incorrect jury instructions about failure to warn causation and substantial factor causation; and by giving jury instructions and using a verdict sheet that improperly suggested that Mack and Ford could be held liable for injuries caused by products manufactured by others. They maintain that these errors caused substantial prejudice and warrant a new trial.

Coates responds that the jury instructions in question were pattern instructions that accurately stated the law and were not erroneous; that Mack and Ford waived any objection to the wording of the verdict sheet by failing to make the argument before the

(…continued)
new trial, but to have the judgment against it set aside entirely. 378 Md. at 492 (quoting *DeFeliciano v. DeJesus*, 873 F.2d 447, 451–52 (1st Cir. 1989)). Therefore, judicial inefficiency was not implicated. (A dissent joined by three members of the Court argued that federal case law was not persuasive because the Federal Rules of Civil Procedure included controlling provisions that the Maryland Rules do not have.) Here, Mack and Ford sought a new trial on the negligent failure to warn claim, not the entry of judgment in their favor; and the verdict was returned after the development in the law of inconsistent verdicts in the years after *Taha*.

trial court that they make on appeal; and that, in any event, the verdict sheet argument lacks merit.

a.

Instructions on Claims Not Being Pursued

The court gave the jurors general instructions about negligence and then gave three instructions about a manufacturer's liability for negligence in a product liability case, taken verbatim from MPJI-CV 26:1(a), (b), & (c):

> The manufacturer of a product has a duty to use reasonable care in the design, manufacturing, testing and inspection of the product to see that the product is safe for any reasonably foreseeable use. A failure to fulfill that duty is negligence.
>
> If despite exercising reasonable care *in the design, manufacturing, testing, and inspection of the product*, the product still cannot be made safe for its reasonably foreseeable use, and the manufacturer knows or through the use of reasonable care should know that the dangerous condition is not obvious to the user of the product, the manufacturer has a duty to give an adequate warning of the danger. A failure to fulfill that duty is negligence.
>
> A manufacturer who uses in a product any material or part manufactured by another has a duty to make such reasonable inspections and tests of the material or part as may be necessary to make the finished product reasonably safe for its reasonably foreseeable use. A failure to fulfill that duty is negligence.

(Emphasis added.)

The court gave the pattern jury instruction on strict liability, as follows:

> The manufacturer or seller of any product is responsible for physical harm resulting from a defective product, even though all possible care was used if, number one, the product was in a defective condition at the time it left possession or control of the seller;
>
> Number two, the product was unreasonably dangerous to the user or the user's property;
>
> Number three, the defect caused the injuries or property damage;

> And number four, the product was expected to and did reach the user without substantial change in its condition.
>
> To recover in an action for strict liability for a product defect, the plaintiff need not prove any specific act of negligence. The focus is not [on] the conduct of the manufacturer or seller, but upon the product itself.

MPJI-CV 26:11. Importantly, the court also instructed:

> The plaintiff has alleged that he is entitled to recover against the defendants under either or both of two separate theories of law. These theories of law are called negligence and strict liability.
>
> In the negligence claim, you will be asked to determine whether the conduct of the defendants was negligent in *manufacturing*, selling, distributing, or supplying their product.
>
> In the strict liability, you will be asked to determine whether the defendants' products were defective and unreasonably dangerous because the defendant failed to warn of dangers which they were or should have been aware of when marketing, selling, distributing or supplying the product.

(Emphasis added.) This instruction combined and modified two non-pattern instructions requested by Coates.

Mack and Ford objected to the court's giving MPJI-CV 26:1 (a), (b), and (c), arguing that the inclusion of manufacturing and design defect language was "misleading to the jury and prejudicial." They further objected to the non-pattern instruction characterizing the negligence claim because it "instruct[ed] the jury on design defect and manufacturing claims, but no such claims remain in the case" and because it did not "correctly instruct on [Coates's] failure to warn claim."

On appeal, Mack and Ford assert that these instructions, taken together, were "misleading and confusing," because they permitted the jurors to find liability for negligent design, manufacture, inspection, or testing of the brakes or brake components,

when no evidence was generated to support those liability theories, rather than for negligent failure to warn, which was the only negligence claim being pursued. They rely primarily on *Dechello v. Johnson Enterprises*, 74 Md. App. 228 (1988).

In *Dechello*, a plaintiff was injured when the plastic bottle stopper on a bottle of sparkling wine allegedly "spontaneously ejected and struck her in the eye." *Id.* at 230. She sued the retailer who sold the wine to her husband and also sued the importer of the wine. She did not sue the manufacturer. By the time of trial, she was pursuing two claims: strict liability failure to warn and breach of implied warranty of merchantability. The latter claim was premised upon the bottle being in a "defective condition unreasonably dangerous to the plaintiff." *Id.* at 231. The jury returned a verdict in favor of the defendants and the plaintiff appealed.

This Court reversed, concluding that the jury instructions were "jumbled and confusing." *Id.* at 234. We explained that the plaintiff's theory at trial appeared to be that the bottle was unreasonably dangerous and therefore defective as a result of a failure to warn. The court's instructions "as a whole, so mixed and misstated the theories of recovery pled by [the plaintiff] as to create a real probability of confusion in the minds of the jury." *Id.* at 240–41. The court had instructed the jurors with regard to the strict liability failure to warn claim that the plaintiff's theory was that there was a "manufacturing defect in the bottle" and "because of this manufacturing defect," she was injured. *Id.* at 241 (emphasis omitted). Thereafter, the court instructed the jurors that a seller is liable for a "design defect which caused the product to be unreasonably

dangerous." *Id*. (emphasis omitted). The court expounded on design defects for some time, before again referring to liability for a manufacturing defect. "Nothing at all was said to the jury about the duty to warn, either for purposes of strict liability or breach of implied warranty." *Id.* at 242. We observed that the plaintiff was partially to blame for these errors, but nevertheless concluded that "[w]ith proper instructions . . . the jury could well have found for her." *Id.* We remanded for a new trial.

We return to the case at bar. As pertinent, "[t]he test for whether a[jury] instruction was proper has two aspects: (1) whether the instruction correctly states the law, and (2) whether the law is applicable in light of the evidence before the jury." *Johnson v. State*, 303 Md. 487, 512 (1985). In other words, the jury instruction must have been generated by the evidence and must correctly state the law.

Here, the court's instructions certainly were not jumbled and confused in the manner present in *Dechello*. We conclude, however, that the inclusion of instructions pertaining to manufacturing and design defects was error. The only liability issues properly before the jury were 1) Whether Mack and/or Ford *negligently failed to warn* Coates about the presence of asbestos in the brakes they manufactured (in the case of Ford) and/or sold/supplied (in the case of both defendants); and (2) Whether Mack and/or Ford were *strictly liable for failure to warn*. Nevertheless, the court instructed the jurors that in the negligence claim they were being asked to determine whether Mack and/or Ford were "negligent in *manufacturing, selling, distributing, or supplying their product*" without any mention that the *only* negligence being alleged was the failure to warn. This

error was compounded by its obvious contrast to the instruction that followed, which correctly informed the jurors that the strict liability claim only concerned a failure to warn.

