

Schelske v. Creative Nail Design, Inc., 280 Mont. 476 (1997)

933 P.2d 799



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Distinguished by [Meyer v. Creative Nail Design, Inc.](#), Mont., April 15, 1999

280 Mont. 476
Supreme Court of Montana.

Mischelle SCHELSKE and Rick Schelske, Plaintiffs
and Appellants,

v.

CREATIVE NAIL DESIGN, INC., a foreign corporation; OPI Products, Inc., a foreign corporation; Clairol, Inc., a foreign corporation, Helene Curtis, Inc., a foreign corporation; [Nexxus Products Company](#), a foreign corporation; The ADU Company, a foreign corporation; Revlon Professional Products, Inc., a foreign corporation; [Cosmetic Arts](#), a foreign corporation; American International, a foreign corporation; Sebastian International, a foreign corporation; Unit Chemical Corporation, a foreign corporation; Paul Mitchell (Bocchi Laboratories); Matrix Essentials, Inc., a foreign corporation; Malibu 2000, a foreign corporation; Highland Corporation, a foreign corporation; Capital Hill Mall Partnership, a Utah limited partnership; JC Penney Company, Inc., a foreign corporation; Palmer Duncan Construction Company, a Montana corporation; and Does and Roes One Through Ten, Defendants and Respondents.

No. 96-153.

Submitted on Briefs Oct. 10, 1996.

Decided Jan. 2, 1997.

Order Denying Rehearing April 1, 1997.

Synopsis

Plaintiffs brought products liability action against cosmetic manufacturers to recover for injuries allegedly caused by workplace exposure to cosmetics. The District Court of the First Judicial District, [Lewis](#) and Clark County, [Dorothy McCarter](#), J., granted summary judgment for manufacturers, and plaintiffs appealed. The Supreme Court, [Erdmann](#), J., held that: (1) plaintiffs failed to comply with case management order; (2) plaintiffs could not rely solely on existence of federally

mandated material safety data sheets for component chemicals to establish prima facie case; and (3) plaintiffs could not rely on principles of allocation of fault among manufacturers to relieve themselves of burden of proving causal connection between particular product and injured plaintiff's condition.

Affirmed; reaffirmed en banc on denial of petition for rehearing.

Trieweiler, J., dissented and filed opinion, in which Hunt and Regnier, JJ., joined on en banc denial of petition for rehearing.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (11)

[1] **Appeal and Error**
🔑 De novo review

Appeals from summary judgment rulings are reviewed de novo. [Rules Civ.Proc., Rule 56.](#)

[2] **Appeal and Error**
🔑 Review using standard applied below

When reviewing district court's grant of summary judgment, Supreme Court applies same evaluation as district court based on summary judgment rule. [Rules Civ.Proc., Rule 56.](#)

[3] **Judgment**
🔑 Absence of issue of fact

Summary judgment is proper only when no

genuine issue of material fact exists and when moving party is entitled to judgment as a matter of law. [Rules Civ.Proc., Rule 56.](#)

have potential adverse health effects, many of them included over 150 pages of material safety data sheets for component chemicals, and none of affiants provided additional information as to specific product names.

[1 Cases that cite this headnote](#)

^[4]

Appeal and Error

🔑 [Pleadings and Evidence](#)

Supreme Court looks to pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine existence or nonexistence of genuine issue of material fact in reviewing summary judgment ruling. [Rules Civ.Proc., Rule 56.](#)

^[7]

Pretrial Procedure

🔑 [Discovery methods and procedure](#)

Plaintiffs in products liability action against cosmetic manufacturers failed to comply with provision of case management order requiring statements specifically describing circumstances of exposure to each product identified as having caused harm and time period during which each product was used; injured plaintiff worked at place of alleged exposure for eight years, and plaintiffs only generally alleged that plaintiff used each and every product on daily basis.

