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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAYNE R. REED, INDIVIDUALLY And AS THE EXECUTOR OF THE ESTATE OF BARBARA REED, DECEASED, and AMY RHODES and COURTNEY REED, AS SURVIVING CHILDREN,	)	
Plaintiffs Below, Appellants,	)	No.: 387, 2016
v.	)	
NOSROC CORPORATION;	)	On Appeal from the Superior Court, in and for New Castle County
Defendant Below, Appellee.	)	Case No.: N13C-11-188 ASB

APPELLEE'S ANSWERING BRIEF ON APPEAL

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II. I. NATURE OF PROCEEDINGS

Barbara Reed and Wayne Reed brought suit on November 15, 2013 against several defendants, including Nosroc Corporation ("Nosroc"), alleging that Mrs. Reed developed mesothelioma as a result of exposure to asbestos from defendants' products.[1]

Nosroc moved for summary judgment on the grounds that there was no evidence that it or its predecessor, G&W.H Corson ("Corson"), sold or supplied any asbestos-containing product to which Ms. Reed was exposed. The trial court issued an Order and written opinion on July 6, 2016 (entered on July 28, 2016) granting Nosroc's motion. The lower court also granted summary judgment to four other defendants-below by orders entered the same day. Plaintiffs appealed all five of the orders.

[1] The complaint subsequently was amended three times to substitute plaintiffs after Mrs. Reed's death.

III. II. SUMMARY OF ARGUMENT

1. Denied as to Nosroc. The trial court correctly granted summary judgment for Nosroc after consideration and review of the entire evidence on the record. At issue was whether Plaintiffs had produced admissible evidence beyond speculation or conjecture that demonstrated that Barbara Reed was exposed to asbestos from the clothing of her father, Raymond Reed. Further, whether Plaintiffs produced admissible evidence beyond speculation and conjecture that at a specific time and place Raymond Ryan worked with or around asbestos-containing products manufactured by Baldwin-Ehret-Hill ("BEH") or Keene and that had been supplied or distributed by G&W.H. Corson, a middleman, rather than by the manufacturers, Baldwin-Ehret-Hill or Keene. The trial court held that, "Plaintiffs have not presented evidence from which a jury could reasonably infer, without undue speculation, that Plaintiff was exposed to friable asbestos for which Defendant is responsible…because none of the witness testimony presented by Plaintiffs specifically place Father[2] in the specific proximity to products at issue at the time they were being used." *Reed v. Nosroc Corp*., C.A. No. 13C-11-188 ASB, at *4 (Del. Super. July 6, 2016)(Scott, J.)(ORDER) (Exh. A).

[2] Ms. Reed's father, Raymond Ryan

III. STATEMENT OF FACTS

This is a so-called "take-home" asbestos case in which Plaintiffs alleged that Barbara Reed was exposed to asbestos brought into the family home on the work clothes of her father, Raymond Ryan. Mrs. Reed lived in the family home from 1957 until 1970. (A242:18-19)[3].

A. Evidence and Testimony Relating to Corson's Alleged Responsibility for Products Manufactured by Other Entities

Plaintiffs sued Nosroc as alleged successor-in-interest to G & W.H. Corson ("Corson"). Corson was a quarry operator and manufacturer of stone products. (A331-A332). For a time, it distributed insulation products. (A331-A332). Among the products it distributed during the relevant time period were materials manufactured by Baldwin Ehret-Hill ("BEH") and Keene Corporation ("Keene"). (A523:19-A526:6).[4]

Corson was not the exclusive source of BEH and Keene products in Delaware during the relevant time periods. Testimony from a former Corson employee confirmed that customers could purchase BEH and Keene products directly from those companies, and an individual who worked with Mr. Ryan testified that such direct purchases in fact occurred on jobs where the two men worked together doing insulation work. (A523:19-A526:6; A528:5-10; A931:22-

[3] References to the Appendix "A" are to Appellants' Appendix
[4] Keene acquired BEH in 1968. (A194-A195).

