

SUPREME COURT OF PENNSYLVANIA

Howard v. A.W. Chesterton Co.

621 Pa. 343 (2013) (Pa.) · Decided September 26, 2013

SUMMARY

The Pennsylvania Supreme Court vacated the Superior Court's decision and reversed the order denying summary judgment in an asbestos-exposure case after the plaintiffs conceded that the record did not establish sufficiently regular and frequent exposure to the defendants' products. The Court reaffirmed that the any-exposure theory cannot establish substantial-factor causation for dose-responsive diseases, that experts must consider dose and provide an individualized exposure assessment, and that de minimis exposure may be insufficient. The case was remanded for reinstatement of the common pleas court's summary judgment order.

OPINION

PER CURIAM.

ORDER PER CURIAM. This asbestos-litigation appeal is being resolved upon mutual consent among the parties, who agree that the order of the Superior Court should be reversed. Appellants were manufacturers or distributors of asbestos-containing products and are defendants in litigation initiated by John C. Ravert and later pursued by Appellees as co-executors of Mr. Ravert's estate.

Mr. Ravert and Appellees contended that his exposure to Appellants' asbestos-containing products caused meso-thelioma. The common pleas court awarded summary judgment in favor of Appellants, reasoning that Mr. Ravert's deposition testimony failed to establish that he breathed asbestos-containing dust from the products manufactured or distributed by Appellants.¹ The court also found expert affidavits submitted by Appellees represented "an artificial record which attempts to de-hor [Mr.

Ravert's] observation denying the existence of asbestos dust." On appeal, the Superior Court reversed on the basis that dust may have been invisible to the naked eye, and the expert affidavits were sufficient to establish a material issue of fact as to whether dust emanating from products associated with Appellants was a substantial factor in causing Mr. Ravert's mesothelioma.

See *Howard v. A.W. Chesterton Co.*, 31 A.3d 974, 981, 983 (Pa.Super.2011). The court also reasoned that a plaintiff bears a diminished burden of meeting a frequency, regularity, and proximity threshold of exposure in cases of mesothelioma, since the disease may be caused by limited exposure to asbestos. See *id.* at 979. Presently, Appellees "concede that the factual record fails to demonstrate regular and frequent enough exposures during which respirable asbestos

fibers were shed by [Appellants'] asbestos-containing products to defeat summary judgment.” Brief for Appellees at 10.

Furthermore, Appellees: recognize that this Court will not allow Plaintiffs to prove that a plaintiffs exposure to a particular asbestos-containing product is substantially causative of disease by the use of affidavits in which the expert’s methodology is founded upon a belief that every single fiber of asbestos is causative.

In Gregg [v. V-J Auto *608Parts, Inc., 596 Pa. 274, 943 A.2d 216 (2007)], this Court articulated that the usage of a particular product had to be substantial enough when measured against the totality of the exposures, that the particular product usage was substantial enough to be a factual cause of the disease....

The test for adequacy is the comparison of the particular product exposure(s) to the totality of the person’s asbestos exposures. Brief for Appellees at 16. Upon Appellees’ concession, the opinion of the Superior Court will be vacated and its order reversed. Appellant Monsey Products Company — in view of its status as a defendant in other cases and the time and expense of this litigation — asks this Court to reaffirm several governing principles deriving from prior cases.

In most respects, these precepts are now well established, and they are relevant to the appropriate disposition of the present case. Accordingly, we are able substantially to accommodate this request. Hence, we reaffirm the following: —The theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive.

See Betz v. Pneumo Abex, LLC, 615 Pa. 504, 44 A.3d 27, 55-58 (2012). —Relatedly, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions. See *id.* —Bare proof of some de minimus exposure to a defendant’s product is insufficient to establish substantial-factor causation for dose-responsive diseases.

