2018 IL App (3d) 160406-U

Order filed June 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

JAMES JOHNSON and FRANKIE JOHNSON, Plaintiffs-Appellants, v. PNEUMO ABEX LLC, OWENS-ILLINOIS, INC., METROPOLITAN LIFE INSURANCE COMPANY, HONEYWELL INTERNTIONAL, INC., SPRINKMANN SONS CORPORATION, UNION CARBIDE CORPORATION, TRANE U.S. INC., BRAND INSULATIONS, INC., TREMCO, INC., GEORGIA-PACIFIC LLC, J-M MANUFACTURING COMPANY, INC., BIRD CORPORATION, BORG WARNER MORSE TEC INC., CBS CORPORATION, CERTAINTEED CORPORATION, CHEVRON USA, INC., CLARK-RELIANCE CORPORATION, CRANE COMPANY, DAP, INC., JOHN CRANE, INC., KELLY MOORE PAINT COMPANY, KENTILE FLOORS, INC., KELSEY-HAYES COMPANY, MCMASTER-CARR SUPPLY COMPANY, MECHANICAL INSULATION COMPANY, INC., and WEIL-MCLAIN COMPANY, Defendants (Pneumo Abex LLC and Owens-Illinois, Inc.,	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois. Appeal No. 3-16-0406 Circuit No. 13-L-50 The Honorable Michael D. Risinger Judge, Presiding.

Defendants-Appellees).)

JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Holdridge specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment to asbestos manufacturers in civil conspiracy claims filed by construction worker, who contracted asbestosis, and his wife.

¶ 2 Plaintiff James Johnson, who was diagnosed with asbestosis, and his wife, Frankie Johnson, initiated this suit against various manufacturers and distributors of asbestos and asbestos-containing products. Plaintiffs alleged that defendants Pneumo Abex LLC (Abex), Owens-Illinois, Inc. (Owens), Metropolitan Life Insurance Company (Metropolitan), and Honeywell International, Inc., were involved in a civil conspiracy to conceal the dangers of asbestos. The trial court entered summary judgment in favor of Abex and Owens. Plaintiffs appeal the trial court's summary judgment orders.

¶ 3 FACTS

¶ 4 James Johnson began working in the construction industry in 1965. He used insulation products from Johns-Manville and Owens Corning Fiberglas. In October 2012, James was diagnosed with asbestosis. In May 2013, James and Frankie filed a complaint against many defendants, alleging they either (1) manufactured and sold asbestos-containing products to which James was exposed, or (2) conspired with other asbestos suppliers and manufacturers to conceal the dangers of exposure to asbestos (Abex, Owens, Metropolitan and Honeywell).

¶ 5 Owens and Abex filed motions for summary judgment on plaintiffs' conspiracy claims against them. The following evidence was presented at hearings on those motions and in discovery.

¶ 6 I. Abex

¶ 7 Abex is primarily a foundry company that used asbestos to make brake linings for automobiles. It is the successor to American Brake Shoe and Foundry Company and a variety of other entities.

¶ 8 A. The Saranac Study

¶ 9 In 1936, Vandiver Brown, general counsel of Johns-Manville, which used asbestos in its brake linings and mined and sold asbestos to other manufacturers, sought funding from other brake manufacturing companies for asbestosis research. American Brakeblok, a division of American Brake Shoe Company, Abex's successor, along with eight other corporations in the asbestos business, signed an agreement to underwrite experiments with asbestos dust to be performed by LeRoy Gardner, a pathologist and director of The Saranac Laboratory for the Study of Tuberculosis in New York. American Brakeblok agreed to contribute $250 a year for three years to Gardner's study.

¶ 10 In February 1943, Gardner wrote Brown a letter stating that his testing was complete. He had not yet written a full report of the approximately 40 animal experiments he conducted. However, he provided an annotated outline of a proposed monograph. One of Gardner's experiments involved 11 mice being exposed to airborne asbestos fibers. Gardner observed lung tumors in 8 or 9 of the 11 mice that inhaled asbestos fibers for several months. Gardner considered his results to be "suggestive but not conclusive evidence of a cancer stimulating action by asbestos dust." Gardner noted several problems with his experiment, including that he

(1) used different strains of mice that were not the same age, (2) "unintentionally" used "cancer susceptible" mice, and (3) failed to use control groups. Gardner concluded: "It is hoped that this experiment can be repeated under properly controlled conditions to determine whether asbestos actually favors cancer of the lung." In his letter to Brown, Gardner stated: "The question of cancer susceptibility now seems more significant than I had previously imagined. I believe I can obtain support for repeating it from the cancer research group. As it will take two or three years to complete such a study, I believe it would better be omitted from the present report."

