Docket No. 103137.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

SALLY NOLAN, as Executrix of the Estate of Clarence Nolan, Appellee v. WEIL-McLAIN, Appellant.

Opinion filed April 16, 2009.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Garman, Karmeier, and Burke concurred in the judgment and opinion.

Justice Kilbride dissented, with opinion.

Justice Thomas took no part in the decision.

OPINION

Plaintiff, Sally Nolan, as executrix of the estate of her late husband, Clarence Nolan (decedent), sought recovery in the circuit court of Vermilion County against defendant, Weil-McLain, for the wrongful death of her husband. The jury returned a verdict for plaintiff, and a majority of the appellate court affirmed. 365 Ill. App. 3d 963. For the reasons that follow, we reverse the judgment of the appellate court and remand this cause to the circuit court for a new trial.

BACKGROUND

Because of our ultimate disposition of this appeal, it is unnecessary for us to set forth the facts in detail.[1] We recite only those relevant to the issue presented.

A. Pretrial Proceedings

In 2001, Clarence and Sally Nolan filed their original complaint against 12 corporations–including defendant Weil-McLain–alleging that Clarence developed mesothelioma[2] after being negligently exposed to the defendants' asbestos-containing products. Specifically, as to Weil-McLain, it was alleged that Clarence was exposed to asbestos when he installed, repaired or removed boilers manufactured by the company. Because Clarence died prior to trial, Sally, as the executrix of his estate, was substituted as plaintiff.

The 11 other defendants either settled or were dismissed prior to trial, leaving Weil-McLain as the lone defendant in plaintiff's suit. In its motion *in limine*, defendant sought to present evidence that the sole proximate cause of decedent's death was his exposure to asbestos-containing products of nonparty entities. Relying upon *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 355 (1992), defendant maintained that "it is possible to exclude certain exposures as substantial contributing causes of a plaintiff's injury," and that once a plaintiff satisfies *Thacker*'s "frequency, regularity and proximity" test, proximate causation is a question for the jury to determine based upon competent and complete evidence. Defendant also relied upon *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83 (1995), to argue that it may present evidence that a nonparty was the sole proximate cause of the alleged injuries.

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[1]A full recitation of the facts and procedural history are set forth in the circuit court's memorandum "Order on Posttrial Motions" entered on March 21, 2005, which may be found at 2005 WL 724041.

[2]Mesothelioma is a tumor arising from the cells which line the inner surface of the peritoneum, pericardium or pleura. 4 J. Schmidt, Attorney's Dictionary of Medicine and Word Finder M-154 (2007).

Plaintiff thereafter filed a motion *in limine* seeking to bar all evidence of decedent's exposure to asbestos products of nonparties as irrelevant under *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 509 (1987). Plaintiff, relying on *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 790 (1993), also argued that other-exposure evidence would confuse the jury and was highly prejudicial. Plaintiff contended that it was impossible to determine the specific fiber or asbestos exposure that caused decedent's mesothelioma, and, at best, defendant could show only concurrent causation of decedent's injury. Plaintiff also maintained that other-exposure evidence was not necessary for defendant to establish its defense that the amount of asbestos decedent inhaled while working with its products could not have caused his mesothelioma.

Defendant countered that *Lipke*, *Kochan* and the related case of *Spain v. Owens Corning Fiberglass Corp.*, 304 Ill. App. 3d 356 (1999), had been overruled by this court's decision in *Leonardi*, and, in any event, were factually distinguishable. Further, because it was the sole defendant, a jury would not accept a low-dose defense without evidence of other asbestos exposures, and that if the evidence showed that its products were decedent's only exposure, a jury could find that its products caused his mesothelioma. Defendant also asked that evidence of decedent's 1988 lawsuit for a different asbestos-related disease, asbestosis,[3] be presented to the jury, as defendant was not named in that case as a source of his asbestos exposure.

The circuit court prefaced its ruling on the motions by stating, "to me, there's a certain unfairness *** I think under the fact situation in this case defendant should be allowed to introduce the other sources." However, "following the law as I read the law as it exists today," the court granted plaintiff's motion *in limine*, and barred defendant from introducing evidence of decedent's other asbestos exposures. Although the court allowed evidence that decedent's earlier lawsuit had identified parties other than defendant as his only sources of asbestos exposure, they could not be named.

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[3]Asbestosis is a lung disease caused by the prolonged inhalation of asbestos dust. 1 J. Schmidt, Attorney's Dictionary of Medicine and Word Finder A-552 (2007).

B. Trial Proceedings

In January 2004, plaintiff's case proceeded to trial against defendant. There was no factual dispute that the cause of decedent's death was mesothelioma or that for a period of time prior to 1974 various asbestos-containing components were supplied with defendant's boilers, including cement and rope manufactured by other entities. The dispute revolved around the extent of decedent's exposure to defendant's boilers, as well as the type of asbestos-containing components which may have been supplied with them.

