IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00455-SCT

ELSIE SMITH, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LARRY D. SMITH, DECEASED, AMY SMITH RHODES, OUIDA SMITH DAWKINS, LARRY CLINT SMITH AND BONNIE SMITH WITTY

v.

UNION CARBIDE CORPORATION, MONTELLO, INC. AND CHEVRON PHILLIPS CHEMICAL COMPANY, LP

DATE OF JUDGMENT:	02/02/2010
TRIAL JUDGE:	HON. ROBERT G. EVANS
COURT FROM WHICH APPEALED:	SMITH COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	GREGORY NEILL JONES WAYNE MILNER S. ROBERT HAMMOND, JR. EUGENE COURSEY TULLOS RANDY JAMES BRUCHMILLER
ATTORNEYS FOR APPELLEES:	LAURA DEVAUGHN GOODSON MARCY BRYAN CROFT ASHLEY ELIZABETH CALHOUN RICHARD D. MITCHELL DAVID CARTAN LOKER GIBBONS, JR. JEFFREY P. HUBBARD JOHN JEFFREY TROTTER HOLMES S. ADAMS BERNARD HESS BOOTH, IV ALEX EMILIO COSCULLUELA ALBERT CHRISTOPHER DERDEN
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	REVERSED AND REMANDED - 12/12/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. The instant case arises from a jury verdict awarding Mrs. Elsie Smith and other wrongful death beneficiaries monetary damages for the wrongful death of Elsie's husband, Larry Smith. Larry, who spent most of his life working on oil rigs, died of lung cancer, and the plaintiffs filed suit against several manufacturers of various drilling additives. She claimed that her husband's proximity to working with these products led to his lung cancer because the drilling additives contained asbestos. After a jury verdict in favor of the plaintiffs, the defendant corporations filed a joint motion for a judgment notwithstanding the verdict (JNOV), which was granted by the trial judge. Plaintiffs appeal the grant of JNOV. We hold that the trial court erred when it granted JNOV by applying the plaintiffs' proof to the frequency, regularity, and proximity test rather than to the elements of the plaintiffs' negligent design claim sounding in products liability. Accordingly, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2. Larry Smith worked on various drilling rigs from the mid-1960s until the early 1990s. At the time, it was commonplace in the industry to use various chemical drilling additives that contained asbestos. Larry indisputably was a heavy smoker, smoking roughly two to three packs a day from at least the mid-1950s through at least 1986. He was diagnosed with lung cancer in August 2002 and died three months later.

¶3. On March 15, 2006, Elsie Smith's and Larry's heirs filed a wrongful death action against Union Carbide Corporation ("UCC"); Dow Chemical Company; Montello, Inc.

("Montello"); Chevron Phillips Chemical Co. ("CPChem"); Baker Hughes; and Mississippi Mud, Inc., alleging that the negligent actions of the defendant led to their products causing Larry's death. The claims against Dow Chemical were later dismissed as a result of a joint motion filed with the court. Mississippi Mud, Inc., later became part of Baker Hughes, and Baker Hughes settled before trial. Bringing a claim for strict liability under a products liability design defect theory, the plaintiffs asserted that Larry's exposure to asbestos while working on various oil rigs over the years caused him to develop lung cancer. The products Visbestos and Super Visbestos were made with asbestos supplied by UCC and distributed by Montello. Montello also distributed Shurlift. Flosal and Visquick were the asbestos products of CPChem. Both CPChem and UCC supplied asbestos for IMCO Best, Superbest, and Shurlift.

¶4. At trial, four former coworkers of Larry's testified concerning his exposure to asbestos. One of the coworkers, Howard Case, who had worked with Larry at various drill sites, could identify the appellees' products as those he had used at various rigs but admitted that he could not place a specific product with a specific rig at a given time. Case testified that he had worked with Smith at Barnwell in 1966, Reading & Bates in 1967-68, Big Chief Drilling in 1972, Helmerich & Payne in 1973-74, and Delta Drilling in 1976. He could not specify the exact extent to which Smith had used the asbestos viscosifiers, but he did state that Smith had used Flosal at Barnwell and Reading & Bates; Flosal, Visbestos, and Super Visbestos at Big Chief and Helmerich & Payne; and Visquick at Delta Drilling. A second coworker, Billy Jack Graves, identified five separate products of the appellees as being present at Rig 56, where he had worked with Larry for three months: Visbestos, Shurlift,

