

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

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<b>SAMUEL IANNUCCI, Executor of the Estate of DANIEL IANNUCCI, Deceased</b>	:	<b>CIVIL TRIAL DIVISION</b>
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<b>Plaintiff</b>	:	<b>DECEMBER TERM, 2005</b>
	:	<b>No. 1830</b>
	:	<b>JUNE TERM, 2007</b>
<b>v.</b>	:	<b>No. 3869<sup>1</sup></b>
	:	
<b>CLEAVER-BROOKS, INC., et al.</b>	:	<b>Superior Court Docket No.</b>
	:	<b>2704 EDA 2007<sup>2</sup></b>
<b>Defendants</b>	:	

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**OPINION**

**Tereshko, J.**

Plaintiff, Samuel Iannucci<sup>3</sup> (“Plaintiff”), Executor of the Estate of Daniel Iannucci (“Decedent”), appeals this Court’s orders granting summary judgment to the following defendants: Cleaver-Brooks, Inc. (“Cleaver-Brooks”), Goulds Pumps, Inc. (“Goulds”), and A.O. Smith Corporation, (“AO Smith”)<sup>4</sup> (collectively “Defendants”), and dismissing with prejudice all claims against said Defendants. For the following reasons, this Court’s orders should be affirmed.

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<sup>1</sup> These cases were consolidated by order of this Court on July 18, 2007.

<sup>2</sup> Plaintiff filed two additional appeals, Iannucci v. Goulds Pumps, Inc., No. 2702 EDA 2007, and Iannucci v. A.O. Smith Corp., Inc., No. 2703 EDA 2007, of this Court’s orders granting summary judgment in favor of those respective defendants. Those appeals were quashed by order of the Superior Court dated December 10, 2007, so that all issues could be raised within the context of this appeal. *See* Order of Superior Court, 12/10/07.

<sup>3</sup> This action was originally instituted by Concetta Iannucci, Decedent’s wife, as Executor of Decedent’s Estate. On March 20, 2007, a Suggestion of Death was filed and Samuel Iannucci was substituted as Plaintiff. *See* Suggestion of Death Upon the Record, 3/20/07.

<sup>4</sup> The original motions filed by Goulds Pumps, Inc. and A.O. Smith Corp., and original orders signed by this Court could not be found within the record. Defendants’ motions, Plaintiff’s responses and any replies have been reproduced for the record. Copies of the signed orders found within Plaintiff’s Notices of Appeal also have been reproduced for the record and attached to the motions, accordingly.

**I. BACKGROUND**

Plaintiff commenced this Asbestos Mass Tort action alleging that Decedent Daniel Iannucci contracted mesothelioma as a result of his occupational exposure to asbestos products. See Plaintiff’s Complaint, ¶¶ 4-5. On August 7, 2007, all three defendants moved for summary judgment. On August 24, 2007, Plaintiffs filed a response to each of the motions. Replies were filed by Goulds Pumps and Cleaver-Brooks on August 29, 2007. Plaintiffs filed sur-replies on August 30, 2007. All Defendants’ motions asserted lack of sufficient product identification as required by Eckenrod vs. GAF Corp., 544 A.2d 50 (Pa.Super. 1988) and its progeny.

After review of the motions, responses, replies and sur-replies, this Court granted summary judgment in favor of each of the Defendants and dismissed with prejudice Plaintiff’s claims.<sup>5</sup>

On October 15, 2007, Plaintiff timely filed appeals of the orders granting summary judgment to Goulds and AO Smith and timely filed an appeal of the order granting summary judgment to Cleaver-Brooks on October 17, 2007.

On November 7, 2007, in response to this Court’s order, Plaintiff filed his Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b), which, in pertinent portion, follows:

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2. Defendants A.O. Smith and Goulds Pumps both argued that summary judgment should be granted on the basis that Plaintiff failed to present sufficient evidence to demonstrate the Decedent’s exposure to asbestos products

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<sup>5</sup> Orders granting summary judgment to AO Smith and Cleaver Brooks were dated September 24, 2007 and docketed on September 25, 2007. The order granting summary judgment to Goulds was dated and docketed on September 25, 2007.

manufactured, sold or supplied by either of those Defendants. The Court erred to the extent it granted summary judgment in favor of those defendants on the basis of that argument.

3. Defendant Cleaver-Brooks argued that Plaintiff failed to demonstrate sufficient evidence of the Decedent's exposure to asbestos-containing products manufactured or supplied by Cleaver-Brooks. Cleaver-Brooks also argued that Plaintiff's claim was extinguished by the Statute of Repose. The Court erred to the extent it granted summary judgment in favor of Cleaver-Brooks on the basis of either of these arguments.

