NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CROYDON PLASTICS COMPANY, INC., Appellant v. GROEN, LAVESON, GOLDBERG & RUBENSTONE, EDWARD RUBENSTONE & ELLIOT KOLDNY v. GARLAND D. CHERRY, JR., ROBERT STUTMAN, WALTER J. TIMBY, JR., R. ERICK CHIZMAR Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1246 EDA 2013

Appeal From Order Entered April 4, 2013
In The Court of Common Pleas of Bucks County Civil Division
At No(s): 97-07003-16-2

BEFORE: ALLEN, JENKINS, and FITZGERALD*, JJ.

MEMORANDUM BY JENKINS, J.: **FILED APRIL 10, 2014**

In 1997, appellant Croydon Plastics Company, Inc. ("CPCI") filed this legal malpractice action against appellees Groen, Laveson, Goldberg and Rubenstone and Edward Rubenstone, Esquire (collectively "Groen"). CPCI alleged that Groen committed malpractice while representing CPCI in the mid-1990's in a products liability action

* Former Justice specially assigned to the Superior Court.

against the Trane Company ("Trane") and Lower Bucks Cooling and Heating ("Lower Bucks").

Fifteen and a half years later, in March 2013, this malpractice action finally proceeded to a jury trial. On March 20, 2013, at the close of CPCI's case in chief, the trial court entered a compulsory nonsuit in favor of Groen and against CPCI. CPCI filed timely post-trial motions, which the court denied on April 4, 2013. On April 30, 2013, the trial court entered judgment in favor of Groen. CPCI filed a timely notice of appeal, and both CPCI and the trial court complied with Pa.R.A.P. 1925.

The trial court properly concluded that the evidence did not support a cause of action against Groen for legal malpractice, because CPCI failed to establish that it had a valid cause of action against Trane in the underlying products liability case. Consequently, we affirm.

This Court discussed CPCI's underlying action against Trane at length in a previous decision: ***Croydon Plastics Co. v. Lower Bucks Cooling & Heating***, 698 A.2d 625 (Pa.Super.1997), ***appeal denied***, 553 Pa. 689, 717 A.2d 1028 (1998) (**"*Croydon*"**). A brief summary of these proceedings will suffice for purposes of today's opinion.

On November 19, 1992, CPCI's factory was destroyed in a fire. The fire marshal determined that the cause of the fire was the

installation of a furnace too close to a combustible wood-paneled wall. CPCI's insurer paid CPCI approximately $1,500,000 in damages. CPCI and its insurer filed suit against Trane, the furnace distributor, and Lower Bucks, the furnace installer, for breach of contract, breach of warranty, negligence and strict liability.[1] ***Croydon***, 698 A.2d at 626. Groen represented CPCI in its excess claim against Trane and Lower Bucks.

A "long, circuitous and tortuous discovery battle" ensued. ***Id***. at 627. On February 24, 1995, the court granted Trane's motion to compel CPCI to produce expert reports within sixty days. CPCI failed to comply with this order.

In October 1995, CPCI replaced Groen with current counsel, Garland Cherry, Jr., Esquire. In February 1996, Trane filed a motion for sanctions seeking preclusion of any expert reports. The court granted this motion and precluded CPCI from presenting expert testimony against Trane. Trane then filed a motion for summary judgment, which the court granted.

Lower Bucks settled CPCI's claims for $1,000,000. CPCI appealed the order granting summary judgment to Trane, and this Court affirmed. ***Id***. at 631. The Supreme Court denied allocatur.

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[1] CPCI's insurer filed a subrogation action against Trane and Lower Bucks for the insurance proceeds it paid CPCI. CPCI filed its own action against Trane and Lower Bucks for monies in excess of its insurer's subrogation claim ("excess claim").