Trial courts are encouraged to use pattern jury instructions in civil and criminal cases. The pattern instructions are a generally reliable source of accurate statements of the law. Many pattern instructions, while accurate, cover several legal theories, including some that may not have been generated by the evidence in the trial of a particular case. When that is the situation, the pattern instructions must be tailored to cover only the legal theories generated by the evidence.

In the case at bar, the only liability theories generated by the evidence and therefore calling for a decision by the jurors were negligent failure to warn and strict liability failure to warn. The pattern instructions given about the duty of a product manufacturer stated that the manufacturer has a duty to use reasonable care "in the design, manufacturing, testing and inspection" of the product to see that it is safe; that the failure to do so is negligence; if the product cannot be made safe the manufacturer must give an adequate warning; and the failure to do so is negligence. This was more than what needed to be said but may not have been problematic in and of itself. It was followed, however, by a non-pattern instruction telling the jurors that "[i]n the negligence claim you will be asked to determine whether the conduct of the defendants was negligent in manufacturing, selling, distributing, or supplying their product."

An error in giving an instruction on a legal theory not generated by the evidence only will warrant reversal if it resulted in prejudice. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 390 (2012), *aff'd*, 430 Md. 431 (2013). Often, there will be no prejudice. We think otherwise here. It is telling that the strict liability failure to warn instructions, on which the jurors returned verdicts in favor of Mack and Ford, were appropriately limited to facts generated by the evidence, unlike the negligent failure to warn instructions, on which the jurors returned verdicts against Mack and Ford. Although we did not address the substance of the verdict inconsistency issue the appellants raised, because the issue was waived, we are persuaded that the verdicts at the least were illogical and that that likely resulted from instructional error.

As the Court of Appeals has observed, "the framework for analysis in strict liability failure to warn cases 'substantially mirrors' that of a negligent failure to warn action." *May v. Air & Liquid Systems Corp.*, 446 Md. 1, 25 n.22 (2015) (citation omitted). In *Owens-Illinois, Inc. v. Zenobia*, *supra*, the Court noted that Professors Henderson and Twerski (who later served as the Reporters for the *Restatement (Third) of Products Liability*) maintained that the difference between strict liability failure to warn and negligent failure to warn is "entirely semantic and unnecessarily confusing." 325 Md. at 435 n.7. The Court recognized that there is an "overlap" between the two claims, but stated that they differ because contributory negligence is a defense to negligent failure to warn, but not to strict liability failure to warn, and because "of the other

comments to § 402A . . . which apply in defective design, defective construction, and failure to warn cases." *Id.*[11]

In the years since *Zenobia* was decided, many courts, in varying contexts and with varying results, have addressed whether negligent failure to warn and strict liability failure to warn are essentially the same. *See e.g.*, *Mazda Motor*, 105 Md. App. at 325 ("a strict liability claim based on failure to warn bears a strong resemblance to a claim of negligence"); *compare Johnson v. Auto Handling Corp.*, 523 S.W.3d 452, 466 (Mo. 2017) (en banc) ("This Court reaffirms its holding that negligence and strict liability theories of product liability are separate and distinct theories.").

Again, we are not deciding that issue today. And we note that the argument Mack and Ford advance is not that the claims are identical, but that all of the elements of a strict

[11] In *Eagle-Picher Industries, Inc. v. Balbos*, 84 Md. App. 10 (1990), *aff'd in part, rev'd in part on other grounds*, 326 Md. 129 (1992), the jury found the asbestos defendants liable on negligence claims but not on strict liability claims. One of the multitude of issues raised on appeal from the judgments was that "the jury verdicts were inconsistent as a matter of law." *Id*. at 21. Four defendants argued that they "could not consistently have been found to have acted negligently with respect to the use of [insulation products] which the jury also concluded were not unreasonably dangerous in the absence of any warning." *Id.* at 35. Assuming, without deciding, that the verdict was inconsistent, this Court rejected this argument because, at that time, inconsistent verdicts "generally are not sufficient grounds for an appellate court to reverse a jury's verdict." *Id*. In *dicta*, we elaborated that the verdicts "may not in fact be inconsistent[,]" because the jurors "may have concluded that whereas the product in its finished state was not 'unreasonably dangerous,' the defendants were negligent in not issuing a warning as to the dangers involved in the application and/or installation of the respective products." *Id.* at 35 n.12.

liability failure to warn claim are subsumed within a negligent failure to warn claim, so it is logically impossible for a jury to find liability for negligent failure to warn and no liability for strict liability failure to warn. We agree that the outcome seems illogical here and that it can be explained by the jurors having been instructed that, with respect to negligence, they were to determine whether Mack and Ford were negligent in *manufacturing* their products, not just in failing to warn, even though the evidence did not generate a negligent manufacturing claim. We conclude, therefore, that the court erred by giving a broad negligence instruction that was not supported by the evidence and that more likely than not the error prejudiced Mack and Ford. Accordingly, a new trial is required.

For guidance on remand, we shall address some of Mack and Ford's other instructional error issues.

b.

Absence of Proximate Cause Instruction

Mack and Ford's proposed instruction No. 23, on negligence, stated that Coates had to prove that their "negligence in failure to warn was a proximate cause of [Coates's] injury." Mack and Ford also proposed a causation instruction, No. 31, further explaining that "[n]o matter the theory of liability, for each Defendant, Plaintiff must prove by a preponderance of the evidence that . . . Defendant's failure to warn was a proximate cause of Plaintiff's claimed injury[.]" Mack and Ford's proposed instruction No. 38 pertained to their negligence cross-claims against CertainTeed and included the

requirement that the jury find that CertainTeed's "failure to warn was a proximate cause of [Coates's] disease."

On November 30, 2016, the court heard argument on the proposed instructions submitted by each party. It decided to give the following causation instruction on the negligence claim. For the plaintiff to recover damages, "the defendants' negligence must be a cause of the plaintiff's injury." On the cross-claims against CertainTeed, however, the court decided to instruct the jurors (as requested by Mack and Ford) that Mack and Ford were required to prove that CertainTeed's "failure to warn was a proximate cause of plaintiff's disease."

Mack and Ford filed written objections the next evening, having obtained a transcript of the hearing,[12] and also objected on the record after the jury was instructed. Ford's counsel objected to the "lack of the proximate cause instruction." Mack's counsel objected to the discrepancy between the causation instruction on Coates's claims and on the cross-claims, explaining:

> [T]he crossclaim instruction that was read differs from what was read as to Ford and Mack. They are obviously the same claims with the same elements, . . . a failure to warn proximate cause instruction was given with regard to the cross-claims but not as with regard to Ford and Mack. So we just think it should be clear to the jury that that's an element that needs to be proven by plaintiff[], if the jury is going to find against in addition to the cross-claims.

[12] The trial court noted that it had not been able to read Mack and Ford's written objections, which had been filed just after 11 p.m. the prior evening.

We agree with Mack and Ford that the trial court erred by not instructing the jurors that liability for negligence required a finding that the failure to warn was a proximate cause of Coates's injury. The instructions did not otherwise make clear that even if the jurors found that Mack and Ford had a duty to warn that was breached, and Coates was injured by exposure to asbestos attributable to their products, the breach had to be a proximate cause of the injury. We disagree with Coates that "proximate cause" is a confusing concept that a court cannot adequately explain. Earlier in its instructions, the court had stated generally that the words foreseeable and foreseeability refer to the use to which a product is intended and harm that may result from its use. The court easily could explain that an injury is proximately caused by a negligent failure to warn when the injury was a reasonably foreseeable consequence of that failure.

c.