See Gregg v. V-J Auto Parts, Inc., 596 Pa. 274, 943 A.2d 216, 225-26 (2007). —Relative to the testimony of an expert witness addressing substantial-factor causation in a dose-responsive disease case, some reasoned, individualized assessment of a plaintiffs or decedent’s exposure history is necessary. See Betz, 44 A.3d at 55-58. —Summary judgment is an available vehicle to address cases in which only bare de minimus exposure can be demonstrated and where the basis for the experts testimony concerning substantial-factor causation is the any-exposure theory.

See Betz, 44 A.3d at 55-58; Gregg, 943 A.2d at 227. —The content of expert discovery is specified in the Pennsylvania Rules of Civil Procedure, as may be supplemented by particular directives by courts of original jurisdiction.² In her concurring statement, Madame Justice Todd appears to oppose any explanation whatsoever relative to this Order, suggesting that supporting reasons are irrelevant in light of a concession on the merits.

See Concurring Statement, *op.* at 610 (“Appellees’ evidentiary concession is the end of the matter[.]”). The concurrence couches the legal precepts which we have set forth above as “unadorned” and “unmoored” from any factual context, while chastising us for violating the axiom that the holding of any case is to be read against its facts. See *id.* at 609-11.

The concurring statement also discusses the limited effect of a *per curiam* order and questions the benefit of explanations provided in them. See *id.* at 610-11. Responsively, we observe that this case was accepted for review on our discretionary docket, briefed, and argued, and we have never understood a party’s merits concession to foreclose the Court’s ability to explicate the ultimate disposition.

Furthermore, the relevance of our discussion to the present case is plain and straightforward. As we have explained, Appellees have related that they read and understood the decisions in *Gregg* and *Betz* to mean what these decisions say — namely, that “this Court will not allow Plaintiffs to prove that a plaintiffs exposure to a particular asbestos-containing product is substantially causative of [an individual plaintiffs particular] disease by the use of affidavits in which the expert’s methodology is founded upon a belief that every single fiber of asbestos is causative.” Brief for Appellees at 16.

The main points we have delineated above represent nothing more than a modest elaboration upon this very reasoning supplied by the Appellees themselves in support of their controlling concession. As such, it is difficult to appreciate what additional “adornment” or “mooring” is contemplated by the concurrence. Certainly, we do not suggest that a *per curiam* order has any effect beyond that represented in Justice Todd’s responsive opinion.

Nevertheless, in light of the intensely protracted nature of this and other asbestos litigation, as well as our own limited resources, we have acceded to Appellants’ reasonable request to provide whatever limited guidance we were able to supply under the circumstances. Notably, Justice Todd does not substantively question any of the now unremarkable propositions indicated above.³ Indeed, as explained in detail in the unanimous decision in *Betz*, the any-exposure opinion is simply unsupportable both as a matter of law and science.

See *Betz*, 44 A.3d at 55-58. Our present effort to highlight this proposition while applying it in a case in which it is conceded to be dispositive, we believe, may be of some benefit to Pennsylvania litigants, in terms of crystallizing the essential burdens of proof.

The opinion of the Superior Court is VACATED, its order is REVERSED, and the case is remanded for reinstatement of the order of the common pleas court. Former Justice ORIE MELVIN did not participate in the consideration or decision of this case. Chief Justice CASTILLE and Justices SAYLOR, EAKIN, BAER and McCAFFERY join the *per curiam* order. Justice TODD files a concurring statement..

For example, the court highlighted that some of the products were used by Mr. Ravert solely in their liquid form.. Here, Monsey seeks a particular admonition that expert reports in asbestos cases must contain a discussion of the methodology supporting the expert opinion. There are enough nuances pertaining to this subject that we are unable to make such a general pronouncement here.

We recognize, however, that per Rule of Civil Procedure 4003.5(a)(1)(b), a party through interrogatories may require the other party to have identified trial experts state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. See Pa.R.Civ.P. No. 4003.5(a)(1)(b).

The rules also provide latitude for the court of original jurisdiction to order further discovery by other means, subject to specified conditions. See *id.* No. 4003.5(a)(2).. In light of the now settled nature of the above, controlling principles, it is difficult to credit Justice Todd's prediction that they are susceptible to "summary rejection" in a future opinion.

Concurring Statement at 4.