¶ 11 In March 1943, Gardner sent a funding request letter to the National Cancer Institute (NCI) to perform a proper cancer experiment. In his application, Gardner stated that the results of his testing at Saranac "mean[t] nothing" because the sample size was too small and the genetic strain uncontrolled. The NCI cancer council denied Gardner's request, finding that "in Gardner's uncontrolled experiment, finding tumors in 8 out of 11 mice was utterly devoid of scientific significance."

¶ 12 In 1946, before Gardner was able to publish his research, he died. In 1948, the companies that sponsored Gardner's research met to discuss a "draft report" created by Dr. Philip Pratt, a Saranac employee, based on Gardner's findings. Abex chose not to attend the meeting, nominating Brown to act on Abex's behalf. In a memo to Brown, Abex's vice-president opined that he saw nothing in the draft report that caused "undue concern."

¶ 13 At the meeting, the sponsoring companies unanimously agreed to delete all references of cancer contained in the draft report from the published report because (1) Gardner's experiments were not meant to determine the incidence of cancer from asbestos dust exposure, (2) Gardner believed a separate study (taking two to three years) should be performed, (3) Gardner indicated

that cancer susceptibility should be omitted from the report, and (4) a strain of tumor-susceptible mice was used. They also agreed to return all copies of the draft reports to Brown.

¶ 14 Pratt and another Saranac employee, Dr. Arthur Vorwald, took over publication of Gardner's findings and published them in The Journal of Industrial Hygiene and Occupational Medicine in 1951. The report omitted all references to tumors and malignancies in mice. Abex did not notify its workers of any dangers or hazards associated with asbestos and kept warnings off its asbestos products until the 1970s.

¶ 15 B. Evidence and Testimony about the Saranac Study

¶ 16 Plaintiffs disclosed an expert, Dr. Arthur Frank, to support their conspiracy claim. In another case, Arthur Frank testified that the results of the Saranac study "would have been significant scientific evidence on the issue of whether there was a relationship between asbestos and cancer." However, Frank also testified that an experiment like the 11-mice study needs a control group to be scientifically valid, which Gardner's study lacked.

¶ 17 Plaintiffs also rely on a letter written by Dr. Kenneth Lynch to Metropolitan Life Insurance Company in 1947. In that letter, Lynch stated he reviewed Gardner's outline and found it "valuable and publishable as it stands." However, in 1952, Lynch published an article summarizing Gardner's 11-mice study as follows:

> "In one of Dr. Gardner's experiments in asbestosis he found a high incidence of the type of lung cancer to which mice are disposed. Since the strain he was using was unknown as to tumor susceptibility and since the experiment was uncontrolled from that standpoint, he stopped it apparently intending to set up a proper experiment to follow the suggestion later."

Lynch concluded in his article that there was "no experimental proof that the inhalation of asbestos *** will cause bronchiogenic carcinoma." Additionally, in a 1957 article, Lynch stated: "Gardner apparently regarded his observations as merely suggestive." There is no evidence that Abex saw Lynch's letter in the 1940s or 50s.

¶ 18 Abex's retained expert, Dr. James Crapo, provided testimony that Gardner's findings did not constitute scientific evidence about the harmful effects of asbestos because the 11-mice experiment was uncontrolled and susceptible strains of mice were used. He believed it was correct not to publish that study.

¶ 19 Dr. Philip C. Pratt, a pathologist who authored the draft report of Gardner's work in 1948 and co-authored the article on Gardner's findings in 1951, testified that he never intended to publish the mouse tumor results because the data was not scientific. He testified that omitting the discussion of cancer from the article published in 1951 was the correct thing to do from a scientific perspective.

¶ 20 II. Owens

¶ 21 Owens is primarily a glass company. In 1938, Owens and Corning Glass formed Owens Corning Fiberglas (OCF).

¶ 22 A. Kaylo

¶ 23 In 1943, Owens began operating a "pilot plant" to manufacture a new thermal insulation product called Kaylo, which contained asbestos. Upon doing so, Owens contacted Gardner to study the effects of Kaylo dust. Upon his initial examination of Kaylo, Gardner referred to it as a "first-class hazard." In 1948, after Gardner's death, Vorwald, Gardner's successor at Saranac, sent an interim report to Owens. Vorwald reported that testing in animals showed that "Kaylo on

inhalation is capable of producing asbestosis and must be regarded as a potentially-hazardous material." In 1948, Owens began commercial production of Kaylo.

