ESSEX COUNTY CIRCUIT COURT
May 12, 1933.

William Lynch)
vs.) Action at Law.
Home Insulation Co.)
)

TRANSCRIPT

INDEX

WITNESSES	DIRECT	CROSS
Motion for nonsuit and court's decision		
• • Directed verdict & • •		
Charge		

(Lawrence Squire)

JOHN MACLAUGHLAN
Official Stenographer Essex
County Courts
Supreme Court Examiner
Room 415, Court House,
Newark, N.J.

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/1

ESSEX COUNTY CIRCUIT COURT.

May 12, 1933.

William Lynch)
vs.)
Home Insulation Company) Action at Law.
)

Before Hon. Worrall F. Mountain, J., and a jury.

For plaintiff appears Elias G. Willman.
For defendant appear Coult, Satz & Tomlinson (by Joseph Coult, Jr.).

x x x

PLAINTIFF RESTS.

MR. COULT. I respectfully move for a nonsuit on behalf of the defendant, on the ground there is no competent evidence of the negligence complained of in the complaint which constitutes proximate cause of the injury to the plaintiff.

Does your Honor require argument to be heard in the presence of the jury or shall the jury retire?

(The jury retires.)

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/2

(Argument.)

MR. COULT. The difficulty with the plaintiff's case is there has not been any proof yet what standard of care is required, other than the mere allegation that we owed the plaintiff reasonable care. They say that he was employed in dusty employment and as a result of that he is suffering from a dust disease, and the rest is left for the consideration of the jury.

They state that a number of masks were furnished but the plaintiff did not like them because they hurt his face and he did not use them.

In the first place, there isn't anything to show that the employer had any knowledge of the conditions which were present at the time this man was in the employ of his employer were dangerous. There isn't anything to show that conditions in this plant were any different from conditions in the standard plant, using standard appliances, nor that masks of any different type were used or any greater number were used in standard plants of this type, in fact, there is no evidence to show that anything could have been done to give this man any greater protection than he had. There is no evidence to show that the masks would

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/3

have helped him if he had worn them, nor is there anything to show that ventilating systems were practical or that other companies used ventilating systems, or that there was any standard custom in regard to the use of ventilating systems. All of this has been gone over very carefully in the case of Butler against the Pennsylvania Pulverizing Company, which was cited in the Circuit Court of Appeals on an appeal from the District of New Jersey, filed September 29, 1932.

(Argument.)

(Adjourned to May 16, 1933, at ten o'clock a.m.)

May 16, 1933.

Continued pursuant to adjournment.

Present, counsel as before stated.

THE COURT. The motion will be denied. I have read the case of Butler v. The Pennsylvania Pulverizing Company in 61 Federal, second series, page 311, and of course I have read with great interest the decision of Chief Justice Gummere and Justice Parker and Justice Kalisch in the case of Rose Smith, Admx., against the International High Speed Company, and also I presume an appeal from that case in 98 Law, page 587, in which I think that case covers this present situation.

It seems that the question of negligence and the question of assumption of risk and the question of contributory negligence are all jury questions under these cases.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury returns into court.)

x x x

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/5

(The jury retires.)

MR. COULT. I move for the direction of a verdict on the same grounds as given on the motion for a nonsuit, that is to say, there is no evidence of negligence on the part of the defendant which proximately produced the injuries complained of, and I wish to add one more ground, which seems to me to be extremely important, and that is this, in that this case differs from the cases that have been recorded and which your Honor has read. Unquestionably, although we could not tell from the record, but it must have been that there was proof that the product employed by the defendants was in fact a dangerous substance; in other words that it contained free silicate which would produce the result which the expert witnesses said in those cases would come about if free silicate were allowed to permeate the air breathed by the plaintiff in particles fine enough to enter the lung tissue. In this case we have an entirely different situation, made up of a substance which admittedly contains no free silicate.

Your Honor will recall that I was careful

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/6

to ask each of the chemists and experts for the plaintiff whether or not the rock wool which was admittedly used by the employers of the plaintiff in this case, which is charged to be a source of injury and which the plaintiff complains of, contained free silicate, and each one said it did not. It is in evidence and undisputed that this product contained no free silicate, and that products not containing free silicate will not produce deleterious results.

There is no evidence that the employer was aware of the danger of free silicate, and therefore he was not obliged to use such care as would be required if he did know the danger of free silicate.

The added element is that in this case there is no free silicate in this substance, and therefore this substance could not produce the injury complained, and that is not denied, that is not rebutted. I cannot recall anywhere in the proof in this case the opinion of anybody that this particular condition is dangerous.

