NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

JOANNE BRANHAM, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF FRANKLIN DELANO BRANHAM, Appellant v. ROHM AND HAAS COMPANY, MORTON INTERNATIONAL, INC., ROHM AND HAAS CHEMICALS, LLC, HUNTSMAN POLYURETHANES, MODINE MANUFACTURING COMPANY, AND HUNTSMAN, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2199 EDA 2011

Appeal from the Order Entered August 9, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): May Term, 2006, No. 3590

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and ALLEN, J.

MEMORANDUM BY STEVENS, P.J. **FILED MAY 31, 2013**

This is an appeal from the order entered by the Court of Common Pleas of Philadelphia County denying the request of Appellant Joanne Branham (Individually, and as the Administratrix of the Estate of Franklin

Delano Branham) to remove the compulsory nonsuit[1] the trial court had entered in favor of Appellees Rohm and Haas Company, Morton International, Inc., and Rohm and Haas Chemicals, LLC ("Rohm and Haas"), before Appellant finished presenting her case-in-chief. Appellant claims on appeal, *inter alia*, that the trial court erred in granting summary judgment on her strict liability claim. We remand for the preparation of an opinion consistent with this decision.

In May 2006, Appellant filed this action in the Court of Common Pleas of Philadelphia County, alleging that the Rohm and Haas chemical manufacturing plant in Ringwood, Illinois, was responsible for groundwater and air contamination that caused her late husband, Franklin Delano Branham ("Mr. Branham"), to develop brain cancer. Shortly after Mr. Branham was diagnosed with glioblastoma muliforme, a malignant brain tumor, he passed away at the age of sixty-three. Appellant contends Rohm and Haas knowingly and recklessly dumped vinyl chloride into an unlined pit for decades at their Ringwood chemical plant, which is located a mile north of McCullom Lake Village, where the Branhams had lived for nearly thirty years. Appellant contends the vinyl chloride from the Ringwood plant migrated south in a groundwater plume and contaminated drinking water

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[1] "Where a court has entered a judgment of compulsory nonsuit, the appeal lies not from the entry of the judgment itself, but rather from the court's refusal to remove it." ***Vicari v. Spiegel***, 936 A.2d 503, 508 n.5 (Pa. Super. 2007) (citing ***Smith v. Grab***, 705 A.2d 894, 896 n. 1 (Pa. Super. 1997)).

wells of McCullom Lake Village homes. In addition, Appellant claimed that vinyl chloride in a shallow groundwater plume percolated up through the ground into the air of McCullom Lake Village.

Appellant's complaint against Rohm and Haas raised claims of strict liability, negligence, and fraud. Rohm and Haas filed a pretrial motion for summary judgment on Appellant's strict liability claim, which the trial court granted as it found Rohm and Haas's disposal of vinyl chloride in the unlined pit did not constitute an abnormally dangerous activity. After the trial court allowed the case to go to trial on the negligence and fraud claims, the trial court entered a nonsuit in the middle of Appellant's case-in-chief.

Before we reach the merits in this appeal, it is necessary to remand for an additional opinion on the trial court's decision to grant partial summary judgment of Appellant's strict liability claim. In reviewing a trial court's decision to grant summary judgment, our standard of review is as follows:

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a

> matter of law. Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

JP Morgan Chase Bank, N.A. v. Murray, ---A.3d---, 2013 PA Super 55 (Pa. Super. filed Mar. 18, 2013) (quoting ***Murphy v. Duquesne Univ. of the Holy Ghost,*** 565 Pa. 571, 777 A.2d 418, 429 (2001)).

Our courts have employed the Restatement (Second) of Torts §§ 519 and 520 (1977) in analyzing similar strict liability claims. ***Diffenderfer v. Staner***, 722 A.2d 1103, 1107 (Pa. Super. 1998). Section 519 of the Restatement provides that "one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." Restatement (Second) of Torts § 519 (2007). Section 520 of the Restatement provides six factors that are relevant in determining whether an activity is abnormally dangerous:

> **§ 520. Abnormally Dangerous Activities**
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> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977). The issue of whether an activity is abnormally dangerous for the purpose of imposing strict liability is a question of law for the trial court, not the jury. ***Diffenderfer***, 722 A.2d at 1107.

In her complaint and response to Rohm and Haas's motion for summary judgment, Appellant claimed that Rohm and Haas improperly disposed of chemical waste in an unlined pit and should be held strictly liable for the resulting leakage and infiltration into the surrounding environment. Appellant filed a memorandum with several exhibits to support her claim. In its order granting summary judgment, the trial court did not discuss the six factors set forth in the Section 520 of Restatement which are relevant to the determination of whether an activity is abnormally dangerous nor did it analyze Appellant's response to Rohm and Haas's motion for summary judgment. Instead, the trial court inferred that Appellant's claims sounded in negligence and assumed that if the storage facility was properly maintained without negligence, there would have been no release into or infiltration of the surroundings. We remind the trial court that in reviewing a motion for summary judgment, courts must view the record in the light most favorable to Appellant as the non-moving party.

Accordingly, we remand the case for preparation of an opinion specifically applying the factors set forth in Section 520 of the Restatement of Torts within thirty days of this opinion. If so desired, Appellant may file a

brief within thirty days from the date that the trial court's opinion is filed. Rohm and Haas shall then have twenty days from the date Appellant's brief is filed to submit a brief to this Court.

Matter remanded with instructions. Panel jurisdiction retained.

Judgment Entered.

Prothonotary

Date: 5/31/2013