The jury heard decedent's testimony via a videotaped evidence deposition. He began his career in 1952, and, over the next 38 years, performed millwright work, plumbing, pipefitting and boiler installation and repair. Decedent estimated he worked on defendant's boilers "20, 25" times, routinely using the asbestos rope provided by defendant between the boiler sections, which produced dust when cut. Other times, he used asbestos cement supplied by defendant to seal gaps between boiler sections, and mixing this cement produced dust. Dust was also created when he cleaned up after a boiler installation. Decedent stated he never saw an asbestos warning on defendant's boilers or any other product, including pipe-covering.

After the video presentation concluded, defendant argued that decedent opened the door to evidence of other exposures by stating he had never seen warnings on *any* asbestos products. The circuit court disagreed, noting that it was "one response" to one question, and that, based upon decedent's testimony, "any intelligent jury [would have] already figured out [decedent had] been exposed to all kinds of asbestos and all kinds of circumstances." In an offer of proof, defendant presented the unedited transcript of decedent's full evidence deposition, including testimony that he had been exposed to numerous asbestos-containing products neither made nor supplied by defendant, including instances working at Lauhoff Grain, when asbestos dust "rained down" on him from insulation and he "certainly" inhaled it.

Decedent's son, Randall Nolan, testified that in 1972 he began to work with his father, and echoed that they installed and repaired defendant's boilers "20, 25 times," using the asbestos-containing dry cement and rope supplied by defendant, which created dust when mixed or cut. If one section of the boiler was broken, the entire unit had to be torn down and rebuilt, which also created dust. They also

worked "a couple times" with air cell insulation on the boiler jackets, which sometimes crumbled off and released dust.

On cross-examination, Randall admitted that he and his father spent roughly 75% of their time performing pipefitting work at a Quaker Oats plant. Defendant made an offer of proof wherein Randall testified that while working at that and other sites, he and decedent removed pipe covering or insulation with a saw, inhaling large quantities of dust. They also worked in areas where insulation workers created dust while installing asbestos pipe covering.

Paul Schuelke, defendant's director of product compliance, testified that all sectional boilers customarily used asbestos products from the 1950s through the 1970s, and that prior to 1974, the assembly instructions for some of defendant's boilers specified the use of asbestos cement. Defendant also provided asbestos rope and asbestos air cell insulation with some of its boilers. Contrary to Randall Nolan's description, Schuelke stated that work on defendant's boilers did not require handling air cell insulation. Schuelke also stated that none of the workers employed by defendant involved in the daily manufacture of its boilers ever contracted mesothelioma, lung cancer, or any other asbestos-related cancer.

William Ewing, an industrial hygienist, testified as an expert for plaintiff. Ewing opined that by working on defendant's boilers, decedent had "significant exposure" to asbestos by using asbestos rope, mixing dry asbestos cement or tearing out air cell insulation.

During Ewing's cross-examination, defendant established that decedent had also performed pipefitting work during his career. Ewing stated that, as a result, decedent likely would have handled many asbestos-containing products, and would have experienced significant asbestos exposure.

Dr. Eugene Mark, a pathologist, also testified as an expert for plaintiff. According to Dr. Mark, "all forms of asbestos cause mesothelioma," and that no exposure to asbestos is safe, including exposure to chrysotile asbestos fibers, the type defendant claimed was used in its products. Dr. Mark found it impossible to determine which asbestos exposure during decedent's career was the sole or single cause of his mesothelioma, and opined that "each and every exposure

to asbestos that [decedent] had was a substantial contributing factor in causing his malignant mesothelioma."

On cross-examination, Dr. Mark accepted the propositions that "on a fiber-by-fiber basis, chrysotile [was] the least carcinogenic" type of asbestos, and that "a greater dose of exposure to chrysotile [would be] required than required for amphibole asbestos exposure" to cause mesothelioma. Dr. Mark also agreed that some studies found no link between chrysotile asbestos exposure and mesothelioma. On redirect, however, Dr. Mark explained that pure chrysotile is rarely found in asbestos products, as it is often mixed with other fibers during the production process.

Defendant made an offer of proof wherein Dr. Mark agreed that pipe covering and insulation contained amphibole asbestos fibers and are considered "potential high-dose, high-exposure products" if handled improperly. He conceded that decedent experienced significant exposure to asbestos by working near insulators removing and installing pipe covering, making those exposures a "significant contributing factor" in decedent's mesothelioma.

Dr. Richard Lemen, an epidemiologist, also testified as an expert on plaintiff's behalf. Dr. Lemen stated that the majority of experts believe chrysotile asbestos causes mesothelioma.

