WILLIAM J. TAUSZ AND LORRAINE TAUSZ, Appellees	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AP GREEN REFRACTORIES CO., ET AL.	:	
APPEAL OF: JOHN CRANE, INC.	:	No. 2147 EDA 2001

Appeal from the Judgment entered June 8, 2001, in the Court of Common Pleas of Philadelphia County, Civil, at No. 2562 December Term, 1999.

BEFORE: HUDOCK, FORD ELLIOTT and OLSZEWSKI, JJ.

MEMORANDUM: **FILED MARCH 28, 2003**

This is an appeal from the final judgment entered following a jury trial in a personal injury suit based on an asbestos claim. We affirm.

The trial court has fully and accurately explicated the factual and procedural predicate of this appeal. Trial Court Opinion, 6/7/02, at 1-19. We see no need to replicate the meticulous work of the trial judge. Therefore, we shall confine our discussion of the facts to the minimum necessary to understand the issues presented for our consideration.

In December of 1999, William and Lorraine Tausz (Appellees) filed a complaint against approximately four dozen manufacturers of asbestos products predicated on injuries Mr. Tausz suffered as a result of his on-the-job exposure to asbestos and asbestos containing products. Mr. Tausz was employed by the Philadelphia Electric Company (PECO) from 1969 until he retired in 1995. His work brought him into contact with a variety of

asbestine products. Just before Christmas in 1999, Mr. Tausz was diagnosed with mesothelioma. This disease is a cancer of the mesothelial tissue surrounding the lung. ***Gutteridge v. A.P. Green Services, Inc.***, 804 A.2d 643, 652 (Pa. Super. 2002). The medical community has not assigned any definitive etiology to lung cancer. ***Id.*** However, mesothelioma is a very rare disease except in those exposed to asbestos. ***Id.*** Mr. Tausz died of mesothelioma before this matter went to trial.[1]

On December 20, 2000, the jury found that Mr. Tausz had suffered an asbestos-related injury and awarded $1,094,000.00 to Appellees. John Crane, Inc. (Appellant) is the only defendant to appeal the jury's verdict. Appellant filed a timely post-trial motion, which was denied by operation of law under Pennsylvania Rule of Civil Procedure 227.4(1)(b) when no trial court ruling was made within 120 days. Final judgment was entered June 8, 2001. Appellant's timely notice of appeal followed. The trial court required Appellant to file a Rule 1925(b) statement. Appellant complied, and the trial court filed an opinion. This appeal presents two issues:

> I WHETHER [APPELLANT] IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON [APPELLEES'] CLAIMS BECAUSE [APPELLEES] FAILED TO PROVE THAT MR. TAUSZ INHALED ASBESTOS FIBERS FROM ANY PRODUCT MANUFACTURED BY [APPELLANT], AND

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[1] The trial court docket was not amended to reflect this event. However, the parties do not dispute the fact that Mr. Tausz expired from mesothelioma prior to trial. To retain consistency of nomenclature, we shall not amend the caption of the case on appeal.

THEREFORE FAILED TO PROVE THAT HIS INJURY WAS CAUSED BY ANY DEFECT IN A JOHN CRANE PRODUCT.

II ASSUMING [APPELLANT] IS HELD LIABLE TO [APPELLEES], WHETHER [APPELLANT] IS ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON ITS CROSS-CLAIMS AGAINST FOUR OTHER DEFENDANTS THAT WERE LISTED ON THE VERDICT SHEET BUT FOUND NOT LIABLE BY THE JURY, WHERE THERE WAS NO RATIONAL BASIS IN THE EVIDENCE FOR THE JURY TO HOLD [APPELLANT] AND THREE OTHER DEFENDANTS LIABLE WHILE ABSOLVING THE OTHER FOUR.

Appellant's Brief at 4.

Entry of judgment notwithstanding the verdict (JNOV) is a drastic remedy because a court cannot lightly ignore the findings of a duly selected jury. ***Burton-Lister v. Siegel, Sivitz and Lebed Associates***, 798 A.2d 231, 236 (Pa. Super. 2002), *appeal denied*, 570 Pa. 681, 808 A.2d 568 (2002). A motion for JNOV constitutes a request for the trial court to review the sufficiency of the evidence and is not a challenge to the weight of the evidence. ***Lanning v. West***, 803 A.2d 753, 766 (Pa. Super. 2002). A claim that the verdict was against the weight of the evidence cannot be remedied by a directed verdict and, thus, is an inappropriate basis for a motion requesting JNOV. ***Id.***

In the present case, Appellant predicated its post-trial motion for JNOV on multiple contentions of evidentiary insufficiency as well as an allegation that the verdict was against the weight of the evidence. Motion for Post-Trial Relief, 12/28/00, at 2-3. In its Rule 1925(b) statement, Appellant asserted several different bases in support of its claim that JNOV should

have been granted on grounds that the evidence was insufficient to sustain the verdict. Statement of Matters Complained of on Appeal, 11/13/01, at 2-4. As discussed more fully below, because Appellant preserved the sufficiency challenge in both its post-trial motion and its Rule 1925(b) statement, it was proper for the trial court to address it on this basis.

