2021 IL App (5th) 160239-UB

NO. 5-16-0239

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| JOHN JONES and DEBORAH JONES, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiffs-Appellants, | ) | Richland County. |
| | ) | |
| v. | ) | No. 13-L-21 |
| | ) | |
| PNEUMO ABEX LLC and OWENS-ILLINOIS, INC., | ) | Honorable |
| | ) | William C. Hudson, |
| Defendants-Appellees. | ) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Justices Cates and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in granting summary judgment to asbestos manufacturers in civil conspiracy claims filed by the plaintiffs, a construction worker who contracted lung cancer from his exposure to asbestos-containing products, and his wife.

¶ 2 The plaintiffs, John Jones and Deborah Jones (John's wife), brought an action against the defendants, Pneumo Abex LLC (Abex) and Owens-Illinois, Inc. (Owens-Illinois), among others, to recover for harm that John suffered resulting from asbestos exposure that occurred while John was employed in construction. The plaintiffs' complaint alleged that Abex was responsible for John's injuries because it entered into a civil conspiracy with Johns-Manville and other manufacturers of asbestos-containing products to suppress information about the harmful health effects of asbestos and to

falsely assert that asbestos exposure was safe. The complaint also alleged that Owens-Illinois entered into the same conspiracy with Owens-Corning Fiberglas Corporation (Owens-Corning), a nonparty in the case. The trial court entered summary judgment in the defendants' favor on the civil conspiracy claims. The plaintiffs appealed, arguing that the court erred in granting summary judgment where there were genuine issues of material fact as to whether the defendants had entered into a conspiratorial agreement to suppress or misrepresent information about the health hazards of asbestos and as to whether the defendants committed acts in furtherance of such an agreement.

¶ 3 Initially, this court reversed the trial court's decision and remanded for further proceedings, finding that genuine issues of material fact remained, which precluded summary judgment. See *Jones v. Pneumo Abex LLC*, 2018 IL App (5th) 160239. The defendants sought review of that decision before our supreme court. The supreme court reversed our decision, finding that we failed to conduct a complete analysis of the issue in accordance with the correct legal standards articulated in the established case law. *Jones v. Pnuemo Abex LLC*, 2019 IL 123895, ¶¶ 30-32. The court remanded for further proceedings so that we may conduct a proper analysis. *Id*. ¶¶ 32-33. After considering the established case law and reviewing the relevant evidence, we now affirm the trial court's entry of summary judgment.

¶ 4 I. BACKGROUND

¶ 5 In February 2013, the plaintiffs filed an action to recover damages they suffered when John contracted lung cancer from his exposure to asbestos. He was diagnosed with lung cancer in 2011. There are two defendants in this appeal, neither of which employed

John: Abex, which manufactured asbestos-containing brake linings; and Owens-Illinois, which manufactured and distributed Kaylo, an asbestos-containing insulation, between 1948 and 1958. The complaint against Abex and Owens-Illinois alleged a civil conspiracy theory.[1] According to the complaint, John contracted lung cancer from his exposure to asbestos-containing insulation during his career in construction, which began in 1969, and from repairing brakes on motor vehicles that he owned.

¶ 6 Count I of the complaint alleged that Abex had conspired with other manufacturers of asbestos-containing products to falsely assert that it was safe for people to work in close proximity to asbestos and to suppress information about the harmful health effects of asbestos exposure. The plaintiffs' theory was that Abex committed numerous tortious acts in furtherance of the conspiracy. Specifically, the plaintiffs alleged that, although Abex was aware of the health hazards of asbestos exposure, it continued making and distributing asbestos-containing products without adequately protecting employees and customers, and it also manipulated the scientific and legal landscape to shield the asbestos industry from liability and ensure continued profitability. The complaint alleged that John was injured as a consequence of this conspiratorial conduct.

¶ 7 The complaint identified the following overt acts allegedly committed by the companies in furtherance of the conspiracy: (1) selling asbestos products, which were used at John's work, without warning customers of the health hazards of asbestos

[1]The case was originally filed in the circuit court of McLean County (a county within the Fourth District) but was transferred to the Richland County circuit court.

exposure; (2) failing to warn employees about the health hazards of asbestos exposure; (3) editing and altering reports and drafts of publications initially prepared by Dr. Anthony Lanza, a physician employed by another alleged conspirator, Metropolitan Life Insurance, during the 1930s, which concerned the health hazards of asbestos exposure; (4) entering into a written agreement to suppress the results of research on the health effects of asbestos exposure; (5) obtaining an agreement in the 1930s from the editors of ASBESTOS magazine, the only trade magazine devoted exclusively to asbestos, that the magazine would not publish articles connecting asbestos exposure to disease and sustaining such agreement into the 1970s; (6) suppressing the dissemination of a 1943 report prepared by Dr. LeRoy Gardner, a former director of the Saranac Laboratory for the Study of Tuberculosis, in which he was critical of the idea that there was a safe level of asbestos exposure; (7) defeating further study on the health of workers through their control of the Asbestos Textile Institute; (8) editing and altering reports and publication drafts initially prepared by Dr. Arthur Vorwald, a former director at Saranac Laboratory, from 1948 through 1951; (9) suppressing the results of the fibrous dust studies conducted between 1966 through 1974, which demonstrated that asbestos exposure caused lung cancer and mesothelioma; (10) participating in drafting a pamphlet published by the National Insulation Manufacturers Association (NIMA), which purportedly failed to disclose the specific health hazards of asbestos exposure; (11) purchasing asbestos without warning labels from co-conspirators; (12) refusing to warn employees who used asbestos-containing materials in the manufacturing of the companies' products; and (13) altering the original report of a study performed by the Industrial Hygiene

Foundation to delete all references to the association of asbestosis (scarring of the lungs) and lung cancer. The complaint further alleged that Owens-Illinois engaged in the same conspiracy with Owens-Corning.

¶ 8 Count II of the complaint was premised on the same theory and was directed at the same defendants but sought relief for Deborah, who claimed that, because of John's injury, she suffered an injury to her husband/wife relationship and became obligated for his medical expenses. Counts III and IV brought negligence claims on the basis that the defendants had manufactured and sold asbestos products and failed to warn the public about the health hazards of asbestos exposure. Counts V and VI were similar but alleged that the defendants' conduct was willful and wanton and sought punitive and actual damages.