(Argument.)

THE COURT. I will deny the motion for

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/7

same reasons I gave in denying the motion for a nonsuit.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury returns into court.)

Mr. Coult sums up for defendant.

Mr. Willman sums up for plaintiff.

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/8

Lynch v. Home Insulation Co.

The Court charges the jury as follows:

MOUNTAIN, J:

The case which you have tried is a case in which the plaintiff alleges that by virtue of the negligence of the defendant he is entitled to recover compensation, not for injuries which he received because of an accident, but for injuries he alleges he received because of the negligence of the defendant in a duty which the defendant owed to him.

These cases are not so usual in a court of law because, as you know, we have passed in this state what is known as the Workmen's Compensation Act and, generally, cases between employers and employees are administered under that act. This case, however, is an exception.

The relation of employer and employee, as we have progressed in the last two hundred years, has brought about different changes in the law. The law has become more refined; there is unquestionably today much more care in legal opinions to care for the servant than there used to be.

Now, I call your attention to the fact that among other things in this case the defendant not only

denies this negligence but alleges and insists that the plaintiff himself was guilty of contributory negligence, and that the plaintiff assumed the obvious risks attendant upon his work. Now, what do I mean by that? Well, again to harken back two hundred years ago, because that is far enough to be safe, a sailer who undertook to ship on a vessel, a sailing vessel, of course assumed the risk of climbing the rigging and working on the lines in all kinds of weather, and perhaps with the danger of being thrown off into the sea. He assumed that risk in taking the job.

When the pioneers came into this country and lumberjacks were operating through Michigan, Canada and Maine, and these men were handed an axe and a camp pack and sent out to the woods, there were certain risks that they assumed. They assumed the risk of danger and the use of an axe on a tree chilled to the steel by the atmosphere; they assumed the risk of rolling logs and in using these camp packs. They assumed risks in crossing streams and breaking log jams. That is what I mean when I mention assumption of risk.

Of course, as civilization has developed we have had more and more machinery. We have had more development in industries, and as a result of this we have had many occupational diseases which arise from the

occupation which a man has to suffer because of his employment.

In this case there are three things that I would like you to remember when you retire to the jury room, because no matter how you approach it, whether from the plaintiff's point of view or the defendant's point of view, these three things are emphatically important. I would say that they are the three things around which the entire case resolves itself. They are the three things which, if I were on the jury, I would take up in their order, in order that there might not be disorder.

The first is, was the defendant negligent and has the plaintiff proven that?

Secondly, did the plaintiff assume the risk?

Lastly, was the plaintiff guilty of contributory negligence?

Now, taking them up in their order, what has the plaintiff adduced to indicate that the defendant was negligent? I may attempt to quote a little testimony, and if I do and if I misquote it, in your opinion, you should entirely ignore my misquotation and take your own recollection of the testimony, because you are the sole arbiters of all questions of fact.

This plaintiff worked for the defendant about nineteen months. The defendant was engaged in insulating

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/11

homes or buildings with a material which I shall call "rock wool," a term used by the chemists called on behalf of the defendant. The plaintiff alleged that after he had been in the defendant's employ for about fourteen months he thought he was getting colds because it pointed to them in his chest, he had shortness of breath, occasional coughing.

His occupation consisted, as I understand it, in handling this rock wool, and either hand-packing it under the floor or else blowing it through a hose into the ceiling so that it acted as insulation between the walls of a building. He alleged that this was a dusty job, that it was accompanied by a great deal of dust and that it was, as I got the impression, rather disagreeable when the dust became a little heavy. The power to force this rock wool was furnished by a gasoline engine which generally, I suppose, was at the curb, and which forced this wool with a pressure of four pounds, up the hose pipe. An attempt was made, as I understand the testimony, to keep this wool from flying back by using loose burlap around the nozzle of the hose, at the aperture where it was placed in the building walls.

The plaintiff alleged also that not only was there visible dust but invisible dust, and that it caused him to expectorate. As I understood him, his

sputum was discolored after a day's work. He alleged, among other things, as testimony indicating the negligence of the defendant, that proper safeguards were not thrown around him to protect him. Among other things he put his finger on the question of a proper mask. Now,as to that mask: I think he told us he used it but once, as I recall his testimony, and he found it was disagreeable and he threw it aside and never used it after that. I do not think he was offered the mask, but saw it and took it, believing that it would be necessary in his work. He told us that the mask cut his face, or irritated his face, which was one of the reasons why he discarded it.