[2 Cases that cite this headnote](#)

^[5]

Products Liability

🔑 [Nature of Product and Existence of Defect or Danger](#)

Products Liability

🔑 [Proximate Cause](#)

In products liability action, plaintiff must show: (1) that he or she was injured by product; (2) that injury occurred because product was defective and unreasonably dangerous; and (3) that defect existed when it left hands of defendant. [MCA 27-1-719\(2\).](#)

[3 Cases that cite this headnote](#)

^[8]

Pretrial Procedure

🔑 [Discovery methods and procedure](#)

Affidavits submitted by plaintiffs in products liability action against cosmetic manufacturers did not satisfy requirement of case management order that plaintiffs present physician's affidavit identifying specific injuries, specific chemicals causing injuries, and scientific or medical basis for causal connection; one affiant was not physician, second affiant merely accepted statements made by first affiant, and third affiant merely stated that chemicals in manufacturer's products were associated with certain diseases of which injured plaintiff had some symptoms.

[1 Cases that cite this headnote](#)

^[6]

Pretrial Procedure

🔑 [Discovery methods and procedure](#)

Affidavits submitted by plaintiffs in products liability action against cosmetic manufacturers did not sufficiently identify specific products to which injured plaintiff was allegedly exposed, as required under case management order; while affidavits listed numerous products that might

[9]

Products Liability

🔑Cosmetics, soaps, and hair-care products

Products Liability

🔑Nature of product and existence of defect or danger

Plaintiffs in products liability action against cosmetic manufacturers could not rely solely on material safety data sheets for component chemicals to establish prima facie case, despite plaintiffs' contention that existence of sheets demonstrated that manufacturers' products were toxic or hazardous; while sheets were required for hazardous chemicals, they provided no direct information regarding possible toxicity and did not establish that any particular product was in defective condition and unreasonably dangerous. 29 C.F.R. § 1910.1200.

MCA 27-1-719; Restatement (Second) of Torts § 433A.

1 Cases that cite this headnote

Attorneys and Law Firms

****800 *479** John C. Doubek, Small, Hatch, Doubek & Pyfer, Helena, for Plaintiffs and Appellants.

Randy J. Cox, Boone, Karlberg & Haddon, Missoula, Susan P. Roy, Garlington, Lohn & Robinson, Missoula, Ronald F. Waterman, Gough, Shanahan, Johnson & Waterman, Helena, for Defendants and Respondents.

Opinion

ERDMANN, Justice.

Mischelle and Rick Schelske appeal from the amended order granting summary judgment in favor of the defendant manufacturers as entered by the First Judicial District Court, Lewis and Clark County. We affirm.

The issue on appeal is as follows:

Did the District Court properly grant summary judgment in favor of the defendants?

A. Did the District Court correctly conclude that the Schelskes failed to comply with the Case Management Order?

B. Did the District Court err in determining that the Schelskes cannot exclusively rely upon Material Safety Data Sheets to establish a prima facie claim of product liability?

C. Did the District Court err in not accepting the Schelskes' legal assertion that once the plaintiffs produce evidence of multiple product "indivisible injury" the causation element of the claimants' burden of proof is satisfied and the burden shifts to the manufacturer ****801** to prove that their product did not cause injury?

[10]

Products Liability

🔑Warnings or Instructions

Products Liability

🔑Chemicals in general

Manufacturers are not subject to absolute liability simply because they have placed into stream of commerce products for which material safety data sheets have been provided pursuant to federal law, which sheets are required for all hazardous chemicals. 29 C.F.R. § 1910.1200.

[11]

Products Liability

🔑Cosmetics, soaps, and hair-care products

Products Liability

🔑Proximate Cause

Principles of allocation of fault among tortfeasors did not relieve plaintiffs in products liability action against cosmetic manufacturers of burden of proving causal connection between particular product and harm to injured plaintiff.

opinion. Specifically the court stated in its order that,

FACTS

Mischelle Schelske worked as a beautician at the JC Penney store in Helena from September 4, 1984, until October 1992, when she left her management position at the salon. On May 11, 1994, Mischelle and her husband Rick filed suit against fourteen cosmetic manufacturing and marketing companies, two construction companies, and the owner of the beauty salon space. The complaint alleges her work exposed her to different substances which allegedly were toxic and that, as a result, commencing in the summer of 1992, she began to experience a variety of pains, swelling, and [digestive disorders](#). She ***480** states in her complaint that by December 1992, she was totally unable to continue her work at the salon because of her severe symptoms and debilitating injuries and that she has since been unable to hold gainful employment and has sustained permanent injuries. The Schelskes assert that each cosmetic manufacturer designed, manufactured, and sold products which were defective and that each product directly and proximately damaged them.

