NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KENNETH DRAKE, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
A.W. CHESTERTON COMPANY, Appellee	:	NO. 3052 EDA 2005

Appeal from the Order entered September 14, 2005,
in the Court of Common Pleas, Philadelphia County,
Civil, February Term, 2003; No. 2059

BEFORE: HUDOCK, PANELLA, JJ., and McEWEN, P.J.E.

MEMORANDUM: **FILED JULY 17, 2006**

This is an appeal from an order granting summary judgment in favor of appellee-defendant, A.W. Chesterton Company (Chesterton), in this asbestos litigation. For the reasons set forth below, we reverse and remand for trial.

Appellant, Kenneth Drake, filed an asbestos action on February 14, 2003,[1] claiming that he was diagnosed with symptomatic pleural disease in December of 2001, as a result of his occupational exposure to asbestos-containing products manufactured by Chesterton, as well as numerous other defendants.[2] On August 9, 2005, Chesterton filed a motion for summary judgment contending that appellant failed to establish that he was exposed to

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[1] Sandra Drake, appellant's wife, was also a named party, seeking damages for loss of consortium. Although it appears that she still remains a party to the action and is listed as an appellant on the briefs filed by both parties, she is not listed as an appellant on this Court's docket. Therefore, we will refer to appellant in the singular.

[2] Appellant named 111 defendants in his action.

asbestos fibers emanating from any Chesterton products. The trial judge granted the motion on September 14, 2005, and dismissed all claims against Chesterton.[3] Less than one month later, on October 5, 2005, appellant settled his claims against the remaining defendants. This timely appeal of the order granting summary judgment in favor of Chesterton followed.[4]

Appellant raises two interrelated issues on appeal, arguing: (1) the trial court erred in failing to view the evidence in a light most favorable to appellant, the non-moving party, and (2) the trial court erred in making a credibility determination.

Our review of an order granting summary judgment is well-established:

> [S]ummary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. ***Capek v. Devito***, 564 Pa. 267, 270 n.1, 767 A.2d 1047, 1048 n.1 (2001). The moving party has the burden of proving that no genuine issue of material fact exists. ***Rush v. Philadelphia Newspapers, Inc.***, 732 A.2d 638, 650 (Pa.Super. 1999). In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. ***Potter v. Henderson***, 762 A.2d 1116, 1117–1118 (Pa.Super. 2000). ...

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[3] The trial court also granted summary judgment in favor of numerous other defendants.

[4] "A trial court order declaring a case settled as to all remaining parties renders prior grants of summary judgment final for [Pa.R.A.P.] 341 purposes, even if the prior orders entered disposed of fewer than all claims against all parties." ***Gutteridge v. A.P. Green Services, Inc.***, 804 A.2d 643, 650 (Pa.Super. 2002), ***appeal denied***, 574 Pa. 748, 829 A.2d 1158 (2003).

> [O]n appeal from a grant of summary judgment, we must [also] examine the record in a light most favorable to the non-moving party. ***Potter***, 762 A.2d at 1118. With regard to questions of law, an appellate court's scope of review is plenary. ***Capek***, 564 Pa. at 270 n.1, 767 A.2d at 1048 n.1. The Superior Court will reverse a grant of summary judgment only if the trial court has committed an error of law or abused its discretion. ***Potter***, ***supra***. Judicial discretion requires action in conformity with law based on the facts and circumstances before the trial court after hearing and consideration. ***Lachat v. Hinchliffe***, 769 A.2d 481, 487 (Pa.Super. 2001).

Gutteridge v. A.P. Green Services, Inc., 804 A.2d 643, 651 (Pa.Super. 2002).

This Court, in ***Eckenrod v. GAF Corp.***, 544 A.2d 50 (Pa.Super. 1988), ***appeal denied***, 520 Pa. 605, 553 A.2d 968 (1988), set forth the elements necessary to prove a *prima facie* case of asbestos liability:

> In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product. Therefore, 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. Summary judgment is proper when the plaintiff has failed to establish that the defendants' products were the cause of the plaintiff's injury.

Id. at 52 (internal citations omitted).

The trial court determined that appellant failed to establish that the Chesterton sheet packing used during his employment contained asbestos. In support of its finding, the court cited to portions of appellant's deposition

testimony, which was attached to both Chesterton's motion for summary judgment and appellant's response, in which appellant acknowledged that the only product manufactured by Chesterton that he recalled working with was sheet packing, and that he did not know whether that particular sheet packing contained asbestos. ***See:*** Trial Court, Opinion, Ackerman, J., December 12, 2005, at pp. 3–4.