In September 1997, unable to recover against Trane, CPCI filed the present legal malpractice action against Groen. In essence, CPCI alleged the following:

1. The furnace was too close to the paneled wall, causing the furnace to overheat.

2. The furnace was defective because it lacked a "rollout switch" that would shut down the furnace when it overheated.

3. Had a rollout switch been in the furnace, the furnace would have shut down before overheating on November 19, 1992.

4. Groen was negligent for failing to prosecute a claim against Trane for not inserting a rollout switch in the furnace.

Prior to trial in March 2013, the court granted Groen's motion to bifurcate trial into two stages. In the first stage, CPCI had the burden of proving that it would have obtained a recovery from Trane in the underlying action. If CPCI was successful in the first stage, trial would proceed to the second stage, in which CPCI would shoulder the burden of proving that Groen's negligence prevented CPCI from recovering against Trane.

During the first stage of trial, CPCI presented one expert witness, Paul Heldenbrand, P.E., an engineer. Heldenbrand testified that the fire started because of (1) the defective installation of the furnace near the combustible paneled wall, (2) poor ventilation, and

(3) the lack of a rollout switch. Tr., 3/19/13, pp. 91-92, 95, 117-18. Since the furnace was too close to the paneled wall, heat radiating from the furnace gradually converted the wooden panels from solid to gas. ***Id***. On November 19, 1992, the gas finally ignited and started a fire, a chemical reaction known as pyrolysis. ***Id.,*** pp. 107-08, 123, 128-29. A rollout switch, Heldenbrand opined, would have shut down the furnace before pyrolysis occurred. **Id**., p. 112.

Heldenbrand admitted that he did not review the manufacturer's specifications for the furnace. Thus, he could not definitively conclude whether the furnace lacked a rollout switch. ***Id***., pp. 121-22. He did say, however, that evidence of long-term damage to the furnace indicated that there was no rollout switch. ***Id***., pp. 106-08, 112-13.

Heldenbrand testified that according to Trane, the range of normal furnace temperatures is between 400-600 degrees. ***Id***., pp. 127, 165. The gas temperatures in CPCI's furnace were constantly between 500-600 degrees due to the poor installation of the furnace. ***Id***., p. 128. This caused the surface of adjacent wood paneling to exceed 500 degrees, which gradually caused the solid wood to convert to gas and ignite into the fire that destroyed CPCI's factory. ***Id***. Critically, however, Heldenbrand never identified the temperature at which a rollout switch would have activated to shut down the furnace and stop the wooden panels from catching fire. His testimony left open

the possibility that the fire could have started even if the rollout switch had been operating properly.

At the conclusion of Heldenbrand's testimony, CPCI rested its case, and Groen moved for a nonsuit. Groen argued that CPCI failed to prove that the furnace actually lacked a rollout switch. Alternatively, Groen argued that Heldenbrand failed to specify the temperature at which the rollout switch would have activated had a switch been in the furnace:

> [Heldenbrand] never told this jury how hot it has to get for the rollout switch to even activate to stop a fire. And the reason that's important is because this witness has told this jury twice that the normal operating temperatures on this furnace were 400 to 600 degrees, and that in his opinion, the temperatures in the furnace or in the flue pipe reached 500 to 600 degrees. At no point did this witness give this jury any testimony that this heater or flue went even one degree above the normal operating temperatures for this unit.

Id., p. 185. CPCI admitted that Heldenbrand did not specify the temperature at which a rollout switch would have turned the furnace off. ***Id.,*** p. 187.

The court granted Groen's motion for nonsuit due to CPCI's failure to establish the activation temperature of the rollout switch. Even if the furnace had a rollout switch, the court reasoned, the fire might have started at a lower temperature than the rollout switch's activation temperature. Thus, the alleged lack of a rollout switch in CPCI's furnace did not constitute a defect. As the court stated:

> [Y]ou have to establish a basis for the defect. And you say the defect is the lack of the rollout switch, and that the defect has to be sufficient to cause the damage. If there was a rollout switch and you don't know when it would have turned off the device, then how do we know that the absence of the device would have made any difference?

Id., pp. 187-88.