Flosal, Superbest, and Visquick. He also stated that he had seen Larry work regularly with those products on that specific rig. A third coworker, Denver Anding, testified that Larry had worked with Flosal while they had worked different shifts on the same rig during a four-month period in the late 1960s. Joe Fitzhugh, another coworker of Larry's, also testified in his deposition that he had worked with Larry for about four months on a rig in the mid-to-late 1960s and had mixed Flosal, Visquick, and Visbestos with him, but Social Security records of the two men show some discrepancies in his account. He also could not identify any physical attributes of the defendants' products that he claimed to have worked with on the rig during the relevant time period.

¶5. After a three-week trial in May 2009, the jury returned a verdict in favor of the plaintiffs and assessed total damages of $3,856,346.17. The jury found CPChem to be 35% at fault, Montello 10%, UCC 35%, and Larry's smoking 20%. Before sending the case to the jury, the defendants moved for a directed verdict, which the trial court denied. CPChem previously had made motions for summary judgment and directed verdict, but the court had withheld judgment on the motions. CPChem later was joined in the motions by the other defendants. After the verdict, the defendants subsequently filed motions for JNOV and for a new trial. On January 26, 2010, the court granted the JNOV for the sole reason that, in the court's opinion, the plaintiffs had not meet the "burden of causation" because they had failed to establish that Larry had been exposed to a specific product on a frequent and regular basis in proximity to where he worked. Plaintiffs timely appealed.

STANDARD OF REVIEW

¶6. A motion for JNOV tests the legal sufficiency of the evidence supporting the verdict,

not the weight of the evidence. ***Tharpe v. Bunge Corp.***, 641 So. 2d 20, 23 (Miss. 1994).

> Where a motion for j.n.o.v. has been made, the trial court must consider all of the evidence – not just evidence which supports the non-movant's case – in the light most favorable to the party opposed to the motion. The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable [jurors] could not have arrived at a contrary verdict, granting the motion is required. On the other hand, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fairminded [jurors] in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the jury's verdict allowed to stand. *See, e.g.*, ***General Tire and Rubber Co. v. Darnell,*** 221 So. 2d 104, 105 (Miss. 1969); ***Paymaster Oil Co. v. Mitchell,*** 319 So. 2d 652, 657 (Miss. 1975); ***City of Jackson v. Locklar,*** 431 So. 2d 475, 478 (Miss. 1983).

3M Co. v. Johnson, 895 So. 2d 151, 160-61 (¶ 31) (Miss. 2005) (quoting ***Jesco, Inc. v. Whitehead***, 451 So. 2d 713-14 (Miss. 1984)). The Court reviews a trial court's grant of a JNOV *de novo*. ***Wilson v. Gen. Motors Acceptance Corp.***, 883 So. 2d 56, 64 (¶ 24) (Miss. 2004).

DISCUSSION

¶7. The issue presented by the plaintiffs is whether the circuit court erred by granting the appellees' motion for JNOV based on the court's determination that the plaintiffs had failed to pass the frequency, regularity, and proximity test. To answer, we must determine whether the trial court erred in analyzing the plaintiffs' claim under the *de minimis* "frequency, regularity, and proximity" test in determining whether or not to grant the motion for JNOV.

I. Whether the trial court erred in analyzing the plaintiffs' claim under the *de minimis* "frequency, regularity, and proximity" test in determining whether or not to grant the motion for JNOV.