¶ 9 In June 2015, Abex filed a motion for summary judgment, asking the trial court to follow *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, *Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, and *Gillenwater v. Honeywell International, Inc.*, 2013 IL App (4th) 120929, all Fourth District cases that found the evidence insufficient to show that Abex had agreed with other companies to suppress or misrepresent the health hazards of asbestos. In August 2015, Owens-Illinois filed a separate motion for summary judgment, also arguing, in pertinent parts, that there was insufficient evidence to support a finding of conspiracy. Relying on the Fourth District civil conspiracy cases, the trial court granted summary judgment in favor of Abex on the civil conspiracy claims, finding that the differences in evidence presented in this case were indistinguishable from the evidence offered in the previously decided cases. The

court also entered summary judgment in favor of Owens-Illinois on the civil conspiracy claims, noting that the plaintiffs' counsel had admitted during argument that the evidence in the instant matter was the same as that in *Gillenwater*.[2] The plaintiffs appeal those decisions.[3]

¶ 10 II. ANALYSIS

¶ 11 A. Civil Conspiracy Definition

¶ 12 A civil conspiracy is defined as "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." (Internal quotation marks omitted.) *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). For a civil conspiracy claim, plaintiff must prove the existence of an agreement and a tortious act committed in furtherance of that agreement. *Id.* The agreement must be knowing and intentional. *Menssen*, 2012 IL App (4th) 100904, ¶ 12. Accidental, inadvertent, or negligent participation in a common scheme does not result in a conspiracy. *McClure*, 188 Ill. 2d at 133-34. Further, mere knowledge of the fraudulent or illegal actions of another is insufficient to establish a conspiracy. *Id.* at 134. A "defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable" for civil conspiracy. (Internal quotation marks omitted.) *Id.* In contrast, a defendant

[2]The plaintiffs also brought claims against Owens-Illinois based on John being directly exposed to Owens-Illinois's asbestos-containing insulation, but at the summary judgment hearing, the plaintiffs indicated that they would not oppose entry of summary judgment against them on those counts.

[3]Although the circuit court's summary judgment orders did not fully resolve the litigation, the trial court entered separate orders pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) in which it made express written findings that there was no just reason for delaying the appeals.

who understands the general objectives of a conspiratorial scheme and agrees to do its part to further those objectives is liable as a conspirator. *Id.*

¶ 13 Because a conspiracy is almost never susceptible to direct proof, it is generally proved through circumstantial evidence and inferences drawn from the evidence. *Id.* If a civil conspiracy is established by circumstantial evidence, the evidence must be clear and convincing. *Id.* Parallel 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 an agreement. *Id.* at 135. Facts that are as consistent with innocence as guilt do not support a finding that an agreement existed. *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.*

¶ 14 B. Summary of Relevant Case Law on Civil Conspiracy

¶ 15 The governing Illinois Supreme Court case on civil conspiracy is *McClure*, 188 Ill. 2d 102. In *McClure*, plaintiffs presented the following circumstantial evidence to prove the existence of a civil conspiracy among Owens-Corning, Owens-Illinois, Union Asbestos and Rubber Company (UNARCO), and Johns-Manville: (1) Johns-Manville and UNARCO prevented information about the health hazards of asbestos exposure from being published (*id.* at 143), (2) Owens-Illinois caused inaccurate information about the health hazards of its asbestos-containing products from being published (*id.* at 143-44), (3) the companies failed to share information about the health hazards of asbestos with the public (*id.* at 144), (4) the companies failed to warn employees about the health

hazards of asbestos (*id.*), and (5) the companies did not adequately control the dust in their plants (*id*. at 144-45).

¶ 16 After analyzing this evidence, the supreme court concluded that the jury could have found that the four companies had engaged in the same type of wrongful conduct (parallel conduct) as follows: (1) selling asbestos-containing products knowing that asbestos exposure could cause disease, (2) selling those products without warning the public about the health hazards of asbestos exposure, (3) failing to warn employees and consumers of the health hazards of asbestos, and (4) failing to adequately protect their employees from asbestos dust exposure. *Id*. at 146. Although the *McClure* court concluded that parallel conduct was relevant as circumstantial evidence of a civil conspiracy amongst manufacturers of similar products, the court determined that such parallel conduct, by itself, was insufficient to prove that the four companies had entered into an agreement to commit the civil conspiracy. *Id*. at 135, 146.

¶ 17 The supreme court then considered whether the following evidence beyond parallel-conduct evidence was sufficient as proof of an agreement: (1) evidence of the relationship between Owens-Corning and Owens-Illinois; (2) evidence that Owens-Corning received information from Johns-Manville about its plan to place warning labels on its products; (3) evidence that Owens-Corning participated in the drafting of the NIMA pamphlet; (4) evidence of the indemnity clause contained in Owens-Corning's agreement to purchase a Bloomington plant from UNARCO; (5) evidence that Owens-Corning contacted other asbestos-product manufacturers about their responses to the Califano announcement, a broadly publicized statement in April 1978 by Joseph

Califano, the then-Secretary of the Department of Health, Education, and Welfare, that asbestos exposure could lead to death many years after exposure had ceased; (6) evidence of a 1979 meeting among asbestos-containing product manufacturers; (7) evidence of a 1983 meeting among asbestos-containing product manufacturers; and (8) the opinion of Dr. Barry Castleman, an expert on the history of American and European medical research on asbestos, that Owens-Corning and Owens-Illinois were involved in the alleged conspiracy with UNARCO and Johns-Manville. *Id*. at 146-47. The court found that, even when considered in the light most favorable to plaintiffs, the evidence of these contacts between the companies were as consistent with innocence as with guilt. *Id*. at 151-52. Thus, the court concluded that the additional evidence, added to the parallel-conduct evidence, was still insufficient to establish a conspiratorial agreement by clear and convincing evidence. *Id*. at 147.

¶ 18 During the pendency of *McClure*, the Fourth District decided *Burgess v. Abex Corp.*, 305 Ill. App. 3d 859 (1999), a conspiracy case involving Abex. In *Burgess*, the court determined that there was direct evidence that Abex was part of a conspiracy to conceal the health hazards of asbestos in that the evidence showed that Abex knew what other manufacturers were doing, took steps not to interfere, and profited from continued production without disclosure to their employees. *Id*. at 867. Thereafter, our supreme court, in the exercise of its supervisory authority, vacated the *Burgess* decision and directed the appellate court to reconsider its judgment in light of *McClure*.