On September 28, 1994, the District Court conducted a preliminary pretrial hearing. Pursuant to [Rule 16, M.R.Civ.P.](#), the District Court issued a Case Management Order (CMO). The CMO, dated October 11, 1994, was designed to help focus the extensive discovery and to aid in the handling of the complex, multi-party litigation. The Schelskes and the defendants agreed to the issuance of this order. The CMO granted the Schelskes sixty days to serve discovery requests on the defendants, but limited this to obtaining information regarding the contents of the products used by Mischelle, or those which she claims to have been exposed to in the salon. All other discovery was stayed pending compliance with the CMO.

The CMO then provided that within ninety days from the entry of the order, the Schelskes were required to provide a list of products, the circumstances of the alleged exposure, an identification of each specific chemical which allegedly caused harm, and a physician's opinion of a causal connection between exposure and injury. The CMO required that the affidavit from the physician stating his or her opinion must: (1) list all injuries, illness, or conditions suffered by Mischelle; (2) specify the chemical(s) that caused each illness, injury or condition; and (3) state the scientific bases for the physician's

It will not be sufficient for the affidavit to state a "laundry list" of injuries and chemicals. Each injury, illness or condition must be itemized and specifically linked to the chemical or chemicals believed to have caused that particular injury, condition or illness.

On January 9, 1995, the Schelskes filed the affidavit of Jack Thrasher, a toxicologist from New Mexico. On January 30, 1995, the cosmetic manufacturers moved to strike Thrasher's affidavit alleging that it failed to comply with the CMO. On the same date the Schelskes filed a notice of filing discovery requests to all defendants. This discovery was not conducted within the sixty days as provided in the CMO, thus the manufacturers resisted the discovery and moved for a protective order.

***481** A consolidated hearing for all pending motions was set for May 25, 1995. On April 13, 1995, prior to the hearing but after the ninety days provided for in the CMO, the Schelskes filed the affidavit of Curt G. Kurtz, M.D., and then on April 28, 1995, they also filed the affidavit of Gunnar Heuser, M.D. The defendants moved to strike both affidavits, alleging that neither came close to complying with the CMO. At the hearing, the District Court determined that the affidavits did not meet the requirements of the CMO because they did not list which chemicals produced which symptoms and stated that if the court were to accept them it would have the effect of reversing the burden of proof. The motions to strike were taken under advisement and the motion for protective order was granted as to the Schelskes' untimely discovery requests. The court gave the Schelskes three additional months to comply with the CMO.

****802** On August 18, 1995, the Schelskes filed a second affidavit by Dr. Heuser which included approximately 100 Material Safety Data Sheets (MSDS). Manufacturers are required by federal law to obtain or develop MSDS for each chemical they produce which potentially can cause a health hazard in order to provide information to employees about the hazards of the chemicals being produced. On October 23, 1995, after consideration of Dr. Heuser's statement, the court determined that it did not

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comply with the CMO as an affidavit from a physician listing all of Mischelle's injuries, illnesses, and conditions caused by the exposures, specifying the chemicals which caused each injury, and medically substantiating the physician's opinion as to these matters. The court concluded that the Schelskes had not complied with the CMO within the three-month extension period previously granted.

The cosmetic manufacturers therefore moved to strike Dr. Heuser's affidavit and moved for summary judgment asserting that the failure to comply with the CMO and the fundamental failure to offer any proof of a defective product was fatal to the Schelskes' case. A hearing was set for January 18, 1996. On January 16, 1996, the Schelskes filed a third affidavit by Dr. Heuser. In its decision and order the court stated that upon reviewing all of Dr. Heuser's affidavits it concluded that they did not satisfy the requirements of the CMO and therefore granted the defendants' motion to strike. The District Court also granted the defendants' motion for summary judgment. The District Court stated that the Schelskes had not even remotely complied with the provisions of the Case Management Order and as a result there was a failure to allege a prima facie *482 products liability cause of action as set forth in § 27-1-719(2), MCA. The Schelskes appeal this decision and order.