In this appeal, CPCI raises three questions:

> 1. Did the trial court err by refusing to apply the malfunction theory of product liability and granting a nonsuit in the product defect phase of this legal malpractice case[,] where [CPCI's] fire expert testified, *inter alia*, that:
>
> - an essential safety feature of a gas furnace is that it shut off automatically if it is overheating;
> - furnaces that lack this safety feature are fire hazards, especially if combustibles are located nearby;
> - investigation revealed an improperly installed flue pipe resulting in poor draft and elevated temperatures in and around the subject gas furnace;
> - there was physical evidence of chronic overheating on the interior of the furnace consisting of abnormal corrosion, sooting and discoloration;
> - the furnace overheated for six years before eventually causing a nearby wall to catch fire; and
> - the furnace would not have continued to operate in this condition if it had been equipped with a safety shut-off switch or 'rollout switch'?
>
> 2. Did the trial court err in bifurcating this legal malpractice case and requiring [CPCI] to prove a product defect before introducing evidence of legal malpractice, where [CPCI's] ability to prove a specific product defect was hindered by [Groen's] legal malpractice?
>
> 3. Did the trial court abuse its discretion in ruling that [Groen] could introduce evidence of industry standards[,] where the clear intent of the evidence was to show compliance with prevailing standards and the reasonableness of the designer's conduct?

In its first argument, CPCI insists that the trial court erred in granting a nonsuit in the first stage of this case, because CPCI had a valid "malfunction" action against Trane due to the lack of a rollout switch in the furnace.[2] Even if we assume there was no rollout switch in the furnace, we do not find this to be a "defect" under malfunction theory principles. Thus, entry of a nonsuit against CPCI was proper.

Pa.R.Civ.P. 230.1 requires entry of a compulsory nonsuit at the close of the plaintiff's case when the plaintiff fails to establish a right to relief. When reviewing an order granting a nonsuit, this Court

> must view the evidence adduced on behalf of the [plaintiff] as true, reading it in the light most favorable to [it]; giving [it] the benefit of every reasonable inference that a jury might derive from the evidence and resolving all doubts, if any, in [its] favor. Additionally, a compulsory nonsuit may be entered only in cases where it is clear that [it] has not established a cause of action. When so viewed, a non-suit is properly entered if [it] has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action.

Keffer v. Bob Nolan's Auto Service, Inc., 59 A.3d 621, 631 (Pa.Super.2012) (citations omitted).

The malfunction doctrine is a species of product liability law. This Court recently summarized malfunction principles as follows:

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[2] Groen argues that CPCI waived this issue by failing to raise the malfunction theory during trial or in post-trial motions. We disagree. CPCI expressly mentioned the malfunction theory during trial while opposing Groen's motion for nonsuit, Tr., 3/19/13, pp. 175-76, and footnote 1 of CPCI's post-trial motions incorporated its trial argument by reference.

Pennsylvania courts have long 'recognized a plaintiff's right to pursue an action in strict liability against the manufacturer of a product pursuant to section 402A of the *Restatement (Second) of Torts.* A plaintiff presents a *prima facie* case of strict liability by establishing that the product was defective and that the product caused the plaintiff's injury. In most instances the plaintiff will produce direct evidence of the product's defective condition. In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability.' ***Rogers v. Johnson & Johnson Products, Inc.,*** 523 Pa. 176, 565 A.2d 751, 754 (1989) (citations omitted). In ***Barnish v. KWI Bld. Co.,*** 602 Pa. 402, 980 A.2d 535 (2009), our Supreme Court engaged in a comprehensive analysis of the malfunction theory:

> [A] plaintiff pursuing a case under the malfunction theory can assert a successful strict product liability claim based purely on circumstantial evidence in cases where the allegedly defective product has been destroyed or is otherwise unavailable. Although the plaintiff does not have to specify the defect in the product, the plaintiff nonetheless must present evidence from which a jury can infer the elements of a strict liability action, beyond mere speculation.

Id. at 539. ***See Liberty Mutual Fire Ins. Co. v. Sharp Electronics,*** 2011 WL 2632880 (M.D.Pa.) at *3 (recognizing viability of 'malfunction theory' in Pennsylvania).