4. All three Defendants manufactured products that required asbestos insulation as an integral component for the proper functioning of each Defendant's respective products. Because Defendants' products incorporated the use of asbestos-containing insulation as part of their overall structure, the Court erred to the extent it concluded that the Defendants did not sell, manufacture or supply the asbestos that was essential for the operation of their products. This issue was fully briefed in the case decided simultaneously with the instant matter and captioned *Diane P. Miletto, Executrix of the Estate of Joseph M. Miletto, Dec'd and in Her Own Right*, August Term, 2005, No. 1027, 2705 EDA 2007, from which Plaintiff has also appealed.

\* \* \* \* \*

See Plaintiff's Concise Statement of Errors Complained of on Appeal, 11/7/07.

## II. DISCUSSION

Plaintiff essentially argues that the granting of summary judgment to Defendants was error, regardless of this Court's reasons. The available record in the instant matter, however, failed to establish that Iannucci inhaled asbestos fibers from products sold, manufactured or supplied by the moving defendants. Thus, summary judgment was appropriate.

"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 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).

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 (internal citations omitted).

Further, our Supreme Court in *Gregg v. VJ Auto Parts, Co.*, 2007 Pa. LEXIS 2935 (Pa. 2007), recently reiterated the duty of a lower court when reviewing an asbestos motion for summary based on product identification:

. . . [W]e believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decendent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

*Id.* at 30.

In light of this binding precedent, we review the record herein. Decedent, Daniel Iannucci, was not deposed prior to his death. In opposition to Defendants' summary judgment motions, Plaintiff presented the testimony of Thomas C. Brown ("Brown") and Thomas Bonner ("Bonner"),<sup>6</sup> both of whom allegedly worked under Decedent during a

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<sup>6</sup> Because the witnesses' depositions were conducted August 7, 2007 and August 16, 2007, respectively,

portion of the time he was employed by the Chester-Upland School District. The witnesses' testimony, however, fails to establish that Decedent was exposed to asbestos fibers shed from moving Defendants' products with the frequency, regularity and proximity required under Pennsylvania law.

### **Cleaver-Brooks**

Defendant Cleaver-Brooks argued that the testimony of Plaintiff's witnesses failed to establish that Decedent was exposed to an asbestos containing product manufactured or supplied by Cleaver-Brooks.<sup>7</sup> We agree. Witness Thomas Brown testified that he worked for the Chester School District as an oil burner repairman from approximately 1969 until 1975. *See* Deposition of Thomas C. Brown, 8/7/07, pp. 14-16, 99. Brown further testified that during the entire time he worked for the Chester School District, Decedent was the Superintendent of Maintenance. *See id.*, pp. 14-17. Brown testified that he recalled working with Cleaver-Brooks products at three of the schools in the Chester School District—the Douglas, Smedley and Pulaski Schools. *See id.*, pp. 83-84. Brown further testified that the only Cleaver-Brooks products he recalled working with in Decedent's presence were pumps and oil burners. *See id.*, pp. 86-96 (Q: "Besides pumps and burners, do you associate any other products with Cleaver-Brooks?" A: "No."). However, Brown also clearly testified that he did not associate asbestos with the Cleaver-Brooks burners or pumps:

Q: Do you believe that the Cleaver-Brooks burner contained asbestos at the Douglas School?

A: Did it contain asbestos?

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Defendants' initial motions, filed August 7, 2007, only generally argued lack of evidence. The witnesses' testimony is specifically addressed in Defendants' reply briefs to Plaintiff's opposition.

<sup>7</sup> Cleaver-Brooks additionally argued in its reply brief that Plaintiff's claims were abolished by the Statute of Repose. This issue will not be addressed as it was not the basis for this Court's grant of summary judgment in Cleaver-Brooks favor.

Q: Yes. Did it contain asbestos?  
A: Where would it contain asbestos at?  
Q: I'm just asking the question, sir.  
A: No. The only thing I know they use -- Cleaver-Brooks used a number four oil. A number four oil has a lot of dirt and wax in that oil. And what it produced – it would coke up at the end of the burner.

*See id.*, p. 90.

\* \* \*  
Q: And as you sit here today, sir, you have no basis for believing that the Cleaver-Brooks pumps contained asbestos; is that correct?  
A: No.  
Q: Yes, my question is correct?  
A: Right.

*See id.*, p. 96.

