IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WILLIAM B. KOERPER,	:	SEPTMEBER TERM, 2005
	:	NO. 1200
Plaintiff	:	
	:	
	:	
	:	
VS.	:	
	:	
BRAND INSULATIONS, INC., et al	:	SUPERIOR COURT NO.
	:	2739 EDA 2007
Defendant	:	

OPINION

Tereshko, J.

PROCEDURAL HISTORY

Plaintiff, William B. Koerper ("Koerper" or "Plaintiff"), appeals this Court's Order granting Summary Judgment to Defendant, Brand Insulations, Inc. ("Brand"), and dismissing with prejudice all claims against said Defendant. For the following reasons, this Court's Order should be affirmed.

BACKGROUND

Plaintiff commenced this Asbestos Mass Tort action alleging that William Koerper, was diagnosed with an asbestos related disease. *See* Plaintiff's Complaint, ¶ 30, filed September 20, 2005. On July 23, 2007, Brand moved for summary judgment asserting lack of sufficient product identification as required by *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988) and its progeny. On August 9, 2007, Plaintiff filed a

response to Defendants' Motion. On August 14, 2007, Defendant replied to Plaintiff's Response. On September 17, 2007, after review of the Motion and Response, this Court granted Defendants' Motion and dismissed with prejudice all claims against Defendants. On October 10, 2007, Plaintiff filed a Notice of Appeal of the grant of summary judgment. On November 8, 2007, Plaintiff filed a Statement of Matters Complained of on Appeal raising, *inter alia*:

> 1) Mr. Koeper [sic] was exposed to asbestos containing products installed by Brand Insulations for years.
> 2) Brand Insulation is a Supplier and Installer of asbestos containing products.
> 3) Deponent knows what asbestos is and that he was exposed thereto.
> 4) No respiratory protection was worn and asbestos fibers were inhaled by Plaintiff.

See Plaintiff's Concise Statement of Errors Complained of on Appeal on November 8, 2007, pp. 2-3.[1]

DISCUSSION

Plaintiff argues that the record in this case establishes genuine issues of material fact as to Koerper's exposure to asbestos fibers from Defendants' products and the court erred in granting summary judgment. However, the available record fails to establish that Koerper inhaled asbestos fibers from a product manufactured by Defendant.

"In determining whether to grant a motion for summary judgment, the trial court must view the record in the light most favorable to the non-moving party and resolve any doubts as to the existence of a genuine issue of material fact against the moving party." *Gilbert v. Monsey Prods. Co.*, 861 A.2d 275, 276 (Pa. Super. 2004). In reviewing a grant

[1] Plaintiff's issues have been summarized for purposes of drafting this opinion.

of summary judgment, an appellate court's scope of review is plenary and will reverse only upon finding that the trial court abused its discretion or erred as a matter of law. *Harahan v. AC & S, Inc.*, 816 A.2d 296 (Pa. Super. 2003).

"Failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor establishes the entitlement of the moving party to judgment as a matter of law." *Young v. DOT*, 744 A.2d 1276, 1277 (Pa. 2000). Yet, evidence presented must be of such weight so that the Court need not speculate in order to find for the Plaintiff. *Juliano v. Johns-Manville Corp.*, 611 A.2d 238 (Pa. Super. 1992). Plaintiff will not survive summary judgment if, "… a jury cannot find, except by speculation, that it was a defendant's product which caused the plaintiff's injury." *Id.* at 239.

Our Superior Court, in *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa. Super. 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.

It has been clearly established in the case law of this Commonwealth that the Plaintiff must present evidence that the Defendant's products contained asbestos:

> …it is not reasonable for the trial court to infer that these products *must* have contained asbestos because they were heat resistant. The same facts could lead to the inference that the heat resistant products contained other heat resistant materials; therefore there was insufficient foundation for a jury to infer by a preponderance of the evidence that the heat resistant products used… contained asbestos.

See Samarin v. GAF Corporation 571 A.2d 398, 404 (Pa. Super. 1989).

Koerper worked as a supervisor from 1961 and 1975 for the independent plumbing sub-contractor, Joseph Scholl ("Scholl"). *See* Plaintiff's Complaint, pp. 14-15. After 1975 Plaintiff was employed as a supervisor by Mechanical Maintenance Incorporated. *Id.* at 15.

Plaintiff alleges he was exposed to asbestos dust (at several different PECO locations during the course of his employ) from pipe insulation installed by Defendant Brand's employees. *Id*. at 14-15. However, Plaintiff failed to show that he was exposed to asbestos as required by *Eckenrod*. Plaintiff alleges that he saw Brand's employees installing insulation at an unspecified point after Scholl's employees completed their job. *See* Deposition of William Koerper on May 25, 2007, p. 264 lns. 11-15. Plaintiff did not see any labels on the insulation or any other indication that connected the insulation to asbestos. *Id.* at 249-250. In addition, Plaintiff was not trained in identifying asbestos products. *Id.* at 249.

