IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

BECHTEL CORPORATION et al.,

Appellants,

v.

RICHARD BATCHELOR and
REGINA M. BATCHELOR,

Appellees.
_____/

Case No. 3D16-2624

L.T. Case No. 2016-12-CA-01
(11th Jud. Cir. Ct.)

REPLY BRIEF OF APPELLANTS BECHTEL CORPORATION AND BECHTEL CONSTRUCTION COMPANY

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I. Bechtel Is Entitled To Judgment On The Premises Liability Claim.

The Answer Brief is replete with assertions that have no basis in the record. A stark example is the Batchelors' argument that they tried not only a premises liability claim but also a "general negligence" claim alleged in count II. AB 1-9. They do not deny conceding with respect to that count that "we can't prove our products liability case against Bechtel . . . because they did not manufacture, distribute, or supply asbestos-containing products . . . ." R 13835. They instead argue, wrongly, that count II also included a general negligence claim. AB 2.

Even a cursory reading shows that every paragraph in count II, other than those on damages (¶¶ 55-56), addressed the defendants' "products." R/A 59-63 (¶¶ 54-60). Count II cannot be read as a general negligence claim, unconnected to products. *See* Fla. R. Civ. P. 1.110(f) (separate claims require separate counts).

The Batchelors say that Bechtel recognized their general negligence claim when it argued against "negligence" before and at trial, and they note that the jury instructions also referenced "negligence." AB 2-5. They ignore that a premises liability claim includes ***negligence*** as well as the ***additional*** elements of "the defendant's possession or control of the premises and notice of the dangerous condition." *Lisanti v. City of Port Richey*, 787 So. 2d 36, 37 (Fla. 2d DCA 2001); *see also Solomon v. New Era Meat #2*, 961 So. 2d 989, 989 (Fla. 3d DCA 2007).

In addition, the Batchelors ignore that the jury instructions expressly required the jury to determine, as a "preliminary" matter, that Bechtel was in "possession or control" of the premises. R 15067. This requirement confirms that the Batchelors tried only a premises liability claim. They simply did so on two bases—failing to warn Batchelor of the dangers of asbestos at the plant and failing to maintain the plant premises in a safe condition. R 15063-65.

Finally, the Initial Brief also explained, with no response from the Batchelors, that even had they pled and tried a general negligence claim, they did not prove it because Dr. Finkelstein never opined that ***Bechtel's*** own release of asbestos fibers was a cause of Batchelor's disease. R 15538; IB 40. Instead, he opined that Batchelor's exposures to all asbestos at Turkey Point from 1974 to 1980 were a cause. R/A 14346-47. That broad opinion did not account for whether airborne asbestos was created by Foster Wheeler, FP&L, or anyone else. Hence, it could not support a general negligence claim against Bechtel.

A. Possession Or Control

Continuing to recharacterize the verdict as based on general negligence, the Batchelors quote *Worth v. Eugene Gentile Builders*, 697 So. 2d 945, 948 (Fla. 4th DCA 1997), and argue that they were not required to prove possession or control because Bechtel was "the contractor" at Turkey Point. AB 10. But that quotation merely recognized that a contractor is liable for harm caused by a condition it

creates while its work is "unfinished," 697 So. 2d at 948, which is not what happened here. *Worth* did not hold that premises liability can be imposed on someone not in possession or control, which is what happened here.

Despite the Answer Brief's extensive discussion of Bechtel's work in constructing the plant, and its post-construction maintenance work at the plant, the Batchelors' premises liability claim did not hold Bechtel liable for creating the supposedly dangerous condition when Batchelor worked there. Their own evidence at trial established that Foster Wheeler was responsible for creating airborne asbestos through its maintenance work on the boilers.

To be clear, Dr. Finkelstein's causation opinion against Bechtel rested on ***all*** of Batchelor's exposures to airborne asbestos at Turkey Point between 1974 and 1980, regardless of who created those exposures. Indeed, in closing arguments, the Batchelors argued that Bechtel was liable because it was "in charge of" the plant, not because it created all of the airborne asbestos at the plant. R/A 15084. Nor did the jury instructions require Bechtel to have created the airborne asbestos at issue.