Likewise, the testimony of witness Thomas Bonner fails to support Plaintiff's claim that Decedent was exposed to asbestos from a Cleaver-Brooks product. Bonner testified that he worked in the maintenance department of the Chester Upland School District and that Decedent was his foreman from approximately 1985 to 1990. *See* Deposition of Thomas Bonner, 8/16/07, pp. 9-10. Bonner testified that the only asbestos he associated with Cleaver-Brooks products was an old rope gasket on a boiler "in the front where you took the burner off, that's it." *See id.*, p. 115-16, 124. However, Bonner had no idea who made or supplied the rope and his only basis for believing that the gasket contained asbestos was what he was told by his supervisors:

Q: Sir, am I correct you don't have any knowledge as to whether, as to who supplied any of the rope material that was used on the boiler, you don't—  
A: I can't tell you.  
\* \* \*  
Q: Sir, do you know what that old rope was made out of?  
A: Honestly, no, it was like just white rope, they said it was asbestos.  
Q: Who said it was asbestos?  
A: The boss.  
Q: Which boss?  
A: Johnny May, Danny.

*See id.*, at 125, 116.

Moreover, Bonner recalled Decedent being present only one time when the rope gasket on the boiler was changed:

Q: Just so I'm clear, you only did this rope work on the boiler on one occasion on one of the boilers located at Main Street?

A: Yeah, I only did it once.

Q: And that was the only occasion that you recall Mr. Iannucci being present when this rope –

A: Yeah, Tommy King, he was the burner man, he would take care of the burner if it didn't fire. We were like leaks, you know.

Q: If you would, sir, and it was only the one occasion that you recall Mr. Iannucci present when this rope work was done on one of the boilers?

A: That's the only one time that I know of.

*See id.*, at 119.

Plaintiff makes much of Bonner's testimony that he and Decedent were frequently exposed to asbestos insulation on the Cleaver-Brooks boilers. *See* Plaintiff's Brief in Opposition, pp., 9-12. However, a close look at the testimony reveals that Bonner was referring specifically to the insulation on the pipes that ran throughout the school and in fact, testified that the Cleaver-Brooks boilers were not insulated on the outside:

Q: You told Mr. Belefsky [sic] earlier that you recall at various times getting a claw hook hammer and removing insulation. Do you recall that?

A: Yes.

Q: Sir, were you talking about removing insulation on the pipes leading to and from the outside of the boiler? Were you there to repair steam leaks?

A: Steam leaks, yeah, if it was a steam leak you just took your knife and just cut right down to the insulation and took it off.

Q: And you're talking about the insulation that was on the pipes leading to –

A: Yeah, on the pipes. That boiler didn't have nothing, no insulation wrapped around it, that was inside of a metal jacket.

*See id.*, at 106-07. (Emphasis supplied).

Thus, considering the foregoing, Plaintiff has failed to establish that Decedent was exposed to any asbestos manufactured, sold or supplied by Cleaver-Brooks and

summary judgment was proper.

### **AO Smith**

Similarly, AO Smith argued that Plaintiff's evidence failed to establish that Decedent inhaled asbestos dust or fibers from a product actually manufactured, sold or supplied by AO Smith. Despite the substantial number of pages of Plaintiff's brief dedicated to Thomas Bonner's testimony, a close examination of the testimony failed to yield sufficient evidence to establish a *prima facie* case of asbestos liability.<sup>8</sup> Bonner testified that his job at the Chester School District was ". . .to maintain the plumbing system, the boilers, the steam boilers, any leaks, bathrooms, anything that had to do with plumbing basically . . ." *See* Bonner Dep., p. 8. Bonner further testified that he associated the name AO Smith with hot water heating systems located at three schools within the district—Main Street School, Toby Farms School and the Vocational or Vo-Tech Building. *See id.*, pp. 17<sup>9</sup>, 43-84, 91-93. Regarding the water heater at the Main Street School, Bonner testified that it was insulated with a "a wrap . . . like a plaster of pears almost." *Id.* at 50. However, when asked if "that material was supplied with the heater or whether it was put on afterwards" he replied, "I have no idea, I couldn't tell you." *Id.* In addition, Bonner only believed the insulation contained asbestos because he was "told that it contained asbestos, just throw it away" by his supervisors, "Danny and Richie." *Id.* at 51. Moreover, Bonner recalled Decedent being present on only one occasion, standing five feet away, when Bonner himself had to chisel away at the plaster

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<sup>8</sup> AO Smith additionally argued that Thomas Bonner's testimony should be disregarded because it was noticed and obtained after the discovery deadline. However, even considering Bonner's testimony, Plaintiff still fails to establish exposure to an asbestos product manufactured, sold, or distributed by Defendant, AO Smith.

<sup>9</sup> Bonner initially associated AO Smith with two other schools, Polasky and Showater, but further testimony revealed that the AO Smith hot water heaters were installed in those schools sometime in the late 1990's after Decedent retired and the witness was unable to identify the manufacturer of the original equipment. *See* Bonner Dep., pp. 84-88.



insulation on the water heater and that job lasted only minutes:

Q: How many times did that happen? How many times did that happen when you were looking for a leak on the water heater itself and you had to chisel away some of the plaster?