¶8. The defendant companies argue that the circuit court correctly granted JNOV because

the plaintiffs failed to satisfy the "frequency, regularity, and proximity" test first established in ***Lohrmann v. Pittsburgh Corning Corp.***, 782 F.2d 1156 (4th Cir. 1986), and adopted by the Court in ***Gorman-Rupp Co. v. Hall***, 908 So. 2d 749 (Miss. 2005). In fact, they relied upon the "frequency, regularity, and proximity" test in their motion for JNOV, and indeed we have written, "[W]e again hold that in asbestos litigation cases, the frequency, regularity, and proximity test is the proper standard in determining exposure and proximate cause" in the context of a motion for summary judgment or directed verdict. ***Monsanto Co. v. Hall***, 912 So. 2d 134, 137 (¶ 8) (Miss. 2005). As stated in ***Gorman-Rupp Co.***,

> [t]he requirements [of the "frequency, regularity, and proximity" test] . . . are:
> "(1) [Plaintiff] was exposed to a particular asbestos-containing product made by the [Defendant],
> (2) with sufficient frequency and regularity,
> (3) in proximity to where [Plaintiff] actually worked,
> (4) such that it is probable that the exposure to [Defendant's] products caused [Plaintiff's] injuries."

Gorman-Rupp Co., 908 So. 2d at 756 (¶ 21) (quoting ***Chavers v. Gen. Motors Corp.***, 349 Ark. 550, 562, 79 S.W.3d 361, 369 (2002)). The Court expressly added product identification to the test in ***Monsanto Co.***, 912 So. 2d at 137 (¶ 8).

¶9. The case *sub judice* evidences confusion regarding the applicability of the "frequency, regularity, and proximity" test.

> In ***Lovelace v. Sherwin-Williams***, 681 F.2d 230 (4th Cir. 1982), we discussed the quantum of circumstantial evidence necessary to allow a finding of causal connection and held that permissible inferences must be within the range of reasonable probability. *See* 681 F.2d at 241. The "frequency, regularity, and proximity test" used by the district court is an application of this principle in an asbestosis setting.

Lohrmann, 782 F.2d at 1163. "The ***Lohrmann*** court further noted that such a rule was in

effect a *de minimis* rule in that a plaintiff is required to prove more than a casual or minimal contact with the product." ***Gorman-Rupp Co.***, 908 So. 2d at 756 (¶ 22). In ***Gorman-Rupp Co.***, the Court was asked to apply the "frequency, regularity, and proximity" test solely "in the context of summary judgment for asbestos cases." ***Gorman-Rupp Co.***, 908 So. 2d at 754-55 (¶19). Further, in ***Chavers***, on which the Court heavily relied in adopting the "frequency, regularity, and proximity" test, the Arkansas Supreme Court adopted the test "to determine the admissible evidence that must be demonstrated by the plaintiff *in order to survive a motion for summary judgment*. . . ." ***Gorman-Rupp Co.***, 908 So. 2d at 756 (¶ 21) (emphasis added).

¶10. We are unable to identify any Mississippi case, other than ***Phillips 66 Co. v. Lofton***, 94 So. 3d 1051 (Miss. 2012), in which the "frequency, regularity, and proximity" test is applied outside the context of a motion for summary judgment. *See* ***Gorman-Rupp Co.***, 908 So. 2d 749; ***Monsanto Co.***, 912 So. 2d 134. Federal courts applying Mississippi law also have applied the "frequency, regularity, and proximity" test only in the context of summary judgment. *See* ***Dufour v. Agco Corp.***, 2009 WL 700769 (S.D. Miss. Mar. 13, 2009); ***Dalton v. 3M Co.***, 2011 WL 5881010, *1 (E.D. Pa. Aug. 2, 2011) ("The plaintiff must prove product identification, exposure, and proximate cause with regularity, frequency, and proximity in order to survive summary judgment."). In fact, of all the jurisdictions and federal circuit courts which have adopted the test, we can find only one example of the test being used as the basis for JNOV. ***Tragarz v. Keene Corp.,*** 980 F.2d 411 (7th Cir. 1992).

¶11. In ***Phillips 66 Co.***, the Court applied, in *dicta*, the "frequency, regularity, and proximity" test in the context of an appeal after the jury had returned a verdict for the

plaintiff. ***Phillips 66 Co.***, 94 So. 3d at 1062 (¶ 29). The Court remanded that case for a new trial as a result of evidentiary issues. ***Id.*** at 1070 (¶ 58). In no other Mississippi case has the "frequency, regularity, and proximity" test been applied as anything other than a *de minimus* test, applied to decide whether a plaintiff's claim would be allowed to proceed past summary judgment or directed verdict, and we today hold that such is the proper limit of its utility.