When they finally address the possession or control issue of their premises liability claim, the Batchelors completely ignore the Initial Brief's argument, and Florida case law holding, that possession or control requires "the right to control access to the property." IB 24-25. They do not point to any evidence showing Bechtel had that right at FP&L's plant or any part of it. None did, and this

omission is dispositive of their premises liability claim.

The Batchelors instead point to the 1978 services agreement and Bechtel's "manhours" at the plant from 1976 to 1980. AB 13-15. The Batchelors ignore the Initial Brief, which showed that the 1978 services agreement provided that specific work would be the subject of separate work orders from FP&L and did not grant Bechtel possession or control of any portion of FP&L's plant. IB 26-28. Provisions obligating Bechtel to maintain the generators and return FP&L's equipment upon termination did not do so. *Id.*

Nor did the number of hours worked do so. *Id.* In addition, although the Batchelors state that Bechtel used "trailers to house its hundreds of workers," AB 15, that statement is not only irrelevant to control, it is without support. Bechtel used trailers from time to time for office space and storage. R 14478.

The Batchelors argue that the services agreement's requirement that Bechtel carry liability insurance for injury to others is "probative of control," AB 14, citing only *Jones v. Basha, Inc.*, 96 So. 3d 915 (Fla. 2d DCA 2011). *Jones* says no such thing. The plaintiff there argued that the landlord's insurance policy created a question of fact on the landlord's control of the property. In disagreeing, the Second District merely noted that the tenant also had insurance. *Id.* at 916-17.

A contractor simply ***present*** on another's property can injure someone by its own work, and requiring that contractor to carry insurance is a standard contract

term. No case supports that carrying such insurance shows that the contractor possessed or controlled the owner's property and assumed responsibility for all dangerous conditions present there regardless of who created them.

B. Dangerous Condition

Once again treating their claim as a negligence claim, the Batchelors state that whether a dangerous condition exists is "the same" as the breach analysis for a negligence claim. AB 16-17. It is not. The breach analysis for a negligence claim inquires whether the defendant's conduct was reasonable or violated an applicable standard of care. By comparison, the existence of a condition known to be dangerous is a distinct element of a premises liability claim. *Lisanti*.

The Batchelors never identify any evidence that the levels of airborne asbestos at the plant where Batchelor worked were dangerous by any then-applicable standard. They instead say Bechtel knew asbestos was used in the original construction because Bechtel built the plant. AB 17-18. But that does not show asbestos was being released in known dangerous levels during maintenance work years after construction.

The Batchelors effectively abandon their reliance below on the two 1980 memoranda regarding protection from "heavy" airborne asbestos when working on a particular project on the nuclear side of the plant. AB 18. Batchelor stopped working there ***four years*** earlier and never had any connection to that project.

They now argue that "[t]he fact that Bechtel never produced" a memo regarding "heavy" asbestos on the conventional side from the time Batchelor worked there "does not diminish the evidence clearly establishing that it was there." AB 18-19. But the Batchelors do not and cannot point to any evidence that known dangerous levels of asbestos fibers existed where Batchelor worked.

The Batchelors wrongly claim that no evidence showed Bechtel or FP&L monitored the air when asbestos was removed. AB 22 n.4. They ignore that the uncontroverted evidence on this issue established that FP&L conducted such testing until 1983, when it asked Bechtel to do so. R 13200-01, 14874-76. They also ignore that there was no evidence of any OSHA citation.

The Batchelors argue that Bechtel violated OSHA by not supplying respirators, special clothing, changing rooms, and caution signs. AB 21-22. Again, they assume that asbestos levels exceeded OSHA's permissible exposure limits, making those steps required. But no evidence showed any such violations.