ISSUE

Did the District Court properly grant summary judgment in favor of the defendants?

[1] [2] [3] [4] We review appeals from summary judgment rulings de novo. *Motarie v. Northern Montana Joint Refuse Disposal Dist.* (1995), 274 Mont. 239, 242, 907 P.2d 154, 156; *Mead v. M.S.B., Inc.* (1994), 264 Mont. 465, 470, 872 P.2d 782, 785. When reviewing a district court's grant of summary judgment, we apply the same evaluation as the district court based on Rule 56, M.R.Civ.P. *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901, 903. Summary judgment is proper only when no genuine issue of material fact exists and when the moving party is entitled to judgment as a matter of law. *Brown v. Demaree* (1995), 272 Mont. 479, 901 P.2d 567. This Court looks to the pleadings, depositions, answers to interrogatories, admissions on

file, and affidavits to determine the existence or nonexistence of a genuine issue of material fact.

Ulrigg v. Jones (1995), 274 Mont. 215, 907 P.2d 937.

A. Did the District Court correctly conclude that the Schelskes failed to comply with the Case Management Order?

The District Court's issuance of the CMO was wholly within its discretion as a management tool contemplated by Rule 16, M.R.Civ.P. This order was patterned after a case management order issued by the United States District Court, District of Montana, in *Eggar, et al. v. Burlington Northern R.R. Co.* (D.Mont.1991), 1991 WL 315487, *aff'd* *Claar v. Burlington Northern R.R. Co.* (9th Cir.1994), 29 F.3d 499. The CMO in the present case required the Schelskes to establish the prima facie elements of their products liability claim. Failure to comply with the order would therefore result in a failure to establish that any genuine issues of material fact existed as to the products liability claim, making the case proper for summary judgment. This Court will therefore review the record de novo to determine whether any genuine issues of material fact exist as to the elements of the Schelskes' products liability claim as required by the CMO.

[5] Section 27-1-719(2), MCA, codified the product liability common law in Montana. This section provides:

A person who sells a product in a defective condition unreasonably dangerous to a user *483 or consumer or to the property of a user or consumer is liable for physical **803 harm caused by the product to the ultimate user or consumer or to his property if:

- (a) the seller is engaged in the business of selling such a product; and
- (b) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

This Court has previously held that in a products liability action the plaintiff must show: (1) the plaintiff was injured by the product; (2) the injury occurred because the product was defective and unreasonably dangerous; and (3) the defect existed when it left the hands of the

defendant. *Brothers v. General Motors Corp.* (1983), 202 Mont. 477, 480, 658 P.2d 1108, 1109; *Brown v. North American Mfg. Co.* (1977), 176 Mont. 98, 105, 576 P.2d 711, 716.

In sum, the Schelskes were required by the CMO to establish the following facts in order to proceed with a prima facie claim of products liability: (1) product identification; (2) use and exposure; and (3) causation linking product defect to an identifiable injury.

^[6] The first element required by the CMO was a statement specifically identifying each product by manufacturer that Mischelle claims to have caused her harm. The affidavits submitted by the Schelskes listed numerous products that may have “potential adverse health effects.” However these affidavits, many of which include over 150 pages of MSDS, do not sufficiently identify the specific products Mischelle claims to have been exposed to in her work at the salon.

The Thrasher affidavit filed on January 9, 1995, includes a list of 153 products under the heading of “Products With Potential Human Adverse Health Effects.” Although Thrasher’s affidavit did not state that all 153 products listed were actually claimed by Mischelle to have caused her harm, this could possibly be inferred from the affidavit. Thrasher states that he had been requested “by Plaintiffs’ counsel to address a number of products which plaintiff Mischelle Schelske has indicated she has used or come into contact with during the course of her working in the beauty salon.” Regardless of whether Thrasher’s affidavit only addresses products Mischelle allegedly claims to have come into contact with, many of the products were listed in generic terms such as “shampoos” or “bleach powders.” Without specific product names, which would have provided the defendants with the necessary information to allow them to defend against the Schelskes’ claim, the affidavit fails to meet the requirements of the CMO.

