SCAPA DRYER FABRICS, INC. V. KNIGHT: TOXIC TORTS, EXPERT TESTIMONY, AND CAUSATION

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In July 2016, the Georgia Supreme Court handed down its opinion in the matter of *Scapa Dryer Fabrics, Inc. v. Knight*, disapproving of the so-called "cumulative exposure theory," popular among plaintiffs' experts in asbestos litigation as a poorly-disguised substitute for the increasingly rejected "every fiber contributes" theory. *Knight* involved a personal injury case where the plaintiffs alleged Mr. Knight's cancer was caused in part by his exposure to asbestos at Scapa's manufacturing facility in Waycross, Georgia, in the 1960s and 70s. After a nearly three-week trial in June 2010, the jury returned an apportioned verdict of $4.2 million against Scapa. Scapa appealed, arguing, in part, that the trial court had erred by admitting the testimony of plaintiffs' expert Dr. Jerrold Abraham that any exposure to asbestos, no matter how small, caused Mr. Knight's disease. In 2015, the Court of Appeals affirmed the trial court with respect to the admission of Abraham's testimony, and Scapa requested cert.

The Supreme Court's decision in *Knight* reversed the Court of Appeals, set aside the jury's verdict against Scapa, and overturned the admission of the disputed expert testimony, an area long-established as one where the trial court holds wide discretion. But it is the substance of Abraham's testimony, and the Court's treatment of it, that makes this case worthy of discussion. Plaintiffs will contend, correctly, that the *Knight* Court's rejection

of the cumulative exposure theory was not absolute, and does not go so far as to require plaintiffs or their experts to provide quantified doses specific to each potential source. Meanwhile, defendants can point to *Knight* as another step toward clarifying a plaintiff's burden with respect to specific causation, while reinforcing the rejection of experts who fail to tie their causation opinions to the particular facts of a case.

***Fulmore, Butler* and *Fouch*: Specific Causation in Toxic Tort Cases**

In Georgia, a toxic tort plaintiff must prove both general causation (e.g., "is exposure to asbestos capable of causing mesothelioma?") *and* specific causation ("did this plaintiff's exposure to asbestos from this product cause his mesothelioma?").[1] In 2001, the Court of Appeals reversed summary judgment for defendants in *Fulmore v. CSX Transportation*. In *Fulmore*, plaintiffs alleged disease resulting from exposure to asbestos at defendants' premises during various periods of time. The defendants argued they were entitled to summary judgment because plaintiffs could not show the actual quantity of their exposures to asbestos for the specific time periods at issue. The Court of Appeals overturned the trial court, holding that while plaintiffs were required to "present some reliable evidence" as to the extent of plaintiffs' exposures, they did not need specific measurements or quantification in order to meet this burden. The court went on to acknowledge that, in toxic tort cases, "some reliable evidence" generally meant reliable expert testimony addressing causation.[2]

In 2011, the Court of Appeals delivered its opinion in *Butler v. Union Carbide*, affirming summary judgment for the defendants predicated on the trial court's exclusion of the plaintiff's medical causation expert, Dr. John Maddox.[3] Maddox testified that "each and every

exposure" to asbestos at levels above background contributed to the plaintiff's disease. Dr. Maddox offered no opinions specific to plaintiff's use of any defendant's product, instead taking the position that each exposure contributed to plaintiff's cumulative exposure. The trial court applied the *Daubert* standards and excluded Maddox's causation opinions as unreliable. The each and every exposure theory had never been tested, could not be tested, and thus was "scientifically unreliable" for purposes of supporting Dr. Maddox's causation opinions.[4] Further, while Maddox pointed to a host of studies and literature he relied on, he failed to connect his reliance materials to evidence of the duration, frequency, and fiber type involved in the occupational exposures actually incurred by the plaintiff. Under these circumstances, the trial court was justified in finding that Dr. Maddox had failed to reliably apply his methodology to the case-specific facts.[5] Since the plaintiff could not prove causation without expert testimony, the Court of Appeals also affirmed defendants' summary judgment.[6]

Just a few years after *Butler*, in 2014, the Court of Appeals relied heavily on *Fulmore* when it overturned summary judgment for defendants in *Fouch v. Bicknell Supply Company*.[7] In *Fouch*, the plaintiff worked as a sandblaster for more than a decade, and alleged that his exposure to silica during this work using defendants' products led to his lung disease and an eventual double-lung transplant. The defendants argued, and the trial court agreed, that plaintiff could not meet his burden as to specific causation without evidence of the quantity of silica he breathed while using each defendant's product. The Court of Appeals reversed, citing *Fulmore* to reaffirm that toxic tort plaintiffs were not required to show actual measurements or dosages in order to prove causation.[8]