Appellant contends, however, that the trial court failed to view the evidence in the light most favorable to him, the non-moving party, but rather, "focused on some inconsistencies in [his] testimony." Brief of Appellant at p. 9. Appellant asserts that he specifically identified the particular Chesterton sheet packing which he worked with during his employment[5] from a picture,[6] which described the product as "compressed asbestos sheets." Moreover, appellant also described the procedure by which he would cut the sheet packing using a ball-peen hammer, which would then create dust that he would breathe in. Appellant argues that this testimony was sufficient to establish a *prima facie* case of asbestos products liability, and therefore, he was entitled to a jury verdict.

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[5] Appellant asserts that he worked with the sheet packing manufactured by Chesterton during his tenure as a road laborer, between 1976 and 1979, for Community Central Energy Corp.

[6] Although it is unclear from the deposition testimony excerpts, we presume the picture was in a product catalog.

In considering appellant's argument, the following excerpt from appellant's deposition is instructive:

> Q. —[Mr. Present][7] But I noticed that on one of these pictures that you picked out, the sheet gasket that you got all that dust from that you were telling [defense counsel] Mr. Leonard about —
>
> Mr. Leonard: Objection.
>
> Q. ***—it says up here, Compressed Asbestos Sheet.***
>
> Mr. Leonard: Objection. He stated that he wasn't certain that he used this particular product. He just knows that he's used this Chesterton —
>
> Mr. Present: No. He said he used this product, just he wasn't certain of the style number. Now, let's call a spade a spade. Okay?
>
> Mr. Leonard: This is a style number. So, if he can't recall this specific style number, there's no way for him—
>
> Mr. Present: Let's call a Chesterton a Chesterton.
>
> Mr. Leonard: — there's no way for him to know that he used this particular style of Chesterton sheet packing.
>
> Mr. Present: Okay. Are you going to testify?
>
> ****
>
> ***Q. With respect to these sheets here that you see in this picture depicted here—***
>
> ***A. Yes.***
>
> Q. ***—is that the product you used?***

[7] Mr. Present was counsel for appellant, and Mr. Leonard was counsel for Chesterton.

A. Yes.

Mr. Leonard: Objection.

Q. Okay. And this product that is depicted in this sheet that you used, you're sure that was made by Chesterton. Even though you're not sure of the style number, you're sure it was made by Chesterton. Is that right?

Mr. Leonard: Objection.

[APPELLANT]: Yes.

Response to Motion for Summary Judgment, August 25, 2005, Exhibit A, N.T., Deposition Testimony of Kenneth Drake, Sr., June 15, 2005, at pp. 301–303 (emphasis added).

Thus, it is evident that, although appellant testified that he did not recall seeing specific labeling on Chesterton's sheet packing identifying it as containing asbestos, and did not know whether the particular product he selected from the picture contained asbestos, he identified a picture of sheet packing, manufactured by Chesterton and described as "compressed asbestos packing," as the product which he regularly cut during his employment and which created airborne dust. In our view, the identification of the "asbestos" product by appellant was sufficient to withstand a motion for summary judgment.[8] Whether that identification ultimately proves reliable will be a

[8] Appellee Chesterton argues in its brief that appellant "never identified 'Chesterton Compressed Asbestos Sheet' depicted in the photo he selected as the exact type or brand of Chesterton sheet packing that he had worked with or around." Brief of Appellee at p. 9. However, our review of the limited

factual question for a jury. Therefore, we are constrained to reverse the order granting summary judgment in favor of Chesterton, and remand the case for trial.[9]

Order reversed. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

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Date:_____

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deposition testimony excerpts included in the certified record appear to prove otherwise. It was Chesterton's burden, as the party moving for summary judgment, to demonstrate that no genuine issue of material fact existed. ***Gutteridge***, ***supra*** at 651 (citation omitted). We conclude here that it failed to do so.

[9] In arriving at this conclusion, we are particularly mindful of the strong presumption in favor of affording a plaintiff his day in court. We further note that the defendant here will have additional and ample opportunities to test the sufficiency of plaintiff's evidence prior to any verdict, including a mid-trial motion for non suit and a post trial motion for judgment notwithstanding the verdict, assuming, that is, that the jury finds for the plaintiff. In any event, we are obliged to reverse since the plaintiff, as the non-moving party, must be given the benefit of any doubt as to the existence of a genuine issue of material fact. ***See: Gutteridge***, ***supra*** at 651.