

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROBERT AND ANNEMARIE BONE,

Appellants

v.

AMERICAN STANDARD, A.O. SMITH
CORPORATION, ASBESTOS
INSULATION COMPANY, INC., A.W.
CHESTERTON, INC., BAYER
CORPSCIENCE, INC., BRAND
INSULATIONS, INC., CERTAINTEED
CORPORATION, COPELVULCAN, CRANE
CO., DEMMING DIVISION, CRANE
PACKING, CROWN CORK & SEAL
COMPANY, INC., DANA COMPANIES,
LLC, DEZURIK WATER CONTROLS,
FEDERAL-MOGUL ASBESTOS
PERSONAL INJURY TRUST, FOSTER
WHEELER CORPORATION, GARLOCK,
INC., GENERAL ELECTRIC COMPANY,
GEORGIA-PACIFIC CORPORATION,
GOODYEAR TIRE & RUBBER COMPANY,
GOODYEAR CANADA, INC., GOULDS
PUMPS, INC., GREEN, TWEED &
COMPANY, INC., HAJOCA PLUMBING
SUPPLY COMPANY, IMO INDUSTRIES,
INC., INGERSOLL RAND CO., ITT
CORPORATION, J.A. SEXAUER
MANUFACTURING CO., J.H. FRANCE
REFRATORIES CO., McMASTER CARR
SUPPLY HOUSE, MELRATH GASKET,
INC., METROPOLITAN INSURANCE CO.,
OWENS-ILLINOIS, INC., PARS
MANUFACTURING COMPANY, PECORA
CORPORATION, RILEY STOKER
CORPORATION, UNION CARBIDE
CORPORATION, VELLUMOID, INC.,
WEIL McLAIN CO., YARWAY
CORPORATION, CBS CORPORATION,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2468 EDA 2012

Appeal from the Judgment entered on July 11, 2012
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 1025 May Term 2010

BEFORE: BOWES, GANTMAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JULY 29, 2013

Robert Bone ("Bone") and Annemarie Bone (collectively, "Plaintiffs") appeal from the trial court's entry of summary judgment against them and in favor of Crane Company ("Crane").¹ We vacate and remand.

In its Opinion, the trial court set forth the relevant history of this case as follows:

Plaintiffs instituted this action on May 7, 2010, alleging [that Bone] developed asbestosis and other lung-related ailments from working with asbestos[-]containing products. On April 24, 2012, Crane moved for summary judgment under the statute of limitations. Plaintiffs answered [on] May 16, 2012.

Bone served in the United States Coast Guard from 1948 to 1953[,] and worked in the South Philadelphia Atlantic Refinery between 1953 and 1960. **See** Plaintiff[s'] Response to Crane's Motion for Summary Judgment, 5/16/12, p.3. During his time with both the United States Coast Guard and the Atlantic Refinery, Bone was exposed to asbestos-containing gaskets, flanges, valves, pumps, and packing materials manufactured or supplied by Crane and others. Bone sought medical treatment for breathing problems in the early 1990s at the Wilmington, Delaware [Veteran's Administration ("VA")] Medical Center and

¹ Although only Crane filed a Motion for summary judgment based upon the statute of limitations, the trial court entered Orders dismissing all of Plaintiffs' claims against all defendants based upon the statute of limitations. Because there are no remaining claims against any party, and the trial court's Order granting summary judgment in favor of Crane disposed of all claims of all parties, we will consider Plaintiffs' appeal. **See** Pa.R.A.P. 341(b)(1) (defining a final order as an order that disposes of all claims of all parties).

was diagnosed with [Chronic Obstructive Pulmonary Disease ("COPD")] and asthma. Bone told the doctor at this initial meeting, as well as other doctors subsequently, that he had worked with asbestos throughout his life. When asked whether this exposure may have caused his breathing problems, Bone testified [that] his doctor in the early 1990s said it "probably was" a factor in his health problems. Bone sought further medical treatment in 1996 at CarolinaEast Internal Medicine and told Dr. Kristina Gintautiene ["Dr. Gintautiene"] that he had been having yearly X-rays for pleural thickening from asbestos exposure. Dr. Gintautiene X-rayed Bone's chest beginning in July 2000 to specifically check for asbestos-related diseases.

Additionally, Bone's 2005 Durham [VA] Medical Center progress notes indicate a history of diagnosed asbestosis and inhalers for its treatment. Although Bone's medical records indicated asbestosis in 2005, his affidavit stated [that] the first time he was told he had asbestosis, COPD and asthma, related to asbestos, was November 2009.