Plaintiff relies solely on his belief that the insulation was asbestos-containing because of how it felt, how it was used, and how it looked. At numerous points in his testimony, Koerper affirms his belief of the presence of asbestos in products installed by and removed by Defendant's employees. Appearance, age, application and comments from unknown persons are the only indicators Plaintiff cites to support his claim. Plaintiff did not see any labels or manufacturers' names on the products.

Q: Do you know the manufacturer of that insulation?
A: I have no idea. That was installed, you know.
Q: Do you know if that insulation contained asbestos?
A: I am sure it was, it was all old. That's all they used back then.
Q: Based on its age, you believe it was asbestos?
A: Yes.

See Deposition of William Koerper on September 26, 2006, p. 84 lns. 12-18.

Q: I'm asking you, how do you know that that dust contained asbestos?
A: We all knew that it packed with the insulation, it was asbestos.
Q: Is that based on what you told me before, based on its application and appearance?
A: Yes.

Id. at p. 87 lns. 19-25 - p. 88 ln. 1. For further testimony where Koerper claims asbestos presence because of the age and appearance, see, *Id.* at p. 91 lns. 12-19, *Id.* at p. 97 lns. 15-23, *Id.* at p. 94 lns. 15-22.

Also, Plaintiff alludes to another person or persons who told him the products contained asbestos. However, Plaintiff did not explain who told him about the presence of asbestos.

Q: How did being around that work expose you to asbestos?
A: They had said that they were insulated with asbestos.
Q: Who said that?
A: Everybody that worked in the plant [k]new that.
Q: And again, is that based on the appearance and application of the product?
A: I would think, yes.

Id. at p. 88 lns. 7-16.

Finally, Plaintiff claimed he could tell the difference between asbestos and fiberglass by touch and sight.

Q: How do you know that this insulation on the boilers contained asbestos?
A: You could tell from the fibers in it, you know. That's all they used.

Id. at p. 100 lns. 16-19. See also, *Id.* at p. 107 lns. 12-18, *Id.* p. 103 lns. 6-14.

Q: Under oath, sir, in terms of materials that the Brand employees used, can you tell me what that was made out of?
A: I suspect it was all asbestos with the pipecovering.
Q: I want to focus on the new materials that the Brand employees used. Sir, do you know as you sit here today what those materials were made of, the pipecovering material?
A: Asbestos.
Q: Sir, how is it you know that?
A: I could tell the difference between asbestos and fiberglass.
Q: Is that based upon appearance of the product?
A: Appearance, feel.
Q: Did you ever see any of the pipecovering materials that the Brand employees uses in its packaging?
A: No.

See Deposition of William Koerper on May 25, 2007, p. 248 lns. 3-25 – p 249 lns. 1-6.

Plaintiff provided no further expert testimony or supporting evidence that the insulation installed by Defendant's employees contained asbestos. Last and most insightful, when asked how he knew the dust contained asbestos, Plaintiff admits "I have no idea." *Id.* at p.87 lns.11-13.

Even though Koerper worked in PECO plants for a long time, without the aid of labeling that would provide non-speculative links to asbestos, Koerper cannot determine what items contain asbestos. Plaintiff argues that, because of his experience and because the insulation was used in high-heat situations, he could "tell" that the insulation was asbestos. In a case with nearly identical facts and argument, our Superior Court, relying on *Samarin,* clearly determined that merely "citing his experience as a tradesman for over

twenty years as the source of his knowledge that the pipecovering contained asbestos, and his statement that the job application called for asbestos pipecovering" did not present a material fact to connect the insulation to asbestos. *See Bushless v. GAF Corporation*, 585 A.2d 496, 503 (Pa. Super. 1990). Our Superior Court's ruling in *Bushless* is supported by the conclusion of the United States Environmental Protection Agency. The US EPA found, "[p]ositive identification of asbestos requires laboratory analysis; information on labels or visual examination is not sufficient…" U.S. EPA, *Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs for Asbestos-Containing Materials* at 4 (July 1990). Plaintiff only claims to have "known" the insulation to be asbestos-containing because of its usage, the way it felt, and its color. As per the ruling of *Bushless*, Plaintiff's identification testimony is merely speculation and cannot be accepted as evidence as to the presence of asbestos. Plaintiff's testimony, "…leave[s] us with enough fact only for a guessing game… However, *Eckenrod* makes it clear that we cannot enter into such a guessing game." *Samarin v. GAF Corporation*, 571 A.2d 398, 408 (Pa. Super. 1989).

A close inspection of Koerper's testimony revels that he admits, <u>not that he knew</u> Defendant's products contained asbestos, but that he <u>assumed</u> Defendant's products contained asbestos. His testimony does not present evidence for the jury because it is speculation and inadmissible. Simply, the Court must grant Summary Judgment because, "… a jury cannot find, except by speculation, that it was a defendant's product which caused the Plaintiff's injury." *See Juliano* at 324.

CONCLUSION

For the foregoing reasons this Court's Order granting Summary Judgment in favor of Defendant, Brand Insulations, Inc. ("Brand"), should be AFFIRMED.

BY THE COURT:

4-1-2008

Date **ALLAN L. TERESHKO, J.**