A: That was only like the one nipple and then the relief valve blew.

Q: So two times?

A: Two times there and then anything else was the circulator pump. . .

\* \* \* \*

Q: When you did those two jobs with the nipple and with the leak, was Mr. Iannucci present on those occasions?

A: I know he was on the nipple, not the relief valve, that was just me and Eddie there that day.

Q: How long did it take you to chisel off the plaster covering when you were checking on the nipple?

A: We just took a hammer and just (indicating), just cut it right up.

Q: How long did that take?

A: That took about three minutes, four minutes.

\* \* \* \*

Q: Can you translate that into distances as far as how far Mr. Iannucci was standing while he was watching you guys do the work? Was he ten feet away, was he five feet away?

A: Probably like five feet away . . .

*Id.* at 56-57.

As for the water heating system at the Toby Farms School, Bonner failed to identify any asbestos materials with either the water heater or the storage tank. Bonner recalled that the insulation on the heater itself was inside a metal jacket, while the storage tank was insulated with some type of gray block material. *Id.* at 60-63, 69-71. However, Bonner never identified any of the insulation as asbestos-containing and had no idea who provided it because it was in place before he started working for the Chester School District. *See id.* at 71-72. Furthermore, Bonner failed to indicate any time that Decedent was present when work was performed on the system. *See id.* at 67-68.

Finally, Bonner testified that the AO Smith water heater at the Vocational Tech Building had no exterior insulation but rather a metal jacket with an interior layer of fiberglass insulation. *Id.* at 80-82. He additionally admitted that he had no idea if there

were any asbestos containing materials on the AO Smith hot water system at the Vocational Tech Building. *Id.* at 82.

Thus, based on Plaintiff's failure to provide evidence of Decedent's exposure to asbestos dust or fibers from a product manufactured or supplied by AO Smith with the regularity, frequency and proximity required under *Eckenrod, supra* and *Gregg, supra*, summary judgment in Defendant's favor was appropriate.

### **Goulds Pumps**

Goulds argued that Plaintiff failed to provide "any evidence that Mr. Iannucci was exposed to and breathed any dust from an asbestos-containing component of a Goulds pump." Defendant's Reply Brief, 8/29/08, pp. 1-2. After review of the record, we concur.

Bonner testified that the only Goulds pumps he ever worked on for the Chester School District were two air-conditioning pumps located in the Perry Building. *See Bonner Dep.*, pp. 127-128, 135. He further testified that he did not associate asbestos with the pumps themselves, but that approximately twice yearly the valves within the pumps would require packing with a graphite-coated asbestos packing:

Q: Now, on this particular pump, just listening to your previous testimony, you believe that it's the packing inside the pump that contains asbestos; is that correct?

A: No, I used the packing, that asbestos packing. I don't know what else is asbestos in the pump. Just the packing that I used.

\* \* \* \* \*

Q: Now why do you believe that packing contained asbestos?

A: Because it said, da, da, da, asbestos packing, graphite asbestos packing on the package.

*See id.* at 128-130 (emphasis supplied).

Bonner testified that the pumps were old and did not contain the original packing. *See id.*, 129, 134. He also testified that the replacement packing was made by someone

other than Goulds. *See id.* at 129 (“What is that called, I called it something. . . . Palmetto braided asbestos packing.”). Notably, Bonner testified that upon removal from the pump, the packing was not dusty:

Q: Was the packing, upon removal, was this packing of a dry or wet consistency?

A: It was, it depends on, if the motor was running hot it would be dry. If it was dripping it would be wet. Some of it would be wet. But you still have that shine, it still had a shine to it. It was like, you know, like it held, it wasn't like too dusty or nothing.

*Id.* at 131-132 (emphasis supplied).

Furthermore and most significantly, Bonner placed Decedent in proximity to the Goulds pumps only “a couple of times.” *Id.* at 131. In fact, Bonner could recall only one specific incident when “[Decedent] was there when [Bonner] did the butterfly valve, and [they] changed the packing on it.” *Id.*

Considering the record before this Court, Plaintiff failed to establish that Decedent “inhaled asbestos fibers shed by” a Goulds pump with the requisite frequency, regularity and proximity and thus was unable to defeat Defendant’s summary judgment motion. *Eckenrod, supra; Gregg, supra.*

### III. CONCLUSION

For the foregoing reasons this Court’s orders granting summary judgment in favor of Defendants, Cleaver-Brooks, A.O. Smith and Goulds Pumps, should be AFFIRMED.

**BY THE COURT:**

\_\_\_\_\_  
Date

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ALLAN L. TERESHKO, J.