¶ 19 In *Burgess II*, the Fourth District reanalyzed the evidence against Abex and found that there was sufficient evidence, beyond parallel-conduct evidence, to establish the

existence of an agreement between Abex and Johns-Manville to suppress or misrepresent information regarding the health hazards of asbestos. *Burgess v. Abex Corp.*, 311 Ill. App. 3d 900, 903 (2000). In so concluding, the court found that there was evidence that Abex and UNARCO directly entered into an agreement with other companies to conceal the dangers of asbestos, *i.e.*, evidence that they participated in a scheme to delete all references to cancer from a study on mice conducted by Gardner at Saranac Laboratory. *Id*. Eight years later, in *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 445-46 (2008), another civil conspiracy case, the Fourth District discussed four items of evidence that plaintiff presented beyond parallel conduct and concluded that the additional evidence satisfied *McClure*. The additional evidence was as follows: (1) evidence that Johns-Manville was the exclusive supplier of asbestos fiber to Bendix (a company that used asbestos in its brake linings and other friction products); (2) evidence that Johns-Manville assisted Bendix with a position paper titled *Asbestos and Human Health* in the late 1960s; (3) evidence that Bendix, Johns-Manville, Raybestos-Manhattan (also a manufacturer of asbestos-containing products), and Abex were members of the same trade organizations, the Brake Lining Manufacturers Association and the Friction Materials Standards Institute (FMSI); and (4) evidence that Johns-Manville and Bendix shared a common director. *Id.* The court concluded that, viewing the evidence in a light most favorable to plaintiff, the evidence did not so overwhelmingly favor defendant that the jury's verdict in favor of plaintiff could never stand. *Id*. at 446.

¶ 20 Thereafter, in *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, ¶ 5, the Fourth District again addressed the issue of whether there was clear and convincing

evidence that Honeywell (Bendix's successor) and Abex had entered into a conspiratorial agreement with the other companies. In support of their argument that defendants acted in conformity with a conspiratorial agreement they had with other corporations to conceal the dangers of asbestos and fraudulently represent that the air inside their factories was safe, plaintiffs presented the following circumstantial evidence: (1) in 1968, Johns-Manville informed Bendix that its asbestos shipments would carry a vague warning label that inhalation of the material over long periods may be harmful (*id*. ¶ 10); (2) after placing the warning labels on the asbestos shipments, Johns-Manville sent Bendix a position paper that identified asbestosis, lung cancer, and mesothelioma as the health hazards of asbestos exposure (*id*. ¶ 11); (3) in 1934, Bendix and American Brake Shoe and Foundry Company (American Brake Shoe Company) (Abex's predecessor) shared a director (*id*. ¶ 13); (4) from 1959 through 1963, Bendix and Johns-Manville shared a director (*id*. ¶ 14); and (5) Bendix, Abex, Johns-Manville, and other manufacturers were members of the FMSI (*id*. ¶ 15).

¶ 21 In addition, plaintiffs presented evidence that, in November 1936, Abex and eight other companies in the asbestos industry entered into a written agreement to equally fund the cost of scientific experiments on the health effects of asbestos dust. *Id*. ¶ 24. The stated purpose of the experiments was to determine the cause and effect of asbestosis (the studies were not designed to study the carcinogenic effects of asbestos), and the companies agreed that Dr. LeRoy Gardner, the then-director of Saranac Laboratory, would perform the experiments. *Id*. ¶¶ 18, 24.

¶ 22 Plaintiffs presented the following evidence about the Saranac study. Vandiver Brown, general counsel for Johns-Manville, sent Gardner a letter requesting that he conduct the contemplated experiments with asbestos dust but reminding him that the study results would be the sole property of the companies who had funded the experiments and that they would decide whether and to what extent to publish the results. *Id*. ¶¶ 18-21. In reply, Gardner agreed that the study would be subject to the companies' conditions and assured Brown that the manuscripts of any reports would be submitted for approval before publication. *Id*. ¶ 22.

¶ 23 In February 1943, after conducting his many experiments, Gardner sent Brown a written annotated outline of a proposed monograph. *Id*. ¶ 27. The outline described an unexpected finding of malignant tumors in 8 out of 11 mice that had been exposed to long-fiber asbestos for 15 to 24 months. *Id*. ¶ 30. However, Gardner expressed the following about the study results:

> " 'These observations are suggestive but not conclusive evidence of a cancer stimulating action by asbestos dust. They are open to several criticisms. The strain of mice was not the same in the asbestos experiment as in many of the others cited; apparently the former were unusually susceptible. Not enough animals survived in the dust for longer than [the] 15 months apparently necessary to produce many tumors. There were no unexposed controls of the same strain and age and no similar controls exposed to other dusts. It is hoped that this experiment can be repeated under properly controlled conditions to determine whether asbestos actually favors cancer of the lung.' " *Id.*

¶ 24 Gardner further wrote that the question of cancer susceptibility seemed more significant than he had previously thought, but he believed it needed further study before it was included in a published scientific report. *Id*. ¶ 31. Thus, he recommended that any references to cancerous tumors should be omitted from the final version of the study. *Id.*

¶ 25 In March 1943, Gardner applied for a research grant from the National Cancer Institute to conduct properly controlled dusting experiments to determine whether asbestos fibers caused cancer. *Id.* ¶ 33. In his application, he summarized the results of his previous dusting experiments but acknowledged that the results meant "nothing" because none of the experiments had been designed to study the carcinogenic effects of asbestos, 11 mice were too small of a group to be meaningful, and some of the mice used were especially susceptible to cancer. *Id.* ¶ 36. In January 1944, the Committee on Cooperation in Cancer Research denied Gardner's grant request. *Id.* ¶¶ 38-43. In evaluating Gardner's application, the committee consulted with Dr. James Murphy, a committee member who had the most experience in pulmonary cancer research. *Id.* ¶ 39. Dr. Murphy believed that a $10,000 research grant was "bringing a very big gun to bear on a subject that probably [would] be settled in a very short time with a very slight expenditure of money." (Internal quotation marks omitted.) *Id.* He noted that some genetic strains of mice developed cancer as much as 80% of the time in normal conditions, Gardner admitted to using cancer susceptible mice in his uncontrolled dusting experiments, and it would be easy to induce lung cancer in those genetic strains. *Id.* ¶¶ 41-42. He also noted that the experiment lacked the proper controls and opined that an uncontrolled experiment was utterly devoid of scientific significance. *Id.*

¶ 26 Gardner died in October 1946 before completing the final report on his dusting experiments. *Id.* ¶ 46. In September 1948, Saranac Laboratory prepared the final report on his experiments, and the report was delivered to Johns-Manville before publication. *Id.* ¶ 48. The report referenced the tumorous mice, but there was a contradiction between

Gardner's proposed monograph and the notes in which he recorded his experimental observations. *Id*. ¶¶ 49-50. The proposed monograph referred to the tumors as "malignant" while his experimental notes referred to them as "adenomas" or benign. *Id*. Therefore, the report noted that there was some confusion as to whether the tumors were malignant and further examination was necessary to determine the exact nature of the lesions. *Id*. ¶ 50.

