NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RACHEL D. ARENA, Administratrix for the Estate of Leonard M. Arena, Deceased and widow in her own right,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
THE FLINTKOTE COMPANY,	:	
Appellant	:	No. 2924 EDA 2003

Appeal from the Order entered on August 14, 2003
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 2896 October Term 1999

ROBERTA RUSSELL, Executrix for the Estate of John L. Russell, Deceased and widow in her own right,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
THE FLINTKOTE COMPANY,	:	
Appellant	:	No. 2925 EDA 2003

Appeal from the Judgment entered on August 14, 2003
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 3431 June Term 1999

BEFORE: MUSMANNO, BENDER and OLSZEWSKI, JJ.

MEMORANDUM: **FILED OCTOBER 31, 2005**

In this consolidated appeal, The Flintkote Company ("Flintkote") appeals from judgments entered in two consolidated asbestos-related cases. The appeal filed at 2924 EDA 2003 involves a case brought by Rachel D.

Arena, as Administratrix for the Estate of her husband, Leonard M. Arena ("Arena"), deceased, and in her own right. Arena had previously worked in a shipyard where he was exposed to asbestos. Arena eventually developed mesothelioma as a result of his exposure to asbestos and died. The appeal filed at 2925 EDA 2003 involves a case brought by Roberta Russell, as Executrix for the Estate of her husband, John L. Russell ("Russell"), deceased, and in her own right. Like Arena, Russell worked in a shipyard where he was exposed to asbestos. Russell developed mesothelioma as a result of his exposure to asbestos and died.

These two asbestos cases were consolidated by the trial court for a reverse-bifurcated jury trial. On September 12, 2001, the jury returned verdicts in favor of both plaintiffs with respect to the medical causation and damages phase. The liability phase of the trial was conducted in December of 2002 before a different jury. The jury in the liability phase also returned verdicts in favor of the plaintiffs. Consequently, the trial court entered verdicts in favor of Arena and Russell and against Flintkote in the amounts of $1,000,000.00 and $550,000.00, respectively. Flintkote filed post-trial motions seeking judgment notwithstanding the verdict or a new trial, which the trial court denied. These timely appeals followed.[1, 2]

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[1] This matter had previously been argued before another panel of this Court on April 21, 2004. However, the appeal was stayed when Flintkote filed for bankruptcy protection on May 7, 2004. Pursuant to a Petition for reinstatement of these appeals filed by the plaintiffs, this case was re-argued before this panel.

On appeal, Flintkote raises the following issues with respect to the ***Arena*** and ***Russell*** cases:

> 1. Whether the trial court erred in failing to enter a non-suit or grant judgment notwithstanding the verdict where Flintkote did not manufacture the product identified by plaintiffs' sole, unreliable product identification witness at trial?
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> 2. Whether the trial court erred in failing to enter a non-suit or grant judgment notwithstanding the verdict where the plaintiffs' evidence regarding exposure did not permit an inference of product-specific causation?

See Brief for Appellant at 5. Flintkote also raises the following issue relating to the ***Arena*** case only:

> Whether the trial court erred in failing to enter a non-suit or grant judgment notwithstanding the verdict where Arena failed to allege a defect in a product manufactured by Flintkote?

Id.

When reviewing the denial of a request for judgment notwithstanding the verdict, the appellate court must "view the evidence in the light most

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[2] Flintkote's notices of appeal purport to appeal from the August 14, 2003 Order that denied its post-trial motions. An order denying post-trial motions, however, is not appealable. Rather, it is the subsequent judgment that is the appealable order when a trial has occurred. ***Brown v. Philadelphia College of Osteopathic Medicine***, 760 A.2d 863, 865 (Pa. Super. 2000). However, the current appeal is proper because the August 14, 2003 Order also entered a judgment on the verdict. ***Taxin v. Shoemaker***, 799 A.2d 859, 860 (Pa. Super. 2002) (stating that an order that denies post-trial motions and unequivocally enters judgment in the same order is immediately appealable and no separate entry of judgment is required).

favorable to the verdict winner and give him or her the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences." ***The Birth Ctr. v. The St. Paul Companies, Inc.***, 787 A.2d 376, 383 (Pa. 2001). Thus, the grant of judgment notwithstanding the verdict "should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner." ***Atkins v. Urban Redevelopment Authority of Pittsburgh***, 414 A.2d 100 (Pa. 1980). It is only when either "the movant is entitled to judgment as a matter of law" or "the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant" that an appellate court may vacate a jury's finding. ***Moure v. Raeuchle***, 604 A.2d 1003, 1007 (Pa. 1992).