On cross-examination, however, Dr. Lemen agreed that several studies have shown a link between mesothelioma and amphibole-type fibers in pipe covering, and that chrysotile fibers are less potent than other fiber types, although "because of its vast usage, [chrysotile] can certainly account for many cases of mesothelioma." He also agreed that there remains scientific debate over whether chrysotile can cause mesothelioma. On redirect, however, Dr. Lemen stated that it was "an academic question as to whether pure chrysotile causes mesothelioma" because studies showed that all commercial forms of asbestos have been contaminated with other fiber types.

Testifying as an expert for defendant, industrial hygienist Frederick Boelter opined that decedent's asbestos exposure from defendant's boilers was insignificant, as only between 2% and 5% of the total work time would be spent in contact with asbestos-containing components. Boelter performed studies in preparation for trial on four boilers manufactured by defendant which revealed that the airborne

asbestos fibers generated were within regulatory limits, and the asbestos in the boiler components was pure chrysotile, with no contamination by other fibers. Based on these studies, Boelter opined that the asbestos exposure of someone who did not work with boilers would be higher than the exposure decedent would have received over 30 years of working with these boilers. Boelter concluded that working with or around asbestos components of defendant's boilers did not create a risk of asbestos-related disease.

On cross-examination, Boelter acknowledged that all but one of the boilers he tested was built after 1974. In addition, none contained air cell insulation and, to his knowledge, none involved the use of dry insulating cement.

Defendant also presented the expert testimony of Dr. Robert Sawyer, a consultant in occupational and preventive medicine, who, contrary to Dr. Lemen, believed that hazardous contaminants could be removed from chrysotile. Dr. Sawyer opined that the type of asbestos found in defendant's boilers was not hazardous at the level of decedent's exposure, and would only be dangerous after a thousand years of the daily average dosage. Dr. Sawyer also noted several studies indicating that pure chrysotile asbestos was not harmful. Although he believed decedent's condition was "occupationally related," Dr. Sawyer concluded that decedent's mesothelioma "could not have been caused by the asbestos component[s] of [defendant's] boiler on the basis of dose and fiber type."

During cross-examination, Dr. Sawyer admitted that he had a "pretty good idea" that only chrysotile was used in defendant's products, but was not completely certain. He also agreed that many asbestos experts believe that chrysotile can cause mesothelioma, and there is no governmental agency in the world that has concluded that chrysotile does not cause this disease.

Defendant then made an offer of proof, wherein Dr. Sawyer testified that he believed decedent was exposed to "pipe covering, thermal insulation, [and] adhesives, [but] primarily pipe covering" in his pipefitting work, and that his mesothelioma was caused by the amphibole fibers in those products.

At the close of the evidence, the circuit court read the following judicial notice statement to the jury: "Clarence Nolan filed a lawsuit

on March 3rd, 1988, claiming that he developed asbestos-related pleural disease and pleural calcification as a result of exposure to asbestos-containing products. Weil-McLain was not a named defendant in that lawsuit." The circuit court then gave the jury, over plaintiff's objection, defendant's proffered sole proximate cause defense instruction, explaining that jurors could reasonably find that decedent's mesothelioma was not caused by asbestos exposure from defendant's products due to the dose and fiber type. Based on that finding, the jury could conclude that some other asbestos product was the sole proximate cause of decedent's disease.

The jury rendered a verdict in favor of plaintiff, awarding $2,368,000 in damages. This award was reduced by a $1,222,500 setoff for the amounts received from the defendants who had settled and been dismissed from the case.

C. Posttrial Proceedings

Defendant filed a timely posttrial motion in which it argued, *inter alia*, that the circuit court erred in granting plaintiff's motion *in limine* to exclude all evidence of decedent's other exposures to asbestos. In a 58-page written order, the trial court set forth in detail the evidence presented at trial, as well as the rationale for its trial rulings and its analysis of defendant's posttrial arguments. Although the court ultimately denied defendant's motion, it prefaced its ruling by noting that "the conflict for the court in this case has been between what the court considers the law *should* be, and the current state of the law in asbestos litigation." (Emphasis in original). The court candidly acknowledged that it was denying defendant's motion "reluctantly," but was bound by the principle of *stare decisis* to do so.