The standard to be applied in assessing the validity of a motion for JNOV is:

> [T]he evidence must be considered in the light most favorable to the verdict winner, and he must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor. Moreover, [JNOV] should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner. Further, a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations.

Burton-Lister, 798 A.2d at 236 (citations omitted). JNOV must be denied where conflicting evidence has been presented to the jury. ***Id.***

To succeed in a products liability claim based on exposure to asbestos, a plaintiff must show that the injuries were caused by the product of a particular manufacturer or supplier and that the product was "defective" as that term is defined by Pennsylvania law. ***Wilson v. A.P. Green Industries, Inc.***, 807 A.2d 922, 924 (Pa. Super. 2002). In an asbestos case, this standard requires the plaintiff to demonstrate that he or she worked on a regular basis in physical proximity with the product or products

of a particular manufacturer. ***Id.*** at 925. However, Pennsylvania law includes no requirement that a plaintiff who suffers a compensable asbestos related injury must establish the specific role played by each individual asbestos fiber within the body. ***Gutteridge***, 804 A.2d at 652.

Our law is well settled that the factfinder is free to accept or reject the credibility of both expert and lay witnesses. ***Gunn v. Grossman***, 748 A.2d 1235, 1240 (Pa. Super. 2000), *appeal denied*, 564 Pa. 711, 764 A.2d 1070 (2000). Indeed, the jury may believe all, part, or none of the evidence presented. ***Id.*** Moreover, the weight to be assigned to the testimony of expert witnesses lies within the province of the jury. ***Id.*** We note that the trial court was well aware of the specific standards applicable to evidentiary sufficiency in asbestos cases and has so stated. Trial Court Opinion, 6/7/02, at 30-31. ***See also Andaloro v. Armstrong World Industries Inc.***, 799 A.2d 71, 86 (Pa. Super. 2002) (holding asbestos case plaintiffs need not establish how many asbestos fibers are contained in dust emissions from a particular asbestos containing product or the overall concentration of fibers in the air).

In this case, the trial court addressed Appellant's contentions that the evidence was insufficient to demonstrate that Mr. Tausz worked in proximity to Appellant's products and that the evidence demonstrated that Appellant's products could not have caused Mr. Tausz's mesothelioma. The trial court has summarized the evidence that established the nature and duration of

Mr. Tausz's work assignments over the years and the identity of the asbestos products used by Mr. Tausz and by others in his vicinity. Trial Court Opinion, 6/7/02, at 2-4, 11-13, 26-27, 28, 30-32. Furthermore, the trial court has discussed and explained the testimony provided by the various expert witnesses who testified. ***Id.*** at 7-11, 14-18, 20 n.1, 21 n.2, 21-22, 28. We find that the trial court's summaries aptly and properly explicate the testimony adduced at trial, and we see no need to reiterate or replicate the trial court's work.

The testimony of Mr. Tausz and his co-workers adequately demonstrates that Mr. Tausz used Appellant's products and that these products also were used by others in his vicinity. We are aware that Appellant presented expert testimony indicating that its products were incapable of releasing asbestos fibers into the air at a level that could have been a causative factor in Mr. Tausz's mesothelioma. However, Appellees presented expert testimony that directly contradicted Appellant's experts. The jury may accept or reject the evidence of both expert and lay witnesses. ***Gunn***, 748 A.2d at 1240. Thus, the jury was entitled to accept Appellees' evidence in preference to that adduced by Appellant. We find that JNOV was denied properly and in accordance with the standard set forth in ***Burton-Lister***, ***supra***.

Appellant next argues that, if it is liable to Appellees, then all of its co-defendants are liable to Appellees. Appellant therefore contends that it is

entitled to JNOV on its cross-claims against four specific co-defendants (AC&S Corporation, Brand Insulations, Inc., Mobil Oil Corporation and General Refractories Co., the "Non-Liable Co-Defendants") on the basis of a weight of the evidence challenge. ***See*** Appellant's Brief at 15-16 (claiming that the jury's finding is "so contrary to the evidence as to shock the sense of justice" and thereby advancing a "weight of the evidence" standard).