^{*484} Dr. Heuser’s first affidavit does not provide any additional information as to specific product names that Mischelle alleges to have caused her harm. Heuser’s second affidavit, filed August 18, 1995, states that he has considered the list of products which Mischelle claims to have been exposed to; however, this list was not provided. The third affidavit of Dr. Heuser, submitted two days prior to the hearing on the motion for summary judgment, comes closest to complying with the CMO, but again does not provide a complete list of each product Mischelle

alleges to have harmed her. The affidavits submitted, therefore, do not substantially comply with the CMO because of their failure to state each specific product that Mischelle Schelske personally identified as having caused her harm.

^[7] The second element required by the CMO to form the basis of a prima facie products liability claim required Mischelle to specifically describe the circumstances of the alleged exposure to each of the products identified in the list required, including the time period during which she alleged exposure and the activities which resulted in the exposure. Mischelle worked at the JC Penney salon for a period of eight years. The record is devoid of any specific statement indicating the time period that each product was used by Mischelle, or the period when she came into contact with each product. In addition, the record only provides a general statement by the Schelskes that Mischelle used “each and every product on a daily basis,” and that she used the products in a manner consistent with the nature of the product. Over a period of eight years, it is reasonable to assume that some products were used for the entire period and others were used for only a limited length of time. ^{**804} Some products may have been used several times daily and others only on a weekly basis. It is also reasonable to assume that some products were not even available at the salon for the entire eight-year period of alleged exposure. In fact, the Schelskes admit that “[t]here may well have been some products which came on the market during the time Mischelle Schelske was employed but for the most part these products were in use the entire time she was employed.” The Schelskes clearly did not comply with the CMO by providing a statement specifically describing the circumstances of the exposure to each of the products identified as having caused harm and the time period during which each of these products were used.

^[8] The third and decisive element which the Schelskes failed to meet, as required by the CMO, is a physician’s affidavit identifying specific injuries, specific chemicals which caused the injuries, and the ^{*485} scientific or medical basis for a causal connection between chemical exposure and injury. The Thrasher affidavit does not satisfy the initial threshold requirement, as Thrasher is not a physician. The affidavit of Dr. Kurtz only states Kurtz’s acceptance of the statements made by Thrasher in his affidavit. It then proceeds to “laundry list” symptoms which Mischelle suffers, and states that she suffers from reactive airway disease and other conditions which have not yet surfaced or been diagnosed. This affidavit is clearly insufficient. The lengthy affidavits submitted by

Dr. Heuser, however, require closer scrutiny.

Heuser's first affidavit does not enumerate any specific injuries or illnesses, or state any specific chemicals alleged to have caused Mischelle harm. Heuser's second affidavit also fails to meet the requirements of the CMO. In this affidavit, Dr. Heuser states that chemicals in the defendants' products are "associated with" certain listed diseases. Dr. Heuser contends that:

Chemicals in defendants' products associated with lung disease, including irritation of mucous membranes, storage disease, asthma, reactive airway dysfunction syndrome, sensitization, atelectasis, bronchiectasis, interstitial pulmonary fibrosis and lung cancer. Mischelle Schelske has exhibited symptoms compatible and suggestive of all the foregoing, with the exception that lung cancer has not yet been diagnosed. The list of diseases and injuries below are a part of what Ms. Schelske suffers from in my medical opinion.