¶ 27 In October 1948, Brown forwarded the Saranac Laboratory final report to the rest of the financing companies and requested that they treat it with the utmost confidence, and it be made available to no one outside of the companies. *Id*. ¶ 55. He anticipated that Saranac Laboratory would want to publish the final report and indicated it would be desirable from the industry's point of view, provided that some of the "speculative" comments were omitted. *Id*. ¶ 56. He recommended the sponsoring companies appoint a representative to attend a meeting at Johns-Manville where they could discuss whether the report should be revised before publication. *Id.* He also recommended that if a company was unable to attend the meeting, the company should appoint a representative from another financing company to act on its behalf. *Id*.

¶ 28 In November 1948, Dr. L.E. Hamlin, the former medical director for the American Brake Shoe Company, now known as Abex, wrote a letter addressing the issue of whether the final report should be revised before publication. *Id.* ¶¶ 57-58. Hamlin stated that, although he had the impression from Brown's letter that Brown was concerned with the possible legal repercussions of the asbestos study, he did not observe anything in the report that would " 'cause undue concern.' " *Id.* He noted that similar

reports were frequent in the literature in this country and abroad and that the basic facts were already known and had been published in other studies on asbestos. *Id.* Therefore, he did not anticipate any unfavorable reaction. *Id.* He further indicated that he would be unable to attend the meeting at Johns-Manville and requested that Brown represent American Brake Shoe Company in connection with the decisions to be made. *Id.*

¶ 29 Shortly thereafter, Brown wrote a letter to W.T. Kelly Jr., executive vice president of American Brakeblok (a division of American Brake Shoe Company), informing him that the sponsoring companies had unanimously agreed to delete any reference to cancer and tumors from the final published report for the following reasons: (1) the experiments were not directed toward determining the incidence, if any, of cancer as a result of asbestos dust exposure; (2) Gardner previously indicated that he believed the asbestos experiments should be recreated under properly controlled conditions, which would take two to three years; (3) Gardner also indicated that the question of cancer susceptibility should be omitted from the final report; and (4) the study unintentionally used a strain of white mice that were susceptible to developing tumors. *Id.* ¶ 63. Brown also requested that Kelly return Hamlin's copy of the unrevised report because everyone felt it would be unwise to have any drafts outstanding where the final report would be different in any substantial respect. *Id.* ¶ 64. In January 1951, Saranac Laboratory published its report on Gardner's dusting experiments. *Id.* ¶ 67. The report omitted all references to tumors and malignancies in the mice, and the section that identified the contradiction between Gardner's experimental notes and his proposed monograph. *Id.* ¶ 68. The report

contained a note, indicating that the published report presented " 'for the first time a complete survey of the entire experimental investigation.' " *Id.* ¶ 67.

¶ 30 After reviewing this evidence, the *Rodarmel* court, relying on *McClure*, rejected plaintiff's claim that there was clear and convincing evidence that established Honeywell's participation in a civil conspiracy. *Id.* ¶ 118. The court made the following findings about the specific evidence: (1) a buyer-seller relationship cannot establish an inference of a conspiratorial agreement (*id.* ¶ 106), (2) purchasing asbestos from Johns-Manville could not serve as evidence beyond parallel conduct because purchasing asbestos is inherent in the parallel-conduct claim that Honeywell failed to adequately protect its workers from asbestos exposure (*id.* ¶ 107), (3) the sharing of information among the asbestos companies did not provide clear and convincing evidence of a civil conspiracy (*id.* ¶ 109), (4) membership in the same trade organization did not support an inference of a conspiratorial agreement (*id.* ¶ 113), and (5) the sharing of a common director did not support an inference of a conspiratorial agreement as it would be based on speculation (*id.* ¶ 117).

¶ 31 In addition to the evidence discussed above, the court looked at the suppression of the tumorous mice in the Saranac study to determine whether Abex had entered into a conspiratorial agreement to unlawfully conceal the carcinogenic effects of asbestos exposure. *Id.* ¶ 120. In rejecting the notion that this evidence showed a conspiratorial agreement, the court stated as follows:

> "[I]n suppressing the cancer references, the sponsors could have done the right thing for the wrong reason. Even if the tumors in the mice scientifically proved nothing, publicizing them could have been prejudicial to Johns-Manville's

> business, or Johns-Manville could have had that fear. So, yes, it is an eminently reasonable inference that Johns-Manville, Abex, and other companies were concerned more about their own skin than about scientific integrity. The question, though, is not whether Abex's motives were pure. Instead, the question is whether Abex agreed 'to commit an unlawful act or a lawful act in an unlawful manner.' [Citation.] As far as we can see, it was not against the law, and it was not tortious, for the financing corporations to conceal the occurrence of tumors in a small group of mice if (1) the tumors were not scientific evidence of a relationship between asbestos and cancer and (2) it was unclear that any of the tumors were in fact cancerous. Granted, from the vantage of hindsight, we now know it is a scientific fact that asbestos causes cancer in humans. But it does not necessarily follow that asbestos caused the tumors (benign or malignant) in the eight or nine mice at Saranac Laboratory, some of which were genetically prone to develop tumors under any conditions. Unless Abex had notice that the tumorous mice were scientific evidence that asbestos caused cancer, Abex did not enter into a conspiratorial agreement by agreeing to conceal information about the tumorous mice—because concealing the information was not an unlawful or tortious act. It cannot be unlawful to hide information that is devoid of significance: information that, as Murphy put it, was 'not of any tremendous value.' " *Id.* ¶ 124.

¶ 32 Noting that the record did not contain any expert opinion that Gardner's finding of tumors in the mice qualified as valid scientific evidence about the harmful effects of asbestos, the court stated as follows:

> "[A]bsent a qualified expert opinion that the tumorous mice were scientific evidence of a relationship between asbestos and cancer—and, indeed, all the qualified experts appear to have opined to the contrary—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. It cannot be unlawful to suppress information that apparently is devoid of significance." *Id.* ¶¶ 127-28.

¶ 33 The court then concluded that there was no evidence that Abex agreed with other companies to suppress or misrepresent the health hazards of asbestos (although there was evidence that Abex did so on its own initiative). Therefore, the court determined that Abex was entitled to a judgment *n.o.v.* due to the lack of clear and convincing evidence on the agreement element of the civil conspiracy claim. *Id.* ¶ 132. The court made clear

that it was declining to follow its previous decisions in *Burgess* and *Dukes*. *Id*. ¶¶ 118, 131.