Substantial Factor Causation

Mack and Ford proposed the following instruction on substantial factor causation:

> The word "substantial" means that a Defendant's product must have such an effect in producing the injury as to lead reasonable persons to regard it as a cause. In this regard, you should review the evidence in light of your own common sense and determine whether a reasonable person would regard it as a substantial factor.
>
> In determining whether exposure to a Defendant's product was a substantial contributing factor you should consider:
>
> - The nature of the product, including whether it contained asbestos and whether asbestos fibers were released from the product during the time that Plaintiff claims he was exposed to that product;
> - How frequently Plaintiff was exposed to the product;

- The proximity in distance and time that Plaintiff was exposed to the product, in other words, how close Plaintiff was to the product and for how long;
- The regularity of Plaintiff's exposure to the product; and
- Evidence – or lack thereof – regarding the medical cause of Plaintiff's injury. In other words, Plaintiff must prove that exposure to Defendant's product could have caused his claimed disease.

The substantial factor instruction given by the court stated:

> In determining whether any defendants' product was a substantial factor in causing the plaintiff's disease, you must evaluate the following factors.
>
> Number one, the nature of the product;
>
> Number two, the frequency of the use;
>
> Number three, the proximity in distance and in time of the plaintiff to the use of a product;
>
> Number four, the regularity of the exposure of the plaintiff to the use of that product;
>
> And number five, the evidence presented as to the medical causation of the plaintiff's particular disease.
>
> The plaintiff must prove that he was in sufficiently close proximity to an asbestos-releasing product with sufficient frequency and regularity to justify a reasonable inference that the product was a substantial factor in causing his alleged disease.

The instruction as given was a correct statement of the law. While Mack and Ford assert that it failed to "define" substantial factor causation, we think that it appropriately defined the term by reference to the frequency, regularity, and proximity test. *See Eagle-Picher Industries, Inc. v. Balbos*, 326 Md. 179 (1992).

III.

Cross-claim Against CertainTeed

(Mack & Ford)

As discussed, CertainTeed settled with Coates on the eve of trial. While not explicit in the record, it is apparent that CertainTeed did not admit to joint tortfeasor status in doing so. Consequently, Mack and Ford were not "entitled to a reduction of [any] damages awarded against [them] on account of the consideration paid by [CertainTeed]" under the Maryland Uniform Contribution Among Joint Tort-Feasors Act, *Jacobs v. Flynn*, 131 Md. App. 342, 374 (2000), unless "a judge or a jury determine[d] [that CertainTeed was] liable for an injury to [Coates]." *Porter Hayden, Co. v. Bullinger*, 350 Md. 452, 470 (1998).

The evidence bearing on CertainTeed's liability was as follows. Lake testified that Coates worked as a pipe layer for Marcantoni for two or three years. In that capacity, he was "down in the hole" with a partner laying utility pipe. Lake was asked if he knew "[w]hat types of different pipe . . . they install[ed]?" He replied "[c]oncrete pipe, PVC pipe, reinforced concrete pipe, cement pipe." In response to a question about who manufactured those pipes, Lake said "[t]he biggest thing I remember is CertainTeed and Johns-Manville."

Lake explained that Marcantoni worked in the greater Baltimore area, including Baltimore City and parts of Baltimore County, Anne Arundel County, Howard County, and Harford County. He agreed that a "lot of CertainTeed asbestos cement pipe was used at a lot of [the] job sites," that Coates personally "cut a lot of asbestos cement pipe," and that the process of cutting cement pipe "generated huge amounts of dust." He estimated

that "90 percent" of the cement pipe used by Marcantoni was manufactured by CertainTeed, although he did "remember some other brands" as well.

Coates also described the dust created by cutting cement pipe. He testified that the white dust would be "all up in [his] nose" and all over his clothing. He did not identify the brand of the cement pipe he worked with. He remembered working at job sites in Baltimore City, as well as Howard County.

Lauderdale opined that Coates's exposure to asbestos cement pipe increased his risk of developing mesothelioma. Millette acknowledged on cross-examination that he had understood the case to be about "asbestos cement pipe" when he first was consulted, but that he had learned on the eve of trial that he no longer would be asked about Coates's exposure to asbestos cement pipe. He had performed an analysis of asbestos cement pipe that showed the composition to be 25 to 35 percent chrysotile asbestos and 5 to 10 percent crocidolite asbestos.[13] Millette also had engaged in studies to determine the amount of asbestos fibers released during various activities involving asbestos cement pipes. Those studies showed that cutting asbestos cement pipe released extremely high numbers of fibers. Finkelstein opined that Coates's exposure to "CertainTeed asbestos-containing cement pipe substantially increased his risk of mesothelioma."

Mack and Ford's expert witnesses uniformly testified that cutting asbestos cement pipe is a significant source of exposure to asbestos.

[13] Crocidolite is the most carcinogenic form of asbestos.

Excerpts from the deposition testimony of Lloyd Ambler, a former employee of CertainTeed, were read into the record during Mack and Ford's case-in-chief on their cross-claims. Ambler had worked as a technical service engineer in CertainTeed's pipe division beginning in 1967. At that time, asbestos cement pipe was "the only water and sewer pipe manufactured by CertainTeed." Ambler later moved to CertainTeed's sales division, where he was involved in the sale and marketing of asbestos cement pipe until at least 1989.

Ambler testified that he had "promote[d] asbestos-cement pipe products" in Maryland. He could not answer whether that included Baltimore City because he understood that there were "some restrictions on asbestos-cement pipe in the city." CertainTeed's asbestos cement pipe had its name stenciled on the pipe itself.

Ambler explained that between 1972 and 1982, CertainTeed's main distributor for asbestos cement pipes in the Baltimore metropolitan area was A&P Water and Sewer ("A&P"). It also worked with some smaller distributors, but he estimated that 99 percent of the CertainTeed pipe sold in the Baltimore area was distributed by A&P. In 2009, in a deposition in another case, Ambler testified that A&P sold CertainTeed asbestos cement pipe to customers in the Baltimore area. He also testified, however, that it was his understanding that there was no asbestos-cement sewer and water pipe installed in Baltimore City except as underdrain pipe. CertainTeed had stopped manufacturing asbestos-containing underdrain pipe in 1967.

Ambler had reviewed CertainTeed's records and had found that they did not reflect any invoices for sales to A&P to be delivered to Marcantoni or any direct sales to Marcantoni. As a result, when, in 1977, CertainTeed undertook to distribute "Recommended Work Practices" booklets to all its customers to warn them about the risks involved in cutting asbestos cement pipe, it did not distribute those booklets to Marcantoni. Ambler explained that that was because "they never bought an[y] asbestos cement pipe from [CertainTeed]." Also, in 1977, CertainTeed began affixing warning labels directly to the asbestos cement pipes.

Excerpts from Coates's supplemental responses to Ford's requests for admission were read into the record at trial. Coates admitted that he "was exposed to asbestos fibers from products manufactured, distributed, or supplied by CertainTeed Corporation . . . [and] Johns Manville Corporation" and that he "breathed in asbestos fibers from products manufactured, distributed, or supplied by CertainTeed Corporation . . . [and] Johns Manville Corporation."