¶ 24 In 1952, Vorwald provided Owens with a final report of the Kaylo dust experiments, informing Owens that "Kaylo dust is capable of producing a peribronchiolar fibrosis typical of asbestosis." In 1953, Owens and OCF entered into an agreement, pursuant to which Owens would manufacture Kaylo and OCF would market and distribute it. Neither Kaylo nor OCF ever placed any warnings on Kaylo. Instead, both companies advertised Kaylo as "non-toxic." In 1958, Owens sold its Kaylo division to OCF. OCF did not warn its employees of the hazards of asbestos until 1978 or 1979.

¶ 25 B. OCF Directors and Stock Ownership

¶ 26 When OCF was created in 1938, Owens owned 49.77% of OCF's common stock. From 1938 to 1947, Owens and OCF had up to four directors in common. In 1948, Owens and OCF shared two directors. Owens and OCF last shared a director in 1949. In 1950, Owens owned 42% of OCF's stock. In 1956, Owens owned over 2 million shares of OCF's stock worth over $143 million. In 1959, Owens owned $110 million worth of OCF stock. In 1968, Owens owned 25% of OCF's common stock. In 1978, Owens owned over 750,000 shares of OCF stock.

¶ 27 C. Court Proceedings

¶ 28 In 1995, OCF initiated an arbitration proceeding against Owens seeking indemnification for asbestos claim payments. OCF's counsel explained that it was difficult for OCF to initiate the proceeding against Owens because of the "filial feelings" between the companies and compared their relationship to that of family members.

¶ 29 In 1999, Owens filed a complaint in the United States District Court for the Eastern District of Texas against Johns-Manville and other asbestos manufacturers, alleging that they

"worked together actively to suppress publication of scientific research concerning the potential risks posed by the exposure to active dust."

¶ 30 In 2003, Owens' CEO, Joseph Lemieux, provided deposition testimony. Lemieux was a plant manager at Owens glass plants in the 1960s and 1970s. He testified that he did not receive information about the dangers of asbestos until after October 1973, when he was no longer working at the plant level. In 1974, most of Owens' glass plants were using asbestos to make glass. Lemieux did not recall ever seeing signs or other information warning plant workers of the dangers of asbestos.

¶ 31 III. Summary Judgment

¶ 32 The trial found that plaintiffs failed to prove the existence of an agreement between Abex, Owens and the other alleged conspirators by clear and convincing evidence. The court granted the summary judgment motions filed by Abex and Owens.

¶ 33 ANALYSIS

¶ 34 Civil conspiracy is "a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998). To state a claim for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999).

¶ 35 "Civil conspiracy is an intentional tort and requires proof that a defendant 'knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner." *Id*. (quoting *Adcock v. Brakegate*, 164 Ill. 2d 54, 62-64 (1994)). "Accidental,

inadvertent or negligent participation in a common scheme does not amount to conspiracy." *Id*. at 133-134.

¶ 36 A conspiracy is almost never susceptible to direct proof. *Id*. at 134. Usually, it must be established by circumstantial evidence. *Id*. If a civil conspiracy is shown by circumstantial evidence, it must be clear and convincing. *Id*. "[P]arallel conduct may serve as circumstantial evidence of a civil conspiracy among manufacturers of the same or similar products but is insufficient proof, by itself, of the agreement element of this tort." *Id*. at 135. Evidence of parallel conduct alone is insufficient to establish a civil conspiracy by clear and convincing evidence. *Id*. at 146.

¶ 37 Facts that are as consistent with innocence as guilt do not support a finding that an agreement exists. *Id*. at 147. Additionally, the mere exchange of information by manufacturers of the same or similar products does not support an inference of an agreement. *Id*. Liability based on speculation is contrary to tort principles and the clear and convincing standard of proof applicable in civil conspiracy cases. *Id*. at 152.

¶ 38 I. Abex

¶ 39 In *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, the Fourth District considered whether the agreement between Abex and other asbestos-manufacturing companies to suppress the cancer references in the Saranac publication was a conspiratorial agreement. The court ruled that it was not against the law for Abex and the other financing corporations to conceal the occurrence of tumors in Gardner's mice study unless they had notice that the tumorous mice were scientific evidence that asbestos caused cancer. *Id*. ¶ 124. The court explained: "It cannot be unlawful to hide information that is devoid of significance." *Id*.