> We will reverse the [trial] court's order only where the record demonstrates that its decision resulted from an abuse of discretion in assessing the evidence, or an error of law in adjudging the cause of action. We will resolve all doubt in favor of the verdict.

Coward v. Owens-Corning, 729 A.2d 614, 622 (Pa. Super. 1999). Moreover, "our standard of review concerning a trial court's ruling on a motion for new trial is as follows[:] This Court will not reverse a trial court's decision regarding the grant or refusal of a new trial absent an abuse of discretion or an error of law." ***Yacoub v. Lehigh Valley Med. Assocs.***, 805 A.2d 579, 586 (Pa. Super. 2002).

In its first issue, Flintkote contends that the trial court erred in failing to enter a non-suit or grant judgment notwithstanding the verdict where Flintkote alleges that it did not manufacture the products identified by each plaintiff's sole, unreliable product-identification witness at trial. In its discussion of this issue, Flintkote attacks the credibility of the plaintiffs' witnesses and urges this court to grant relief on the basis that the witnesses were unreliable. In fact, more than 20 pages of Flintkote's brief are devoted to attacking the credibility of the plaintiffs' respective witnesses.

It is within the sole province of the jury to weigh questions of fact and assess the credibility of witnesses. Our Supreme Court has long held that in determining the facts, the jury has the right to believe all, some of, or none of a witness's testimony. ***Martin v. Evans***, 711 A.2d 458, 463 (Pa. 1998) (citation omitted). Furthermore, it was the jury's duty to consider all of the facts and circumstances established by the trial evidence . . . ." ***Smith v. Shaffer***, 515 A.2d 527, 529 (Pa. 1986) (quoting ***Tinicum Real Estate Holding Co. v. Commonwealth Department of Transportation***, 389 A.2d 1034, 1040 (Pa. 1978)).

Here, the juries found the plaintiffs' respective witnesses to be credible and disregarded the testimony of Flintkote's witnesses. This decision was the jury's right and we will not reweigh their credibility determination on appeal. Accordingly, Flintkote is not entitled to relief on this claim.

In its second issue, Flintkote contends that the trial court erred in failing to enter a non-suit or grant judgment notwithstanding the verdict on the basis that the plaintiffs' evidence regarding exposure did not permit an inference of product-specific causation. Specifically, Flintkote argues that the plaintiffs failed to satisfy the "frequency, regularity, and proximity test" set forth in ***Eckenrod v. GAF Corp.***, 544 A.2d 50, 52 (Pa. Super. 1988).

In asbestos litigation, evidence of the plaintiff's exposure must demonstrate that the plaintiff worked, on a regular basis, in physical proximity with the product, and that his contact with it was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it. ***Samarin v. GAF Corp.***, 571 A.2d 398, 405 (Pa. Super. 1998) (citing ***Eckenrod***, 544 A.2d at 52). "A plaintiff must establish more than the presence of asbestos in the workplace. He must prove that he worked in the vicinity of the product's use." ***Eckenrod***, 544 A.2d at 52. However, the plaintiff need not demonstrate the specific level or duration of his exposure. ***Junge v. Garlock, Inc.***, 629 A.2d 1027, 1029 (Pa. Super. 1993) (citations omitted). An additional inquiry exists where circumstantial evidence (rather than direct) supplies the link between the decedent and the disease, namely "that decedent worked in proximity to such a product on a regular basis." ***Wilson v. A.P. Green Industries, Inc.***, 807 A.2d 922, 926 (Pa. Super. 2002).

Upon consideration of the evidence adduced to establish that the plaintiffs were exposed to products manufactured by Flintkote, we conclude that the trial court properly determined that the evidence was legally sufficient to establish exposure in both cases. Both Arena and Russell died from mesothelioma prior to providing any testimony concerning their exposure to Flintkote's products. However, the testimony of individuals who worked with each plaintiff provided sufficient evidence to establish Arena's and Russell's exposure to Flintkote's products.