Before trial, CertainTeed had moved, unsuccessfully, for summary judgment. At trial, counsel for Mack and Ford read into the record an excerpt from Coates's opposition to CertainTeed's motion for summary judgment. The excerpt was as follows:

> Christopher Coates worked as a pipe layer, helper, and truck driver. He worked on a large number of pipe insulation projects in the Baltimore metropolitan area.
>
> From 1972 to 1982, he was regularly, frequently, and proximately exposed to large clouds of visible dust created when he and others around him cut CertainTeed asbestos-containing pipe using gasoline-powered saws.

> CertainTeed's asbestos-cement pipe contained approximate [sic] 15 to 20 percent asbestos, of which almost 5 percent was crocidolite. The remainder being chrysotile. The visible dust created by the power sawing of CertainTeed's asbestos cement pipe contained respirable crocidolite and chrysotile asbestos fibers. CertainTeed acted in reckless disregard with indifference to the dangers presented by its asbestos . . . containing products.

After this excerpt was read into evidence, Coates's lawyer asked permission to read into the record an excerpt from CertainTeed's reply memorandum in support of its motion for summary judgment, for "completeness." Counsel for Mack and Ford objected, arguing that because the reply memorandum was a "different document" and was hearsay, it was not admissible for completeness or otherwise. The court overruled the objection. The excerpt was read into evidence. It stated:

> CertainTeed has conducted an exhaustive investigation into [Coates's] claims, and has amassed tangible conclusive evidence that rebuts the CertainTeed pipe identification of Misters Coates [and] Lake . . . , and demonstrates that Mr. Coates was not exposed to CertainTeed asbestos cement pipe.
>
> As discussed in its Memorandum in Support of CertainTeed's Motion for Summary Judgment, the documentary evidence assembled by CertainTeed indisputably proves CertainTeed asbestos cement pipe was not used at the various job sites as recalled by Mr. Coates and his coworkers.

At the conclusion of all the evidence, Mack and Ford moved for judgment on their cross-claims against CertainTeed, arguing that the evidence conclusively established that Coates was exposed to fibers from asbestos cement pipe manufactured and sold by CertainTeed and that there was no dispute that that exposure was a substantial contributing factor in his developing mesothelioma. Coates's counsel responded that whether Coates was exposed to CertainTeed asbestos cement pipe was a question of fact

for the jury given Ambler's testimony that there was no asbestos cement pipe installed in Baltimore City, where Coates testified he had worked, with the exception of underdrain pipe.

The court denied the motions for judgment. After the jury found against Mack and Ford on their cross-claims, they moved for JNOV or, in the alternative, for a new trial on the same bases. The court denied those motions as well.

a.

Liability as a Matter of Law

Mack and Ford contend the trial court erred by denying their motions for judgment and for JNOV on their cross-claims against CertainTeed because no reasonable jury could find in favor of CertainTeed on the evidence presented. Coates responds that the trial court properly submitted the issue of CertainTeed's liability to the jury because there was evidence from which the jurors could find that Coates never worked on CertainTeed asbestos pipes or that CertainTeed adequately warned customers about the dangers of asbestos.

In assessing whether the trial court erred by denying Mack and Ford's motions for judgment and for JNOV on their cross-claims against CertainTeed, we are guided by the principle that "[a] party is not entitled to judgment [as a matter of law] unless the facts and circumstances so considered are such as to permit of only one inference with regard to the issue presented." *Owens–Illinois, Inc. v. Armstrong*, 326 Md. 107, 117, (1992) (quoting *Impala Platinum v. Impala Sales*, 283 Md. 296, 327 (1978)).

In the case at bar there was a conflict in the evidence as to whether Coates was exposed to asbestos fibers from CertainTeed asbestos cement pipe. There was evidence from which reasonable jurors could find that CertainTeed did not supply any asbestos-cement pipe directly to Marcantoni, or to Marcantoni through its main distributor in the Baltimore metropolitan area; and there was evidence from which reasonable jurors could find that asbestos cement pipe was not permitted to be used in Baltimore City, where Coates primarily had worked as a pipe layer. On the other hand, Lake's testimony was sufficient proof to support a reasonable finding that Coates in fact was exposed to CertainTeed asbestos cement pipe. Accordingly, the issue was disputed and properly was for the jury to decide. On this basis alone, the trial court did not err by denying the motions for judgment and JNOV.[14]

b.

Admission of Excerpt from Reply Memorandum

Mack and Ford contend they are entitled to a new trial on their cross-claims because the trial court erroneously admitted an excerpt from CertainTeed's reply

[14] We decline to consider the argument advanced by Mack that, pursuant to Rule 2-424(d), Coates's admission that he was exposed to CertainTeed attributable asbestos was binding on him and "conclusively established his exposure and inhalation." That argument was not raised in Mack's motion for judgment on its cross-claim and, accordingly, was waived. *See* Md. Rule 2-532(a) ("In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and *only on the grounds advanced in support of the earlier motion*.") (emphasis added).

memorandum in support of its motion for summary judgment that was inadmissible hearsay and that was prejudicial.

Coates responds that any error in admitting the excerpt did not prejudice Mack or Ford because the excerpt was cumulative of the deposition testimony of CertainTeed's corporate designee, which had been read into the record at trial.

With respect to Mack and Ford, the excerpt from Coates's opposition to CertainTeed's motion for summary judgment was a statement by a party opponent, *i.e.*, a statement by Coates, that was offered against Coates. Therefore, under Rule 5-803(a), it was not excluded by the rule against hearsay and was properly admitted in evidence. As noted, once that excerpt was properly admitted, Coates's attorney argued that the excerpt from CertainTeed's reply memorandum in support of its motion for summary judgment should be admitted under the "doctrine of completeness." That doctrine allows "a party to respond to the admission, by an opponent, of part of a writing or conversation, by admitting *the remainder of that writing or conversation*." *Conyers v. State*, 345 Md. 525, 541 (1997) (emphasis added). It "does not allow evidence that is otherwise inadmissible as hearsay to become admissible[,]" however. *Id*. at 545.

The excerpt from CertainTeed's reply memorandum plainly was hearsay, *i.e.*, an out of court declaration offered for its truth. In a footnote, Coates argues that the excerpt "may" have been admissible notwithstanding its hearsay status either as a statement of a party-opponent, or under the catch-all exception. He is mistaken. Although after it settled, CertainTeed remained a cross-defendant, it no longer was Coates's party-

opponent. Moreover, the excerpt from CertainTeed's statement in its reply memorandum was not being offered "against" it, given that it was a denial of CertainTeed's liability. Moreover, it did not have "circumstantial guarantees of trustworthiness" to justify its admission under Rule 5-803(b)(24).