¶ 40 The court found that plaintiffs did not prove their conspiracy claim because they failed to offer expert testimony that the 11-mice study constituted valid scientific evidence that asbestos causes cancer. *Id*. ¶ 127. The court explained: "[A]bsent a qualified expert opinion that the tumorous mice were scientific evidence of a relationship between asbestos and cancer * * * Abex's agreement to conceal information about the tumorous mice was not an agreement to perform an unlawful act and hence was not a conspiratorial agreement." *Id*. ¶ 128. The court further stated: "Besides, in agreeing to suppress the eight or nine tumorous mice, the financing corporations did not agree, generally and perpetually, to withhold any and all information about the carcinogenic effects of asbestos." *Id*. ¶ 130. The court concluded: "[W]e find no evidence in the present case that Abex agreed with other companies to suppress or misrepresent the health hazards of asbestos * * * Therefore, we hold that Abex * * * was entitled to a judgment notwithstanding the verdict * * * because of a lack of clear and convincing evidence on the agreement element of a civil conspiracy." *Id*. ¶ 132.

¶ 41 The following year, the court reaffirmed its decision in *Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, ¶ 51, stating: "We adhere to our analysis in *Rodarmel* and conclude that, without more, Menssen failed to provide evidence that Abex agreed with other companies to suppress or misrepresent the health hazards of asbestos." Thus, the court affirmed the trial court's decision to grant Abex a judgment notwithstanding the verdict "because the additional evidence offered by the plaintiff was insufficient to prove Abex entered into a conspiratorial agreement with other corporations to suppress or misrepresent the dangers of asbestos." *Id*. ¶ 52.

¶ 42 Here, plaintiffs contend that they provided additional evidence that was missing in *Rodarmel* that they claim precluded the trial court from granting Abex's motion for summary judgment. Specifically, they point to the testimony of Dr. Frank, who opined that Gardner's

study "would have been significant scientific evidence on the issue of whether there was a relationship between asbestos and cancer[,]" as well as the letter from Dr. Lynch describing Gardner's research as "valuable and publishable as it stands."

¶ 43 The Fourth District in *Rodarmel* placed much weight on the absence of an expert providing testimony that the tumorous mice were scientific evidence of a relationship between asbestos and cancer. However, we find that the addition of expert testimony in this case did not preclude the trial court's entry of summary judgment in favor of Abex. Engaging in a conspiracy requires that the defendant knowingly participate in a scheme to commit an unlawful act or a lawful act in an unlawful manner. *McClure*, 188 Ill. 2d at 133. Unless Abex knew that the tumorous mice were scientific evidence that asbestos caused cancer when it entered into the agreement with the other asbestos-producing companies to remove any mention of the 11-mice study from the Saranac article, they did not commit conspiracy. See *Rodarmel*, 2011 IL App (4th) 100463, ¶ 128. The fact that an expert testified 70 years later that a study was "significant" does not change what Abex knew in 1943, which was that the study's own author did not recommend publishing the 11-mice study without further experimentation and study.

¶ 44 Additionally, Lynch's letter does not support plaintiffs' position that Abex entered a conspiracy to suppress or misrepresent the harmful effects of asbestos. First, there was no evidence that Abex saw Lynch's 1947 letter when Abex agreed with the other sponsoring companies to delete all references to Gardner's 11-mice study in the final publication of Gardner's work. Moreover, Lynch contradicted his opinion in the 1947 letter that Gardner's outline was "valid and publishable as stands" by later recognizing limitations and weaknesses in Gardner's 11-mice study, calling it "uncontrolled" in 1952 and "merely suggestive" in 1957.

¶ 45 Plaintiffs failed to present any evidence showing that the decisions of Abex and the other companies to remove mention of the tumorous mice were invalid and unlawful. Thus, the trial court properly granted summary judgment to Abex on plaintiffs' civil conspiracy claims. See *id.* ¶ 124.

¶ 46 II. Owens

¶ 47 A claim of conspiracy seeks to hold the encouragers liable for the wrongful act just as the doer of the act is liable. *Gillenwater v. Honeywell International, Inc.*, 2013 IL App (4th) 120929, ¶ 70. "The function of a conspiracy claim is to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted[,] or encouraged the wrongdoer's acts." *Adcock v. Brakegate*, Ltd., 164 Ill. 2d 54, 62 (1994).