The cases leading up to *Knight* show us the parameters of plaintiff's burden with respect to causation in toxic tort cases. As illustrated by *Fulmore* and *Fouch*, a particular quantity or measurement of the exposure is not required. Further, plaintiffs do not have to show that exposure from a particular defendant's product was a "substantial factor" in causing their injuries, only that it was a "contributing factor."[9]

However, the contribution to the injury must be more than merely *de minimis*.[10] Additionally, proof of causation *does* require reliable expert testimony[11] sufficient to "show at least a probable cause, as distinguished from a mere possible cause."[12]

Knight: Connecting the Dots Between Causation and Admissibility of Expert Opinion

For the first time since the *Butler* case, *Knight* analyzed the admissibility of an expert opinion in light of a plaintiff's burden as to causation in a toxic tort case. Indeed, it is important to note that in *Fulmore* and *Fouch*, both cases where defense summary judgments were reversed on appeal, the admissibility of plaintiff's expert testimony on causation had not been challenged. Conversely, the defendants in *Butler* and *Knight* sought to resolve the question of causation in their favor by first attacking the expert testimony relied on by the plaintiffs.

While both *Butler* and *Knight* highlight the interplay between the admission of expert testimony and causation, *Knight* goes a step further. In *Butler*, the defendants challenged Dr. Maddox's testimony as unreliable under *Daubert*. In *Knight*, while Scapa did challenge Dr. Abraham's causation opinions as unreliable, they also used the standard for causation to show that his opinions should be excluded as irrelevant. Under *Daubert* and O.C.G.A. § 24-7-702(b),[13] expert testimony must assist the trier of fact. "[E]xpert testimony is helpful to the trier of

fact only to the extent that 'the testimony is relevant to the task at hand and logically advances a material aspect of the case.'"[14] On cert, the Supreme Court embraced this aspect of Scapa's argument, finding Dr. Abraham's testimony that *any* exposure beyond background contributed to Knight's cumulative exposure "could not have been helpful to the jury."[15]

It is routine for defendants in products liability and toxic tort cases to seek exclusion of expert testimony in order to lay the foundation for a dispositive motion on liability. *Knight* shows how the elements of a claim and related legal standards should be used as a framework in which to challenge the relevance of an expert's opinion under *Daubert*. In a toxic tort case, Georgia law requires that a defendant-specific exposure must be more than a *de minimis* contribution to the plaintiff's injury in order to satisfy plaintiff's burden as to specific causation. If the expert's opinion fails to qualify or characterize that specific exposure as being more than *de minimis*, it does not then "fit" with the issue to be determined by the jury, and should be excluded under O.C.G.A. § 24-7-702(b).[16]

Since *Knight*

In addition to serving as a strong reminder of the often-overlooked relevance prong of the *Daubert* test for admissibility, *Knight* re-affirmed existing standards for evaluating exposure and causation evidence in toxic tort cases. Georgia still has not adopted the substantial contributing factor test used in many other jurisdictions. But *Knight* introduced the term "meaningful contribution" to the existing "more than *de minimis*" standard for a causative exposure to a toxin.

Moreover, *Knight* (and *Butler* before it) makes clear that while a causation expert in a toxic tort case does not have to measure or quantify specific doses of exposure, they must "undertake to estimate the extent of

exposure in [a] meaningful way."[17] Where, like Dr. Maddox in *Butler* and Dr. Abraham in *Knight*, the expert makes no effort to evaluate and characterize the extent of exposure from a particular defendant or source, and does not qualify his causation opinion "upon a reliable estimate of actual exposure,"[18] his opinion could properly be excluded as irrelevant and/or unreliable under O.C.G.A. § 24-7-702(b). "There is a difference… between… claiming causation in a conclusory fashion and identifying, through use of expert testimony, a significant and sustained exposure in the plaintiff's history."[19]