¶12. In 1993, the Mississippi Legislature codified the Mississippi Products Liability Act, setting the elements of products liability claims. ***Williams v. Bennett***, 921 So. 2d 1269, 1273 (¶ 13) (Miss. 2006). With the Legislature having created a statutory scheme for products liability, it is not for the Court to add or subtract from those delineated elements.[1] "The duty of this Court is to interpret the statutes as written. It is not the duty of this Court to add language where we see fit. '[O]ur primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature.'" ***Stockstill v. State***, 854 So. 2d 1017, 1022-23 (¶ 13) (Miss. 2003) (quoting ***Anderson v. Lambert***, 494 So. 2d 370, 372 (Miss. 1986)). Since the enactment of the Products Liability Act, "products liability claims have been specifically governed by statute, and a claimant, in presenting his case, must pay close attention to the elements of the cause of action and the liability limitations enumerated in the statute." ***Williams***, 921 So. 2d at 1273 (¶ 13). It is the trial court's job –

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[1]In his dissent, Justice Kitchens cites ***C & C Trucking Co. v. Smith***, 612 So. 2d 1092, 1098 (Miss. 1992), for the proposition that a judge applies the same legal standards when considering a motion for JNOV as when faced with a motion for directed verdict. However, nothing in ***C & C Trucking*** contradicts the proposition that a court considering either applies the evidence to *the elements of the claim***.** Accordingly, it does not contradict the result reached here, that a court which applies the evidence to a list of factors *not* elements of the claim, errs.

as it is ours – when considering a motion for JNOV to apply the evidence to the elements of a plaintiff's claim. ***In Town Lessee Assocs., LLC v. Howard***, 67 So. 3d 711, 718 (¶ 22) (Miss. 2011) ("In essence, judgments as a matter of law present both the trial court and the appellate court with the same question – whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated."); ***Wilson v. Gen. Motors Acceptance Corp.***, 883 So. 2d 56, 63 (¶ 22) (Miss. 2004).

¶13. We clarify today that the "frequency, regularity, and proximity" test is a *de minimis* rule employed to determine whether a plaintiff has successfully made a *prima facie* case solely in the context of summary judgment or directed verdict. Justice Kitchens, in his dissent, criticizes us for doing so, but the weight of the authority detailed above, which neither dissent addresses, compels the result we reach. As Justice Kitchens writes, the test is a legal one. However, once consideration of the *facts* of the case are in the hands of the jury, our Legislature has mandated the elements for the jury to consider. At the jury consideration stage, the "frequency, regularity, and proximity" test falls away, and a plaintiff must demonstrate the elements of a design defect product liability claim as delineated in Mississippi Code Section 11-1-63, including proximate causation. *See* Miss. Code Ann. § 11-1-63 (Rev. 2002).

¶14. Because the jury must consider the elements of the claim as established by the Legislature, the court must match the evidence to those elements rather than to the judicially created frequency, regularity, and proximity test when considering a JNOV motion. The "frequency, regularity, and proximity" test is a legal determination, not to be determined by

the fact-finder. Today's clarification does not conflict with the holding of ***Phillips 66 Co.***, as our discussion of the test therein appeared only in *dicta*.

¶15. In the context of the motion for JNOV now before us, the trial court erred as a matter of law when it applied the "frequency, regularity, and proximity" test outside a summary judgment or directed verdict situation.[2] Instead, the trial court should have matched the plaintiffs' proof against the statutory elements of a design defect products liability claim, just as would be required in any nonasbestos negligent design litigation.[3] Nothing in Section 11-1-63 indicates that the Legislature intended to create a separate class of litigation for asbestos cases. Because the trial court erred in applying the "frequency, regularity, and proximity" test to the plaintiffs' claim instead of the statutory elements of plaintiffs' negligent design claim, we reverse the trial court's grant of JNOV and remand for further proceedings consistent with our opinion.

CONCLUSION

¶16. The trial court erred when it applied the "frequency, regularity, and proximity" test to the plaintiffs' claim instead of the well-established proximate cause analysis as required under the Mississippi Products Liability Act. Miss. Code Ann. § 11-1-63 (Rev. 2002). Accordingly, the trial court erred in its grant of judgment notwithstanding the verdict. Thus,

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[2]Although not raised by the parties, we take the opportunity to point out a logical consequence of today's holding, that trial courts err in instructing juries as to the "frequency, regularity, and proximity" test, which is a legal determination not for the finder of fact.