(Emphasis added.) Dr. Heuser's statement only asserts an association between the chemicals in the defendants' products and the diseases of which Mischelle has exhibited symptoms. He does not claim that Mischelle actually suffers from those diseases or injuries, but rather that she has exhibited symptoms which are compatible and suggestive of those problems. The list that Dr. Heuser provides is a compilation of the data from the MSDS and is merely a collection of potential consequences from contact with the chemicals in the products and does not describe the particular injuries suffered by Mischelle. Furthermore, Dr. Heuser clearly asserts that the list of diseases and injuries provided is not an exhaustive list and is only a part of what Mischelle suffers from. The CMO specifically required that the physician's affidavit list "all" injuries, illnesses, or conditions suffered by Mischelle. The affidavit is also deficient in that it does not *486 identify each chemical that caused each injury but lists generic terms such as "hair sprays" and "solvents."

The third affidavit filed two days prior to the hearing on the motion for summary judgment speaks to some of the deficiencies of his second affidavit as noted by the court. Dr. Heuser complains in his affidavit, as did counsel for the Schelskes in a previous affidavit, that he is unable to identify certain undisclosed chemicals in some of the products such as "hair sprays." Although the Schelskes were limited in their discovery at this time due to concerns regarding trade secrets, they still failed to identify the known disclosed chemicals and connect them to particular injuries or illnesses. In his third affidavit, Heuser again states that the products are "associated" with certain diseases and that Mischelle exhibits symptoms "compatible with" certain illnesses. These affidavits clearly do not comply with the CMO. The allegations made within the affidavits are vague and conclusory without providing **805 the specific causation linking the product defect to an identifiable injury. This Court has consistently held that speculative and conclusory statements are not a sufficient basis on which to raise a genuine issue of material fact.  *Ulrigg*, 907 P.2d at 941;  *Miller v. Herbert* (1995), 272 Mont. 132, 137-38, 900 P.2d 273, 276.

The requirements of the CMO were explicitly detailed to the Schelskes in both the written order and orally during the pretrial proceedings. The Schelskes did not serve their discovery within the sixty days provided by the CMO. They did not provide the information required by the CMO within ninety days from entry of the order. On May 25, 1995, the court determined that the CMO had not been complied with and specifically informed the Schelskes again what was necessary for compliance. The court granted the Schelskes an additional three months from May 25, 1995, to comply with the order. On January 16, 1996, the Schelskes made a last attempt to comply with the order, which was well beyond the additional three months granted by the District Court, and additionally, did not fulfill the requirements of the CMO. We therefore determine that the District Court was correct in concluding that the Schelskes did not comply with the Case Management Order.

B. Did the District Court err in determining that the Schelskes cannot exclusively rely upon Material Safety Data Sheets to establish a prima facie claim of product liability?

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^[9] ^[10] The Schelskes largely premise their assertion that they established a prima facie claim of products liability on the Material Safety Data Sheets submitted with the affidavits. They argue that *487 the existence of these MSDS demonstrate that the manufacturers' products are toxic or hazardous. The Schelskes, in fact, seemingly urge this court to adopt a standard imposing absolute liability on any manufacturer who complies with federal law by publishing MSDS.

The publication of MSDS is pursuant to federal law and is intended to provide information to employees about the hazards of the chemicals being produced. See 29 C.F.R. § 1910.1200. The chemical manufacturers must obtain or develop MSDS for each hazardous chemical they produce or import. A hazardous chemical is defined as one which can produce a physical hazard or health hazard. 29 C.F.R. § 1910.1200. The description of the potential toxicity of the chemical in the MSDS is based on a pure, undiluted sample of the chemical and not on the product itself.

The MSDS therefore provide no direct information regarding the possible toxicity of the products themselves and, furthermore, the MSDS do not establish that any particular product is in a defective condition and is unreasonably dangerous. See [Thornton v. E.I. Du Pont De Nemours and Co., Inc.](#) (11th Cir.1994), 22 F.3d 284, 288–89. In addition, the MSDS provided with the affidavits do not link a particular product with the chemical as one ingredient, to a specific injury, illness, or condition that Mischelle suffers from. This Court declines to adopt a standard imposing absolute liability on manufacturers solely on the basis that they have placed products into the stream of commerce for which MSDS have been provided pursuant to federal law. We conclude therefore that the District Court did not err in determining that the Schelskes cannot exclusively rely upon the Material Safety Data Sheets to establish their prima facie claim of product liability.