D. Appellate Proceedings

A majority of the appellate court affirmed. 365 Ill. App. 3d 963. The panel rejected defendant's argument that the lower court erred by excluding evidence of decedent's other exposures to asbestos, holding that "[o]nce a plaintiff satisfies the [frequency, regularity and proximity] *Thacker* test, a defendant is presumed to be a proximate cause of a decedent's asbestos injury." 365 Ill. App. 3d at 968. Although the trier of fact is required "to independently evaluate

whether the exposure was a substantial factor in causing decedent's injury," the panel, relying upon *Lipke*, *Kochan* and *Spain*, held that evidence of other asbestos exposures is irrelevant in answering this question. 365 Ill. App. 3d at 966-68. The panel also found defendant's reliance upon this court's decision in *Leonardi* to argue that such evidence is properly admitted to support a sole proximate cause defense to be misplaced. Noting that *Leonardi* involved a medical malpractice action, the panel held it did not control the instant cause, which "indisputably involves asbestos exposure rather than medical malpractice." 365 Ill. App. 3d at 968. The panel concluded that it was reasonable for the jury to find that "decedent was exposed to defendant's asbestos-containing products," and that such exposure "was a substantial factor in causing decedent's injuries and resulting death." 365 Ill. App. 3d at 969.

The dissenting justice, believing it was error to bar the other-exposure evidence, would have reversed and remanded this cause for a new trial where defendant would be permitted to present the jury with evidence of decedent's other asbestos exposures in support of its sole proximate cause defense. 365 Ill. App. 3d at 977-78 (Steigmann, J., dissenting).

This court allowed defendant's petition for leave to appeal. 210 Ill. 2d R. 315. We also allowed the filing of several *amicus curiae* briefs in support of both plaintiff and defendant. 210 Ill. 2d R. 345.

ANALYSIS

This appeal presents the question of whether the circuit court committed error by excluding all evidence of decedent's exposure to asbestos throughout his 38-year career from products other than those of defendant. Defendant contends that the circuit court's ruling improperly deprived it of its right to present evidence in support of its sole proximate cause defense, as it could not identify to the jury other asbestos exposures of sufficient dosage and fiber type as the sole proximate cause of decedent's injuries. Further, defendant maintains that the circuit court's ruling–based upon the appellate court's decision in *Lipke* and its progeny–directly conflicts with this court's decisions in *Thacker* and *Leonardi* by creating an "irrebutable presumption" of liability, as "the jury was not allowed to consider and

weigh the evidence, and instead, the lower courts chose which side's evidence was to be admitted and believed." Defendant also notes the circuit court's candid admission that it denied its posttrial motion on this issue "reluctantly." Because defendant contends these trial errors were not harmless, it requests that we reverse the judgment of the lower courts and remand this cause for a new trial, where evidence of all of decedent's exposures to asbestos may be admitted.

Plaintiff counters that, based upon the *Lipke* line of cases holding such evidence to be irrelevant, the circuit court properly excluded evidence of decedent's exposure to other asbestos-containing products. Plaintiff contends that asbestos cases are "completely unlike" other tort cases, in that "they call for different rules of proof," evidenced by the "presumption" of causation established by this court in *Thacker*. To that end, plaintiff requests that we "recognize an exception to the rule set forth in *Leonardi*" for asbestos actions. Finally, plaintiff disputes defendant's assertion that any trial error was not harmless because despite the exclusion of other-exposure evidence, "[t]he jury [nevertheless] heard all the relevant evidence *** [and] clearly understood that [decedent] was exposed to asbestos from sources other than [defendant]." We disagree with plaintiff on all points.

Because the lower courts' exclusion of evidence of decedent's other exposures to asbestos was based upon their interpretation of existing case law, the question presented is one of law. Accordingly, our review is *de novo*. *In re A.H.*, 207 Ill. 2d 590, 593 (2003).

In light of the parties' arguments, our analysis in this case is necessarily three-fold. First, we must initially examine whether *Thacker* created the presumption of causation that plaintiff suggests. If *Thacker* did create such a presumption, then the circuit court's exclusion of other evidence was correct. If *Thacker* did not create such a presumption, however, we must then examine the separate question of the propriety of the circuit court's ruling excluding evidence of decedent's exposure to asbestos from nonparties. Finally, if the circuit court erred in excluding this evidence, we must determine if that error is harmless or reversible.

A. The "Presumption" of Causation

In *Thacker*, the plaintiff brought suit against several defendants seeking damages for her husband's injuries and death from cancer, which she claimed he contracted while working with their asbestos-containing products. The jury found for plaintiff, and, on appeal, we considered whether the circuit court erred in denying a defense motion for judgment *n.o.v.* because the plaintiff failed to produce sufficient evidence of exposure to defendants' asbestos. *Thacker*, 151 Ill. 2d at 351-52. Defendants maintained that their products comprised a small amount of the decedent's total asbestos exposure relative to the large amount of exposure he experienced from other sources, and that the jury's verdict was unsupportable, as it was forced to improperly speculate regarding the cause of his injuries. *Thacker*, 151 Ill. 2d at 355. The plaintiff countered that she met her burden by showing that the defendants' asbestos circulated in the air that decedent breathed, and, in light of medical testimony that only slight exposure could cause his illness, the jury's award was justified. *Thacker*, 151 Ill. 2d at 355-56. In holding that the circuit court correctly denied the defense motion for judgment *n.o.v.*, we detailed the proper analysis to be used in determining whether a plaintiff has satisfied the burden of proof at trial.