¶ 34 Following *Rodarmel*, the Fourth District decided *Menssen v. Pneumo Abex Corp.*, 2012 IL App (4th) 100904, ¶¶ 1, 33, another civil conspiracy case against Abex and Honeywell, in which plaintiff was exposed to asbestos from 1967 to 1969. The majority of plaintiff's civil conspiracy evidence against Abex was factually indistinguishable from the evidence presented in *Rodarmel*. *Id.* ¶ 7. Adhering to its analysis in *Rodarmel* and finding it dispositive, the *Menssen* court concluded that, without more, plaintiff had failed to provide sufficient evidence to prove Abex had agreed with other companies to suppress or misrepresent the health hazards of asbestos. *Id.* ¶ 51.

¶ 35 C. Standard of Review

¶ 36 The present case and the previously discussed asbestos civil conspiracy cases differ procedurally because this case is before us after the trial court granted summary judgment in favor of Abex and Owens-Illinois while the Fourth District cases were appealed following a denial of the asbestos companies' motions for judgment *n.o.v.* However, our supreme court stated that, in the asbestos cases that do not present the typical summary judgment scenario and instead have a long and well-documented historical record that has been thoroughly explored and aggressively tested in previous litigation, there is no practical difference between the standard for summary judgment and that governing directed verdicts. *Jones*, 2019 IL 123895, ¶¶ 24-25. Even if some issue of fact is presented by the summary judgment motion, if what is contained in the pleadings and affidavits constitutes all of the evidence before the court, there is nothing

left to go to the jury, and the court is required to direct a verdict, then summary judgment should be granted. *Id.* ¶ 25.

¶ 37 As the supreme court noted, the parties here have made no claim that there is additional evidence that needs to be uncovered before the matter can be properly considered by the trier of fact. *Id.* ¶ 24. Thus, although *McClure*, *Rodarmel*, and *Menssen* involved entry of judgment *n.o.v.*, and the case before us now was decided at the summary judgment stage, we still apply an identical standard of review, *i.e.*, "whether all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand." *Id.* ¶ 26. Accordingly, the question here is whether, after reviewing all of the evidence, the plaintiffs could not prevail as a matter of law. *Id.* ¶ 32. Moreover, where plaintiff seeks to establish a civil conspiracy based on circumstantial evidence, the clear and convincing evidentiary standard of proof is applicable. *Id.* ¶ 30.

¶ 38 D. Abex

¶ 39 1. *Rodarmel Evidentiary Gap*

¶ 40 The plaintiffs maintain that Abex's participation in the Saranac study was direct evidence that it was part of a broader conspiracy to suppress information about the health hazards of asbestos exposure. Before *Rodarmel*, the Fourth District had agreed with the plaintiffs' argument. However, as previously noted, *Rodarmel* disagreed with those previous decisions and concluded that, unless Abex had notice that the tumorous mice were scientific evidence that asbestos caused cancer, Abex did not enter into a conspiratorial agreement by agreeing to conceal information about the tumorous mice

where concealing information that is devoid of scientific significance is not an unlawful or tortious act. *Rodarmel*, 2011 IL App (4th) 100463, ¶ 124.

¶ 41 The plaintiffs have interpreted *Rodarmel* to impose a new, additional burden of providing a "qualified expert opinion that the tumorous mice were scientific evidence of a relationship between asbestos and cancer." In that regard, the plaintiffs have presented a February 2014 report and the previous testimony of Dr. Arthur Frank, a board-certified specialist in internal medicine and occupational medicine, who has published several articles in medical and scientific literature on asbestos and health.

¶ 42 In his report, Frank stated that the Saranac results had scientific validity at the time, would have been significant and meaningful in the development of knowledge about asbestos hazards, and "the suppression of this data at the time could have been thought to have lengthened the time that physicians and scientists understood the carcinogenic potential of exposure to asbestos." In his testimony, he opined that the disclosure of the tumorous mice would have been significant scientific evidence on the issue of whether there was a relationship between asbestos and cancer. However, he agreed that the spontaneous tumor rate of a species is an important consideration when selecting a species for an experiment, that a control is scientifically necessary if the spontaneous tumor rate is unknown, and that the spontaneous tumor rates in mice can increase with age. He acknowledged the many flaws in Gardner's experiments, such as that there is no known information about the strain of mice used or the age of the mice when the tumors appeared, and Gardner's experiments were uncontrolled.

¶ 43 In addition, the plaintiffs rely on a 1947 letter written by Dr. Kenneth Lynch, who was consulted about posthumously publishing Gardner's research. In the letter, Lynch stated that he combined Gardner's manuscripts into a "proposed single publication," and Gardner's outline on experimental asbestosis was "valuable and publishable as it stands." However, in 1952, Lynch published an article summarizing Gardner's study, which recognized the limitations and weaknesses in the study, such as the facts that the strain of mice used was unknown as to tumor susceptibility, and the experiment was uncontrolled from that standpoint. Lynch then concluded in the article that there was no experimental proof that the inhalation of asbestos caused bronchogenic carcinoma. Also, in a 1957 article, Lynch noted that Gardner apparently regarded his observations as merely suggestive, and the incidence of naturally occurring pulmonary tumors was not established. There is no evidence that Abex saw Lynch's letter when it agreed with the other sponsoring companies to delete all references to Gardner's study in the final publication.

¶ 44 In response, Abex points to the trial testimony of Dr. Philip Pratt, who was a co-author of the publication on Gardner's research, that any references to the tumorous mice should not be published because it was the result of uncontrolled experiments. Abex also presented a report of its retained expert, Dr. James Crapo, who has published numerous articles on toxicology involving various agents (including asbestos) and has completed animal experimentation studies. In his report, Crapo noted that he had been asked to offer an opinion on whether the tumorous mice findings in the uncontrolled experiment constituted valid scientific evidence that asbestos caused cancer. Pointing to the research

flaws in the experiments, *i.e.*, the strain and age of the mice being unknown, the experiment being uncontrolled, and Gardner referring to the tumors as "usually adenomatous in type" in his notes, Crapo believed that the study had no scientific validity that asbestos exposure caused cancer. He believed that it would not have been "appropriate or useful" for the results of the experiment to be published, and it would have instead been misleading. Also, in his deposition, he testified that the experiments were not reliable evidence of the potential health hazards related to asbestos exposure. He also noted that none of the mice had classic lung cancer. Instead, he opined that two or three of the mice had a type of sarcoma not caused by asbestos, and the others had benign adenomas. He further testified that publishing the experiments would not be good for science because the data was not valid; he opined that the work with the mice was unpublishable.

¶ 45 Noting the competing evidence that Gardner's findings were scientifically valid, the plaintiffs contend that, at this stage in the proceeding, *i.e.*, the summary judgment stage, the court cannot make credibility determinations and weigh the evidence. However, we find that the additional evidence presented by the plaintiffs did not preclude the trial court's entry of summary judgment in favor of Abex.