C. Did the District Court err in not accepting the Schelskes legal assertion that once the plaintiffs produce evidence of multiple product “indivisible injury” the causation element of the claimants’ burden of proof is satisfied and the burden shifts to the manufacturer to prove that their product did not cause injury?

^[11] The Schelskes assert that the principles of joint and

several liability provide the means of achieving fairness where there are multiple defendants and multiple products which contain a variety of toxic or hazardous chemicals which combine to cause injury. They argue that it is not the responsibility of the injured party to allocate the harm among various tort feasons.

**806 The authority provided by the Schelskes for this assertion is § 52, *Prosser on Torts*, and § 433A, Restatement (Second) of Torts (1986). *488 Neither of these sections absolves an injured party of the burden of first establishing causation. These sections provide only that once a defendant’s conduct has been determined to be a cause of some damage suffered by the plaintiff then issues of apportionment can arise. The proof of causation is a necessary predicate to a claimant’s burden of proof in a product liability action. See § 27–1–719, MCA. We have determined the record in this case does not provide evidence that any specific substance caused specific harm to Mischelle Schelske, and therefore we need not address the issue of apportionment as it relates to damages and not causation.

We affirm the District Court’s amended order granting summary judgment in favor of the defendants.

GRAY, NELSON and HUNT, concur.

TRIEWEILER, Justice, dissenting.

I dissent from the majority opinion.

Assuming for the purpose of this case only (because the plaintiffs have not argued otherwise), that the District Court had the authority to require that plaintiffs prove their case prior to trial, without any shifting of the burden pursuant to normal summary judgment procedures, I conclude that the plaintiffs’ affidavits, when read in combination with each other, were sufficient to establish that products produced by the defendants included toxic chemicals which contributed as causes to specific injuries sustained by Mischelle Schelske.

The Schelskes submitted affidavits from three different professionals in response to the District Court’s case management order. The first was from Jack Thrasher,

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Ph.D., a toxicologist from New Mexico; the second from Curt Kurtz, M.D., Mischelle's attending physician; and the third from Gunnar Heuser, M.D., a physician with extensive experience in the effect of toxic chemical exposure.

Dr. Thrasher indicated that he reviewed the products identified by Mischelle as those with which she had come into contact during the course of her employment, and also reviewed the Material Safety Sheets pertaining to each product. He listed those products by name, manufacturer, and the chemicals included in each product. He also listed products for which the chemical components had not been adequately identified by the manufacturer and for which further information was required. He identified typical adverse effects from the types of chemicals which were included in the list and stated that in his opinion, daily exposure to a combination of these chemicals caused Mischelle's physical ailments. He described her injuries as *489 central and [peripheral neuropathy](#), the presence of auto-antibodies in her immune system, and injuries to her organs, vascular system, and nervous system as a result of the auto-antibodies' presence. In his letter attached to his affidavit, he stated that:

In short, the exposure to multiple chemicals and her symptom complex indicate that Ms. Schelske suffers from multiple organ injuries. These type of injuries have been collectively termed [multiple chemical sensitivity](#) by various clinicians.

In conclusion, Ms. Schelske's current health problems are permanent. It is my opinion, within a reasonable degree of scientific and toxicologic probability, that her chronic daily exposure to emissions from various cosmetic products is directly related to her chronic health problems.

Dr. Curt G. Kurtz stated, in his affidavit, that he is a medical doctor practicing in Bozeman and had treated Mischelle Schelske for the past year and was, therefore, familiar with her medical condition. It was his opinion that Mischelle had suffered injuries as a result of exposure to chemicals in the work place. He stated that her injuries include reactive airway disease and multiple organ injuries. He stated that she was also being evaluated for [cognitive deficits](#) due to chemical exposure. He had reviewed the affidavit of Dr. Jack Thrasher and stated overall agreement with its contents. He stated that all of the chemicals listed in the Thrasher affidavit are toxic to some extent and likely caused or contributed to the

various injuries sustained by Mischelle.