A932:14). In seeking to create the misimpression that Corson was the sole potential source of BEH and Keene products Mr. Ryan might have used, Plaintiffs rely upon a snippet of deposition testimony of Robert Hinks, a former Corson employee deposed in 1986. (A205-A206; A365:19-22). However, there is other testimony in that same deposition immediately following the statements upon which Plaintiffs rely, in which Mr. Hinks explained that customers could also purchase BEH and Keene products directly from the manufacturer. (A523:19-A526:6; A528:5-10).

Moreover, nearly four hundred pages of invoices reflected direct sales of insulation products from BEH and Keene to the Getty Refinery, a worksite at which Plaintiffs claimed Mr. Ryan had worked with those products. (A530-A927). No witness involved in any transaction or activity in any way involving Mr. Ryan suggested that Corson had any connection with any BEH or Keene product from which he was exposed to asbestos.

The only testimony cited by Plaintiffs that even colorably suggested Corson had anything to do with this case was that of Edward Stevens, former president of BEH. In opposition to Nosroc's motion for summary judgment, Plaintiffs submitted portions of depositions given by Stevens in 1981 and 1985, in which he suggested that Corson was the only source of BEH and Keene products in Delaware. Not only was that testimony inconsistent with other evidence in the

record, but it was given at depositions taken decades ago in cases in which Nosroc was not a party. Nosroc did not attend the depositions, and there is no evidence it had notice of them. (A334; A337:4-21; A368; A380; A383:3-18). Nosroc had, therefore, no opportunity to cross-examine Stevens regarding the purported bases for statements which, while perhaps helpful to his company in the case in which they were given, were adverse to Nosroc's interests in the instant case. Plaintiffs also did not point to any other party at the deposition who had a motive to do what Nosroc clearly would have done had it been present – *i.e.*, impeach Stevens' claim that BEH and Keene did not sell products directly in Delaware.[5]

B. Testimony Regarding Mr. Ryan's Purported Work with BEH and/or Keene Products

Mr. Ryan was not deposed in this matter. In lieu of such testimony, Plaintiffs presented testimony he gave in 1990 in his own asbestos lawsuit and a separate action filed by his wife, Barbara Ryan. As with Stevens' testimony, Plaintiffs offer nothing to suggest that Nosroc was a party to Mr. Ryan's case or Mrs. Ryan's, or that it had notice of or attended his depositions in those matters. (A269; A299). In the cited testimony, Mr. Ryan testified to his recollection of

[5] Plaintiffs also rely on testimony from Stevens for the proposition that senior Corson executives also were directors of BEH, without explaining the relevance of that fact to whether BEH and Keene sold their products directly to Delaware customers, including Mr. Ryan's employers. To be clear, Corson was not owned by BEH or Keene, nor is there anything in the record suggesting they were, and they were unrelated corporate entities.

having worked with two BEH/Keene products, "Monoblock" and "Thermasil." He admitted, however, that he could not recall during what time periods or at what jobsites he encountered those products (A309:16-20; 310:23-A311:2), a significant omission since Monoblock contained asbestos only until 1968 and Thermasil contained asbestos only until 1972, and both products continued to be sold but they no longer contained asbestos after those dates. (A407-A409).[6]

Raymond Ryan's brother, James Ryan, who was also an insulator, was also deposed in this case. (A302). He recalled working with "Thermasil" pipe covering, and he speculated (while admitting he did not actually know) that Mr. Ryan also "would be" working with the same product. (A304:1-16). James Ryan offered no testimony as to the nature or extent of any encounter Mr. Ryan might have had with Thermasil, or when any such work might have occurred.

[6] Plaintiffs also cite deposition testimony of Ms. Reed's mother, Barbara Ryan, from her own, separate asbestos lawsuit. (A492, p. 47:22-p. 48:5, A502-506). Nosroc was not a party to that action and did not attend the deposition. Mrs. Ryan offered no testimony regarding any work Mr. Ryan might have done with BEH or Keene products.

IV. LEGAL ARGUMENT

A. THE SUPERIOR COURT CORRECTLY APPLIED DELAWARE LAW ON THE ISSUE OF PRODUCT NEXUS

1. Question Presented

Whether Plaintiffs Have Presented Sufficient, Admissible Evidence Beyond Speculation and Conjecture that Raymond Ryan Worked With Asbestos-Containing Insulation Products For Which Nosroc Corporation is Liable and that Barbara Reed was Ultimately Exposed to Asbestos from Such Work. (Issue Preserved at A81-A91; A507-A519).