We find no merit in Coates's argument that even if it was error to admit the excerpt, the error was not prejudicial to Mack or Ford because the excerpt merely was "cumulative of and provided a convenient summary of" the prior testimony by Ambler. Ambler testified that he had reviewed CertainTeed's records and found no evidence that it had supplied asbestos cement pipe to Marcantoni directly or via its main supplier. Thus, his testimony was that there was an absence of evidence in CertainTeed's records confirming a sale to Marcantoni. By contrast, the excerpt from CertainTeed's reply memorandum that was read into the record stated that CertainTeed had "conducted an exhaustive investigation into [Coates's] claims" and, importantly, had "amassed tangible ***conclusive*** evidence that rebuts the CertainTeed pipe identification of Misters Coates [and] Lake . . . , and demonstrates that Mr. Coates was not exposed to CertainTeed asbestos cement pipe." The excerpt went on to say that CertainTeed had evidence that "indisputably prove[d] CertainTeed asbestos cement pipe was not used at the various job sites as recalled by Mr. Coates and his coworkers." The reply memorandum, unlike Ambler's testimony, represented that there was affirmative evidence establishing that CertainTeed asbestos cement pipe never was used by Marcantoni when Coates was employed there.

The prejudice to Mack and Ford from the admission of this evidence is clear. The excerpt was read into the record immediately prior to the close of all the evidence. Defense counsel was not permitted to cross-examine the declarant or to rebut the statement that "tangible, conclusive" evidence, none of which was introduced at trial, even existed. In closing argument, Coates's lawyer explicitly referenced the reply memorandum, stating: "We told you that CertainTeed conducted an exhaustive investigation and determined that asbestos cement pipe was not used at the job sites. I think this was the reply that we read in." For these reasons, Mack and Ford are entitled to a new trial on their cross-claims against CertainTeed.

IV.

Sufficiency of the Evidence

(Mack)

Finally, Mack contends the trial court erred by denying its motion for judgment at the close of all the evidence and its motion for JNOV based on insufficient evidence that Coates was exposed to asbestos attributable to Mack products. We address this issue because if the evidence indeed were legally insufficient to support any judgment against Mack, Mack would be entitled to a flat reversal instead of a new trial.

Coates and Lake testified extensively about Coates's exposure to asbestos during his employment by Marcantoni. Lake began working for Marcantoni full-time in 1972, right after he graduated from high school, and continued working there until May of 1984. Initially, he worked in the shop assisting the mechanics, but soon he became an

equipment operator and later a utility pipe foreman. He recalled meeting Coates shortly after he started working full-time. (As mentioned, Coates began working at Marcantoni in 1974.) Coates worked as a pipe-layer for "two or three years" and then began driving trucks. Coates drove "a dump truck and a lowboy," the latter of which Lake explained was a tractor used to "haul[] heavy equipment from one job site to the other." Coates worked under Lake's direct supervision on "hundreds" of occasions.

Lake observed Coates in the shop "very often . . . pretty close to every day." Lake estimated that Coates spent 80 percent of his time in the field and 20 percent in the shop. Coates "picked up his truck [next to the shop]" and, before driving to his work site, would have "a little talk session" with the mechanics and others who were in the shop. Coates also spent time there at the end of the day "all the time." On rainy days, Marcantoni would pay truck drivers to work in the shop to assist the mechanics. Even those employees who were not getting paid to help often would "just hang around the shop half a day before they went home." Lake recalled Coates being in the shop "[e]very rainy day [he could] ever remember."

According to Lake, between 1972 and 1984, Marcantoni owned "four, five, six [Mack] [tandem] dump trucks." A tandem dump truck has one axle in the front, with two wheels, and two axles in the back, each with four wheels, for a total of ten wheels per

truck. Marcantoni purchased the Mack dump trucks around the "late [19]70s," "two . . . at a time."[15]

The "biggest function in the shop" were brake and clutch repair jobs. Brakes on dump trucks were replaced about every six to eight months, with the process lasting about half a day to a full day. Dump trucks required a clutch replacement "every couple years," with the process taking between one and two days.

Lake described the work involved in a brake replacement job as follows. The mechanics would raise the truck on a hydraulic jack and remove the wheel bearings and hubcaps, the tires, and the brake drums. Using a stiff brush, a mechanic or someone assisting the mechanics would "go around the brake shoes and the vacuum plates and all the springs and hardware and clean everything up." At the same time, the person cleaning the brake shoes would use a 120 PSI air hose to blow away the dust created by the brush. This process took about 15 minutes per wheel. It created a "massive amount of some dust coming out of the brake drum area." The next step was to remove the brake shoes. The air hose would be used again after this process was complete. This also would create "large amounts of dust" that "would just fill the shop up, basically." The last step was to reinstall the brake shoes with new hardware and brake pads. The brake shoes were sanded to "take the glaze off of them," as was the brake drum, and the air hose was used for a third time.

[15] Lake testified that Marcantoni also owned two older Mack dump trucks, but they were retired in 1973 or 1974.

Lake also described the process for replacing a clutch on a dump truck. A mechanic would raise the truck on a jack, and remove the driveshaft, the transmission, and the bell housing (which is the housing for the clutch assembly). The bell housing was cleaned using the air hose, which created a "lot of dust." The clutch assembly was removed and sanded to "clean all the hardware." The air hose was used again before the new clutch assembly was installed.

Lake saw Coates in the shop during brake replacements on dump trucks "[v]ery often." Coates "[o]ften" was present when brake drums and shoes were being blown out with the air hose, and frequently assisted the mechanics by doing that job himself. Lake also recalled Coates being present in the shop when an air hose was applied during a clutch replacement "quite a few times." Lake acknowledged that Coates would not have been present "every time" brakes or a clutch were replaced on a vehicle.

Coates testified that he was in the shop "five days a week or six days a week." He would stand around and talk to the people there, or "sometimes . . . help[] . . . out [the mechanic]." From time to time, the mechanic would ask Coates to help clean, "[e]specially if he was doing a brake job." Coates used the air hose to blow out brake dust "[a] lot of times." He was present during brake replacement jobs "[e]very five, six weeks."

Sometime in the "late [19]70s, early [19]80s" Marcantoni acquired "four brand new Mack[] [tandem dump trucks]." Coates was asked whether he ever was "present in

the shop when the Mack trucks had to be serviced?" He replied, "Yeah." When asked what kind of service the mechanics performed on those trucks, he replied:

> From changing the oil to adjusting the clutch. If it had to – after a while – you, it was a while before they started messing with the brakes because they were new trucks. Then eventually started doing brake work on them.

He later was asked if he ever had assisted with clutch work on a Mack truck. He replied in the affirmative, elaborating:

> Had to do whatever had to be done to them. If [the mechanic] had to do a brake job on one of the Macks, you know, after they started to get a little older, had to do a brake job on it, do the same thing. You know, blow it out and stuff, and – if it need some parts, run and get – go to the Mack company and get some parts.

Coates was asked if he recalled how often the Mack dump truck he drove needed to be serviced.[16] He replied that he couldn't really remember, but estimated every "three to four months," adding that in "the beginning they didn't really have much problem with them" "because they were almost new trucks." When asked whether he could recall how soon after the Mack trucks were acquired by Marcantoni that they "required brake work," he replied, "Oh, my gracious, no. No. Like I said, that was 40 something years ago. I couldn't remember back that far." Coates testified that if the Mack truck he drove required brake work, he would "be in [the shop] helping [the mechanic] out," unless a supervisor directed him to be elsewhere. Coates acknowledged that he would not have

[16] Coates had not yet testified that he ever drove a Mack dump truck, but he later testified that he drove a Mack truck "for a little while," before he switched to a lowboy.

been present in the shop "every time a brake was replaced on a Mack vehicle."[17] He could not remember whether the Mack trucks were still being used by Marcantoni in 1989, when the company closed down.