The Supreme Court in ***Barnish*** explained how the plaintiff establishes a *prima facie* case of products liability under the malfunction theory:

> While reminiscent of the logic of a *res ipsa loquitur* case, the malfunction theory requirements correlate with the three elements of a standard 402A claim. First, *the 'occurrence of a malfunction' is merely circumstantial evidence that the product had a defect*, even

> though the defect cannot be identified. The second element in the proof of a malfunction theory case, which is evidence eliminating abnormal use or reasonable, secondary causes, also helps to establish the first element of a standard strict liability case, the existence of a defect. By demonstrating the absence of other potential causes for the malfunction, the plaintiff allows the jury to infer the existence of defect from the fact of a malfunction. For example, by presenting a case free of abnormal uses, such as using the product for an unintended purpose, the plaintiff can demonstrate that the product failed to perform as a reasonable customer would expect; thus, that it malfunctioned. Similarly, by eliminating other reasonable secondary causes, a plaintiff allows the jury to infer that a defect in the product caused the malfunction, as opposed, for example, to operator error or failure to service the equipment. Similarly, by presenting a case free of 'abnormal uses' by the plaintiff and free of 'other reasonable secondary causes,' a plaintiff can establish through inference from circumstantial evidence the second and third elements of a 402A case, that the alleged defect caused the injury (as opposed to another cause) and that the defect existed when it left the manufacturer's control (as opposed to developing after the product left the manufacturer's control).

Id. at 541–42.

Wiggins v. Synthes (U.S.A.), 29 A.3d 9, 14 (Pa.Super.2011) (emphasis added).

According to CPCI, the defect in the furnace -- or, in malfunction parlance, "the occurrence of the malfunction," ***Wiggins, supra*** -- was its lack of a rollout switch. CPCI's evidence of this alleged defect is

tenuous at best. Heldenbrand could not say for certain whether the furnace had a rollout switch. He merely inferred that the furnace lacked a rollout switch based on his observations about long-term damage to its interior.

Even assuming that the furnace lacked a rollout switch, a fatal flaw still exists in CPCI's evidence: CPCI's failure to specify the temperature at which a properly designed rollout switch would have activated to shut down the furnace. While Heldenbrand testified that the furnace constantly operated between 500-600 degrees, he failed to state that a rollout switch would have turned off the furnace in this temperature range. Conceivably, a rollout switch would not have activated until the furnace exceeded 600 degrees.[3]

Since CPCI did not specify the activation temperature of the rollout switch or prove that the furnace operated at or above the activation temperature, it cannot prove that the absence of a rollout switch was an actionable defect. Since it cannot prove that the furnace had an actionable defect, CPCI cannot prove it had a valid cause of action against Trane, which in turn defeats its malpractice action

[3] Indeed, it seems counterintuitive for a rollout switch to activate between 500-600 degrees, since this was within the normal temperature range of a Trane furnace. N.T., Tr., 3/19/13, pp. 127, 165. Presumably, a properly designed rollout switch would not activate until the temperature *exceeds* the normal range.

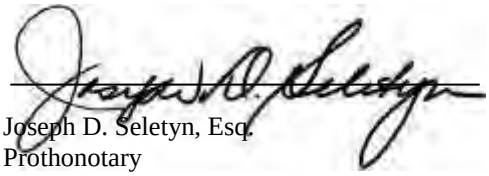
against Groen as a matter of law. Therefore, the trial court properly entered a nonsuit against CPCI and in favor of Groen.

CPCI's second argument on appeal -- the trial court abused its discretion in bifurcating this malpractice action -- need not occupy us for long. Under Pa.R.Civ.P. 213(b), the decision whether to bifurcate trial is within the trial court's discretion. ***Gallagher v. Pa. Liquor Control Bd.,*** 584 Pa. 362, 883 A.2d 550, 557 (2007). We find no abuse of discretion in the court's decision to bifurcate this trial. To the contrary, this case was an ideal candidate for bifurcation. Unless CPCI first proved that it had a valid cause of action against Trane in the underlying case (stage 1), it made no sense to litigate whether Groen was negligent in the underlying case (stage 2). Since CPCI lost stage 1 of trial, stage 2 became unnecessary. The court's decision to bifurcate trial undeniably conserved precious judicial resources.

We can resolve CPCI's third and final argument in several sentences. CPCI objects to the trial court's decision to permit Groen to introduce evidence of industry standards during trial. Since the trial court based the nonsuit upon grounds unrelated to industry standards, its decision to admit this evidence did not prejudice CPCI.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/10/2014