The Batchelors argue that compliance with OSHA does not preclude liability. AB 23-24. But, if the Batchelors wished to assert that OSHA's "permissible exposure limits" did not set the applicable standard for what was known to constitute a dangerous level, then the burden was on them to produce evidence of some other standard and show its violation. They did not do so.

The Batchelors cite 1986 OSHA findings regarding "take home exposure"

and mesothelioma rates. AB 24-25 & n.5. Such findings were not evidence at trial, and they are irrelevant because they post-date Batchelor's work by 6 years.

The Batchelors also cite Dr. Finkelstein's view that OSHA's permissible exposure limits were not set to "eliminate" cancer and his comparison of fiber numbers from ambient air and general asbestos removal. AB 24-25. The Initial Brief demonstrated that Dr. Finkelstein was wrong by quoting OSHA's own language that it set its permissible limits to prevent cancer. IB 30-31. The Initial Brief also demonstrated that Dr. Finkelstein's testimony did not correlate his figures to any standard for permissible exposures and did not show that asbestos levels at the plant were known to be dangerous by any standard. IB 30-32. The Batchelors cannot and do not respond.

C. Causation

1. Toxicity

The Batchelors all but concede that they did not prove the toxicity of the insulation they claim caused Batchelor's disease. They simply say that asbestos is a carcinogen. AB 26. But that does not establish toxicity to prove causation under *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985), *Snoozy v. U.S. Gypsum Co.*, 695 So. 2d 767, 769 (Fla. 3d DCA 1997), *Lagueux v. Union Carbide Corp.*, 861 So. 2d 87, 88 (Fla. 4th DCA 2004), and *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 2d DCA 1994).

The Batchelors state that they were not required to prove toxicity because (1) *Dougherty* and its progeny involved *Fabre* defenses, AB 26-27, and (2) the requirement supposedly applies only to products liability claims that they did not bring against Bechtel. AB 27-28. They provide no argument or authority to support either contention. Both are incorrect.

First, as the Initial Brief demonstrated, toxicity is required to prove causation in a toxic tort case, regardless of whether that element is found in a plaintiff's claim against a defendant or in a defendant's *Fabre* defense regarding a nonparty. IB 34-36. The Batchelors ignore that the discussion in *Celotex*, on which the toxicity requirement is predicated, had nothing to do with *Fabre* defenses.

Second, causation is required in a premises liability case. *Lisanti*. Thus, the Batchelors were required to prove toxicity here. That requirement is particularly important because their claim focused on exposure to outdoor dust intermingled with debris from all insulation removal, and Dr. Finkelstein was admittedly unable to perform a risk assessment for Batchelor's insulation exposures.

2. Speculation And Pyramided Inferences

The Initial Brief also showed that Dr. Finkelstein's causation opinion was based on stacked inferences and unsupported assumptions. The Batchelors assert that they first proved "beyond any reasonable doubt" that the dust Batchelor recalled inhaling outdoors contained asbestos. AB 30. But the evidence they point

to only shows the possibility that some dust contained asbestos—not that all of it did beyond a reasonable doubt. Yet, that threshold inference then became the improper foundation for Dr. Finkelstein's further inferences regarding the sufficiency of Batchelor's exposures to cause mesothelioma, including proximity, duration, and frequency.

The Batchelors incorrectly assert that Dr. Finkelstein made no additional inferences. AB 32. They say he relied on Batchelor's deposition, which they quote to show Batchelor's proximity to gasket replacement work on the nuclear side. *Id.* But his alleged exposures were not limited to that work and the quoted deposition testimony does not even address the duration or frequency of any of his exposures, much less all of them. Thus, it does not support Dr. Finkelstein's broad opinion, which was based on assumptions and improper inferences regarding proximity, duration, and frequency, and expressly encompassed all asbestos exposures on both sides of the plant from 1974 to 1980.

The Batchelors also contend that an expert may rely upon hypothetical facts. AB 31-32. But the hypothetical facts must be supported by evidence or the expert's opinion is of "no evidential value." *Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957); *see also Smith v. State*, 7 So. 3d 473, 501 (Fla. 2009).