As mentioned, Mack obtained the brakes and clutches for its trucks from two different suppliers. According to Mack's corporate designee, the suppliers put a warning label on the packaging and, when Mack supplied replacement brake kits to companies such as Marcantoni, it usually "supplied the brake linings in the original packaging." Lake and Coates recalled the Mack replacement parts only being labeled with the "Mack" name, however. They did not remember ever seeing a warning on the packaging. Coates acknowledged that he didn't read the "label or the packaging" on replacement parts he picked up for the mechanics, however, because "[i]t was like Chinese to [him]."

In deposition, Brown,[18] a former Mack engineer, testified that Mack purchased brakes with asbestos linings throughout the 1960s and for "most of the 1970s." According to Brown, Mack began the "switch to non-asbestos brake linings" in the "early" 1980s.

Mack's corporate designee testified that replacement brakes for R600 tandem dump trucks, which were the type used by Marcantoni according to Coates and Lake,

[17] As discussed, Coates did not specifically testify that he ever was present when brakes were replaced on a Mack vehicle.

[18] Excerpts of two depositions of Brown were read into the record. The first was taken in 1999, and the second in 2011.

would not have contained asbestos lining after December 1979. On cross-examination, he acknowledged that the conversion to non-asbestos brake linings took many years and was completed in the "mid [19]80s or so, maybe a little later."

Coates's expert witnesses testified that brake dust was a source of asbestos exposure both for people blowing out brake drums or sanding brake shoes, and for people present within a vicinity of 10-20 feet during such activities. Lauderdale, an expert in industrial hygiene with a specialty in asbestos, testified that the presence of "visible dust" from an asbestos containing product is indicative of a high risk for exposure. Once asbestos fibers have been released into the air, they can "remain airborne" for up to eight hours and, once they have settled, they can be redistributed at a later time. Respirable asbestos fibers can be released during brake servicing when the friction components contain asbestos. Activities that can release the fibers include cleaning brake components, repairing brake shoes, replacing the friction surfaces, and sanding or grinding the friction surfaces. A study of exposure levels relative to different types of brake servicing found that "blowing out brake drums with compressed air" creates a zone of exposure that, at a minimum, extends three to five feet away and, at a maximum, ten to twenty feet away, in values at least "a million times higher than background."[19]

[19] The "background levels" of asbestos, meaning the levels present in the ambient air, generally are estimated to be less than one fiber per cubic meter.

Lauderdale opined that "every exposure to asbestos would contribute to the risk" that an individual would develop mesothelioma during his or her lifetime.

Rosner, a professor of public health and history at Columbia University, opined that by the early 1960s, the "association between asbestos exposure and mesothelioma was established in the scientific community." Asbestos in friction components of brakes and clutches also is recognized as a source of asbestos exposure. Millette, an expert in environmental science, forensic engineering, and microscopy, opined based upon his microscopic analysis of brakes manufactured by Ford and the suppliers used by Mack in the relevant time period that the brakes contained both chrysotile and tremolite fibers and that people within ten to twenty feet away from someone blowing out brakes would be exposed to levels of respirable asbestos fibers that were more than 200,000 times the background levels.

Brody, an expert in cell biology and experimental biology as it relates to the effects of asbestos fibers on the human body, explained the process by which asbestos fibers may be respirated into the lungs, causing damage to the DNA in the lining of the lungs and eventually causing mesothelioma. He opined that all types of asbestos, including chrysotile asbestos, can cause mesothelioma.

Maddox was accepted as an expert in pathology and, specifically, in the pathology of malignant mesothelioma. He had reviewed the pathology slides from the biopsy of Coates's tumor and concluded that his cancer was malignant mesothelioma. He opined that that tumor was a "signal tumor" indicative of past exposure to asbestos. In his

opinion, there was no "safe threshold of exposure at levels above background," and Coates's mesothelioma was caused by "cumulative asbestos exposure."[20]

Finkelstein, an expert in the epidemiology of risk assessment relative to asbestos, published several epidemiological studies of asbestos exposure in mechanics who worked with brakes. He found that brake workers have more asbestos in their lungs than individuals with no known asbestos exposure and that the asbestos primarily was from Canada, which is where most American companies purchased asbestos for use in friction lining for brakes. He discussed two epidemiological studies from Sweden and Denmark that determined that mechanics involved in brake work had a risk of developing mesothelioma that was 10 times higher and 25 times higher, respectively, than individuals without any exposure to asbestos. He opined that Coates's mesothelioma was caused by his "cumulative exposures" to asbestos, meaning that "[a]ll of his exposures contributed to risk," while "only a handful of [asbestos] fibers from the many millions that he breathed actually caused the mutations," and that Coates's exposure to "brake dust" was one of the contributing exposures.

Coates's attorney read into the record excerpts from a pamphlet published by the EPA in 1986 titled "Guidance for Preventing Asbestos Disease Among Auto Mechanics"

[20] Maddox was not permitted to offer a specific causation opinion. The court ruled that his expertise was limited to diagnosing mesothelioma, not determining whether exposure to particular sources of asbestos had caused an individual to develop that disease.

("the EPA Gold Book"). As pertinent, the excerpts stated that "[m]illions" of asbestos fibers could be released during brake or clutch servicing and that those fibers could "linger[] around a garage long after a brake job is done and can be breathed in by everyone inside a garage, including customers."

Mack asserts that Coates failed to adduce evidence that he was present in the shop when the brakes or a clutch on a Mack truck were being replaced, much less that he participated in the work. It maintains that there was no evidence establishing that the Mack trucks purchased by Marcantoni in the late 1970s or early 1980s even contained asbestos, given the timing of Mack's conversion to non-asbestos friction components. Further, Mack posits that even if Coates satisfied his burden to prove product-identification, he did not adduce sufficient evidence to prove that his exposure to Mack-attributable asbestos was a substantial factor in his developing mesothelioma, both because he failed to show that his exposure was frequent, proximate, and regular and because he did not present expert testimony on specific causation. It also maintains that the evidence showed that Mack provided warnings with its replacement parts; that those warnings were legally adequate; and that, in any event, the failure to warn could not have been a proximate cause of Coates's injury because (according to his own testimony) he never looked at the warnings.

Coates responds that he adduced legally sufficient evidence to prove that he was exposed to asbestos from Mack products and that any exposure above background levels of asbestos was a substantial factor causing him to develop mesothelioma. He points to

the evidence that he was present in the shop on a daily basis for more than ten years; that he regularly blew out brakes and clutch assemblies with an air hose; that he regularly was present when others performed those jobs; and that the use of an air hose on the friction components created massive amounts of dust containing respirable asbestos fibers. He disagrees that he was required to produce expert testimony that his exposure to Mack-attributable asbestos was a substantial factor causing him to develop mesothelioma, or that the evidence was legally insufficient to allow the jury to find that Mack failed to include warnings on the replacement brakes.

The test for the legal sufficiency of the evidence is whether

> there [is] *some evidence* in the case, including all inferences that may permissibly be drawn therefrom, that, if believed and if given maximum weight, could logically establish all of the elements necessary to prove that the defendant committed the crime, that the tortfeasor committed the tort, that the defendant breached the contract, etc. [by the applicable standard of proof.]