Another claim he makes is that he should have been warned of the character of the dust. Well, of course when you approach that claim you have to ask yourselves whether the defendant knew of the dangerous character of the dust, if it was dangerous. You have to also inquire, among other things, as to the conduct of the plaintiff himself, as a reasonable and prudent man, working on a job of the character he had.

Now, the defendant has alleged, among other things, as I say, by way of defense, that they were not negligent. When I say "they" I refer to the defendant company. They allege that in the first place they did not know that this dust was dangerous, if it was dangerous,

and they have produced experts who have told us that it was not dangerous; and, in the second place, they allege that under all the circumstances existing, the plaintiff, in the exercise of reasonable care, should have been warned by the obvious conditions and that he assumed the risk of his employment.

They allege he was guilty of contributory negligence. Perhaps, incident to that claim, you might find, among other things, they base it upon testimony given perhaps by himself, that he used his mask but once.

You have to decide a great many questions of fact in this case, and among other things, as I say, you come to the question of whether or not this dust was dangerous, whether it was noxious when breathed into the lungs of a human being.

We have had experts who testified on the plaintiff's side as to the chemical analysis made of samples submitted to the chemists. These same samples are in evidence. As I understood the testimony of the chemist, he told us among other things that an analysis showed the composition of this product, and that was put in documentary form, written out by him in the nature of a report and put in evidence.

The defendant took that same report which was put in evidence by the chemist, and questioning certain

gentlemen from the John Hopkins University they told us that there was no free silicate in this sample and that if there had been this dust would have been dangerous, but in the absence of free silicate it was not dangerous.

Then you have heard not only the battle of expert physicians but the battle of expert Roentgenologists. On the one hand you have testimony which you may find tends to indicate the plaintiff in this case had silicosis, or pneumoconiosis.

The testimony of the plaintiff's X-ray men, you may find, tends to indicate that the lungs were subject to this dust by the pathological findings. On the other hand you have the testimony given by the defendant's x-ray men, one of whom is the Chief of the X-ray Staff of John Hopkins, to the effect that the plates offered in evidence by the plaintiff showed no pathology as claimed by the plaintiff, and in addition to that the defendant has introduced other plates in evidence taken at different times which they say tend to show that these conditions were entirely absent in this man's lungs. Of course, that is rather an important point, but I do not mean that it is more important than the finding of whether or not this product consisted of free silicate, but if these x-rays do indicate that this man's lungs were not affected, that might have considerable to do with your eventual verdict.

If, on the other hand, it is found that this man's lungs were not affected and that these X-rays did not show it, you may find that weakens any clinical finding by the doctors, because as I recall the testimony it was to the effect that they were largely guided in the diagnosis of these two diseases by the X-rays.

Now, what was the duty? If the defendant was negligent why was he negligent and how was he negligent and what duty did he owe to the plaintiff in this case when he hired the plaintiff? The Courts of this state have held that under a contract of employment it becomes the master's duty to take reasonable care to provide a proper place in which the servant may work, and to furnish suitable tools and instruments with which he may work, to inspect and repair the apparatus at reasonable intervals and select and employ competent workmen. It is also accepted as law in this state that under the same contract, the servant assumes the risks incident to his employment, including such as arise from the negligence of a fellow servant engaged under the same master in common employment, and assumes also those plain and obvious dangers which are apparent to one of ordinary skill and understanding.

Now, to harken back to our ancestors who were employed as sailors or lumberjacks or steel workers a couple of hundred years ago, if they had steel them, the

kind they have today--I think they were made into swords, not into plow shares--as I say, it was perfectly obvious to a lumber man when he accepted an axe that he expected or knew of the obvious dangers that were going to happen in its use. When the sailer undertook to climb a rigging in a gale and perhaps the lines were loose, he accepted the dangers which were obvious to him.

Now, in this case you come then to what the defendant did with this obligation cast upon it. The plaintiff claims that he was not given a safe place to work in, nor did he work under conditions which were safe. The plaintiff claims that he was not furnished with proper apparatus so that he could have prevented inhaling this dust. Of course, that is met by testimony on the other side, and you may also, of course, consider that if there were masks there, whether one or two, the plaintiff said he wore it once because of the irritation in wearing it--I may be wrong about that, but I think he said he wore it once.

Now, you may find that if that were the case and he did work under conditions which would have warned a reasonably careful and prudent man that there was danger by the irritation, either through his nostrils or by the irritation of this mask when he wore it, if you find he was negligent or assumed this risk, he cannot recover in this case. The burden of proving assumption of

risk and contributory negligence is upon the defendant. The burden of proving negligence on the part of the defendant is upon the plaintiff. By burden of proof I do not mean whenever one party calls one witness and the other calls seven, that it is measured by the number of witnesses. It is not measured by quantity but by quality; it means a fair preponderance of credible evidence.