¶ 48 A. Owens and OCF

¶ 49 In *Gillenwater*, the Fourth District ruled that that there was clear and convincing evidence that Owens and OCF were engaged in a conspiracy to conceal that Kaylo dust was potentially a respiratory danger from 1953 to 1958, during the period of the distributorship agreement between the two companies. 2013 IL App (4th) 120929, ¶ 96. However, the court ruled that the conspiracy ended with Owens's sale of its Kaylo division to OCF in 1958. *Id.* ¶¶ 107-108.

¶ 50 The court reasoned that the central object of the conspiracy, to sell Kaylo without an adequate warning of its inherent danger, was accomplished in 1958, at the end of the distributorship agreement. *Id.* ¶ 107. The court refused to find that the conspiracy continued beyond 1958 simply because the two entities shared directors and Owens owned OCF stock. See *id.* ¶¶ 86-88, 107. Since the conspiracy between the two companies ended in 1958, long before the plaintiff's alleged injury by Kaylo in 1972, the Fourth District affirmed the trial court's grant of judgment notwithstanding the verdict to Owens. *Id.*

¶ 51 The court also found that Owens withdrew from the conspiracy when it sold the Kaylo division to OCF in 1958. *Id*. ¶ 111. The court relied on United States Supreme Court precedent to determine what qualifies as withdrawal from a civil conspiracy. *Id*. ¶ 110. The U.S. Supreme Court instructed: "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978). The Fourth District reasoned that selling the Kaylo division to OCF was Owens's affirmative act inconsistent with the object of the conspiracy that was communicated to OCF. *Gillenwater*, 2013 IL App (4th) 120929, ¶ 111.

¶ 52 Here, plaintiffs allege in their complaint that James Johnson was first exposed to asbestos in 1965. Because the conspiracy between Owens and OCF ended years before that, in 1958, the trial court granted summary judgment to Owens. Plaintiffs contend that the conspiracy between Owens and OCF continued well beyond 1958 because Owens had a financial stake in OCF's success by sharing directors with OCF and owning OCF stock. To further support their conspiracy theory, plaintiffs rely on statements made and facts revealed from 1995 to 2003, including (1) a statement made by OCF's counsel in 1995 that Owens and OCF had "filial feelings" toward each other, (2) a 1999 complaint filed by Owens against Johns-Manville and other asbestos manufacturers, alleging that they "worked together actively to suppress publication of scientific research concerning the potential risks posed by the exposure to active dust[,]" and (3) 2003 testimony from Owens' CEO that most of Owens' glass plants were using asbestos to make glass in the early 1970s without warning employees of the dangers of asbestos.

¶ 53 The record establishes that when OCF was created in 1938, OCF and Owens were heavily intertwined, with Owens and OCF sharing several directors and Owens owning nearly

half of OCF's stock. However, as time passed, the two companies became increasingly separate. By 1950, Owens and OCF no longer shared any directors, and Owens' OCF stock ownership decreased to 42 percent. Owens' stock ownership of OCF continued to decrease, with Owens owning only 25 percent of OCF's common stock in 1968, just a few years after plaintiff James Johnson was first exposed to asbestos. Because Owens did not share any directors with OCF and owned a declining percentage of OCF stock when plaintiff James Johnson's first asbestos exposure occurred, plaintiff failed to prove by clear and convincing evidence that Owens' conspiracy with OCF existed at the time of plaintiff's injury. See *id*. ¶¶ 86-88.

¶ 54 Additionally, none of the other facts produced by plaintiffs establishes that the conspiracy between Owens and OCF to manufacture and distribute Kaylo existed in 1965 or after. First, OCF's counsel's reference to the "filial feelings" between the companies does not establish that they conspired about asbestos nearly 10 years after they stopped working together on an asbestos product. Additionally, Owens' complaint against Johns-Manville and other asbestos manufacturers filed in 1999 does not support plaintiff's theory that Owens' and OCF's conspiracy continued after 1958 because Owens does not name OCF in its 1999 complaint. Finally, the fact that Owens used asbestos in glass-making in the early 1970s has nothing to do with the alleged conspiracy between Owens and OCF regarding Kaylo or show that the conspiracy extended well beyond 1958.

¶ 55 We agree with *Gillenwater* and affirm the trial court's grant of summary judgment to Owens. The conspiracy between Owens and OCF to create and sell a dangerous product without adequately warning employees and consumers concluded in 1958, well before plaintiff James Johnson's exposure.

