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J. A09015/98

ALICE BAKER, EXECUTRIX OF THE ESTATE OF JOHN W. BAKER, JR., DECEASED, AND WIDOW IN HER OWN RIGHT,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	# 300
v.	:	
H. B. SMITH CORP., ET AL.,	:	
Appellees	:	No. 4180 Philadelphia, 1997

Appeal from the Order entered September 3, 1997, In the Court of Common Pleas, Bucks County, Civil Division, at No. 96-90041-18-1.

BEFORE: McEWEN, P.J., MUSMANNO and BROSKY, JJ.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BUCKS *County be, and the same is hereby* REVERSED AND REMANDED FOR A NEW TRIAL. JURISDICITON RELINQUISHED.

BY THE COURT:

PROTHONOTARY

Dated: July 15, 1998

J. A09015/98

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MEMORANDUM:

FILED JUL 15 1998

In this asbestos case, appellant appeals the dismissal of her motion for a new trial. Appellant contends that a new trial should have been awarded because the result was tainted by an erroneous instruction to the jury. We agree, and therefore reverse and remand for a new trial.

The record indicates that John Baker, appellant's decedent, worked as a maintenance technician for the Solebury School from March 1961 to approximately 1976, and thereafter for the Central Bucks School District until approximately 1991. (N.T. 3-12-97, pp. 59, 139, 142). Mr. Baker's

duties included a variety of mechanical and maintenance tasks. It is not disputed that there were a number of asbestos products present in various areas of the schools in which Mr. Baker worked.

Mr. Baker was apparently healthy when he retired. In late 1994, however, he became seriously ill and was eventually hospitalized. In February 1995, he was diagnosed as suffering from mesothelioma, a cancer of the lung lining which is almost exclusively associated with asbestos exposure. Mr. Baker died in March 1995.

Mrs. Baker instituted this wrongful death action against a number of defendants, of whom all but H. B. Smith Company, Inc. ("H. B. Smith"), appellee herein, were dismissed from the case as a result of bankruptcy, settlement or pretrial motions. The case proceeded to trial against H. B. Smith alone.

H. B. Smith is a manufacturer of heating equipment. Since 1900, H. B. Smith has manufactured and sold large boilers used to heat institutional buildings such as the schools in which Mr. Baker worked. The record indicates that H. B. Smith boilers were present at the Solebury School and in four of the schools within the Bucks County School District at which Mr. Baker worked. The record also discloses that asbestos was present in at least some H. B. Smith boilers manufactured before 1972.

Appellant introduced the testimony of two witnesses to establish that Mr. Baker had been exposed to asbestos fibers that could be traced to H. B. Smith boilers. The first of these was Andrew String, decedent's supervisor at the Solebury School from 1961 to 1964. The substance of Mr. String's testimony was as follows:

Between 1961 and 1963, three H. B. Smith boilers were dismantled and replaced by new boilers, which were also supplied by H. B. Smith. (N.T. 3-12-97, pp. 64, 67). Mr. String believed that the insulation on these boilers was asbestos because it was the best insulating product known in 1920, when the boilers were manufactured. (N.T. 3-12-97, p. 66). The dismantling process took between two and three days for each of the three boilers. (N.T. 3-12-97, p. 66). As part of the dismantling process, the contractor broke up the old insulation with a sledgehammer. (N.T. 3-12-97, p. 64, 66-67). Dust was created by this process. (N.T. 3-12-97, p. 65). Mr. String testified that both he and Mr. Baker inhaled some of that dust. The waste insulation was disposed of by the contractor. (N.T. 3-12-97, p. 66). There was no testimony at trial as to how much time Messrs. String and Baker spent observing the process.[1]

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[1]In his deposition testimony, Mr. String said that he and Mr. Baker occasionally checked in on the contractor. He estimated that for each boiler, Mr. Baker spent about an hour doing so. String Deposition Transcript at p. 35, l. 6-16.

