

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

ANNE CAMPBELL, Executrix : MAY TERM, 1997
of the Estate of THOMAS F. CAMPBELL, :
deceased, and widow in her own right :
v. : NO. 1298
FLINTKOTE CO., et al. : ASBESTOS CASE

RICHARD W. FARLEY : OCTOBER TERM, 1998
v. : NO. 93
CHICAGO FIRE BRICK CO., et al. : ASBESTOS CASE

O P I N I O N

O’Keefe, J.

November 7, 2000

I. Overview

In these asbestos actions, Plaintiffs appeal this Court’s Order of September 21, 2000, granting summary judgment in favor of Flintkote Company and Chicago Fire Brick Company (“Defendants”).

II. Facts and Procedural History

A. Anne Campbell (Executrix of the Estate of Thomas F. Campbell)

This asbestos action was commenced on May 13, 1997, by way of a complaint. The complaint alleges that Thomas F. Campbell was diagnosed with lung cancer on December 11, 1996, as a result of his exposure to asbestos during his various positions of employment between 1938 and 1985. Thomas F. Campbell died on December 22, 1997. The captioned Plaintiff in this lawsuit

was substituted to reflect Mr. Campbell's death. Thereafter, the Plaintiff was and still is known as Anne C. Campbell, Executrix of the Estate of Thomas F. Campbell. The complaint states that Mr. Campbell smoked one pack of cigarettes per day from 1930 to 1980. On September 21, 2000, upon consideration of Defendant-Flintkote's Motion for Summary Judgment based upon lack of product identification, and Plaintiff-Campbell's response thereto, this Court granted summary judgment in favor of Defendant-Flintkote. Thereafter, Plaintiff-Campbell filed the present appeal.

B. Richard W. Farley

This asbestos action was commenced on October 5, 1998, by way of a complaint. The complaint alleges that Richard W. Farley was diagnosed with lung cancer on July 15, 1998, as a result of his exposure to asbestos during his various positions of employment between 1939 and 1978. The complaint states that Mr. Farley smoked one pack of cigarettes per day from 1948 to 1990. On September 21, 2000, upon consideration of Defendant's motion for summary judgment based upon lack of product identification, and Plaintiff-Farley's response thereto, this Court granted summary judgment in favor of Defendant-Chicago Fire Brick. Thereafter, Plaintiff-Farley filed the present appeal.

III. Argument

Summary judgment is appropriate "if, after the completion of discovery . . . an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R. Civ. Pro. 1035.2(2). The Superior Court has outlined the general standard for summary judgment:

A motion for summary judgment may properly be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues of material facts and that the moving party is entitled to judgment as a matter of law.

Hopewell Estates, Inc. v. Kent, 435 Pa. Super. 471, 475, 646 A.2d 1192, 1194 (1994). On appeal, the appropriate standard of review of a trial court's decision on a summary judgment motion is as follows:

When determining if a trial court properly entered summary judgment, this Court's scope of review is plenary. We must examine the entire record in the light most favorable to the non-moving party and resolve all doubts against the moving party when determining if there is a genuine issue of material fact. We will only reverse the trial court's decision if there was an abuse of discretion or error of law. An abuse of discretion occurs 'when the cause pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the actions is a result of partiality, prejudice, bias or ill will.'

Merriweather v. Philadelphia Newspapers, Inc., 453 Pa. Super. 464, 684 A.2d 137, 140 (1996) (quoting Coker v. S.M. Flickinger Co., Inc., 533 Pa. 441, 447, 625 A.2d 1181, 1185 (1993)).

To avoid summary judgment, the non-moving party must set forth facts specific and essential to the cause of action, thus demonstrating that there is a genuine issue for trial. "Note" to Pa. R. Civ. Pro. 1035; See also Henninger v. State Farm Ins. Co., 719 A.2d 1074, 1076 (Pa. Super. 1998).

In asbestos cases, the specific standard followed by Pennsylvania courts in deciding summary judgment motions was originally set forth in Eckenrod v. GAF Corp., 375 Pa. Super. 187, 191-92, 544 A.2d 50, 52-53 (1988). The Eckenrod test establishes that in order for there to be a genuine issue of material fact, a plaintiff must be able to identify a particular manufacturer as the cause of the alleged injuries. Id. This entails naming a defendant's specific asbestos product as the one that was used in the vicinity of where the plaintiff worked. Id. The Eckenrod court stated that, "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." Id. (citations omitted). Product identity can be established where the record shows that plaintiff inhaled asbestos fibers shed by that manufacturer's specific product. Id.