The Batchelors seek to avoid *Reaves v. Armstrong World Indus.*, 569 So. 2d 1307 (Fla. 4th DCA 1990), by saying the plaintiff there failed to establish product

identification. AB 33. They ignore, however, that *Reaves* was a bystander case that also rejected using an inference of exposure as a basis to make additional inferences, including sufficient proximity to those who actually removed asbestos-containing insulation. The Fourth District held that causation was speculative and based on pyramided inferences. 569 So. 2d at 1308-09. So too here.

The Batchelors complain that they are being held to an "impossible burden," AB 30, ignoring that they sought an expedited trial before knowing whether any such documentary evidence existed. They also accuse Bechtel of "never bother[ing] to conduct air monitoring" or "discard[ing] the results" of tests. AB 30-31. They ignore that FP&L did the testing during Batchelor's time at Turkey Point and that they were free to seek discovery from FP&L (or Batchelor's union) regarding that period. They also ignore that the trial court found nothing unreasonable about Bechtel no longer having documents relating to the 1970s.

II. At The Very Least, Bechtel Is Entitled To A New Trial.

A. The Excluded *Fabre* Defendants

1. Standard of review

A directed verdict on a *Fabre* defense is reviewed de novo. IB 41.

2. Evidence

The Batchelors make no attempt to defend the trial court's stated basis for excluding Bendix, Ford, NAPA, and Georgia-Pacific from the verdict: that the evidence of exposure to their products was "de minimis" and thus insufficient.

R 15048-49. That ruling is not defensible, as the Batchelors implicitly concede.

The Batchelors instead argue that the evidence failed to show the non-parties' fault and toxicity. AB 37-39. They are incorrect. As to fault, it was shown through Batchelor's testimony that he used those products and they contained no warnings—the very basis on which the Batchelors sued manufacturers in this case. *See* R/A 61, 64. Florida law has long held that the absence of a warning can make a product unreasonably dangerous. *See, e.g.*, *Advanced Chemical Co. v. Harter*, 478 So. 2d 444, 447 (Fla. 1st DCA 1985).

The Batchelors also claim that "the jury did not hear any evidence concerning what Ford, Bendix, NAPA, or Georgia-Pacific knew or should have known about the hazards of asbestos . . . ." AB 39. That is absurd. The law charged manufacturers who used asbestos in their products with having then-current knowledge regarding asbestos. 478 So. 2d at 448 ("A manufacturer has the duty to possess expert knowledge in the field of its product.").

As for toxicity, the Batchelors argue that Bechtel needed to show "the specific asbestos fiber types, the percentages of asbestos, or the physical properties of the various brands of brakes and joint compound to which Mr. Batchelor was exposed." AB 37. They misread *Dougherty*, however, which, quoting *Celotex*, discussed the need to establish the toxicity of an asbestos product. 636 So. 2d at 748. But neither *Celotex* nor *Dougherty* stated a three-part test for toxicity.

Rather, an expert must reach a causation opinion based on the product's potential to cause disease, taking into account the type of asbestos and the product's physical characteristics, and present a causation opinion based on "specifics" regarding "how often the products were used" and "the toxicity of those products as they were used." 636 So. 2d at 748.

Here, Dr. Finkelstein's testimony regarding the brake and joint compound manufacturers met these requirements. He had personal knowledge of those products and had studied them; also, studies had measured the exposures resulting from their use. R 14333-35, 14346, 14349. He was able to quantify Batchelor's exposures from his work with brakes and joint compound and perform a risk assessment to support his causation opinion. R 14376-77.

By comparison, Dr. Finkelstein could not do either of those things regarding the supposedly insulation-based dust Batchelor breathed. R 14377. If his testimony as to Bechtel is nonetheless found to be sufficient to establish causation, then it is necessarily sufficient to do the same regarding the *Fabre* defendants.