Messrs. Baker and String also observed some of the installation of the new boilers. (N.T. 3-12-97, p. 70). Again, an outside contractor actually performed the operation. (N.T. 3-12-97, p. 68). As with the removal operation, neither man was present throughout. To some extent, they alternated their observations, although Mr. String believed that they were both present some of the time. (N.T. 3-12-97, p. 89). Each man would observe the installation for two or three hours of the night. (N.T. 3-12-97, p. 91). The possibility of exposure to asbestos arose because asbestos-containing cement was mixed with water and then applied to the exterior of the boiler. (N.T. 3-12-97, p. 70). Dust was generated when the cement was poured out of the bag, and Mr. String stated that both he and Mr. Baker breathed this dust. (N.T. 3-12-97, p. 70). The cement came in a kit brought by the contractors. There was no testimony that H. B. Smith supplied the kit.

Except for emergencies, Mr. Baker was not responsible for the repair and maintenance of boilers in the 1961-64 period. (N.T. 3-12-97, p. 80, 84). However, Mr. String observed Mr. Baker performing the blow down of the boilers, a maintenance task that had to be performed two or three times a week. (N.T. 3-12-97, pp. 73-75). This process lasted between one and six minutes, and involved opening a valve on the boilers. (N.T. 3-12-97, p. 83). As the steam escaped from the valve, it blew against the adjacent

insulation, creating dust. (N.T. 3-12-97, p. 74). Arguably, Mr. Baker breathed that dust. (N.T. 3-12-97, p. 75, 83).

The second product identification witness was John F. Baker, the son of appellant and the deceased. The younger Mr. Baker testified that in 1979, he worked with his father at various schools within the district. He testified that there were H. B. Smith boilers at four of the district's schools. (N.T. 3-12-97, pp. 107, 109-112). He testified that he observed his father breathing dust from powder, insulating cement and rope, all asbestos-containing products, that were used in the regular maintenance of the boilers. (N.T. pp. 116-120). He did not know who supplied these materials. (N.T. 3-12-97, p. 126, 132). Before the fresh materials were installed, the old powder and rope would have to be removed. (N.T. 3-12-97, pp. 117, 119.) In removing the old materials, the elder Mr. Baker would generate and breathe dust from them. (N.T. 3-12-97, p. 118, 119).

Appellant introduced the testimony of an expert witness, Dr. Yasunosuke Suzuki, who has published extensively on the subject of asbestos diseases. Dr. Suzuki testified that mesothelioma is "almost exclusively caused by exposure to asbestos" (N.T. 3-13-97, p. 37). He also testified that no one knows the threshold amount of asbestos that is necessary for mesothelioma to develop. (N.T. 3-13-97, p. 43-44, 79-80). However, because mesothelioma has been observed in patients having little

scarring, Dr. Suzuki opined that it could be caused by exposure to a small amount. Dr. Suzuki testified that between 100 and 200 hours of exposure to asbestos during a single summer would be enough to cause Mr. Baker's mesothelioma. (N.T. 3-13-97, p. 63). Dr. Suzuki was unable to state whether 20 hours exposure would be enough. (N.T. 3-13-97, p. 66).

Dr. Suzuki was unable to state which particular asbestos-containing product caused Mr. Baker's mesothelioma, but that any product that Mr. Baker had been exposed to could have been a contributing cause (N.T. 3-13-97, p. 57). Dr. Suzuki further stated that each of Mr. Baker's exposures during the removal, dismantling and servicing of the boilers at the Solebury School and the Central Bucks School District was a substantial factor in causing decedent's illness. (N.T. 3-13-97, p. 82).

Appellee presented no witnesses, instead relying on the weaknesses of appellant's case.