In the trial court, Appellant requested JNOV on the grounds that the "jury's finding of liability against only three of the eight defendants on the verdict sheet regarding John Crane's cross-claims was against the weight of the evidence." Appellant's Motion for Post-Trial Relief, 12/28/00, at 3 ¶ 13. It is improper to predicate a request for JNOV on a challenge to the weight of the evidence. ***Lanning***, 803 A.2d at 766. As noted above, the trial court never ruled on the post-trial motions, but permitted them to be denied by operation of law. Thus, there is no separate trial court opinion addressing Appellant's post-trial motions.

In its Statement of Matters Complained of on Appeal, Appellant did not contend that the trial court erred in denying JNOV on the above basis. Rather, Appellant raised a straightforward weight of the evidence claim: "The jury's finding of liability against [Appellant] was against the weight of the evidence." Statement of Matters Complained of on Appeal, 11/13/01, at 3 ¶¶ 10, 13. When, as in the present case, the trial court directs an appellant to file a statement of matters complained of on appeal, any issues

not raised in such a statement must be deemed waived. ***Commonwealth v. Alsop***, 799 A.2d 129, 133 (Pa. Super. 2002) (*en banc*). Even if an appellant actually files a concise statement when directed to do so, issues are not preserved if they are raised in too vague a fashion for the trial court to identify and address the claim. ***Id.*** at 133 n.7. In this case, the Rule 1925(b) statement did not place the trial court on notice that Appellant was advancing a sufficiency claim contesting the denial of JNOV as to its cross-claims. The court, therefore, did not consider whether the evidence was sufficient to warrant JNOV on the basis of Appellant's cross-claims. Instead, the trial court addressed the question of whether the verdict in favor of Appellees was against the weight of the evidence.

Distinguishing between a claim that the trial court erred in denying JNOV and a claim that the verdict was against the weight of the evidence does not constitute a mere quibble nor does it create a distinction without a difference. JNOV is a remedy granted in civil cases when the evidence is insufficient to sustain the decision of the factfinder. ***Lanning***, 803 A.2d at 759. By way of contrast, a challenge to the weight of the evidence constitutes a request for the trial court to grant a new trial on the grounds that the verdict is contrary to the evidence. ***Id.*** at 765. The standard of review applicable to "weight of the evidence challenges" is different from "sufficiency of the evidence" claims. ***Id.*** at 765.

> The general rule for a grant of a new trial on the basis that it is against the weight of the evidence allows the

> granting of a new trial only when the jury's verdict is [so] contrary to the evidence as to shock one's sense of justice and a new trial is necessary to rectify this situation. Unlike appellate review of a refusal to enter a judgment N.O.V., where the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict winner, the appellate court in reviewing the refusal to grant a new trial, ordinarily considers all of the evidence. The court is not required to consider the evidence in the light most favorable to the verdict winner when passing on the question of whether a verdict is against the weight of the evidence. Rather, the court is to view all of the evidence.

Id., 803 A.2d at 766 (quoting ***Ditz v. Marshall***, 393 A.2d 701, 703 (Pa. Super. 1978)).

In the present case, Appellant's Rule 1925(b) statement preserved a challenge to the weight of the evidence, not a challenge to the trial court's decision to deny a grant of JNOV. We find that Appellant has waived its claim of error with regard to the denial of JNOV as to its cross-claims against the Non-Liable Co-Defendants. The trial court has addressed the question of whether the weight of the evidence supports the jury's verdict and that is the issue we find to be preserved under the Rule 1925(b) statement.

Arguably, Appellant has waived the weight of the evidence claim in its entirety by failing to properly identify it in its post-trial motions as a basis for requesting a new trial. In ***Lanning***, we declined to address a challenge to the weight of the evidence on appeal where no new trial had been requested via post-trial motion. In the present case, Appellant did request a new trial, albeit on different grounds than that the verdict was against the weight of

the evidence. However, as the trial court has addressed Appellant's argument on appeal, in an abundance of caution, we shall do likewise.

An appellate court, by its nature, stands on a different plane than a trial court. ***Zeffiro v. Gillen***, 788 A.2d 1009, 1012 (Pa. Super. 2001). For this reason we are not empowered to merely substitute our opinion concerning the weight of the evidence for that of the trial judge. ***Id.*** The focus of appellate review is on whether the trial judge has palpably abused his discretion, as opposed to whether the appellate court can find support in the record for the jury's verdict. ***Id.*** The decision of "whether to grant a new trial on weight of the evidence grounds rests within the discretion of the trial court and that decision will not be disturbed absent an abuse of discretion." ***Dolan v. Carrier Corp.***, 623 A.2d 850, 853 (Pa. Super. 1993). An abuse of discretion occurs "when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will." ***Harman ex rel. Harman v. Borah***, 562 Pa. 455, 469, 756 A.2d 1116, 1123 (2000).