****807** In his affidavit dated August 17, 1995, Dr. Heuser stated that during the previous month he and assorted other specialists had seen and examined Mischelle, and that based upon those examinations, and his consideration of the list of products to which she indicated she had been exposed, along with the information about those products included in the Material Safety Data Sheets, he believed that certain of the chemicals included in those products caused injuries to Mischelle. He then listed specific chemicals and the specific disease suffered by Mischelle which was associated with that chemical. He introduced the lists by stating in his affidavit that:

A list of the injuries sustained by Ms. Schelske, though not by any means an exhaustive list, is presented along with documentation from the medical literature which confirms that the symptoms and injuries sustained by Mischelle Schelske are in fact the result *490 of repeated exposure to the said chemicals within the identified products.

He went on to state that:

Chemicals in defendants' products [are] associated with [lung disease](#), including irritation of mucus membranes, storage disease, [asthma](#), [reactive airway dysfunction syndrome](#), sensitization, [atelectasis](#), [bronchiectasis](#), [interstitial pulmonary fibrosis](#) and [lung cancer](#). Mischelle Schelske has exhibited symptoms compatible with and suggestive of all of the foregoing, with the exception that [lung cancer](#) has not yet been diagnosed. *The list of diseases and injuries below are part of what Ms. Schelske suffers from in my medical opinion.*

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(Emphasis added.)

In other words, the affidavit of Jack Thrasher, Ph.D., identified the chemical component of each of the products to which Mischelle had been exposed. The affidavit Gunnar Heuser, M.D., identified the injury that, in his opinion, Mischelle has sustained as a result of exposure to each of the chemical components. Both affidavits also stated that without further information from the manufacturers, there were some products whose chemical components were not known. However, it clearly is not correct, as the District Court concluded, that Dr. Heuser's affidavit failed to list Mischelle's injuries, and failed to identify chemicals which contributed as a cause of those injuries.

I conclude that the Schelskes provided all of the information that could reasonably have been provided or required at this stage of pretrial proceedings, and that that information was certainly adequate to enable the defendants to proceed with discovery by further depositions of the experts who had submitted affidavits. If further identification of specific time periods during which exposure occurred, or the nature of consequences from specific chemicals was necessary in order to defend against this case, the defendants had all of the information they needed with which to begin discovery of those details.

I therefore conclude that if the District Court ever had authority to require the plaintiffs to prove their case prior to trial in as great a detail as was required by the District Court's case management order, then that order was satisfied by the information summarized above.

For these reasons, I dissent from the majority opinion. I would reverse the District Court order granting summary judgment to the defendants.

ORDER

On January 2, 1997, this Court issued its opinion in the above case. The opinion is presently reported at 280 Mont. 476, 933 P.2d 799, 54 St.Rep. 21. On January 10,

1997, Appellants petitioned for rehearing and Respondents filed their brief in opposition thereto. Appellants objected to Respondents' brief. Because Justice Charles E. Erdmann, the author of the opinion, was no longer a sitting justice on this Court and because there were, otherwise, insufficient votes from the original 5-member panel to either grant or deny the petition for rehearing, this case was placed back on the classification agenda and was reconsidered by the Court *en banc* with District Judge John Warner sitting for Justice W. William Leaphart, who had originally recused himself.

****808** Upon careful reconsideration of the record, briefs on appeal, petition for rehearing and the briefs filed in support of and in opposition to the petition for rehearing,

IT IS ORDERED that this Court's opinion as filed January 2, 1997, is reaffirmed and shall continue as the decision of this Court in this case and cause. Appellants' petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this order by mail to counsel of record and that this order be published with the Court's January 2, 1997 opinion.

/s/ J.A. Turnage

/s/ Chief Justice

/s/ James C. Nelson

/s/ Karla M. Gray

/s/ John Warner

/s/ Justices

TRIEWEILER, Justice, continues to dissent to the Court's January 2, 1997 opinion in this case and cause and Justices HUNT and REGNIER join that dissent.

All Citations

280 Mont. 476, 933 P.2d 799

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Schelske v. Creative Nail Design, Inc., 280 Mont. 476 (1997)

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