Over objection by appellant, the trial court instructed the jury in the following terms:

> For the plaintiff to recover, the plaintiff must prove, however, by a preponderance of the evidence that he was exposed to the defendant's harmful asbestos fibers frequently, regularly and proximately.
>
> Thus, even though the plaintiff's expert testimony may have shown that one exposure to asbestos fibers could cause the mesothelioma, the plaintiff is held by Pennsylvania law to a

> higher standard of frequency, regularity and proximity by a preponderance of the evidence.
>
> Irregular exposure to asbestos dust of a particular defendant is insufficient as a matter of law to support a finding that a particular defendant caused any of this plaintiff's conditions.
>
> There must be evidence of the frequent, regular and proximate nature of exposure to asbestos dust of a particular defendant in order to find that the plaintiff's conditions were caused by that particular defendant.
>
> * * *
>
> [I]t is not enough that evidence has been shown that plaintiff worked on or around a defendant's product, in this case a boiler.
> Plaintiff must show by a preponderance of the evidence that the defendant manufactured or supplied an asbestos-containing product which the plaintiff was exposed to on a regular and frequent basis and which was a substantial cause in bringing about the plaintiff's harm.

(N.T. 3-3-14-97, pp. 22-23, 26).

The jury was provided with special interrogatories in which they were asked to answer (a) whether Mr. Baker's mesothelioma was caused by asbestos, and (b) whether the products of six named manufacturers, including H.B. Smith, were substantial factors in causing Mr. Baker's mesothelioma. During deliberations, the jury requested clarification as to whether they were required to respond for each company individually or as a collective. The court responded that the jury was required to respond with six individual answers, one for each named entity. (N.T. 3-14-97, Questions from Jury, p. 3).

The jury retired again. After concluding their deliberations, the jurors returned a defense verdict. They responded to the special interrogatories by finding that Mr. Baker's disease was caused by asbestos, but that none of the named manufacturers' products was a substantial factor in causing the disease. (N.T. 3-14-97, p. 42).

Appellant contends that the jury charge was erroneous, and that the incorrect instructions so affected the verdict that appellant is entitled to a new trial. Appellant concedes that her decedent's exposure to asbestos from H.B. Smith's boiler was not regular or frequent. However, appellant argues that it is illogical to require that a plaintiff demonstrate "regular, frequent and proximate" exposure to asbestos in a mesothelioma case because even a small exposure to asbestos can result in the disease. Appellant also argues that our decision in ***Lilley v. Johns-Manville Corporation***, 596 A.2d 203 (Pa. Super. 1991) establishes that a jury should be instructed that a single day's exposure is sufficient to establish causation provided competent expert testimony is offered to support that finding. Appellant claims that the court erred in refusing to give such an instruction.

Our scope of review of a trial court's instructions to the jury was set forth in ***Juliano v. Johns-Manville Corp.***, 611 A.2d 238 (Pa. Super. 1992) in which we stated:

> In reviewing a trial court's instructions to the jury, it is well settled that we must view the court's charge in its entirety to determine whether any prejudicial error has been committed. A trial court is not required to accept the precise language of points for charge submitted by counsel so long as the issues are defined accurately and the applicable law is correctly reviewed.

Id. at 241 (citations omitted).

The challenged jury instruction was intended to implement this court's decision in *Eckenrod v. GAF Corporation*, 544 A.2d 50 (Pa. Super. 1988). In *Eckenrod*, the plaintiff-decedent worked as a maintenance pipefitter, welder and millwright in the Wallace Run plant of Babcock & Wilcox Company ("B & W").[2] The plaintiff alleged that her decedent had contracted asbestosis as a result of exposure to the products of a number of defendant suppliers. In response to the defendants' motions for summary judgment, plaintiff produced purchasing records of B & W, which showed that the various defendants had supplied asbestos-containing products to the plant. Additionally, plaintiff introduced the affidavits of three co-workers who stated that they had worked with the decedent "on occasion". The affiants each claimed that the decedent was exposed to asbestos in his workplace, but none of them clarified the proximity of the products to the workers. *Id.*

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[2]This plant was described as "enormous" in a later decision of this court. *Samarin v. GAF Corp.*, 571 A.2d 398, 407 (Pa. Super. 1989).

at 52. The coworker affidavits did not state that any particular defendant was the manufacturer of any product that the decedent used. *Id.* at 52-53.