A new trial may not be granted on the grounds that the verdict was against the weight of the evidence merely because the evidence is conflicting and the factfinder could have decided in favor of either party. ***Lanning***, 803 A.2d at 765. Rather, a new trial based upon a weight of the evidence claim should be granted only if the verdict is so contrary to the evidence as to shock one's sense of justice. ***Zeffiro***, 788 A.2d at 1012-13.

> When a jury's finding is so opposed to the demonstrative facts that looking at the verdict, the mind stands baffled, the intellect searches in vain for cause and effect, and reason rebels against the bizarre and erratic conclusion, it can be said that the verdict is shocking.

Gunn, 748 A.2d at 1239. Additionally, when considering a motion for a new trial on the grounds that the verdict was against the weight of the evidence, we must review all evidence presented at trial to determine whether the trial court's stated reasons and factual basis in granting or denying the motion can be supported. ***Coker v. S.M. Flickinger Co., Inc.***, 533 Pa. 441, 452, 625 A.2d 1181, 1187 (1993).

Appellant grounds its claim that the weight of the evidence is against the verdict in favor of the Non-Liable Co-Defendants on the testimony of Kevin Braden. ***See*** Appellant's Brief at 14-15 (citing the reproduced record at 474a-79a, 493a-504a, which corresponds to N.T., 12/7/00, at 25-30, 44-55). However, as noted above, we do not confine our attention to the cited portions of the record when reviewing the trial court's determination that no new trial is warranted on the basis of a weight of the evidence claim. Rather, we review all of the evidence adduced at trial when considering a challenge to the weight of the evidence. ***Lanning***, 803 A.2d at 766. Nevertheless, on the basis of Mr. Braden's testimony alone, it is apparent that the trial court correctly ascertained that the verdict was not against the weight of the evidence.

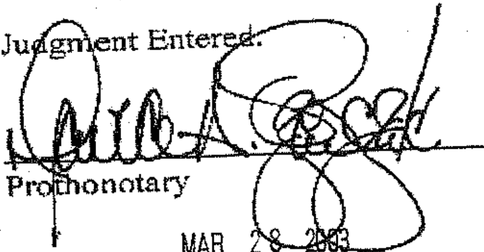
Mr. Braden testified that he worked directly with or in close proximity to Mr. Tausz from 1972 until 1983. N.T., 12/7/00, at 22. During this timeframe, the witness, Mr. Tausz, and their co-workers used asbestine products manufactured by many different companies. Mr. Braden specifically identified nineteen manufacturers, including Appellant and the Non-Liable Co-Defendants, as sources for asbestos-containing products. ***Id.*** at 44-54. However, Mr. Braden's testimony emphasized the role that Appellant's products played in the work environment.

Mr. Braden specifically identified Appellant's rope packing as a product he and Mr. Tausz used in their work. ***Id.*** at 9-10. The witness further stated that he and Mr. Tausz also used Appellant's general packing materials, sheet, and gasket materials, and that other tradesmen used these products in their vicinity. ***Id.*** at 11-13. Furthermore, Mr. Braden indicated that Mr. Tausz used Appellant's products, or that they were used very near to him, on multiple occasions on a weekly basis. ***Id.*** at 13-15. Mr. Braden specifically identified Appellant's products and Garlock products as being on site "all the time." ***Id.*** at 17. Mr. Braden also stated that, even if Mr. Tausz was not directly using Appellant's products, he was "around" Appellant's products as part of his normal day-by-day ongoing work process. ***Id.*** at 21.

We cannot say that it was a palpable abuse of discretion for the trial court to refuse the grant of a new trial on weight of the evidence grounds in this case. The jury heard extensive evidence emphasizing the role

Appellant's products played in Mr. Tausz's work environment. The jury was not presented with this type of evidence concerning the products of the Non-Liable Co-Defendants. Thus, the record indicates a sound basis on which the jury could have concluded that Appellant's products played a definitive role in the causation of Mr. Tausz's mesothelioma while the Non-Liable Co-Defendants' products were not a significant contributing cause. In light of this, we cannot find the jury's conclusion to be either "bizarre" or "erratic." Thus, we cannot say that the trial court's sense of justice should have been shocked by the jury's verdict. We can grant no relief on this claim.

Judgment affirmed.



Judgment Entered:

Prothonotary

Date: MAR 28 2003