We began by reciting the "general rule in civil cases" that a plaintiff bears the burden of producing evidence sufficient to establish each element of the claim. *Thacker*, 151 Ill. 2d at 354. We explained that a plaintiff meets the burden of production with regard to a given element of proof "when there is some evidence which, when viewed most favorably to the plaintiff's position, would allow a reasonable trier of fact to conclude the element to be proven," and cautioned that "[w]hile circumstantial evidence may be used to show causation, proof which relies upon mere conjecture or speculation is insufficient." *Thacker*, 151 Ill. 2d at 354.

Focusing upon the specific element of causation, we observed that "causation requires proof of both 'cause in fact' and 'legal cause.' " *Thacker*, 151 Ill. 2d at 354. Because the parties in *Thacker* disputed whether the plaintiff had established the defendants were a "cause in fact" of the decedent's injuries, we noted that there are generally two tests used by courts to determine cause in fact: the traditional "but for" test, where "a defendant's conduct is not a cause of an event if

the event would have occurred without it"; and the "substantial factor" test, where "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." *Thacker*, 151 Ill. 2d at 354-55.

Because the plaintiff in *Thacker* chose to prove that the defendants were a cause in fact of decedent's injuries through the substantial factor test, we discussed that test at length:

> "The substantial factor test requires that the alleged tortfeasor's conduct be somehow 'responsible' for producing the injury at issue. (See Restatement (Second) of Torts §431, Comment *a* (1965).) The question of whether an alleged tortfeasor's conduct meets this test is usually a question for the trier of fact, but if a contrary decision is clearly evident from a review of all the evidence, Illinois courts rule in favor of the defendant as a matter of law. [Citations.] Put in a slightly different way, Illinois courts have, as a matter of law, refused to allow a plaintiff to take the causation question to the jury when there is insufficient evidence for the jury to reasonably find that the defendant's conduct was a cause of the plaintiff's harm or injury." *Thacker*, 151 Ill. 2d at 355.

Thacker noted that because "unique problems [are] posed by asbestos injury," courts "have struggled with how a plaintiff in an asbestos case can fairly meet the burden of production with regard to causation." *Thacker*, 151 Ill. 2d at 356-57. Surveying the varying approaches taken in jurisdictions throughout the country, we observed that the United States Court of Appeals for the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), had fashioned a rule derived from section 431 of the Restatement (Second) of Torts–and which had been adopted in several other jurisdictions–to determine whether sufficient evidence of cause in fact has been presented to allow a case to go to the jury. *Thacker*, 151 Ill. 2d at 359.

In *Lohrmann*, the court upheld a district court's grant of directed verdicts to three manufacturers of asbestos products used in the plaintiff's workplace because the plaintiff had adduced insufficient evidence to establish cause in fact between the use of the products and the plaintiff's asbestosis. The *Lohrmann* court explained in detail the rationale for its decision:

> "Appellants would have us adopt a rule that if the plaintiff can present any evidence that a company's asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff's disease. Such a rule would be contrary to the *** law of substantial causation. ***
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> To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Lohrmann*, 782 F.2d at 1162-63.

The *Lohrmann* court characterized this as "a *de minimis* rule" since "a plaintiff must prove more than a casual or minimum contact with the product." *Lohrmann*, 782 F.2d at 1162.

In *Thacker*, we adopted *Lohrmann*'s "frequency, regularity and proximity" test as a means by which an asbestos plaintiff can prove more than minimum contact to establish that a specific defendant's product was a substantial factor in being a cause in fact of a plaintiff's injury. *Thacker*, 151 Ill. 2d at 359. Thus, if an asbestos plaintiff chooses to establish cause in fact by using the substantial factor test, in order to have the question of legal causation submitted to the jury, the plaintiff must first show that the injured worker "was exposed to the defendant's asbestos through proof that (1) he regularly worked in an area where the defendant's asbestos was frequently used and (2) the injured worker did, in fact, work sufficiently close to this area so as to come into contact with the defendant's product." *Thacker*, 151 Ill. 2d at 359. It was our view in *Thacker* that "[t]hese requirements attempt to seek a balance between the needs of the plaintiff (by recognizing the difficulties of proving contact) with the rights of the defendant (to be free from liability predicated upon guesswork)." *Thacker*, 151 Ill. 2d at 359.

We concluded that under the facts in *Thacker*, the plaintiff had satisfied the frequency, regularity and proximity test to withstand a directed verdict and allow the issue of legal causation to be submitted to the jury. Because we further determined that the jury's ultimate ruling in favor of plaintiff was supportable based upon the totality of the evidence presented, we found no error in the trial court's denial of

the defendants' motion for judgment *n.o.v.*. *Thacker*, 151 Ill. 2d at 366.