[3]Justice King's dissent finds enough evidence to support the verdict under the elements found in the negligent design products liability statute. However, the trial court did not analyze the motion for JNOV pursuant to the elements of the statute, and the parties did not argue that the evidence did or did not meet the elements of the statute in their briefs.

the judgment of the Circuit Court of Smith County is reversed and the case is remanded for further proceedings consistent with the instant opinion, including reconsideration of the grant of JNOV in accordance with the statutorily established elements of the plaintiffs' negligent design claim.

¶17. **REVERSED AND REMANDED.**

WALLER, C.J., AND DICKINSON, P.J., CONCUR. LAMAR, J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER AND KING, JJ.; LAMAR, J., JOINS IN PART. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND CHANDLER, JJ. RANDOLPH, P.J., AND PIERCE, J., NOT PARTICIPATING.

KITCHENS, JUSTICE, DISSENTING:

¶18. I fully join Justice King's dissent. He correctly identifies the issue on appeal: whether the plaintiffs presented sufficient evidence of causation. Despite criticism that the King opinion "does not apply any legal standard to the evidence," the dissent clearly addresses the statute's requirement that "[t]he defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought." Miss. Code Ann. § 11-1-63 (Rev. 2002). Moreover, there is no dispute regarding the well-established legal standards governing a motion for judgment notwithstanding the verdict. As Justice Coleman's opinion explains, the motion tests the sufficiency of the evidence, which is to say, whether the movant is entitled to a verdict as a matter of law, *see, e.g.,* ***3M Co. v. Johnson***, 895 So. 2d 151, 160-61 (Miss. 2005) (citing ***Tharp v. Bunge Corp.***, 641 So. 2d, 23 (Miss. 1994)), and any judicial determination that "the necessity of a trier of fact has been obviated," necessarily requires the court to examine the evidence presented. ***Hyundai Motor***

America v. Applewhite, 53 So. 3d 749, 752-53 (Miss. 2011) (citing ***U.S. Fid. & Guar. Co. v. Martin***, 998 So. 2d 956, 964 (Miss. 2008)). Applying these standards, the dissent provides a thorough recitation of the evidence presented at trial, and correctly determines that the issue of proximate cause, under Mississippi Code Section 11-1-63, was a question for the jury.

¶19. Furthermore, I respectfully disagree with the curious conclusion that a trial court may not consider the "frequency, regularity, and proximity" test once a verdict has been entered. This test is a legal standard relevant to the element of causation.[4] I find no authority or sound basis for an argument that the legal standards applicable to an essential element of the plaintiff's claim would change depending on the stage of the proceedings. Indeed, this Court applies the same *de novo* standard of review to a denial of summary judgment, directed verdict, and motion for a judgment notwithstanding the verdict, for each motion contends that the movant is entitled to a judgment as a matter of law. ***Denbury Onshore, LLC v. Precision Welding, Inc.***, 98 So. 3d 449, 452 (Miss. 2012) (citing ***Alpha Gulf Coast, Inc. v. Jackson***, 801 So. 2d 709, 720 (Miss. 2001)). For purposes of this discussion, the only difference is that these motions are made at different stages of the proceedings. *See* ***Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.***, 519 So. 2d 413, 415 (Miss. 1988) ("The motion for summary judgment is the functional equivalent of the motion for directed verdict made at the close of all the evidence, the difference being that the motion for summary judgment occurs

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[4]"In asbestos litigation in Mississippi, the proper test to be used is the frequency, regularity, and proximity standard to show product identification of the defendants' actual products, exposure of the plaintiffs to those products, and proximate causation as to the injuries suffered by the plaintiffs." ***Monsanto Co. v. Hall***, 912 So. 2d 134, 137-38 (Miss. 2005).

at an earlier stage.") (citing ***Smith v. Sanders***, 485 So. 2d 1051, 1054 (Miss. 1986); ***Brown v. Credit Center, Inc.***, 444 So. 2d 358 (Miss. 1983)); ***C & C Trucking Co. v. Smith***, 612 So. 2d 1092, 1098 (Miss. 1992) ("It is only when a directed verdict at the close of the plaintiff's case[,] and again at the close of the defendant's case, would have been proper that a judgment notwithstanding the verdict is proper.").