2. Standard and Scope of Review

The standard of review of the trial court's decision granting summary judgment is *de novo*. *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996). Although Nosroc bore an initial burden to show the absence of a genuine issue of material fact precluding entry of summary judgment in its favor, it discharged that burden by pointing to the absence of any evidence supporting Plaintiffs' claims. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986)). Thus, Plaintiffs could overcome Nosroc's motion by presenting more than a scintilla of evidence and rather evidence "on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249 (1986).

"[A]n appellee is entitled to argue any theory in support of the judgment in its favor, even if that theory was not relied upon in the decision on appeal". *Smith v. Delaware State Univ.*, 47 A.3d 472, 480 (Del. 2012)(citations omitted).

3. Merits of Argument

In denying summary judgment, the trial court concluded that "Plaintiffs have not presented evidence from which a jury could reasonably infer, without undue speculation, that [Mrs. Reed] was exposed to friable asbestos for which [Nosroc] is responsible…because none of the witness testimony presented by Plaintiffs specifically place [Mr. Ryan] in the specific proximity to products at issue at the time they were being used." *Reed v. Nosroc Corp*., C.A. No. 13C-11-188 ASB, at *4 (Del. Super. July 6, 2016) (Scott, J.) (Exh. A). Because this conclusion aptly summarized the lack of evidence establishing a nexus between Mrs. Reed and any product for which Nosroc is responsible, as well as for reasons not addressed by the trial court relating to the inadmissibility of evidence cited by Plaintiffs in opposing Nosroc's motion, the trial court's conclusion was correct.

a. The only testimony purporting to show a link between Nosroc and any product giving rise to Mrs. Reed's alleged asbestos exposure – that of Stevens – is inadmissible because Nosroc had no opportunity to cross-examine him.

In considering a motion for summary judgment, the Court may consider only admissible evidence presented by the parties. *Continental Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743, 747 (Del. 1965); *see also Hills Stores Co.*

v. Bozic, 769 A.2d 88, 102 (Del. Ch. 2000), *see also Collins v. Ashland, Inc.*, 2009 Del. Super. LEXIS 7 (Del. Supr.); *Stigliano v. Anchor Packing Co.*, 2006 Del. LEXIS 431 (Del. Supr.).

Under Delaware Superior Court Rule 32(a), prior deposition testimony is admissible only if the party against whom it is offered "was present or represented at the taking of the deposition or who had reasonable notice thereof. . . ." Delaware Rule of Evidence 804(b)(1) similarly permits admission of prior deposition testimony only if "the party against whom the testimony is now offered . . . [or] a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." These rules preclude the admission of the testimony of Stevens against Nosroc, which did not have notice of or attend his depositions and therefore had no opportunity to cross-examine him.

The Delaware Superior Court excluded testimony from a deceased plaintiff where the defendant was not a party to the case or on notice of the deposition at the time of the plaintiff's deposition. *In re Asbestos Litig. (Spear v. Excelsior)*, Del. Supr., C.A. N13C-06-169 ASB, Boyer, S.M. (July 18, 2014)(citing *Ream v. Cameron Int'l Corp*., 2012 U.S. Dist. LEXIS 89140 (E.D. Pa.)(directly conflicting motives, such as implicating additional parties, renders prior deposition testimony

inadmissible.)[7] *But see Temple v. Raymark Inds. Inc.*, 551 A. 2d 67 (Del. Super. Ct. 1988)[8].

Plaintiffs attempt to justify the admissibility of the testimony based on the fact that Keene was present at the depositions and examined the witnesses. However, there is no evidence that Keene was a "predecessor in interest" to Nosroc. Moreover, Keene had no similar motive to cross-examine Stevens on the question of whether BEH and/or Keene sold their products directly in Delaware. Indeed, in Nosroc's absence, both plaintiff's lawyer and counsel for multiple defendants examined Stevens on the relationship between BEH/Keene and Corson. (A370:20-A374:21; A383:3-A385:5). In testimony that offered potential benefit to Keene and other defendants – but which could only harm Corson – Stevens

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[7] *See Apartment Communities Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004) *citing Canaday v. Superior Court of Delaware*, 119 A.2d 347, 352 (Del. 1955) (holding that the Delaware Superior Court Rules of Civil Procedure are "greatly influenced by the federal judiciary's construction of the Federal Rules of Civil Procedure since the two sets of rules are almost identical."). *Nelson v. State of Delaware*, 628 A.2d 69, 74 fn. 7 (Del. 1993) (noting that "[t]he Delaware Rules of Evidence are modeled after, and in many instances track, the Federal Rules of Evidence.")