In subsequently interpreting our decision in *Thacker*, however, our appellate court has erroneously concluded that *Thacker* stands for the proposition that once a plaintiff meets the frequency, regularity and proximity test, he or she thereby establishes *legal* causation. This error is evident in the opinion of the appellate panel below, which held that "[o]nce a plaintiff satisfies the *Thacker* test, a defendant is presumed to be a proximate cause of a decedent's asbestos injury." 365 Ill. App. 3d at 968, citing *Thacker*, 151 Ill. 2d at 360. This court in *Thacker* created no such presumption. The lower court's incorrect reading of *Thacker* conflicts not only with the clear language of that opinion, but also with our goal of adopting that test to fairly balance the interests of plaintiffs and defendants in these actions.

Thacker reaffirmed the axiomatic rule that a plaintiff alleging personal injury in any tort action–including asbestos cases–must adduce sufficient proof that the defendant caused the injury. *Thacker*, 151 Ill. 2d at 354-55. In so doing, we reiterated black-letter, general principles of tort causation law, and repeated the well-settled rule that proof which relies on conjecture, speculation or guesswork is insufficient. Although we noted that asbestos plaintiffs face unique challenges in showing causation, we did not carve out an exception for asbestos cases which relieved those plaintiffs from meeting the same burden as all other tort plaintiffs. Rather, we adopted *Lohrmann*'s frequency, regularity and proximity test–tailored to application in asbestos actions–as a means by which a plaintiff choosing to prove cause in fact through use of the substantial factor test may meet that burden. In addition, by adopting the rationale of the *Lohrmann* decision, *Thacker* thereby rejected the argument advanced by plaintiff here–and accepted by the appellate panel below–that so long as there is *any* evidence that the injured worker was exposed to a defendant's asbestos-containing product, there is sufficient evidence of cause in fact to allow the issue of legal causation to go to the jury. As the *Lohrman* court observed, such an approach is contrary to the concept of substantial causation, as without the minimum of proof required to establish frequency, regularity and proximity of exposure, a reasonable inference of substantial causation in fact cannot be made.

Thus, when correctly viewed, *Thacker* provides a means for determining whether a plaintiff in an asbestos case has presented sufficient evidence to establish cause in fact and, thereby, shift the *burden of production* to the defendant. We reiterate, however, that the ultimate *burden of proof on the element of causation* remains exclusively on the plaintiff, and that burden is never shifted to the defendant. For the sake of clarity, we reaffirm that *Thacker* creates no presumption on the issue of causation.

B. Exclusion of Other-Exposure Evidence

Having concluded that no presumption of causation was created by our decision in *Thacker*, we now determine whether the circuit court's exclusion of evidence that decedent was exposed to asbestos from sources other than defendant was in error. Defendant correctly notes that in *Thacker*–unlike in the matter before us–evidence that other, nonparty manufacturers' asbestos products were present in the plaintiff's workplace was admitted, and the question of whether other-exposure evidence was admissible was not addressed. We do observe, however, that *Thacker* considered the very evidence that, in the matter at bar, the circuit court precluded the jury from hearing: that the plaintiff had been exposed to asbestos from nonparty entities. *Thacker* allowed the jury to consider all of the evidence–including that of other exposures–in deciding whether the defendants were a legal cause of the decedent's injuries. Although we ultimately held that the plaintiff had adduced sufficient evidence to support the jury's verdict in her favor, it is significant that the jury had a complete picture of all the evidence at the time it rendered its verdict. See *Thacker*, 151 Ill. 2d at 360.

In contrast, although the circuit court in the matter before us allowed plaintiff to introduce circumstantial evidence to satisfy her burden on the causation element, it also excluded evidence which defendant wished to present to rebut plaintiff's claims and to support its sole proximate cause defense. The circuit court felt compelled to bar this evidence pursuant to the decision in *Lipke*–a case decided five years prior to our ruling in *Thacker*–and its progeny. Defendant now asks that we strike down the exclusionary rule crafted by *Lipke*–and subsequently expanded in *Kochan* and *Spain*–because it skews the facts in favor of plaintiff and leads the jury to conclude that the

asbestos products of the sole defendant at trial *must* have caused the plaintiff's asbestos-related disease in the absence of evidence of any other asbestos exposures. In addition, defendant argues that this rule of exclusion conflicts with our decision in *Leonardi*, which upheld the general validity of the sole proximate cause defense and allowed a defendant to introduce evidence of other potential causes of injury so that the jury may resolve which was a proximate cause.