The only evidence identifying the manufacturer of any of the asbestos products used in the plant consisted of purchasing records and the deposition testimony of distributors and B & W's storeroom personnel. Those witnesses testified that particular products were delivered to the plant, but did not establish where each product was used or that the decedent had come into contact with any identifiable product. *Id.* at 53.

We determined that the record evidence was not sufficient to overcome summary judgment, stating:

> Whether a plaintiff could successfully get to the jury or defeat a motion for summary judgment by showing circumstantial evidence depends on the frequency of the use of the product and the regularity of the plaintiff's employment in proximity thereto.
>
> Upon careful scrutiny of the record, we must uphold the trial court's grant of summary judgment in favor of Porter and A-Best. We acknowledge that the facts establish that the decedent was exposed to asbestos; there is no evidence however, as to the regularity or nature of decedent's contact with asbestos. Moreover there is no testimony establishing that Mr. Eckenrod worked with asbestos supplied and/or manufactured by Porter or A-Best or any of the other appellees. The mere fact that appellees' 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. Absent testimony of record that identifies appellees' products as being present in the furnace [where Mr. Eckenrod worked], there is not even a

> reasonable inference that appellant was exposed to appellees' asbestos products.

Id.

The quoted passage is worth reading closely, and it should be read in context. Our decision in *Eckenrod* was based on the state Supreme Court's decision in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), in which the Supreme Court held that a plaintiff must establish that his or her injuries were caused by a product of a particular manufacturer. *Eckenrod*, 544 A.2d at 52. We held that in an asbestos case, this meant that to overcome summary judgment, the plaintiff had to come forward with evidence that he or she inhaled the fibers shed by the specific manufacturer's product. *Id.* This showing could be made on the basis of circumstantial evidence, but in that case the plaintiff was required to produce evidence of the frequency of use of the product and the regularity of the plaintiff's employment in proximity thereto. *Id.* at 53.

The logic underlying our decision in *Eckenrod* compels the conclusion that there is no reason to adopt a different rule for mesothelioma than for other asbestos-related diseases. Unless the plaintiff can show that he inhaled fibers from the particular manufacturer's product, the plaintiff will not be able to demonstrate that the product was the cause of his disease. This is just as true of a disease like mesothelioma, which can be caused by a

relatively small amount of asbestos as it is of other diseases, which require more extended exposure. ***Eckenrod*** establishes a minimum standard for the quantum of circumstantial evidence that will suffice to create a jury question as to whether the plaintiff indeed inhaled fibers from a particular product at all, and is therefore applicable to all asbestos diseases.

However, while the trial court was correct in finding that ***Eckenrod*** applies in a mesothelioma case, the jury instruction did not accurately reflect the law set as set forth in ***Eckenrod***, and for that reason we are constrained to reverse and remand for a new trial.

Eckenrod did not hold that the plaintiff must show that he was exposed to a particular asbestos product on a regular, proximate and frequent basis. In fact, it held only that where the plaintiff relies on circumstantial evidence, he must introduce evidence to show how frequently the product was used in an area where the plaintiff regularly worked. With that information, the court or the jury can determine whether it is a fair deduction that the plaintiff was exposed to fibers from the particular product.[3]

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[3] With that information, the court or the jury can determine whether it is a fair deduction that the plaintiff inhaled the particular fibers. Thus in ***Rotondo v. Keene Corp.***, 956 F.2d 436, 441 (3d Cir. 1992), the Third Circuit found that where plaintiff worked in a location for 50% of the time and defendant's product was used in same area for 50% of the time, the

It is a different matter entirely to hold that to make a prima facie showing of causation, a plaintiff must demonstrate that exposure to the product occurred on a frequent, regular basis in proximity to where plaintiff worked. This goes beyond requiring that the plaintiff demonstrate that he was exposed to a particular product, and instead establishes a threshold amount of exposure. Some courts have adopted such a standard, ***see e.g. Lohrmann v. Pittsburgh-Corning Corp.***, 782 F.2d 1156, 1162-63 (4th Cir. 1986), and others have confused the ***Lohrmann*** and ***Eckenrod*** standards, ***see Robertson v. Allied Signal, Inc.***, 914 F.2d 360, 367-68 (3d Cir. 1990), but they are not the same. In ***Lilley***, this court expressly held that it was not bound by ***Lohrmann*** when it held that the trial court was not required to instruct the jury that a defendant could not be found liable on the basis of *de minimis* exposure. ***Lilley***, 596 A.2d at 210.