Trial Court Opinion, 10/19/12, at 1-2 (citations omitted). Following the trial court's entry of summary judgment in favor of Crane, Plaintiffs filed the instant timely appeal, followed by a court-ordered Concise Statement of Matters Complained of on Appeal, pursuant to Pa.R.A.P. 1925(b).

Plaintiffs present the following claim for our review:

Did the lower court abuse its discretion or err as a matter of law in ruling that [P]laintiffs' causes of action for nonmalignant asbestos-related disease and loss of consortium had accrued more than two years before they filed their Complaint, and granting the [M]otion for summary judgment based on expiration of the statute of limitations?

Brief for Appellants at 4.

Plaintiffs claim that the trial court erred in granting summary judgment against them and in favor of Crane. ***Id.*** at 8. Plaintiffs argue that the trial court's conclusion, *i.e.*, that progress notes from 2005 triggered Plaintiffs'

duty for further investigation, is founded upon several errors. ***Id.*** Plaintiffs assert that the 2005 progress reports actually are a nurse practitioner's erroneous recordation of medical history, and not a diagnosis by a medical doctor. ***Id.*** According to Plaintiffs, the trial court improperly ignored Bone's medical records from 1996 through 2008, which showed no diagnosis of asbestosis; no link between asbestos exposure and Bone's breathing issues, and the doctor's attribution of Bone's ongoing breathing difficulties to COPD. ***Id.*** Therefore, Plaintiffs contend, the entire record discloses no diagnosis of symptomatic asbestosis until 2009. ***Id.*** On that basis, Plaintiffs assert that the trial court erred in concluding that the nurse practitioner's progress notes triggered the limitations period for filing Plaintiffs' cause of action. ***Id.*** at 8, 10-11.

Our standard of review of an order granting or denying a motion for summary judgment is well established:

We 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. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Daley v. A.W. Chesterton, Inc., 37 A.3d 1175, 1179 (Pa. 2012) (quoting ***Pappas v. Asbel***, 768 A.2d 1089, 1095 (Pa. 2001) (citations omitted)).

The general consensus in Pennsylvania law is that to present a *prima facie* case for a compensable asbestos-related injury, the plaintiff must present evidence of (1) his discernible asbestos exposure, (2) which is related to an asbestos-related condition that is (3) symptomatic, and (4) he suffers some functional impairment or disability as a result. ***Glaab v. Honeywell Int'l, Inc.***, 56 A.3d 693, 701 (Pa. Super 2012). Pennsylvania courts have recognized that “only upon the development of symptoms and physiological impairment could a plaintiff commence litigation for an asbestos-related injury.” ***Summers v. Certainteed Corp.***, 997 A.2d 1152, 1162 (Pa. Super. 2010). Therefore, diagnosed, but asymptomatic, asbestos-related pleural thickening fails to state a cognizable cause of action. ***Id.*** (citing ***Simmons v. Pacor, Inc.***, 674 A.2d 232, 237 (Pa. 1996)). Moreover, shortness of breath alone is not a compensable injury, because it is not a discernible physical symptom, functional impairment, or a disability. ***Taylor v. Owens Corning Fiberglas Corp.***, 666 A.2d 681, 687 n.2 (Pa. Super. 1995). As this Court has observed, “breathlessness is also associated with any number of non-asbestos-related ailments including lung cancer, excessive cigarette smoking, heart disease, obesity, asthma, emphysema and allergic reactions.” ***Id.***

In the instant case, the trial court granted Crane’s Motion for summary judgment, concluding as a matter of law that Plaintiffs failed to file their cause of action within the two-year statute of limitations. Trial Court

Opinion, 10/18/12, at 3. The trial court based its conclusion on evidence that (1) Bone had asked his doctor whether asbestos exposure contributed to his lung conditions; (2) the doctor said that it was “probable”; (3) in 1996, CarolinaEast Internal Medicine x-rayed Bone for pleural thickening; and (4) the 2005 progress notes indicated a diagnosis of asbestosis. Trial Court Opinion, 10/18/12, at 5-6. The trial court further concluded that “[b]y asking his doctors whether prior exposure was related to his lung conditions, Bone clearly indicated he knew about asbestos and its potential harm.” ***Id.*** at 7. The trial court opined that “Bone was not symptom[-]free because he had complained to doctors in the early 1990s about breathing difficulties.” ***Id.***

Upon our review of the record, we conclude that the trial court erred in granting Crane’s Motion for summary judgment. Specifically, Plaintiffs presented evidence contradicting Crane’s claim that Bone was on notice of an asbestos-related injury long before 2009. In support, Plaintiffs presented an affidavit executed by Bone, Bone’s testimony, and his medical progress notes throughout the years.