Starke v. Starke, 134 Md. App. 663, 678–79 (2000) (emphasis added). In the case at bar, the only claim sustained against Mack was for negligent failure to warn, and Mack's challenges to the sufficiency of the evidence all turn upon proof of the causation element of that claim.

Eagle-Picher Industries, Inc. v. Balbos, *supra*, 326 Md. 179, is the seminal case addressing the evidence necessary to prove causation in a product liability action arising from exposure to asbestos. Quoting from the *Restatement (Second) of Torts*, section 431, the *Balbos* Court explained that an "actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm." *Id*. at 208–

09. If, as was the case here, there is expert testimony that each exposure to asbestos fibers is cumulative and increases the risk that the plaintiff will develop mesothelioma, then "the failure to warn on the part of any one supplier of an asbestos product to which [the plaintiff] was exposed can operate as a concurrent proximate cause with the failures to warn on the part of other such suppliers." *Id*. at 209. Exposure to the asbestos products of a particular manufacturer or seller "may be established circumstantially." *Id*. at 210.

In *Balbos*, the plaintiffs were shipworkers at two different shipyards owned by Bethlehem Steel. Balbos, a sheet metal worker on ships under construction, regularly worked in the vicinity of the engine room, where asbestos cement insulation was mixed and applied. Knuckles worked as an erector at a ship repair yard, "hang[ing] new plates" on the inside and outside of ships. *Id*. at 207. He worked on two "specifically identified ships" for a period of one year per ship. *Id.* at 208. Those ships had their sterns torn out. The process of ripping out damaged areas of the ship generated asbestos dust from old insulation. There was evidence that Eagle-Picher, a defendant, supplied asbestos powder used at both ship yards. Porter Hayden Company, a defendant in Knuckles's case, was alleged to have supplied Johns-Manville asbestos products to the shipyard and its workers were alleged to have used those products there as well.

On appeal, Eagle-Picher and Porter Hayden challenged the sufficiency of the evidence to prove substantial factor causation as to the products they supplied and/or used. The Court of Appeals enunciated the following standard for proof of causation:

> Whether the exposure of any given bystander to any particular supplier's product will be legally sufficient to permit a finding of substantial-factor causation is fact specific to each case. The finding involves the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff. Within that context, the factors to be evaluated include the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product.

Id. at 210 (internal citation omitted).

The Court discussed several federal cases applying the "frequency, regularity, and proximity" test. In *Blackston v. Shook & Fletcher Insulation Co*., 764 F.2d 1480 (11th Cir. 1985), and *Robertson v. Allied Signal, Inc*., 914 F.2d 360 (3d. Cir. 1990), the plaintiffs presented evidence that the defendants' asbestos products were used frequently at their place of employment but failed to present evidence that they worked in proximity to where those products were being used. The courts held the evidence in those cases legally insufficient to prove causation.

In *Rotondo v. Keene Corp*., 956 F.2d 436 (3d Cir. 1992), the Third Circuit affirmed a verdict in favor of a plaintiff who had worked as a welder in a shipyard for one year. The defendant manufactured an asbestos pipe covering. The evidence showed that the defendant's pipe covering and another manufacturer's pipe covering each were used in the boiler room of a specific ship about fifty percent of the time. The plaintiff had worked in the boiler room of that ship two days per week for three to four months, within

eight feet of the insulation workers. The Third Circuit opined, quoting from a Pennsylvania state court decision:

> "[A] plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use." In particular, a plaintiff must present evidence "to show that he inhaled asbestos fibers shed by the specific manufacturer's product." The relevant evidence is "the frequency of the use of the product and the regularity of the plaintiff's employment in proximity thereto."

Id. at 439 (quoting *Eckenrod v. GAF Corp*., 544 A.2d 50, 52-53 (Pa. 1988)). The plaintiff in *Rotondo* made a sufficient showing because the evidence established not just that the product was used on the ship where he worked, but that it was used in the "specific area (*i.e.*, the boiler room) in which [he] worked." *Id*. at 442. Moreover, the evidence showed that the plaintiff "worked in the boiler room . . . at least 2 days a week for at least 3 to 4 months . . . and that the pipecoverers used the [defendant's] product fifty percent of the time." *Id*.

Returning to the facts before it, the *Balbos* Court concluded that the evidence that "great quantities of [Eagle-Picher asbestos powder]" were used in the vicinity of where Balbos worked at his shipyard and that he often was covered in asbestos dust was legally sufficient to prove circumstantially that he was exposed to asbestos attributable to Eagle-Picher. Likewise, the evidence that placed Knuckles near the engine room on ships being repaired, which was where the Eagle-Picher product had been installed, while not as regular as in Balbos's case, was sufficient for the jury to find that he had been exposed to the product. In contrast, the Court held that the evidence was not legally sufficient to show that Knuckles was exposed to asbestos supplied and/or used by Porter Hayden

because the evidence did not support a reasonable inference that Porter Hayden was the only supplier of the Johns-Manville products. As such, the product identification evidence pertaining to Johns-Manville asbestos did not furnish a causal link to Porter Hayden.

More recently, in *Reiter v. Pneumo Abex, LLC*, 417 Md. 57 (2010), the Court of Appeals affirmed the grant of summary judgment in favor of the manufacturers of crane brake-lining equipment in a case brought against them by the surviving spouses of three deceased steelworkers who had worked at Bethlehem Steel's Sparrow's Point facility. The decedents had worked in three different locations at the facility where overhead cranes were located. The Court upheld the trial court's decision that evidence placing the decedents in the "same massive facility in which overhead cranes were utilized" was not legally sufficient, however. *Id*. at 64. It opined that the plaintiffs were required to adduce evidence that a specific manufacturer's brake linings were used on a crane in the immediate vicinity of the decedents' work site. Evidence that a defendant's product had been used "somewhere in [the facility] does not establish that [that product] was on the crane that was in the 50 square feet where [a decedent] 'actually worked.'" *Id*. at 73.[21]

[21] The Court emphasized, moreover, that the trial court had denied a motion for summary judgment as to other decedents where there was evidence that they worked close enough to the cranes to inhale dust from the brakes *and* that the defendant's products were used at the specific site where the decedents worked.

In reaching that result, the *Reiter* Court distinguished *ACandS, Inc. v. Godwin*, 340 Md. 334 (1995). In *Godwin*, the evidence showed that the plaintiffs had worked in the vicinity of asbestos-containing insulation and that the defendant's asbestos products had been used "interchangeably with the products of other manufacturers." 340 Md. at 355. The *Godwin* Court held that product identification evidence placing the defendant's product in the facility near where each plaintiff worked was sufficient to generate jury questions on whether each plaintiff had been exposed to asbestos fibers from that product. In contrast, in *Reiter*, the evidence showed that crane brake linings were not interchangeable and a particular defendant's brake linings would have to have been replaced with new brake linings from the same manufacturer. Thus, evidence merely placing a decedent near an overhead crane was not sufficient to link that decedent to a particular defendant's asbestos-containing brake linings.