¶ 46 The additional evidence offered by the plaintiffs does not show that the decision of Abex and the other companies to remove mention of the tumorous mice was invalid and unlawful. Although Frank concluded that Gardner's results had scientific validity as to the growth rate of tumors, he acknowledged the previously discussed deficiencies in Gardner's experiments; deficiencies that Gardner identified when he indicated the

tumorous mice should be omitted from the publication. Frank's testimony and report cannot cure deficiencies in experiments that were conducted in the 1940s. Moreover, unless Abex knew that the study was scientific evidence that asbestos exposure caused cancer when it entered into the agreement with the other sponsoring companies, they did not commit conspiracy. See *Rodarmel*, 2011 IL App (4th) 100463, ¶ 128. The fact that an expert testified 70 years later that an experiment was significant scientific evidence does not show that, in the 1940s, Abex knew that the omitted study was scientific evidence that asbestos caused cancer.

¶ 47 As for Lynch's letter, there was no evidence that Abex had seen that letter when it agreed with the other sponsoring companies to delete all references to Gardner's mice study in the final publication. Also, Lynch recognized the weaknesses in the study in his subsequent publications and noted that Gardner apparently regarded his observations as merely suggestive.

¶ 48 Consistent with the Fourth District cases, we conclude that there is nothing in the record to indicate that Abex knowingly and intentionally entered into a conspiracy to conceal the health hazards of asbestos exposure. The plaintiffs point to no further evidence that would cause us to deviate from *Rodarmel* and *Menssen*. Gardner's experiment did not provide reliable scientific evidence supporting the link between asbestos exposure and cancer, and, thus, it was not sufficient direct evidence of a broader conspiracy to suppress the health risks associated with asbestos exposure. Accordingly, we conclude that the trial court properly granted summary judgment in favor of Abex on the plaintiffs' civil conspiracy claims.

¶ 49 E. Owens-Illinois

¶ 50 1. *Summary of Gillenwater*

¶ 51 The plaintiffs also argue that Owens-Illinois entered into a conspiracy with Owens-Corning to suppress or falsely misrepresent the health hazards of asbestos exposure. The rules discussed above also apply to this issue. Owens-Illinois, citing *McClure*, 188 Ill. 2d at 151-54, argues that our supreme court, which addressed much of the same evidence presented here, has already determined there was insufficient evidence to establish that Owens-Illinois entered into a conspiratorial agreement. In particular, Owens-Illinois points to the following from *McClure:*

> "Although the scope of our review of jury verdicts is limited, we find that the evidence in this case so overwhelmingly favors defendants that judgment notwithstanding the verdict should have been granted. Plaintiffs' evidence of parallel conduct is insufficient to establish the agreement required by the civil conspiracy theory. When plaintiffs' evidence of contacts between defendants and [UNARCO] or Johns-Manville is added to this parallel conduct, the evidence still cannot support the jury's determination that plaintiffs proved agreement by clear and convincing evidence. The contacts between defendants, [UNARCO], and Johns-Manville were isolated, particularly with respect to Owens-Illinois, and an inference of agreement based on these contacts is not reasonable. Even when considered in the light most favorable to plaintiffs, evidence of these contacts was as consistent with innocence as with guilt." *Id*. at 151-52.

¶ 52 Although Owens-Illinois was a defendant in *McClure*, the plaintiffs distinguish *McClure* from the present case on the basis that their allegations relate to a different conspiracy, *i.e.*, that Owens-Illinois and Owens-Corning entered into a conspiracy with each other (as opposed to the argument that Owens-Illinois and Owens-Corning had entered into a civil conspiracy with other asbestos companies). These same allegations

were addressed by the Fourth District in *Gillenwater*, which discussed much of the same evidence presented by the plaintiffs here.

¶ 53 In *Gillenwater*, plaintiff alleged that Owens-Illinois entered into a civil conspiracy with a nonparty, Owens-Corning, a manufacturer of Kaylo, an asbestos-containing insulation, to which plaintiff was exposed during his career as a pipefitter. *Gillenwater*, 2013 IL App (4th) 120929, ¶ 1. To prove the civil conspiracy, plaintiff presented the following circumstantial evidence that the two companies had committed the same type of wrongful conduct: they inadequately protected employees from asbestos exposure, they kept quiet about the health hazards of asbestos, they affirmatively concealed or downplayed the dangers of asbestos exposure, and they continued to use asbestos in their products without warning employees and consumers about the dangers. *Id.* ¶ 18.

¶ 54 As for the allegation that Owens-Illinois and Owens-Corning had affirmatively concealed the health hazards of asbestos exposure, plaintiffs presented the following evidence. In February 1943, Owens-Illinois retained Gardner at Saranac Laboratory to conduct dust studies on Kaylo, a new type of thermal insulation that was in the "pilot plant" stage, to determine whether it was an "air hazard." *Id.* ¶ 30. The Kaylo study was separate from the Saranac study previously discussed in connection with Abex. In March 1943, after receiving more information on Kaylo's composition, Gardner wrote a letter to U.E. Bowes, the director of research at Owens-Illinois, indicating disappointment that what " 'we thought to be synthetic asbestos proved to be chrysotile [asbestos] which had been added as a reinforcing agent.' " *Id.* Gardner then cautioned that " '[t]he fact that you are starting with a mixture of quartz and asbestos would certainly suggest that you

have all the ingredients for a first class hazard.' " *Id*. ¶ 34. In November 1948, Arthur Vorwald, Gardner's successor at Saranac Laboratory, wrote to Bowes, summarizing the results of the Kaylo dusting experiments. *Id*. ¶ 37. In this letter, Vorwald referenced a previous interim report that was sent to Owens-Illinois, which indicated that the animals exposed to Kaylo dust for 30 months showed no adverse effects but revealed a subsequent finding that the animals exposed to Kaylo dust for *more* than 30 months had showed signs of asbestosis. *Id.* ¶ 38.

¶ 55 Vorwald wrote in the letter:

> " '[T]he experimental study of the effects of inhaled Kaylo dust on normal uninfected animals is now finished and conclusions expressed on that subject are final rather than tentative.
>
> In the report issued one year ago, which describes the findings in animals that inhaled Kaylo dust for periods up to 30 months, the following tentative conclusion was made:
>
> "In consequence of the experimental studies with guinea pigs to determine the biological activity of Kaylo, it may be tentatively concluded that Kaylo alone fails to produce significant pulmonary damage when inhaled into the lung."
>
> During the 30 to 36 months [*sic*] period, however, definite indication of tissue reaction appeared in the lungs of animals inhaling Kaylo dust and therefore, I regret to say, our tentative conclusion quoted above must be altered. In all animals sacrificed after more than 30 months of exposure to Kaylo dust unmistakable evidence of asbestosis has developed, showing that Kaylo on inhalation is capable of producing asbestosis and must be regarded as a potentially-hazardous material.' " *Id.*

¶ 56 He concluded as follows:

> " 'I realize that our findings regarding Kaylo are less favorable than anticipated. However, since Kaylo is capable of producing asbestosis, it is better to discover it now in animals than later in industrial workers. Thus the company, being forewarned, will be in a better position to institute adequate control measures for safeguarding exposed employees and protecting its own interests.' " *Id*. ¶ 39.