¶ 56 CONCLUSION

¶ 57 The judgment of the circuit court of Tazewell County is affirmed.

¶ 58 Affirmed.

¶ 59 JUSTICE HOLDRIDGE, specially concurring in part and dissenting in part:

¶ 60 I agree that the trial court properly granted summary judgment to Abex on the plaintiffs' civil conspiracy claim. I write separately on this issue to clarify one point about the plaintiffs' argument. Like the *Rodarmel* court, at times the majority appears to suggest that the conspiratorial agreement alleged by the plaintiffs was the agreement between Abex and other asbestos manufacturers to suppress the references to cancer in Saranac publication. See *supra* ¶ 39. However, in this case, the plaintiffs have alleged a broader conspiratorial agreement between Abex and other asbestos manufacturers to suppress information about the health risks of asbestos. They maintain that the agreement to suppress cancer references in the Saranac publication is "direct evidence" of this broader agreement; however, they contend that the former agreement is not, in itself, the conspiratorial agreement at issue.

¶ 61 Regardless, for the reasons stated by the majority, the plaintiffs have failed to prove any conspiratorial agreement. As the majority notes, Gardner's 11-mice experiment did not provide reliable scientific evidence supporting a link between asbestos exposure and cancer. For that reason, Gardner himself did not want to publish the results of the study. An agreement to suppress such a deeply flawed and unreliable study could not possibly be evidence of a broader conspiracy to suppress the health risks associated with asbestos.

¶ 62 However, I dissent form the majority's judgment and analysis as to the plaintiffs' civil conspiracy claim against Owens. As the majority notes, the *Gillenwater* court held that there was clear and convincing evidence that Owens and OCF entered into a conspiratorial agreement to produce and sell Kaylo without adequately warning employees and consumers of the health

risks associated with that product, but that Owens withdrew from the conspiracy when it sold its Kaylo division to OCF in 1958. *Gillenwater v. Honeywell International, Inc.*, 2013 IL App (4th) 120929, ¶¶ 96, 107-11. The plaintiffs argue that the *Gillenwater* court erred by ruling as a matter of law that Owens withdrew from the conspiracy in 1958. They argue that the issues of whether and when Owens withdrew from the conspiracy are questions of fact. In this case, the plaintiffs attempted to rebut *Gillenwater*'s ruling by presenting evidence of post-1958 conduct by Owens and OCF in furtherance of a continuing conspiracy. For example, the plaintiffs presented evidence suggesting that, after the 1958 sale, Owens continued to have a financial stake in OCF's Kaylo sales, continued to provide packaging for the Kaylo sold by OCF, and continued to use asbestos in its other products without warning its workers or consumers.

¶ 63 The majority holds that the plaintiffs "failed to prove by clear and convincing evidence" that Owens' conspiracy with OCF existed at the time of the plaintiff's injury because "Owens did not share any directors with OCF and owned a declining percentage of OCF stock when plaintiff James Johnson's first asbestos exposure occurred" in 1965. As an initial matter, the plaintiffs were not required to "prove" a conspiracy by clear and convincing evidence in order to survive a motion for summary judgment. They were merely required to present sufficient facts, when viewed in the light most favorable to the plaintiffs, from which a jury could find the existence of the conspiracy by clear and convincing evidence.[1] Moreover, I do not believe that the plaintiffs were precluded from making this showing merely because Owens did not share any directors with OCF and owned a declining percentage of OCF stock when plaintiff James

[1] See generally *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 134-35, 140-42, 146-47, 151-52 (1999) (evaluating plaintiffs' circumstantial evidence of a civil conspiracy under the clear and convincing standard of proof when deciding defendant's judgment for motion notwithstanding the verdict); *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, ¶¶ 88, 132 (same); *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992) (clear and convincing standard of proof is implicated when the court rules on a motion for summary judgment in antitrust conspiracy action).

Johnson's first asbestos exposure occurred. In my view, the evidence that the plaintiffs' presented regarding Owens' continued financial stake in Kaylo sales after 1958, its continued production of Kaylo packaging, and its continued interest in suppressing information about the harmful effects of asbestos, when viewed in the light most favorable to the plaintiffs, could support a finding of a continuing civil conspiracy after 1958 by clear and convincing evidence.

¶ 64 In my view, given the evidence presented by the plaintiffs, the question of whether and when Owens withdrew from its conspiracy with OCF was a question of fact that should have gone to the jury. I would therefore reverse the trial court's grant of summary judgment for Owens.