Scapa Dryer Fabrics, Inc. v. Saville, 418 Md. 496 (2011), also is instructive. Carl Saville sued Scapa for negligence and strict liability arising from his alleged exposure to asbestos while working as a "broke hustler[]" at a pulp and paper mill. *Id.* at 506. Scapa supplied the mill with dryer felts, which are "massive fabric sheets" that are run through machines and used to dry slurry, which becomes paper. *Scapa Dryer Fabrics, Inc. v. Saville*, 190 Md. App. 331, 338 (2010). As part of his job, Saville was required to "scrape" the dryer felts with a sharp blade once or twice a day. 418 Md. At 506. The evidence showed that only two of the seventy-five dryer felts supplied by Scapa contained asbestos and that those felts were run exclusively on "the second position" of

one machine for a period of thirteen months. Saville worked in the machine room building where that machine and a second machine were located. *Id.* There was circumstantial evidence permitting a reasonable inference that he worked on the machine on which the asbestos-containing felts were used, although primarily at the "first" position. *Id.* at 507. The evidence was unclear as to the precise distance between the first and second position, but it was less than thirty feet and possibly as little as ten feet apart. On this evidence, the jury found Scapa liable.

The Court of Appeals affirmed the judgment. It reasoned that Saville had met the *Balbos* frequency, regularity, and proximity test by showing that the asbestos-containing dryer felts were used on a particular machine for a period of one year, satisfying the frequency prong; that Saville worked on that machine on a regular basis during that same time period; and that his work site was in proximity to the position on the machine where asbestos felts were in use.

In the case at bar, Mack offers two primary reasons to support its argument that Coates failed to adduce legally sufficient evidence that he was exposed to Mack-attributable asbestos. First, it argues that the evidence showed that it was "extremely unlikely that Coates ever worked at Marcantoni when asbestos-containing friction products were used on [a Mack truck]." We disagree. There was evidence showing that Marcantoni purchased at least four Mack trucks in the late 1970s; that Mack did not begin phasing out asbestos-containing brake linings until the early 1980s; and that it did not complete that process until the mid-1980s, or possibly a "little later." Thus,

reasonable jurors could have found that the Mack trucks purchased by Marcantoni in the late 1970s had asbestos in the friction linings and that replacement parts supplied by Mack through the mid-1980s also contained asbestos in the friction linings.

Second, Mack maintains that even if the Mack brakes contained asbestos during some of the time that Coates worked for Marcantoni, Coates failed to adduce any direct evidence that he ever worked on "any Mack truck replacing asbestos-containing brakes or clutches" and also did not adduce sufficient circumstantial evidence to prove exposure to Mack-attributable asbestos. In response, Coates acknowledges that he did not present direct evidence of his exposure to Mack-attributable asbestos. He argues, however, that he made out a strong circumstantial evidence case based upon the number of brake jobs that necessarily would have been performed over the period of time he worked for Marcantoni after it acquired the Mack trucks. He posits that from 1977 to 1982, at least four Mack trucks containing asbestos in the friction components of the brakes would have been serviced in the shop. He derives this time frame from his testimony that Marcantoni purchased the Mack dump trucks in the late 1970s and the evidence that the brakes in those trucks would have contained asbestos until at least the early 1980s. He then estimates that "at least 960 brake linings were blown out in Marcantoni's garage" during that period of time. He arrives at that figure by multiplying the number of brake linings per wheel (2) by the number of wheels per tandem dump truck (10) by the number of brake replacements per year (2), which comes to 40 brake linings being blown out per

truck per year.[22] He asserts that there was evidence at trial that respirable asbestos fibers released during brake blow outs lingered in the air for hours, days, and even months and, as such, his "mere presence in the . . . garage between five and seven days per week meant he suffered exposure to dust from *all* of the 960 Mack blow-outs." (Emphasis in original.)

We conclude that Coates's evidence satisfied the *Balbos* "frequency, regularity, and proximity" test for substantial factor causation. On the frequency prong, he adduced evidence that the brake linings of the four Mack trucks were serviced in the shop at least twice yearly after they began wearing out, around 1980, in addition to having clutch replacements every few years. On the regularity prong, he adduced evidence that he was in the shop daily, in the mornings and the evenings, and often all day if it rained. Moreover, since a brake job took "half a day to a full day" and a clutch job took at least a full day, a reasonable juror could infer from this evidence that it was more likely than not that Coates was present in the shop when brakes and clutches on Mack trucks were being replaced.

On the proximity prong, Coates adduced evidence that he worked directly on brake blow outs whenever he was asked to help, which was often. When not helping

[22] We agree with Mack that some of Coates's calculations are not supported by the evidence. For instance, assuming that the Mack dump trucks were purchased in 1977, the evidence was clear that those trucks did not require any brake replacements for at least several years, meaning the earliest that Coates could have been present during a brake replacement on a Mack truck would have been 1980, not 1977.

directly, he was socializing with the mechanics, permitting an inference that he was in close proximity to the mechanics and their helpers when brakes were blown out.

Unlike in *Reiter*, where the decedents worked in a static location beneath an overhead crane but could not identify the manufacturer of the brake linings on those cranes, here Coates presented evidence that he was regularly in the location where asbestos exposure occurred *and* that Mack's asbestos-containing product regularly was present in that location as well. In *Rotundo*, one of the federal cases relied upon by the *Balbos* Court, the court emphasized that the evidence did not need to show that a defendant's product was always present *or* that the plaintiff was always present, just that both were present with sufficient regularity to make it more likely than not that the plaintiff was exposed to asbestos fibers from that defendant's product. In the case at bar, the expert witness testimony, coupled with the EPA Gold Book, showed that Coates could be exposed to asbestos fibers any time he was present in the shop during a brake or clutch job, so long as he was within a 20-foot radius of the work.

Mack further argues Coates's failure to adduce any "specific-causation opinion" is fatal to his claim. He suggests that Coates needed to present expert testimony that his exposure to Mack-attributable asbestos was a substantial factor causing him to develop mesothelioma. We disagree. Coates's expert witnesses testified that brake work was a source of asbestos exposure to mechanics, assistants, and bystanders; that inhalation of all types of asbestos fibers can cause mesothelioma; and that exposures are "cumulative," meaning that every exposure increases the risk that an individual will develop

mesothelioma. Coates's expert witnesses did not need to further opine that a specific exposure to a specific manufacturer's asbestos-containing brake lining was a source of exposure that could have caused his mesothelioma.

Mack argues that it furnished warnings about the asbestos-containing friction products it supplied, and that those warnings were adequate, as a matter of law. Coates and Lake both testified, however, that they never saw any warning labels on the Mack brakes. Contrary to Hinderliter's testimony that the replacement parts always were supplied in their original packaging with warning labels, Coates and Lake recalled those products being in boxes with the Mack name on them. This was evidence from which reasonable jurors could find that Mack did not include warning labels with the brakes it supplied to Marcantoni when those brakes contained asbestos.

Finally, Mack asserts it was entitled to judgment on the negligent failure to warn claim because Coates testified that he did not read the warnings on the replacement parts he picked up from Mack. Coates also testified, however, that he did not see any warnings about asbestos and that, had he been warned about the dangers of asbestos, he would have quit his job at Marcantoni. This testimony was sufficient to establish that the failure to warn was a proximate cause of Coates's injury.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY IN FAVOR OF THE APPELLEE ON NEGLIGENT FAILURE TO WARN REVERSED. JUDGMENTS IN FAVOR OF CERTAINTEED CORPORATION ON CROSS-CLAIMS AGAINST IT REVERSED. JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.