There is one more fact I want to bring up in connection with this charge, and that is as to the alleged negligence of the defendant. If the condition, under which this man and other men now employed by the defendant worked, was such as to indicate to a reasonably careful and prudent employer that there was peril; if there was a suggestion from the character of the work under all the circumstances that could have been carried to the mind of the reasonably prudent and careful man to indicate danger, you might find that the defendant, under the conditions that existed, was guilty of negligence.

Now, the other side of that picture is equally obvious. One man has taken the stand and testified he worked and did not use any mask and never had any difficulty. The defendant insists that there were not any circumstances presented which suggested danger or peril to them, and in the absence of that they insist they cannot be charged with negligence. Now, what do I mean by that

exactly? Well, perhaps some of you grew up on a farm and perhaps some of the farms were not quite as refined as they are today, but you may remember that you took ears of wheat down to the cellar and you had a very dusty job. The modern farm, as you know, frequently has a silo on it for the benefit of the cattle. One of the jobs on a farm that often takes place is to send someone up the silo to trim it down, and if that person is wise he wears a wide brimmed hat and suffers. Now, I suppose a man might trim down this every day for two years and breath up some of that very finely cut herbage to his detriment. If he had to work at it steadily for two or three weeks it might occur to him, and on the other hand it might not occur to him.

If you find for the defendant in this case your verdict should be for the defendant. If you find for the plaintiff and he is entitled to recover, then he would be entitled to recover compensation for the bodily injury resulting from the negligence of the defendant. The character of that injury has been described. We were told that this injury was progressive. We were told that he left this position and took a job with the Hudson County Park Commission and that he occasionally attended bar at night.

He would be entitled to damages which you

think would compensate him for his pain and suffering. He would be entitled to damages for the effect of this injury or disease upon his health, that is as to whether it is temporary or permanent. He would be entitled to recover for the pecuniary loss he has suffered by reason of his inability to continue in his prior occupation, in short, that is the diminution in his wage earning ability, and that would be the limit of his recovery if you find he has made out a case and is entitled to recover anything.

I have somewhat shortened this charge, not that I charge very lengthy, but I have a number of requests here which cover some of the law which I have not covered myself, the requests being made by the plaintiff.

"1. It was the duty of the Home Insulation Co., Inc., of New Jersey, to exercise reasonable care that the place in which it set William Lynch to work and the system or method adopted by it for the doing of the work should be reasonably safe for William Lynch and free from latent dangers known to it or discernible by an ordinary prudent employer in like circumstances."

"3. While you may consider customary methods in determining whether or not the Home Insulation Co., Inc., of New Jersey performed its duty to provide a safe place of work for William Lynch, that does not constitute a controlling test, but it is for you to say whether, under the circumstances

of the case, the provisions made by the Home Insulation Co. Inc., of New Jersey were such as an employer of ordinary prudence would have made for the safety of his workmen."

No. 3 I will not charge, as I have covered that.

"4. If the Home Insulation Co., Inc., of New Jersey knew that the atmosphere in and about the premises where William Lynch was working was contaminated by a dangerous dust, as is claimed, and it failed to correct the condition by resorting to some reasonable safeguard, or if such a contaminated condition existed for such a length of time that a reasonable test or inspection by the Home Insulation Co., Inc., of New Jersey through its agents, as was its duty, would have discovered it, then, whether it be actual knowledge or implied knowledge, the duty of the Home Insulation Co., Inc., of New Jersey to William Lynch was to exercise reasonable care to keep the said dangerous dust under such proper control so that it would cause no harm to the plaintiff."

"5. It was the duty of the Home Insulation Co., Inc., of New Jersey to instruct and warn William Lynch as to the danger of the inhalation of the dust particles if it knew or should have known of that danger as a reasonably prudent employer, and of which it knew or should have known that William Lynch was ignorant," if he was.

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/21

The sixth I will not charge as I have already charged that, and the seventh I will not charge.

"8. In determining the question of assumption of risk, you are also to consider that common experience does not justify the conclusion that the average individual would know that the breathing of dusty air is anything more than a temporary inconvenience; and if William Lynch as an average individual justifiably believed that, then he in no way assumed the risk of a permanent injury by working in the dusty atmosphere."

(The jury retires.)

MR. COULT. I respectfully pray an exception to that portion of your Honor's charge in which your Honor charged the fourth request of the plaintiff.