¶ 57 In February 1952, Vorwald sent W.G. Hazard, of Owen-Illinois's Industrial Relations Division, the final report, which was titled "Investigation Concerning the Capacity of Kaylo Dust To Injure the Lung." *Id.* ¶¶ 41, 44. In the cover letter, Vorwald wrote:

> " 'The results of the investigations with animals show that Kaylo dust is capable of producing a peribronchiolar fibrosis typical of asbestosis. The dust also has a slightly unfavorable influence upon a tuberculosis infection. Although extrapolation from animal to human experience is difficult, nevertheless the results of the study indicate that every precaution should be taken to protect workers against inhaling the dust. Therefore, control measures should be directed to reducing the amount of atmospheric dust, especially at those points of operation where dust is generated.' " *Id.* ¶ 42.

¶ 58 The final report's introduction noted that it was important to determine whether any dust liberated from Kaylo during manufacture, handling, or fabrication would likely constitute a respiratory hazard to exposed individuals before it was used commercially on a large scale. *Id.* ¶ 45. The report discussed the negative findings from the initial 30-month period, and the positive findings after more than 30 months of exposure, and concluded that " 'Kaylo dust, when inhaled for a prolonged period is capable of producing in the lungs of guinea pigs, but not of rats, the peribronchiolar fibrosis typical of asbestosis.' " *Id.* ¶ 47.

¶ 59 As for evidence regarding the interactions or ties between Owens-Illinois and Owens-Corning, and Owens-Corning and Johns-Manville, plaintiffs presented the following evidence. Owens-Illinois began commercial production of Kaylo in 1948. *Id.* ¶ 54. Thereafter, in 1953, Owens-Illinois and Owens-Corning entered into a distributorship agreement where Owens-Illinois would continue to manufacture Kaylo,

and Owens-Corning would market the product. *Id.* ¶ 55. During the distributorship agreement, neither company put warning labels on the Kaylo packaging, and each company advertised Kaylo as "non-toxic." *Id.* ¶¶ 57, 60. In 1958, Owens-Illinois sold its Kaylo division to Owens-Corning, and Kaylo was strictly an Owens-Corning product from that point forward. *Id.* ¶¶ 56, 65.

¶ 60 Owens-Illinois owned stock in Owens-Corning in 1959. *Id.* ¶ 62. From 1938 through 1948, Owens-Illinois and Owens-Corning had some of the same directors. *Id.* ¶ 23. In the early 1940s, Owens-Corning employees complained of experiencing skin irritation from the fiberglass insulation and demanded more pay. *Id.* ¶ 27. In response, Owens-Corning obtained numerous medical articles from Owens-Illinois showing that the alternative to fiberglass, asbestos, could be deadly to breathe. *Id.* Owens-Corning had intended to use these articles as "weapons in reverse" in negotiations with the employees but never had to use these "weapons." *Id.*

¶ 61 In 1964, Owens-Corning received notice that Johns-Manville was putting a vague warning label on its asbestos-containing products and, consequently, considered putting a warning label on its own asbestos products. *Id.* ¶ 67. Owens-Corning placed a warning label on its Kaylo cartons in 1966, indicating that the product contained asbestos fiber and to avoid breathing the dust, but it did not identify any specific health hazards. *Id.* ¶ 68.

¶ 62 In evaluating the interactions and ties between Owens-Corning and Owens-Illinois to determine whether it was evidence beyond parallel conduct of a civil conspiracy, the *Gillenwater* court concluded that the shared directors did not count as a valid "plus

factor," beyond parallel conduct, because it did not reasonably tend to exclude the possibility that Owens-Illinois and Owens-Corning were acting independently by selling Kaylo without warning labels from 1953 to 1958. (Internal quotation marks omitted.) *Id.* ¶¶ 84, 86. Also, the court noted that although Owens-Illinois and Owens-Corning shared directors from 1938 until 1948, at that time, Owens-Corning was not yet in the asbestos business. *Id.* As for Owens-Illinois owning stock shares in Owens-Corning in 1959, the court concluded this "sheds no light on what relationship, if any, the two companies had with each other in the 1970s, when [plaintiff] was exposed to Kaylo." *Id.* ¶ 88.

¶ 63 However, as for the distribution agreement, the court concluded that this agreement evidenced an implied understanding between Owens-Illinois and Owens-Corning that the potential danger of Owens-Illinois's product would be concealed, or not disclosed, when the product was distributed. *Id.* ¶ 96. In so deciding, the court noted that both companies knew that Kaylo dust was a potential respiratory hazard, and few consumers would have chosen Kaylo after being informed that dust control measures would be required to guard against the risk of asbestosis. *Id.* The court stated:

> "Given what these two companies knew about the respiratory threat posed by asbestos, Owens-Illinois's encouragement of Owens-Corning, via the distributorship agreement, to sell Owens-Illinois's product, Kaylo, amounted to encouragement to keep quiet about the danger of Kaylo—because such silence was essential to the marketing and selling of Kaylo." *Id.*

¶ 64 Thus, the court concluded that a rational trier of fact could find, by clear and convincing evidence, that, during the distributorship agreement (1953 to 1958), Owens-Illinois encouraged Owens-Corning to distribute Kaylo without an adequate warning label. *Id.* ¶ 99.

¶ 65 The court then discussed the scope of any civil conspiracy, *i.e.*, whether the conspiracy ended with Owens-Illinois's sale of its Kaylo division to Owens-Corning in 1958. *Id.* In concluding that the conspiracy ended in 1958, the court analyzed United States Supreme Court criminal cases, which held that once the object of the conspiracy is accomplished, the prosecution cannot extend the life of the conspiracy by implying a subsidiary agreement to keep silent about the agreement. *Id.* ¶ 100. The court stated as follows:

> "[T]he central object of the conspiracy between Owens-Illinois and Owens-Corning was to sell Owens-Illinois's product, Kaylo, without an adequate warning of its inherent danger, *i.e.*, the danger that breathing Kaylo dust could cause asbestosis. That object was accomplished in 1958, at the end of the distributorship agreement, whereupon Owens-Illinois sold its Kaylo division to Owens-Corning. The record gives no basis for supposing that, after 1958, Owens-Illinois cared whether Owens-Corning sold any more Kaylo.
>
> It is true that, presumably, Owens-Illinois did not want anyone to get the idea of suing it for the Kaylo that, prior to 1958, it manufactured and released into the stream of commerce without a warning label, and so Owens-Illinois no doubt preferred that Owens-Corning continue to keep quiet about the potential of Kaylo to cause asbestosis. But arguing that the conspiracy continued as long as the conspirators concealed their misdeeds predating 1958 would extend the life of the conspiracy to absurd lengths—for 14 years, for example." *Id.* ¶¶ 107-08.