Michael Hainsworth ("Hainsworth") testified in the ***Arena*** case as follows:

> [Plaintiffs' counsel]: This Flintkote asbestos cement, when you would mix it up in the water, what would happen to the material?
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> [Hainsworth]: That was a dusty operation. It would come up in the air and, much as you tried, it did make a lot of dust.
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> . . .
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> [Plaintiffs' Counsel]: Did you ever see other people using it where [Arena] was?
>
> [Hainsworth]: Yes. We used it quite often.
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> [Plaintiffs' Counsel]: Did you yourself ever use the Flintkote asbestos cement?
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> [Hainsworth]: I remember using it at the powerhouse and the boiler lab. But I'm not sure if I ever used it on the 19.
>
> . . .

[Plaintiffs' Counsel]: Did you see other people using it on the 19?

[Hainsworth]: Yes.

[Plaintiffs' Counsel]: And where was Mr. Arena when they would use the Flintkote asbestos cement on the 19?

[Hainsworth]: He would be in the – working in the fire room. As I said before, various distances. He might be close at one point and far way at another.

[Plaintiffs' Counsel]: What is the closest you ever saw him come to this bag of Flintkote cement when he would work with it?

. . .

[Objection sustained.]

. . .

[Plaintiffs' Counsel]: Can you tell me definitively how close you saw him?

[Hainsworth]: I would say within an arm's reach.

[Plaintiffs' Counsel]: Did you ever see him in the area when they would be mixing up this Flintkote asbestos cement?

[Hainsworth]: Yes.

[Plaintiffs' Counsel]: Where would the cement go?

[Hainsworth]: It went in the air all over the place.

[Plaintiffs' Counsel]: Did you see the dust around where Mr. Arena was standing when they would mix it?

[Hainsworth]: Yes.

> [Plaintiffs' Counsel]: And how often would that happen?
>
> [Hainsworth]: That would –
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> [Plaintiffs' Counsel]: How often would you see him in the area when there would be dust from this Flintkote asbestos cement being mixed? How often would you see him around it?
>
> [Hainsworth]: We didn't – at that point we weren't using the Flintkote that often, but I would say a few times.

N.T., 12/4/02, at 21-23. It is clear that Hainsworth's testimony established more than mere presence of the Flintkote product in Arena's workplace. Hainsworth's testimony demonstrated that the Flintkote cement created a significant amount of dust when it was mixed. The evidence also established that the cement was used frequently around Arena and that Hainsworth himself observed Arena in close proximity to the Flintkote cement when it was being mixed at least a few times.

Furthermore, with respect to Russell, the trial court summarized the testimony as follows:

> In the instant case, Mr. Batson testified that the product manufactured by Flintkote was applied wet and after it dried it had to be sanded. He further testified that during the sanding, there would be a lot of dust and Mr. Russell would be in the vicinity when the dust was created. He, therefore, believed that Mr. Russell inhaled the dust. In addition, Mr. Batson testified that Mr. Russell was in and out of the job "all of the time."

Trial Court Opinion, 10/10/03, at 3 (quotations in original). In viewing the evidence in accordance with our standard of review, we discern no abuse of discretion on the part of the trial court in denying Flintkote's post-trial motions.

In its final claim of error, Flintkote argues the trial court erred in denying its post-trial Motion in the ***Arena*** case on the basis that Arena failed to allege a defect in a product manufactured by Flintkote. Flintkote contends that Hainsworth's testimony concerning the information and precautions provided by Flintkote and other asbestos-containing manufacturers whose products were present at the shipyards, demonstrates that there was no lack of warning. ***See*** Brief for Appellant at 43. Flintkote asserts that Hainsworth's testimony establishes that Hainsworth and Arena would have been adequately warned and that Flintkote was entitled to a presumption that Arena read and heeded all warnings. ***Id***. We disagree.

This Court has explained that

> in cases where warnings or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning, and that the defendant, in order to rebut that presumption, must produce evidence that such a warning would not have been heeded.
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> . . . Accordingly, if the defendant produces evidence that ***the injured plaintiff*** was fully aware of the risk of bodily injury, or the extent to which his conduct could contribute to that risk, the presumption is rebutted and the burden of

> production shifts back to the plaintiff to produce evidence that he would have acted to avoid the underlying hazard had the defendant provided an adequate warning.

Coward, 729 A.2d at 621 (quotations omitted and emphasis added).

In this case, Flintkote has produced no evidence concerning whether Arena himself was fully aware of this risk of exposure to asbestos-containing products. Moreover, Flintkote has not established specifically what information was provided to Arena concerning the risk. Consequently, we conclude that Flintkote is not entitled to relief on this claim.

Judgment affirmed.

Judgment Entered.

Prothonotary

Date: OCT 31 2005