¶20. As our opinion in ***C & C Trucking***, 612 So. 2d at 1098, clearly articulated, a trial judge faced with a motion for judgment notwithstanding the verdict applies the same legal standards as if he or she were considering a motion for a directed verdict. Yet, Justice Coleman's opinion concludes that the "frequency, regularity, and proximity" test cannot be considered once a verdict has been entered, citing two opinions from this Court, an opinion from the Arkansas Supreme Court, two opinions from the United States Court of Appeals for the Fourth Circuit, and two orders from federal district courts.[5] But none of these cases held that this legal standard is applied only in the context of a motion for summary judgment or motion for a directed verdict. Instead, the courts' application of the standard to motions for summary judgment was merely a consequence of the procedural posture of a particular case.

¶21. Justice Coleman's opinion would prohibit trial judges' reconsideration of prior rulings and would unfairly prejudice defendants. In the present case, the trial court withheld ruling on the defendants' motion for summary judgment, and then denied their motion for a directed

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[5] ***Monsanto***, 912 So. 2d at 137; ***Gorman-Rupp Co. v. Hall***, 908 So. 2d 749 (Miss. 2005); ***Chavers v. Gen. Motors Corp.***, 79 S.W.3d 361, 369 (2002) ***Lovelace v. Sherwin-Williams***, 681 F.2d 230 (4th Cir. 1982); ***Lohrmann v. Pittsburgh Corning Corp.***, 782 F.2d 1156 (4th Cir. 1986); ***Dufour v. Agco Corp.***, 2009 WL 700769 (S.D. Miss. Mar. 13, 2009); ***Dalton v. 3M Co.***, 2011 WL 5881010, *1 (E.D. Pa. Aug. 2, 2011).

verdict. Thus, as a consequence, the plaintiffs may be relieved from their burden of demonstrating "frequency, regularity, and proximity," even though the defendants had placed the issue before the trial judge.

¶22. Finally, the opinion mischaracterizes this Court's discussion of the "frequency, regularity, and proximity" test in ***Phillips 66 Co. v. Lofton***, 94 So. 3d 1051 (Miss. 2012), as *dicta*. In that case, the judgment in favor of the plaintiff was reversed, and the case was remanded for a new trial based on evidentiary errors; yet, those errors did not dispose of the appellant's argument that the plaintiff had failed to prove causation. In general, reversible evidentiary errors will not preclude a second trial. In contrast, the plaintiff's failure to meet his or her burden of proof entitles the defendant to a judgment as a matter of law, and the plaintiff does not get a second chance to prove his or her case. Had the defendant prevailed on its claim that the proof failed to meet the "frequency, regularity, and proximity" standard, the Court would have reversed and rendered judgment for the defendant. *See* ***Applewhite***, 53 So. 3d at 753 (noting that a new trial is appropriate when there are errors "within the trial mechanism itself," whereas a verdict unsupported by the evidence warrants a judgment for the opposing party). Therefore, because this issue would have changed the disposition, the issue was essential to this Court's decision, and the decision in ***Phillips 66*** is binding authority.

CHANDLER AND KING, JJ., JOIN THIS OPINION. LAMAR, J., JOINS THIS OPINION IN PART.

KING, JUSTICE, DISSENTING:

¶23. I dissent from the plurality opinion herein.

¶24. In the trial court, this products liability case resulted in a jury verdict in favor of the plaintiffs. The trial court then granted the defendants' motion for judgment notwithstanding the verdict (JNOV), holding that the plaintiffs' proof failed to meet the frequency, regularity, and proximity test. The plaintiffs have appealed the grant of that JNOV to this Court.

¶25. The plurality holds that the frequency, regularity, and proximity test is restricted to a determination of whether to grant or deny summary judgment. Pl. Op. at ¶¶ 8-14. The plurality decides that the trial court applied an incorrect standard to grant the defendants' motion for JNOV, thus it should reverse and remand this matter "for further proceedings consistent with our opinion." Pl. Op. at ¶ 15.