B. Adverse Inference Jury Instruction

1. Standard of review

Interpretation of the rules of civil procedure is reviewed do novo. IB 44-45.

2. No "postcard" search requirement

The Initial Brief showed that no case has interpreted rule 1.310(b)(6) to require a corporate defendant to send former employees postcards in a random

search for persons with knowledge about topics listed in a deposition notice. No one does that, and such a failure, standing alone, does not violate the rule.

In response, the Batchelors quote pages of deposition testimony. AB 43-45. But Bechtel was not sanctioned for deposition answers—the transcripts were not even before the trial court. *See* R 6076 n.1. In fact, most of the Answer Brief's quotations are from the subsequent depositions, which ***post-dated*** the sanctions hearing.

The Batchelors also assert that the trial court "sanctioned Bechtel" by requiring its representatives to submit to those additional depositions. AB 40. But no such sanction occurred, which is why they cite nothing in support. Bechtel produced additional documents after the first depositions and offered follow-up depositions, which were held. R 16158-299.

The Batchelors assert that corporations must prepare representatives with information "reasonably available," including information from former employees, citing *Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329 (Fla. 4th DCA 2013). AB 42. But the trial court did not find that Bechtel failed to consult "reasonably available" former employees. It found that Bechtel failed to send postcards to former employees with whom it had no current relationship, on the chance someone would have information regarding events from 36-42 years ago.

3. Erroneous sanction

Even if Bechtel could be held to have violated rule 1.130(b)(6), the imposition of an adverse inference was an abuse of discretion. The Initial Brief explained that, under *Saewitz v. Saewitz*, 79 So. 3d 831, 835 (Fla. 3d DCA 2012), and similar cases, Bechtel should not have been sanctioned without first being given a chance to comply with the rule. IB 46-47. The Batchelors do not respond to this controlling law, which alone requires reversal.

The Initial Brief relied on *Jordan v. Masters*, 821 So. 2d 342 (Fla. 4th DCA 2002), where the Fourth District held an adverse inference instruction to be an improper comment on the evidence, and *Lowder v. Economic Opportunity Family Health CT.*, 680 So. 2d 1133, 1135 (Fla. 3d DCA 1996), where this Court affirmed the denial of an adverse inference instruction after determining that even argument on the failure to call former employees as witnesses was inappropriate when both parties had equal opportunity to do so. Again, the Batchelors do not respond.

The Batchelors argue that, under *Palmas y Bambu S.A. v. E.I. DuPont de Nemours and Co., Inc.*, 881 So. 2d 565, 580 n.13 (Fla. 3d DCA 2004), this Court approved the use of certain adverse inference instructions. AB at 47-48. But that case concerned spoliation, not the failure to search for former employees.

The Batchelors ignore that they made no showing that anyone with relevant information was available, and they offer nothing but their ipse dixit that their case

was hindered by any failure of Bechtel to search for employees from decades earlier. They did not even call the one former employee they mentioned having located. They could have searched for others and called witnesses from FP&L or Batchelor's union. Instead, they filed a motion for sanctions against every defendant on this basis, and at the hearing they blamed Bechtel for not sending postcards to seek out former employees from decades ago. They then obtained an adverse inference instruction that improperly commented on the evidence, suggested that Bechtel had a burden to produce witnesses, and tilted the playing field in the Batchelors' favor.

Finally, the Batchelors have not demonstrated harmless error beyond a reasonable doubt. By simply declaring that any error here would be harmless, AB 50, they do not even try to meet their burden. This erroneous sanction, an adverse inference jury instruction, cannot be harmless beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, a true and correct copy of this brief was served via email on Juan P. Bauta (ncb@ferrarolaw.com, jpb@ferrarolaw.com), and Paulo R. Lima (prl@ferrarolaw.com, jcf@ ferrarolaw.com), of The Ferraro Law Firm, 600 Brickell Avenue, Suite 3800, Miami, Florida 33131, counsel for Appellees.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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