Plaintiff, in defending the validity of the exclusion of other-exposure evidence under *Lipke*, also relies upon *Kochan* to contend that even if such other-exposure evidence is excluded, a defendant may still show that the injured worker was not exposed to the defendant's products, or that his exposure was so insignificant as not to cause harm. Plaintiff also asserts that the exclusion of other-exposure evidence does not conflict with *Leonardi*, a medical malpractice case, because the distinctive factual natures of medical malpractice and asbestos suits require differing standards of proof to establish causation. We reject plaintiff's arguments.

In *Lipke*, the plaintiff was an insulation worker who filed a complaint against 27 manufacturers of asbestos products alleging they caused his asbestosis. Prior to trial, all but one defendant settled. At trial, the remaining defendant argued that the plaintiff did not have asbestosis but, rather, a lung disease caused by "habitual" smoking, and, in the alternative, that he had not been exposed to its asbestos products. The circuit court excluded evidence of the plaintiff's other asbestos exposures, and the jury found in favor of the plaintiff, awarding both compensatory and punitive damages. *Lipke*, 153 Ill. App. 3d at 501.

In affirming the judgment of the circuit court, the appellate court noted that "[t]he major thrust of defendant's brief and argument is directed against the award of punitive damages." *Lipke*, 153 Ill. App. 3d at 503. Accordingly, the appellate opinion, in large part, consists of analysis of this issue. As to the defendant's secondary argument raising "a series of errors dealing with evidence, continuance and instructions," the court, in one short paragraph, disposed of the assertion that evidence of the plaintiff's exposure to other asbestos products was erroneously excluded. After noting the general rule that there can be more than one proximate cause of an injury, the court then stated:

> " 'In such a situation, one guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury ***.' [Citation.] *** [W]here such guilt exists, 'it is no defense that some other person, or thing contributed to bring about the result for which damages are claimed. Either or both parties are liable for all damages sustained.' Thus, the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries. Evidence of such exposure is not relevant." *Lipke*, 153 Ill. App. 3d at 509.

This quoted passage comprises, in its entirety, the *Lipke* exclusionary rule. We note the court simply cites to basic tort law principles that are neither new, novel nor solely applicable to asbestos cases, and fails to analyze how those principles applied to the case before it. In our view, *Lipke* stands for no more than the well-settled rules that it cites: that the concurrent negligence of others does not relieve a negligent defendant from liability. When read correctly, *Lipke* simply holds that if a defendant's negligence proximately caused a plaintiff's harm, evidence that another's negligence might also have been a proximate cause is irrelevant–and therefore properly excluded–if introduced for the purpose of shifting liability to a concurrent tortfeasor. *Lipke* simply determined that evidence of the plaintiff's other exposures was not relevant to the specific defense raised, *i.e.*, that the plaintiff did not have an asbestos-related disease, and he had no exposure whatsoever to defendant's asbestos products. In the matter at bar, however, defendant wishes to offer evidence of decedent's other exposures for different purposes: to contest causation through the use of the sole proximate cause defense, which was not raised by the *Lipke* defendant. As the instant cause presents a factually different situation, *Lipke* is inapposite.

In the appellate court's subsequent decision in *Kochan*, the plaintiffs brought personal injury suits against several defendants to recover damages for injuries suffered by workers who had been exposed to the defendants' asbestos-containing products. Prior to trial, all defendants except one settled with the plaintiffs. Although the remaining defendant argued that it was not a cause in fact of the worker's injuries and sought to introduce other-exposure evidence, the circuit court, relying upon *Lipke*, granted the plaintiffs' motion *in*

limine to exclude such evidence. The jury returned a verdict for the plaintiffs, and defendant appealed. *Kochan*, 242 Ill. App. 3d at 787-88.

In affirming the lower court, the appellate court loosened *Lipke* from its factual moorings and unduly expanded its exclusionary rule to hold that "evidence of exposure to other asbestos-containing products is not relevant *** in cases in which actual cause or cause in fact is disputed." *Kochan*, 242 Ill. App. 3d at 789. In other words, the *Kochan* court extended *Lipke* to hold that other-exposure evidence is *always* irrelevant, and supported this holding with the questionable rationale that because it is "impossible" to determine whether a specific exposure caused injury, "[a]llowing a defendant to present evidence of a plaintiff's exposures to other products whose manufacturers are not defendants in the trial would only confuse the jury," and, therefore, "[t]he purpose for which the evidence is offered is inconsequential." *Kochan*, 242 Ill. App. 3d at 790.