[8] Defendant includes this only because it anticipates that Plaintiffs' Counsel will cite this case in reply as has been their custom in this litigation. In *Temple*, the testimony that was being sought to be offered concerned "the existing knowledge primarily of Johns-Manville with respect to asbestos health dangers." *Temple v. Raymark*, 551 A.2d at 69. It was not being offered to prove conspiracy, which was the claim at issue in *Temple*, but rather general knowledge as to the hazards of asbestos and the standard of care. *Id*.

characterized Corson as culpable participant in the distribution of BEH/Keene products. (A368-A403). Among other things, implication of Corson in the distribution of products offered both Keene and other defendants another "share" to whom a jury might allocate responsibility for plaintiff's injury. Had Corson been present at the deposition, it clearly would have had a directly contrary interest in developing testimony to clarifying and delineating any role it played in the distribution of BEH/Keene products.

Nosroc's inability to examine Stevens and the absence of any examination of him by any person or entity with a motive and interest even remotely aligned with Corson's renders the testimony inadmissible against Nosroc in the instant case. The fact that other evidence in the record – including testimony of one of Mr. Ryan's co-workers and invoices to one of the jobsites alleged to be at issue – confirm that BEH/Keene sold products directly in Delaware during relevant times only underscores the prejudice to Nosroc flowing from its inability to cross-examine Stevens.

Therefore, the unavailability of Stevens' testimony means that there is no evidence in the record to establish any connection between Nosroc and – or any basis for holding it responsible for – any product ever encountered by Mr. Ryan.

b. There is insufficient testimony in the record to support any causal relationship between any BEH or Keene product and asbestos exposure to Mr. Ryan.

Plaintiffs' argument that BEH and/or Keene products were the source of asbestos exposure to Mr. Ryan – much less to Mrs. Reed – is based on similarly inadmissible evidence, decorated with outright speculation. Like Stevens' testimony, that of Mr. Ryan occurred in depositions at which Nosroc was not present. It never had an opportunity to depose those witnesses regarding the purported circumstances of their work with those products. While Keene had an interest in exploring that issue, there is insufficient information from which to determine how closely its interests in those cases might have aligned with Nosroc's in the instant action. Perhaps most significantly, the instant case ultimately turns on the alleged exposure not of Mr. Ryan, but of *Mrs. Reed*. Whatever its general interest in challenging Mr. Ryan's recollection regarding BEH/Keene products, Keene had no incentive to question him regarding the particular aspects of that work that would have formed any nexus between them and Mrs. Reed. Thus, Mr. Ryan's prior testimony, like Stevens', is inadmissible against Nosroc under Superior Court Rule 23(a) and Rule of Evidence 804(b)(1).

Moreover, even Raymond Ryan's testimony were admissible, it does not even remotely suffice to demonstrate asbestos exposure from BEH/Keene products. The plaintiff in an asbestos action cannot survive summary judgment based upon the mere presence of a defendant's asbestos-containing product at a large job site; rather, the plaintiff must also proffer evidence that he "was in

proximity to that product at the time it was being used." *Nutt v. A.C. & S. Co., Inc.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986); *see also In re Asbestos Litig. (Nutt)*, 509 A.2d 1116, 1117-18 (Del. Super. Ct. 1986).

In evaluating the evidence in the context of a motion for summary judgment, the court should not "indulge in speculation and conjecture"; rather, it should decide the motion based on the evidence actually produced by Plaintiffs, "not on evidence potentially possible." *In re Asbestos Litig. (Nutt)*, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986), *aff'd on other grounds*, *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del. 1987); see also *Foucha v. Georgia Pacific, LLC*, C.A. No. N10C-05-042, (Del. Super. Jun. 3, 2011) (Ableman, J.) ("Delaware courts do not allow a plaintiff to proceed against a defendant based on speculative exposure to that defendant's product") (citation omitted).