Bone testified that in the 1990s, the VA in Wilmington told Bone that he suffered from COPD and asthma. N.T., 6/23/11, at 72, 73. Bone testified that he had regular X-rays from his “regular practitioner” and breathing tests as recommended by the VA. ***Id.*** at 73. Bone indicated that

only about six months to a year prior to his testimony, he was diagnosed with asbestosis in addition to COPD and asthma. ***Id.*** at 74.

Medical progress notes throughout the years confirm Bone's testimony. The medical progress reports indicate that Bone's primary care physician closely monitored Bone not only for COPD and asthma, but to determine if he also suffered from asbestos-related symptoms:

October 18, 1996 (Progress Note): Dr. Gintautiene described Bone's first visit to her office, acknowledging, *inter alia*, Bone's statements that he had been exposed to asbestos over a 10-year period and that yearly chest x-rays indicated pleural thickening. Regarding Bone's breathing difficulty, Dr. Gintautiene stated, "I feel that this would probably be a mix of both restrictive and obstructive lung disease exacerbated by seasonal allergies." Dr. Gintautiene indicated that she would obtain a baseline x-ray during "a quiet period, as far a[s] lung problems are concerned[.]" Dr. Gintautiene did not diagnose Bone with asbestosis at his initial visit.

November 14, 1997 Progress Note: Dr. Gintautiene diagnosed Bone with "[m]ild obstructive lung disease[.]" Dr. Gintautiene indicated that Bone had a "[h]istory of exposure to asbestos: He will need a repeat CXR in February."

June 20, 2000 Progress Note: Bone presented to Dr. Gintautiene for "increased dyspnea[,] which is day to day." Dr. Gintautiene again diagnosed Bone with COPD, prescribing two puffs on a Combivent inhaler four times a day, as well as prescribing use of Vanceril and Serevent Diskus inhalers. Dr. Gintautiene separately noted Bone's "[h]istory of exposure to asbestos[.]" and the need for yearly chest x-rays. She further observed that a chest x-ray had been taken that day. Dr. Gintautiene did not diagnose Bone with asbestosis.

July 24, 2000 Progress Note: Bone had a follow up appointment for "bronchospasm **as caused by COPD.**" Progress Note, 7/24/00 (emphasis added). Dr. Gintautiene's Progress Note stated, "Chronic obstructive pulmonary disease and history of asbestos exposure: He needs a yearly chest x-ray...." ***Id.***

February 11, 2002 Progress Note: Bone sought treatment for a cough and chest congestion. Dr. Gintautiene diagnosed Bone with exacerbation of his COPD. Dr. Gintautiene stated that Bone had a chest x-ray taken that day. There is no mention of asbestosis-caused symptoms.

October 8, 2002 Progress Note: Bone sought treatment from George Poehlman, M.D. ("Dr. Poehlman"), for cough and chest congestion. Dr. Poehlman summarized Bone's medical history as including COPD with asbestos exposure. Dr. Poehlman stated that Bone had acute onset of bronchitis **with a history of COPD secondary to asbestos** and cigarettes.

July 8, 2003 Progress Note: Dr. Gintautiene noted that Bone appeared "for followup of the usual medical problems." In addition to treatment for prostate problems, Dr. Gintautiene indicated that Bone had no dramatic increase in shortness of breath over the past year, no cough and no chest pain. "Basically, he is doing quite well except for the recurrence of prostate cancer." In her assessment, Dr. Gintautiene again diagnosed Bone with severe COPD. However, Dr. Gintautiene stated that Bone "had a normal chest x-ray in January 2003 also." Dr. Gintautiene did not identify symptoms caused by asbestos exposure.

January 12, 2004 Progress Note: Bone appeared for a "follow up of medical status, mainly COPD." At that time, Bone reported no cough or unusual shortness of breath[.]" Dr. Gintautiene assessed Bone as having "[s]evere [COPD]: chest x-ray is done today."

January 28, 2005 Progress Note: Bone sought treatment from regional VA medical facility for a melanoma on his left forearm. The nurse practitioner, who transcribed the Progress Notes, summarized Bone's medical history as including asbestosis, and that he was to continue with inhalers for asbestosis.