In a later opportunity to revisit the summary judgment motion standard, the Superior Court harmonized the asbestos standard with the general summary judgment standard by incorporating some of the Eckenrod principles in the general definition. The court remarked, “[i]t is clear that if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicated that the plaintiff is unable to satisfy an element of the cause of action.” Godlewski v. Pars Mfg. Co., 408 Pa. Super. 425, 431, 597 A.2d 106, 109 (1991) (citing Eckenrod in a parenthetical, “wherein, by approving grants of summary judgment on motions that were based upon the failure of the plaintiffs to satisfy an element necessary to their case, we *impliedly* utilized this principle.” and citing Celotex Corp. V. Catrett, 477 U.S. 317 (1986), in a parenthetical, “wherein the Supreme Court considered the language of F.R.C.P. 56(c), which is similar to that set forth in Pa.R.C.P. 1035(b) and *explicitly* indicated the same.”) (emphasis in original).

The present cases are similar to the facts established in Eckenrod. In Eckenrod, the Superior Court affirmed the granting of summary judgment where the plaintiff failed to present evidence that he worked with asbestos supplied and/or manufactured by the named defendants. The fact that the plaintiff was exposed to asbestos, in and of itself, was not sufficient. Eckenrod, 375 Pa. Super. at 192, 544 A.2d at 52-53. “The mere fact that [defendant’s] asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered.” Id. at 192, at 53.

Whether direct or circumstantial evidence is relied upon, our inquiry, under a motion for summary judgment, must be whether plaintiff has pointed to sufficient material facts in the record to indicate that there is a genuine issue of material fact as to the causation of decedent’s disease by the product of each particular defendant.

Id.

The Superior Court outlined specific guidelines and circumstances where a summary judgment

motion in an asbestos case would be granted in favor of a defendant. The court recognized that evidence must be presented by a plaintiff showing that the plaintiff inhaled asbestos fibers “shed by the specific manufacturer’s product.” Id. at 191, at 52. The court further explained that a plaintiff must prove that he worked in the vicinity of defendant’s product and that the product was the cause of the alleged injuries. Id. The court concluded that testimony establishing that a defendant’s product as being present would be persuasive in raising a reasonable inference of exposure. Id. at 192, at 53. Taking all of these factors into considerations into account, it can be asserted that summary judgment is appropriate where the record does not establish the identity of the manufacturer of the alleged asbestos product with which the plaintiff came into contact.

A. Anne Campbell (Executrix of the Estate of Thomas F. Campbell)

In its motion for summary judgment, Flintkote contended that Plaintiff-Campbell had failed to establish any exposure to an asbestos product which Flintkote manufactured. Campbell did not satisfy Eckenrod’s product identification requirement by establishing a sufficient connection between a Flintkote product and Mr. Campbell’s alleged injury.

The thrust of Flintkote’s argument hinged on the incongruous fact that while Mr. Campbell alleged that he inhaled asbestos fibers as a result of cutting Flintkote corrugated roofing sheet, Flintkote, through affidavits and admissions of Plaintiff’s own counsel, never manufactured a corrugated roofing sheet. At oral argument, Plaintiff urged that the “magic word” corrugated should not be the dispositive factor and is simply a “red herring”, but rather, the unquestioned fact that Flintkote did indeed manufacture products that contained asbestos. Notes From Oral Argument, 9/21/2000, at 64. In support of its position, Plaintiff presented the deposition testimony of one witness -- John Majrocki. By any stretch of the imagination, Mr. Majrocki is not a persuasive witness for Plaintiff-Campbell. The deposition notes indicate that Mr. Majrocki was

unsure and appeared confused but eventually concluded that his only definite workplace contact with Mr. Campbell occurred sometime in the 1950s and 1960s at the DuPont Plant in Barrington, New Jersey and the Owens-Corning Plant in Gibbstown, New Jersey. Deposition of John Majrocki, 8/30/2000, at 12-14, 24, 42-43. Mr. Majrocki confirmed that Plaintiff-Campbell had spent much of his time at these plants cutting sheets of roofing material with a skill saw. Id. at 18. Mr. Majrocki testified that corrugated roofing material with the name “Flintkote” and the word “asbestos” on the package was on the products that Mr. Campbell frequently cut. Id. at 17-19.

As was argued in brief and then again at oral argument, the vague and oftentimes uncertain assertions of the lone witness in this case simply is not enough for the Plaintiff to sustain her burden. Even though Mr. Majrocki indicated that Mr. Campbell was exposed to asbestos products generally, his identification of the products specifically used was, in even a most favorable light, shaky. Mr. Majrocki described the product cut by Mr. Campbell as gray corrugated roofing sheets that were approximately 1/2 to 5/8 inches thick. Dep. John Majrocki, at 53. It is an uncontested proposition that the Defendant never manufactured the product which Mr. Majrocki described in his deposition.