¶26. The plaintiffs raise only one issue in this appeal, which is that: "The trial court erred by granting Appellees' motion for judgment notwithstanding the verdict because more than sufficient evidence supported the jury's verdict." There is no cross-appeal by the defendants and, thus, no additional issue has been placed before this Court by the defendants. Therefore, the sole issue before this Court is whether the plaintiffs submitted to the jury sufficient evidence upon which reasonable persons might return a verdict for the plaintiffs. *See* ***Architex Ass'n, Inc. v. Scottsdale Ins. Co.***, 27 So. 3d 1148, 1154 (¶13) n.11 (Miss. 2010) (finding issue not properly before Court because appellee failed to file a cross-appeal). The Court repeatedly has held that it will not address issues not raised on appeal. *See* ***Hood ex rel. State Tobacco Litigation***, 958 So. 2d 790, 815 (¶86) n.17 (Miss. 2007). The plurality completely ignores the issue placed before it by the plaintiffs and the Court's admonition that it will not address issues not raised on appeal.

¶27. The question presented to this Court is whether there was sufficient evidence to

support the jury's verdict. The plurality would reverse this matter for consideration under Mississippi Code Section 11-1-63 (Rev. 2002), the Products Liability Statute. The plurality, however, fails to indicate which element, if any, of the products liability statute was not placed before the jury. A review of the record indicates that sufficient evidence was placed before the jury from which it could be found that the plaintiffs established a products liability claim pursuant to Section 11-1-63. Because I believe that there was sufficient evidence from which the jury could return a verdict in favor of the plaintiffs, I dissent and would reverse the grant of JNOV and reinstate the jury's verdict as rendered for the plaintiffs.

¶28. Howard Case testified that he worked in the oil drilling industry with Larry Smith off and on from 1966 through 1990. During that time, Larry mixed drilling mud, which contained asbestos. This was a very dusty process, which placed a significant amount of asbestos dust in the air, and no respirators were used. Case worked with Larry at Barnwell, where Larry was exposed to Flosal, an asbestos product. He worked with Larry at Reading and Bates, where Larry also was exposed to Flosal. He worked with Larry at Big Chief, where Larry was exposed to Super Visbestos, Visbestos, and Flosal, all of which were asbestos products. They worked at Helmerich & Payne in 1973 and 1974, where Larry was exposed to Flosal, SuperVisbestos, and Visbestos, all of which were asbestos products. They worked for Delta Drilling, from about 1974 to 1988, where Larry was exposed to Visquick, an asbestos product. Additionally, Larry was exposed to Shurlift, an asbestos product, but he did not recall at which company.

¶29. Jack Graves testified that he had worked with Larry for three months, on Delta Rig 56, where Larry was exposed to Visbestos, Shurlift, Super Best, Flosal, and Visquick, all

asbestos products. The workers were not provided with respirators or protective clothing. They worked seven days a week and were on call twenty-four hours a day.

¶30. Denver Anding worked with Larry in the late 1960s at Marlin Drilling Company for a period of four months. Larry was exposed to Flosal, an asbestos product, and worked without a respirator or protective clothing. Nor were the workers given any warning regarding the danger of asbestos.

¶31. Dr. Edwin Holstein, who practiced occupational medicine, testified that Larry suffered from lung cancer due primarily to exposure to asbestos. Larry's exposure to asbestos concentration was considered substantial. Dr. Holstein opined that the four months Larry worked at Marlin would have been sufficient exposure to asbestos to cause Larry's lung cancer.

¶32. Dr. Murray Finklestein, an epidemiologist, testified that Larry's lung cancer was caused by exposure to asbestos and smoking. Dr. Colella, a diagnostic radiologist, testified that Larry was exposed to asbestos working in the 1960s, 1970s, and 1980s and that his lungs showed asbestos-related disease. Dr. Kenneth Cohen, an industrial safety engineer and certified industrial hygienist, testified that Larry had significant exposure to asbestos under his working conditions. Dr. Jerrold Abraham, a pathologist, testified that there was no safe type of asbestos and that Larry's lung cancer was caused by exposure to asbestos.