Furthermore, when the court stated in ***Eckenrod*** that the plaintiff was required to demonstrate the frequency, proximity and regularity of exposure, it carefully restricted that holding to cases in which the plaintiff sought to prove exposure by circumstantial evidence. ***Id.*** at 53. A plaintiff may demonstrate that he was exposed to asbestos shed by a particular

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jury could legitimately find that plaintiff was exposed to defendant's product. The court stated that it would be far more speculative to assume that the pipecoverers used only the other brand of asbestos pipecovering when the plaintiff was present. ***Id.***

product by direct or circumstantial evidence, or by a combination of the two. ***Lilley***, 596 A.2d 203, 207 (Pa. Super. 1991). In this case, the evidence of exposure to appellee's product was direct, and in such a case some of the concerns underlying the requirements of ***Eckenrod*** are absent. The plaintiff must still prove proximity to the product, but the regularity and frequency prongs of the ***Eckenrod*** test become unnecessary because the testimony, if believed, places the fibers and the plaintiff in the same place at the same time.[4]

In sum, the heart of our decision in ***Eckenrod*** is the requirement that a plaintiff prove that he or she inhaled fibers from a particular product. This is as true for mesothelioma cases as for cases involving other asbestos-related diseases, and a trial court should give a jury instruction that explains this requirement. We examined jury instructions setting forth this requirement in ***Juliano***, 611 A.2d at 241 and ***Lilley***, 596 A.2d at 209, and in both cases found them satisfactory. However, the instruction given by the trial court in this case was erroneous because it informed the jury that the

[4] Whether the plaintiff attempts to prove exposure through direct or circumstantial evidence, the duration and intensity of exposure are still relevant to proof of causation. However, this is a question to be answered by the finder of fact on the basis of expert testimony, and, as noted previously, is an issue to which ***Eckenrod*** does not speak.

plaintiff was required to prove matters that *Eckenrod* does not require. Therefore, we are constrained to reverse and remand for a new trial.

Finally, we address appellant's contention that the jury should have been instructed that a single day's exposure to asbestos is sufficient to establish causation when supported by expert testimony. This unmeritorious contention relies on a misinterpretation of our decision in *Lilley*. In *Lilley*, the defendant appealed on the grounds that the evidence was insufficient to sustain the jury's verdict in favor of the plaintiff. In that case, the plaintiff had introduced evidence that (i) the plaintiff worked in confined quarters with asbestos; (ii) some of those products were manufactured by the defendant; (iii) the plaintiff suffered from a disease that was caused by asbestos; and (iv) an expert testified that one day's exposure to asbestos dust constituted a "substantial contributing factor" toward the injury. We held that this evidence was sufficient to support the verdict. *Id.* at 210.

As appellee correctly argues, we did not state that one day's exposure established causation as a matter of law. The lower court here was therefore correct to refuse to give the requested instruction. The flaw with appellant's argument is that it confuses the functions of the judge and the jury. It is the jury's function to determine the verdict winner on the basis of the preponderance of the evidence. It is the court's function to determine whether the evidence is sufficient to support the verdict when the facts and

all reasonable inferences are viewed in the light most favorable to the verdict winner. ***Bannar v. Miller***, 701 A.2d 232, 238 (Pa. Super. 1997). Appellant is not entitled to have the evidence viewed in this favorable light when it is submitted to the jury, and thus an instruction that certain evidence is "sufficient" is not only irrelevant to the jury's deliberations but risks serious confusion.

Reversed and remanded for a new trial. Jurisdiction relinquished.

MCEWEN, P.J., Concurs in the Result.

MUSMANNO, J., Concurs in the Result.