¶ 66 The court concluded that Owens-Illinois withdrew from the conspiracy by taking affirmative action inconsistent with the object of the conspiracy when it sold the Kaylo division to Owens-Corning in 1958. *Id.* ¶ 111. The court concluded that "[b]y selling the Kaylo division to Owens-Corning in 1958 and walking away, Owens-Illinois signified to Owens-Corning that it no longer would participate in the conspiracy to distribute Kaylo without [an] adequate warning label." *Id.* ¶ 118. Since the conspiracy between the two companies ended in 1958, long before plaintiff's alleged injury by Kaylo in 1972, the

court affirmed the trial court's granting of judgment *n.o.v.* in favor of Owens-Illinois. *Id.* ¶¶ 86-88, 107.

¶ 67 2. *Additional Evidence Offered*

¶ 68 In addition to the evidence discussed in *Gillenwater*, the plaintiffs here offered the following evidence to show a conspiratorial agreement between Owens-Illinois and Owens-Corning. First, the plaintiffs offered evidence of interactions or ties between Owens-Corning and Johns-Manville. Specifically, in 1958, Owens-Corning entered into rebranding agreements with other manufacturers where Owens-Corning bought asbestos-containing products from other companies, such as Johns-Manville, and resold them under Owens-Corning's Kaylo brand.

¶ 69 Second, the plaintiffs offered evidence that Owens-Illinois previously acknowledged the existence of the civil conspiracy. In particular, the plaintiffs presented evidence of a 1999 antitrust lawsuit filed by Owens-Illinois in which Owens-Illinois alleged that the suppliers and sellers of asbestos (which included Johns-Manville) were engaged in a price-fixing conspiracy. Owens-Illinois alleged that the conspirators had formed an international asbestos cartel whose purpose was to suppress information about the health hazards of asbestos exposure and maximize the demand for, and profits from, the sale of asbestos. According to Owens-Illinois, a central part of the conspiracy was the conspirators working together to suppress publication of scientific research concerning the potential risks posed by asbestos exposure, which included monitoring and editing scientific research results to eliminate references to unfavorable results and

withholding information about asbestos-related illnesses from their own employees and the public.

¶ 70 Third, the plaintiffs presented evidence demonstrating the close relationship between Owens-Illinois and Owens-Corning. In 1938, Owens-Illinois owned 49.77% of Owens-Corning's common stock. In 1978, Owens-Illinois owned over 750,000 shares of Owens-Corning stock. In the 1990s, Owens-Corning brought an arbitration proceeding against Owens-Illinois, claiming that Owens-Illinois was legally responsible for its mounting liability relating to Kaylo. During an opening statement at arbitration, Owens-Corning's counsel said that it was as difficult for Owens-Corning to initiate these proceedings "as it would be for one member of a family to sue another member of a family." Also, although Owens-Illinois sold its Kaylo division, it continued to provide packaging for Kaylo until the late 1960s; the packaging contained no warning label about the risks of asbestos exposure.

¶ 71 Last, the plaintiffs offered evidence of the companies' failure to warn employees about the dangers of asbestos exposure. In 2003, Joseph Lemieux, a former Owens-Illinois CEO, testified that asbestos-containing products were used in some aspects of the glass-making process throughout the 1960s and 1970s. He did not recall seeing asbestos warnings in Owens-Illinois's glass plants from 1965 to 1972. He did not learn about the health hazards of asbestos-containing products until 1974 when Owens-Illinois began its asbestos-control program. In June 1974, Lemieux received a letter from W.G. Horney, also from Owens-Illinois, which stated that asbestos exposure protection standards had been put in place by federal law, many of Owens-Illinois's plants were not meeting the

standards, and Dr. George Bates, Owens-Illinois's medical director, had prepared a corporate asbestos-control program. As a result of this letter, Lemieux contacted plant managers about bringing Owens-Illinois's program in compliance with federal asbestos regulations. He did not recall any communication in the 1970s from Owens-Illinois to the workers about the health hazards of asbestos exposure. Owens-Corning did not provide any warning about the risks of asbestos exposure until 1977 or 1978.

¶ 72 Although *Gillenwater* concluded that a reasonable jury could find, by clear and convincing evidence, that Owens-Illinois and Owens-Corning had entered into a conspiratorial agreement during the time period in which the distributorship agreement was in effect (from 1953 until 1958), we note that John was not exposed to asbestos during this time. Instead, his first exposure occurred in 1969, after the distribution agreement was terminated.

¶ 73 The additional evidence offered in the present case, *i.e.*, that Owens-Illinois used asbestos in products after 1958, it owned shares of Owens-Corning stock after 1958, it did not warn its employees of the health hazards of asbestos exposure until 1974, the manner in which it operated its glass plants, and the manner in which it operated its asbestos-control program, is not different in nature from the evidence rejected as insufficient in *McClure* and *Gillenwater*. Although the evidence shows repeated business contact between Owens-Illinois and Owens-Corning, it also indicates that the two companies became less intertwined after 1950. They no longer shared any directors, and Owens-Illinois's stock ownership decreased to 42% by 1950 and 25% in 1968. Also, the fact that Owens-Corning's counsel compared Owens-Illinois to family does not establish

that they conspired about asbestos nearly 10 years after the termination of the distribution agreement. Moreover, we note that the 1999 antitrust lawsuit filed by Owens-Illinois does not support the plaintiffs' argument that the Owens-Illinois and Owens-Corning conspiracy continued after 1958 where Owens-Corning was not named in the complaint. Lastly, the fact that Owens-Illinois continued to use asbestos in its products and failed to warn its employees about the dangers of asbestos until the late 1970s also does not show that the conspiracy continued beyond the termination of the distribution agreement. Thus, we find that the plaintiffs failed to prove by clear and convincing evidence that the conspiracy between Owens-Illinois and Owens-Corning existed at the time of plaintiff's injury. Accordingly, we affirm the trial court's order granting summary judgment in favor of Owens-Illinois.

¶ 74 III. CONCLUSION

¶ 75 For the foregoing reasons, we affirm the judgment of the circuit court of Richland County.

¶ 76 Affirmed.