Exception noted as ground of appeal.

MR. COULT. I respectfully pray an exception to that portion of the Court's charge in which the Court charged the jury that there might be a recovery in this case if the jury found the plaintiff had established by the greater weight of the evidence that there was negligence and the defendant failed to establish by the greater

weight of the evidence that there was assumption of risk or contributory negligence, on the ground that even though negligence existed, and contributory negligence and the assumption of risk were absent, there could be no recovery whatever in this case unless the jury found that the condition which the plaintiff complained of was present.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1. It was the duty of the Home Insulation Co. Inc. of New Jersey, to exercise reasonable care that the place in which it set William Lynch to work and the system or method adopted by it for the doing of the work should be reasonable safe for William Lynch and free from latent dangers known to it or discernible by an ordinary prudent employer in like circumstances. CHARGED.

Burns v. Del. & Atl. Tel. Co.
70 N. J. L. 745.

2. While you may consider customary methods in determining whether or not the Home Insulation Co. Inc. of New Jersey performed its duty to provide a safe place of work for William Lynch, that does not constitute a controlling test, but it is for you to say whether, under the circumstances of the case, the provisions made by the Home Insulation Co. Inc. of New Jersey were such as an employer of ordinary prudence would have made for the safety of his workmen. CHARGED.

Baird Co. v. Boyd, 41 (fed.(2) 878 (C.C.A. 4th.)
Midland R.R. v. Bell 242 Fed.803 (8th cir.)
Texas R.R.Co. v. Behymer 189 U.S.468 (U.S.Sup.Ct)

3. It was also the duty of the Home Insulation Co.

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/24

Inc. of New Jersey to make inspections and tests of its machinery, appliances and premises at proper intervals so as to enable it to maintain them in a reasonable safe condition.

DENIED

N. Deutscher Lloyd Co. v. Ingelbregsten
57 N. J. L. 400.

Zelles v. Delany, 80 N. J. L. 452.

Atz v. Newark Lime Co., 57 N. J. L. 41.

4. If the Home Insulation Co. Inc., of New Jersey knew that the atmosphere in and about the premises where William Lynch was working was contaminated by a dangerous dust, as is claimed, and it failed to correct the condition by resorting to some reasonable safeguard, or if such a contaminated condition existed for such a length of time that a reasonable test or inspection by the Home Insulation Co. Inc. of New Jersey through its agents, as was its duty,would have discovered it, then, whether it be actual knowledge or implied knowledge, the duty of the Home Insulation Co. Inc. of New Jersey to William Lynch was to exercise reasonable care to keep the said dangerous dust under such proper control so that it would cause no harm to the plaintiff

CHARGED.

5. It was the duty of the Home Insulation Co. Inc. of New Jersey to instruct and warn William Lynch as to

the danger of the inhalation of the dust particles if it knew or should have known of that danger as a reasonably prudent employer, and of which it knew or should have known that William Lynch was ignorant. CHARGED.

Ramsey v. Raritan Copper Works, 78 N.J.L. 474.

Rhebovsky v. N.J.Worsted Spinning Co. 76 N.J.L. 542

Tulpon v. Cantor, 87 N.J. L. 213.

The purpose of warning William Lynch of the dangers of his work, is not merely to enable him to work in safety, but to enable him to determine whether his contract of employment should be enlarged to include the danger or whether it should be abandoned. DENIED.

Thompson v. United Laboratories, 108 N.E. 1042 (Mass.)

6. The defendant alleges that the plaintiff assumed the risk of his employment. This is an affirmative defense and the burden to establish such defense is on the Home Insulation Co. Inc. of New Jersey. DENIED.

Davis v. Crane, 12 Fed. (2d) 355 (8th Cir.)

Kanawha R.R. v. Kerse, 239 U.S. 576.

7. The plaintiff, William Lynch, did not assume the risk of working in a dusty atmosphere unless he then knew or should have known the pathelogical effect and the ful:

danger of the inhalation of the dust particles with which he claims to have been surrounded. DENIED.

Burns v. Del. & Atl. Tel. Co. 70 N.J.L. 748.

8. In determining the question of assumption of risk, you are also to consider that common experience does not justify the conclusion that the average individual would know that the breathing of dusty air is anything more than a temporary inconvenience; and if William Lynch as an average individual justifiably believed that, then he in no way assumed the risk of a permanent injury by working in the dusty atmosphere.

CHARGED.

Smith v. International High Speed Co.

(N.J.Sup. Ct. 1922 - Unreported opinion).

Published by AsbestosClaims.Law
asbestosclaims.law/library/11919/27