There have been very few reported cases citing *Knight* since the decision was published in July 2016. In Georgia, we have seen *Knight* cited for a basic restating of Georgia's adoption of the *Daubert* standard without any further meaningful analysis or reliance.[20] In a December 2016 mold exposure case, the Court of Appeals reversed the trial court's denial of the defendant's summary judgment motion, holding that the expert testimony failed to show that the alleged mold exposure made a "meaningful contribution" to the plaintiff's injuries.[21] Most recently, in October 2017, the Georgia Court of Appeals relied on *Knight* in finding that the defendants' human factors expert failed to satisfy the reliability or relevance prongs of 24-7-702(b).[22]

Knight is also representative of a growing national trend disapproving the "each and every exposure" and "cumulative exposure" theories and excluding expert causation testimony predicated on them. Similar opinions from the federal appellate courts,[23] federal district courts,[24] and other states' high courts[25] are becoming more pervasive. While many of these cases come from jurisdictions that follow the "substantial factor" test for causative exposures to toxic substances, the reasons for their rejection of "each and every

exposure" and "cumulative exposure" opinions are equally applicable to Georgia's "meaningful more than *de minimis* contribution" standard as espoused in *Knight*. A dearth of case law from the Eleventh Circuit and its district courts indicates this trend may have been slower to develop in the southeast. It is reasonable to expect that *Knight* and its immediate progeny will play a significant role in speeding up that development.

Conclusion

For Georgia litigators representing product defendants and premises owners, the importance of *Knight* is likely to increase as it becomes more familiar to trial courts and, over time, discussed in more substantive ways by our appellate courts. As authority fleshing out and reaffirming Georgia's standards with respect to specific causation, *Knight* is a step in the right direction for defendants.

But *Knight* also reminds us that it is not enough for experts to be qualified and give opinions based on reliable methodology and well-established science. The opinion testimony must also "fit" with the inquiry being made by the jury. Opinions delivered by an impressive expert witness can persuade the jury, even if those opinions are irrelevant to the issues the jury is supposed to determine. Attorneys should be mindful to use *Daubert* and O.C.G.A. § 24-7-702(b) to exclude opposing experts based on relevance.

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[1] Toole v. Georgia-Pacific, LLC, No. A10A2179, 2011 WL 7938847, *8 (Ga. Ct. App. Jan. 19, 2011).
[2] Fulmore v. CSX Transp., 252 Ga. App. 884, 891-92 (2001).
[3] Butler v. Union Carbide, 310 Ga. App. 21, 30 (2011).
[4] *Id.* at 24.
[5] *Id.* at 26-27.
[6] *Id.* at 31.
[7] Fouch v. Bicknell Supply Co., 326 Ga. App. 863, 868-69 (2014).
[8] *Id.*
[9] *Id.* at 869.
[10] John Crane, Inc. v. Jones, 278 Ga. 747, 750 (2004).
[11] *Butler*, 310 Ga. App. at 30.
[12] *Fouch*, 326 Ga. App. at 869.
[13] Formerly O.C.G.A. § 24-9-67.1.
[14] *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 290 (2016).
[15] *Id.* at 291
[16] *Id.* at 291-293.

[17] *Id.* at 292
[18] *Id.* at 293
[19] *Id.* at 292 (quoting Quirin v. Lorillard Tobacco Co., 23 F. Supp. 3d 914, 920 (N.D. Ill. 2014)).
[20] Cash v LG Elecs., Inc., 342 Ga. App. 735, 736 (2017); Hosp. Auth. v. Fender, 342 Ga. App. 13, 24 & n.6 (2017).
[21] Barko Response Team, Inc. v. Sudduth, 339 Ga. App. 897, 900-01 (2016).
[22] Vineyard Indus. v. Bailey, 343 Ga. App. 517, 522 (2017).
[23] *See generally* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2008); McIndoe v. Huntington Ingalls Inc., 817 F.3d 1170 (9th Cir. 2016); Stallings v. Georgia-Pacific Corp., 675 F. App'x. 548 (6th Cir. 2017); Krik v. Exxon Mobil Corp., 870 F.3d 669 (7th Cir. 2017).
[24] *See generally* Yates v. Ford Motor Co., 113 F. Supp. 3d 841 (E.D.N.C. 2015); Rockman v. Union Carbide Corp., 266 F. Supp. 3d 839 (D. Md. 2017); Barabin v. Scapa Dryer Fabrics, Inc., No. C07-1454JLR, 2018 WL 840147 (W.D. Wash. Feb. 12, 2018).
[25] *See generally* Schwartz v. Honeywell Int'l, Inc., No. 2016-1372, 2018 WL 793606 (Ohio Jan. 24, 2018).