We agree with the circuit court below that *Kochan* "effectively removed from asbestos defendants any opportunity to point to the negligence of another as the sole proximate cause of plaintiff's injury." The circuit court found *Kochan* to be premised upon a "fallacious argument": although that decision purports to allow defendants to present alternative defenses that a particular exposure was not the proximate cause of a plaintiff's injury "simply by showing, for example, that plaintiff was not exposed to its products, that exposure to its products was insufficient to cause injury, or that its product contained such a low amount of asbestos that it could not have been a cause of the injury" (*Kochan*, 243 Ill. App. 3d at 790), the circuit court concluded that these claimed defenses "in reality do not exist because plaintiff will likely call an expert to testify that every exposure to asbestos is a substantial factor in causation." We also agree with the circuit court that *Kochan* is "internally inconsistent," as we fail to discern how it is both "impossible" to exclude specific exposures as a proximate cause, and yet "simple" for a defendant to defeat proximate cause at trial. Indeed, our decision in *Thacker* establishes that it is possible to exclude particular exposures as substantial contributing causes of a plaintiff's injury in asbestos cases, and that proximate cause is properly a question of fact for the jury to resolve based upon competent evidence. *Thacker*, 151 Ill. 2d at 355. The court's holding

in *Kochan* improperly deprives a defendant of a rational alternative explanation, in the form of the excluded other-exposure evidence, for why the plaintiff is suffering from an asbestos-related disease.

The error of *Kochan* becomes more evident upon review of this court's decision in *Leonardi.* There, the plaintiffs, individually and as administrators of the decedent's estate, brought a medical malpractice action against several defendants seeking damages resulting from an improperly performed Cesarean-section procedure. Prior to trial, the decedent's attending physician–who was a named defendant–died and his estate settled with the plaintiffs. Thereafter, the plaintiffs filed a motion *in limine* to bar evidence relating to the alleged negligence of any person other than the remaining named defendants. The circuit court denied the motion and allowed evidence relating to the deceased attending physician's standard of care. The jury found in favor of the defendants, and the appellate court affirmed. *Leonardi*, 168 Ill. 2d at 90-92.

On appeal to this court, the plaintiffs argued that the lower courts erred in denying their motion *in limine* and allowing the jury to hear evidence of the conduct of the decedent's treating physician. The plaintiffs also advanced a broader attack against the validity of the sole proximate cause defense, which we defined as a defense which "seeks to defeat a plaintiff's claim of negligence by establishing proximate cause in the act of solely another not named in the suit." *Leonardi*, 168 Ill. 2d at 92. We noted that the plaintiffs relied upon the

> "common law principle that there can be more than one proximate cause of an injury, and that a person is liable for his or her negligent conduct whether it contributed wholly or partly to the plaintiff's injury *as long as it was one of the proximate causes of the injury.* [Citation.] A person *who is guilty of negligence* cannot avoid responsibility merely because another person is guilty of negligence that contributed to the same injury. *Where such guilt exists*, it is no defense that some other person or thing contributed to the injury. Thus, evidence of another person's liability is irrelevant to the issue of defendant's guilt." (Emphases in original.) *Leonardi*, 168 Ill. 2d at 92-93.

Therefore, the plaintiffs argued, the lower courts erred in denying their motion *in limine* because "evidence of the [attending physician's]

conduct was irrelevant and, therefore, inadmissible." *Leonardi*, 168 Ill. 2d at 92.

We concluded that the plaintiffs' reliance on this principle was "misplaced," as it "presumes that a defendant's conduct is at least *a* proximate cause of the plaintiff's injury." (Emphasis in original.) *Leonardi*, 168 Ill. 2d at 93. The defendants in *Leonardi* "denied that they were even partly a proximate cause of plaintiffs' injuries," and pursued the theory that the decedent's deceased treating physician was the sole proximate cause of the injuries. *Leonardi*, 168 Ill. 2d at 93.

As we did in *Thacker*, we again in *Leonardi* emphasized that "[i]n any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that defendant proximately caused plaintiff's injury." *Leonardi*, 168 Ill. 2d at 93. We also reiterated that "[t]he element of proximate cause is an element of the *plaintiff's* case *** [and] the law in no way shifts to the defendant the burden of proof." (Emphasis in original.) *Leonardi*, 168 Ill. 2d at 93-94.

We further explained that, under this analytical framework, a defendant "has the right not only to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries," but also "has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries." *Leonardi*, 168 Ill. 2d at 101. Accordingly, we expressly rejected the plaintiffs' argument–which was previously adopted by the appellate court in *Kochan*–that evidence of other possible causes for the claimed injury would confuse a jury or "distract[ ] [its] attention from the simple issue of whether a named defendant caused, wholly or partly, a plaintiff's injury." *Leonardi*, 168 Ill. 2d at 94. To the contrary, we held that the "sole proximate cause defense merely focuses the attention of a properly instructed jury *** on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of plaintiff's injury." *Leonardi*, 168 Ill. 2d at 94. We therefore overruled any "[d]ecisions that contain statements to the contrary." *Leonardi*, 168 Ill. 2d at 94.

Leonardi made it clear that the exclusionary rule first fashioned in *Lipke* is limited to the facts presented there, and held that it is error to