September 22, 2006 Progress Note: Bone appeared for a "regular followup." Dr. Gintautiene notes the absence of a cough or shortness of breath. Dr. Gintautiene diagnosed Bone with, *inter alia*, malignant melanoma and prostate cancer. She further assessed Bone as having COPD and stated that Bone was to have a chest x-ray. The chest x-ray disclosed "streaky pleural

change" but "[n]o acute infiltrate." Dr. Gintautiene identified no symptoms caused by asbestos exposure.

November 3, 2006 Progress Note: Dr. Gintautiene summarized Bone's medical history, including prostate cancer, COPD, and a large hernia. In reviewing Bone's symptoms, Dr. Gintautiene stated the following: "Lungs: [Bone] does have [COPD], but no difficulty with breathing. No cough, pneumonias, or bronchitis." Dr. Gintautiene's reviewed a May 23, 2005 CT scan of Bone's chest, which showed, *inter alia*, "chronic bilateral noncalcified pleural plaquing[.]" Dr. Gintautiene did not identify any symptoms caused by exposure to asbestos. Dr. Gintautiene's notes further summarized Bone's chest x-ray as follows: "There are a few, streaky, pulmonary changes noted, noncalcified, stable from prior study, September 2006."

March 21, 2007 Progress Note: Dr. Gintautiene noted Bone's history of malignant melanoma on the left forearm, then stated that "[b]ecause of the cough, history of melanoma, and prostate cancer, we will get a chest x-ray today. I do not see any acute lesions, and will have the radiologist give a report."

September 19, 2007 Progress Note: Dr. Gintautiene assessed Bone as having, *inter alia*, COPD, but does not identify any symptoms as being caused by exposure to asbestos.

February 18, 2008 Progress Note: The chest x-ray disclosed "some chronic streaky pulmonary markings bilaterally, some of which is likely pleural plaque, noncalcified." However, the report also states that "the findings appear stable from prior study of 2006 and 2007, with only a few new linear markings seen at the right lung base."

March 18, 2008 Progress Note: Dr. Gintautiene summarizes "Active Problems" as including COPD, but not asbestosis or asbestos-related symptoms.

September 26, 2008 Progress Note: Dr. Gintautiene summarizes "Active Problems" as including COPD, but not asbestosis or asbestos related symptoms.

November 10, 2009 Evaluation: Stanley L. Altschuler, M.D., a lung specialist, diagnosed Bone as having bilateral asbestos related pleural disease and bilateral asbestosis.

Based upon the above review, we conclude that the trial court erred in granting summary judgment in favor of Crane (and all defendants) based upon the statute of limitations. Specifically, we conclude that the notations related to asbestos in the Bone's medical record, prior to 2009, provided no basis to impose a duty upon Bone to know that he suffered from symptomatic asbestosis, or trigger a duty for further inquiry.

As the trial court pointed out, Bone was told in 1996 that it was "probable" that asbestos contributed to Bone's ailments. Trial Court Opinion, 10/18/12, at 5. However, the record reflects that Bone exercised due diligence by seeking treatment from Dr. Gintautiene, who concluded that Bone's breathing issues were attributable to COPD. Dr. Gintautiene's 1996 Progress Notes did not diagnose Bone with symptomatic asbestosis. In 2002, Dr. Poehlman diagnosed Bone with "acute onset of bronchitis with a history of COPD secondary to asbestosis," but the record reflects no "history" of asbestosis in Bone's medical records, or that Bone was informed of a potential change in diagnosis. Moreover, Bone's follow-up appointments showed no diagnosis of or treatment for symptomatic asbestosis. When Bone sought treatment for a melanoma in 2005, the Progress Notes indicated a prior diagnosis of asbestosis, and that Bone was to continue with his inhalers for treatment. However, Bone's medical records reflect no formal diagnosis of symptomatic asbestosis. The records further indicate that the inhalers were prescribed to treat COPD. Based upon these

discrepancies, we cannot conclude that this Progress Note triggered a duty in Bone to know of a diagnosis for symptomatic asbestosis, or a duty of further inquiry. Bone's subsequent medical records disclose only his continued treatment for COPD, and no diagnosis of or treatment for symptomatic asbestosis until 2009.

Based upon the foregoing, we conclude that the trial court erred in granting summary judgment against Bone and in favor of Crane. The record does not support the trial court's conclusion that Bone's Progress Notes triggered a duty to know of a diagnosis of symptomatic asbestosis, or a duty of further inquiry, prior to 2009. Accordingly, we vacate the Order of the trial court and remand for further proceedings consistent with this Memorandum.

Order vacated; case remanded for further proceedings consistent with this Memorandum; Superior Court jurisdiction relinquished.

Judgment Entered.

A handwritten signature in dark ink, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 7/29/2013