Plaintiffs cite a 1985 trial court opinion for the proposition that Delaware law imposes on them only a minimal burden on the issue of a nexus between a product for which Nosroc is responsible and Mrs. Reed. *Clark v. A.C.&S.*, C.A. No. 82C-DE-26 (Del. Super. Sept. 3, 1985).

The product nexus standard as applied by the Superior Court has narrowed in the intervening thirty-one years. The Court, in analyzing the product nexus standard set forth, wrote,

> Establishing spatial proximity will pose more of a challenge to the plaintiff. The more confined the property, the easier it will be for the

> co-worker to meet the spatial proximity test. In larger facilities, it is incumbent upon the plaintiff to describe the location of his own work within the facility with sufficient detail to allow the Court to compare that description to the description of the location of the asbestos offered by the co-worker in order to determine if an inference of exposure is reasonable.

In re Asbestos Litg. (Helm), 2007 Del. LEXIS 155, pg. 19 (Del. Supr.) (*Affirmed* by *In re Asbestos Litig*. (*Archie),* 2008 Del. LEXIS 120 (Del.) (internal citations omitted).

However, even if their interpretation of that case was a correct statement of Delaware law, the facts of that case did not present anything like the obstacles Plaintiffs face here. There is simply no admissible evidence sufficient to link a product for which Nosroc is responsible to Mrs. Reed.

Raymond Ryan gave only vague, generalized testimony regarding product names he recalled. He did not link use of those products with time periods during which the products actually contained asbestos, nor did he provide any information that would permit quantitative or qualitative assessment of the amount of asbestos exposure, if any, that resulted on the occasions, if any, when he might have encountered asbestos-containing versions of the products. He also provided no testimony regarding that would permit such determinations particular to the occasions, if any, on which he used BEH/Keene products in some way connected to Corson; indeed, he did not mention Corson at any point in his testimony. Lastly,

his testimony shed no light on whether, how or at what level Mrs. Reed was exposed to asbestos from those products.

James Ryan did not offer any testimony based on first-hand knowledge or direct evidence that he saw Raymond Ryan working with any BEH or Keene product at any specific part of DuPont Seaford or Getty. Moreover, he offered no testimony that Corson was the supplier of any insulation to Seaford or Getty. Thus, James Ryan's testimony does not support an inference of exposure under *Helm*.

Randle Meadows identified BEH and Keene as suppliers Monoblock at DuPont Seaford but his testimony lacked first-hand knowledge as to the "time and space" requirement articulated in *Helm*.

Even assuming *arguendo* that Mr. Stevens' testimony is admissible, it is directly in conflict with the testimony of the other witness Plaintiffs offered in this case, Robert Hinks, who testified that customers could buy directly from BEH and Keene themselves. Thus, any conflict is one of Plaintiffs' own making and does not create a genuine issue of material fact[9].

[9] *See Edmisten v. Greyhound Lines, Inc*., 49 A.3d 1192 at *3 (Del. 2012)(Internal inconsistencies in Plaintiff's record do not create genuine issues of material fact). *See also Smith v. Del. State Univ.*, 47 A.3d 472, 478 (Del. 2012) ("in deciding a motion for summary judgment, courts are permitted to consider that the plaintiff's testimony is self-contradictory and unsupported by other evidence, such that no rational juror could find in the plaintiff's favor.")

Plaintiffs have not provided any admissible evidence, beyond speculation or conjecture, upon which a reasonable juror could find that Raymond Ryan worked with an asbestos-containing BEH or Keene product that was supplied by middleman Corson as opposed to supplied directly by the manufacturer, BEH or Keene. Further, Plaintiffs have not, without resorting to speculation or conjecture, connected Nosroc to any of Barbara Reed's exposures to asbestos. Accordingly, the trial court's grant of summary judgment in favor of Nosroc Corporation was not in error and should be affirmed.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the Superior's order granting summary judgment in favor of Nosroc.

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