The Plaintiff’s argument that the word “corrugated” is a red herring fails to survive Eckenrod because there simply has not been a positive and certain identification that Mr. Campbell inhaled asbestos dust from a Flintkote product. The lone witness presented seemed unsure of his answers throughout his deposition. However, it was this same witness that specifically identified the type of sheet which Mr. Campbell cut as “corrugated” sheet. The Plaintiff would have this Court believe that as long as Flintkote manufactured a product that contained asbestos and an unreliable witness testified that a Flintkote product was present at plant at the same time as Mr. Campbell, then summary judgment should be denied. This Court is unpersuaded by this argument in light

of the fact that Flintkote never manufactured the type of product specifically identified and described by the lone Plaintiff witness in this case.

The standard set forth in Eckenrod compels this Court to find that no reasonable inference can be drawn that Mr. Campbell was ever exposed to Defendant's asbestos product. 375 Pa. Super. at 192, 544 A.2d at 53. Therefore, this Court submits that summary judgment was properly granted because there is no issue of a material fact.

B. Richard W. Farley

In its motion for summary judgment, Chicago Fire Brick contended that Plaintiff-Farley failed to establish any exposure to an asbestos product which Chicago Fire Brick manufactured. Farley did not satisfy Eckenrod's product identification requirement by establishing a sufficient connection between a Chicago Fire Brick product and his alleged injury.

The facts supporting Chicago Fire Brick's argument was simple. Chicago Fire Brick manufactured a *fire brick* that does not contain asbestos. Notes From Oral Argument, 9/21/000, at 14. At oral argument, Plaintiff urged that summary judgment should be denied because Chicago Fire Brick may or may not have distributed a *block* product manufactured by the Phillip Carey Company that did contain asbestos. Notes, at 15-16. However, this possibility, which was contested by Chicago Fire Brick, is simply irrelevant. If this was indeed the case, Plaintiff certainly did not present to this Court any evidence which would implicate Chicago Fire Brick's role as a distributor for Phillip Carey Company. In fact, Plaintiff's entire argument is contingent upon a fact which may or may not be true and no effort was made to prove its accuracy by the Plaintiff.

In support of its position, Plaintiff presented the deposition testimony of the Plaintiff, Richard W. Farley. At oral argument, counsel for the Plaintiff read back the testimony of Mr. Farley. The

portion of the deposition testimony presented to this Court seems to indicate that Mr. Farley came into contact with a Phillip Carey Company block product that contained asbestos which may or may not have been distributed by Chicago Fire Brick. Notes, at 16-17. The problem with this testimony is that Mr. Farley testified that he handled a *block* that was manufactured by Chicago Fire Brick and he associated no other product with Chicago Fire Brick. Id. at 14. As indicated, it is uncontroverted that Chicago Fire Brick never manufactured a block. Id. at 14, 18. At the conclusion of his testimony, Mr. Farley was asked specifically by his own attorney whether he associated any other product with Chicago Fire Brick and he answered in the negative.

The Plaintiff's argument that Chicago Fire Brick distributed a product that contained asbestos fails to survive Eckenrod because there simply has not been a positive and certain identification that Mr. Farley inhaled asbestos dust from a Chicago Fire Brick product. The Plaintiff's answers in his deposition were inconsistent with products actually manufactured by Chicago Fire Brick. The Plaintiff would have this Court believe that as long as Chicago Fire Brick may have distributed a Phillip Carey Company product that contained asbestos, then summary judgment should be denied. This Court is unpersuaded by this argument in light of the fact that Chicago Fire Brick never manufactured the type of product specifically identified and described by the Plaintiff in this case.

The standard set forth in Eckenrod compels this Court to find that no reasonable inference can be drawn that Mr. Farley was ever exposed to Defendant's asbestos product. 375 Pa. Super. at 192, 544 A.2d at 53. Therefore, this Court submits that summary judgment was properly granted because there is no issue of a material fact.

IV. Conclusion

This Court finds plaintiffs have not sustained their burden of proof under Eckenrod. Neither

Plaintiff Thomas F. Campbell nor Richard W. Farley either used or was otherwise exposed to any product containing asbestos that was manufactured by either Flintkote or Chicago Fire Brick. Therefore, this Court respectfully submits that the granting of summary judgment in both cases was proper.

BY THE COURT,

J.