¶33. Ken Campbell , who served as president of Montello from its beginning in 1957 to the early 1990s, testified that Montello had used asbestos from Union Carbide in its products of Visbestos and Super Visbestos. The process used was that Montello took the orders, Union Carbide did the manufacturing, and, in most cases, it shipped directly to the customer. He

stated that Shurlift was Visbestos – packaged under EMCO's private label.

¶34. J.C. Floyd, who worked for Phillips 66 starting in 1966 until retirement in 1992, testified that nonasbestos products were available as early as 1956, and that his company was aware at least by 1969 that asbestos was a carcinogen. He testified that, in August 1973, Phillips 66 circulated a memo to Drilling Specialty employees which indicated that any person who handles loose Flosal fiber for a cumulative total of seven hours per year was an asbestos worker and was entitled to an annual company physical. As a result, Floyd took a medical exam for asbestos exposure, but he did not tell persons who worked daily with asbestos in the oil field about the availability of this medical exam.

¶35. Floyd testified that Drilling Specialties put Flosal on the market in 1964, using asbestos from Johns Mansville. He testified that Flosal was packaged under a private label for EMCO, that it was placed in an IMCO bag with the IMCO label.[6] Super Best was a Montello/Union Carbide product. Shurlift was a Phillips 66/Drilling Specialties product packed for IMCO.

¶36. Floyd testified that after 1965, Drilling Specialties and Montello were the only suppliers of asbestos for drilling mud. He testified that Drilling Specialties also packaged Flosal under a private label of Magcober Visquick, for Magcobar/Dresser Industries.

¶37. Phillips 66 admitted that, from 1964 through 1985, nonasbestos products were available for use in oil drilling. It admitted that Flosal was intended to perform its function without causing asbestos-related disease. It admitted that, between 1963 and 1967, Flosal

[6]The court reporter was inconsistent in spelling the company's name, thus the two spellings: EMCO or IMCO.

was distributed without a warning label. It admitted that the asbestos used in Flosal came from Johns Manville mines from 1964 through 1984.

¶38. In response to interrogatories, Phillips stated that IMCO Best and Shurlift were Flosal, rebranded for International Minerals Company, and Visquick was Flosal, rebranded for Magcober.

¶39. Montello admitted that, prior to 1968, its products contained no warning labels. It admitted that after 1969, the asbestos in all of its products was from Union Carbide. It admitted that all of its asbestos products were intended to perform their function without causing asbestos-related diseases.

¶40. Union Carbide admitted in the asbestos toxicology report, which it prepared in 1964, that the potential association between asbestos exposure and certain diseases had been known for years.

¶41. Based on the foregoing, sufficient evidence was placed before the jury to establish a products liability claim under Section 11-1-63. The evidence presented to the jury supported a finding that:

- The defendants were manufacturers and sellers of asbestos products sold for use in the oil-drilling industry.
- The asbestos products manufactured and sold by the defendants were intended to be used in the oil-drilling industry without causing asbestos-related diseases.
- The defendants were aware that there was a link between exposure to the asbestos products they manufactured and sold for use in the oil-drilling industry and several respiratory diseases, including asbestosis and lung cancer.
- While aware of the link between their asbestos products and respiratory diseases, the defendants sold these products for several years without warning of the health hazards.

- Larry Smith was exposed to asbestos products manufactured and sold by the defendants for use in the oil-drilling industry, which were used in the manner intended by the defendants.

- Larry Smith died from lung cancer, which was caused by exposure to asbestos products manufactured and sold by the defendants for use in the oil-drilling industry.

- There was no safe asbestos, and the products manufactured and sold by the defendants for use in the oil-drilling industry were inherently unsafe.

- Alternative, effective, safe, and asbestos-free drilling products were available well before the defendants manufactured and sold their asbestos drilling products for use in the oil-drilling industry.

¶42. Based on the testimony, sufficient evidence was presented at trial for a reasonable juror to conclude that the defendants' products caused Larry's injury. Accordingly, the jury returned a verdict for the plaintiffs. Therefore, I would reverse the grant of a JNOV, and reinstate the jury's verdict in favor of the plaintiffs.

KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION.