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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000443-MR

JULIA ANN MINDEL, ANCILLARY EXECUTRIX
OF THE ESTATE OF OSCAR MINDEL, JR. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 10-CI-007125

FLUOR ENTERPRISES, INC.
AND FLUOR-DANIEL ILLINOIS, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Julia Ann Mindel, Ancillary Executrix of the Estate of Oscar Mindel, Jr., appeals from a Summary Judgment of the Jefferson Circuit Court in her action alleging a breach of duty resulting in the decedent's death due to long-term asbestos exposure. She argues that the trial court erred in excluding an expert witness who would have testified that the Appellees deviated from the standard of

care. She also contends that even if the testimony were properly excluded, Summary Judgment was improperly rendered. For the reasons stated below, we find no error and AFFIRM the Summary Judgment on appeal.

The facts are not in controversy. Oscar Mindel, Jr. ("Mr. Mindel") began employment as a laboratory assistant with Louisville Gas & Electric ("LG&E") beginning in approximately 1953. Over the years that followed, Mr. Mindel worked at three or more LG&E facilities in the Louisville area, where he was promoted to Instrument Man B, Instrument Man A, and eventually Instrument Supervisor. These positions had various responsibilities, including maintenance on turbines and boilers used in the production of electricity. The record indicates that when working on or around the turbines, Mr. Mindel was exposed to asbestos insulation and asbestos dust. He retired from LG&E in 2001.

In 2009, Mr. Mindel was diagnosed with terminal lung cancer, and he died shortly thereafter. The following year, his wife Julia Ann Mindel, as Ancillary Executrix, filed the instant action in Jefferson Circuit Court against 26 defendants alleging in relevant part that the parties involved in the design and installation of the asbestos-containing components should have 1) researched whether their materials and components were hazardous, 2) discovered that the insulation products were dangerous, and 3) warned of the hazard or specified an asbestos-free substitute.[1] The matter proceeded in Jefferson Circuit Court,

[1] The Appellant, without explanation, refers to Executrix Julia Ann Mindel in her appellate brief as "Judy". Additionally, she refers to Fluor Enterprises, Inc. and/or Fluor-Daniel Illinois, Inc. as "Pioneer". It appears from the record that Pioneer Service and Engineering Co. ("Pioneer") was a predecessor entity to what later became known as Fluor-Pioneer and eventually Fluor

whereupon Fluor filed a Motion for Summary Judgment alleging that Julia Ann Mindel (hereinafter "Mrs. Mindel") failed to name any engineering expert to establish the standard of care for design engineers during the relevant period. Thereafter, the court rejected Mrs. Mindel's response that it was not required to present expert testimony because the jury could rely upon its own knowledge to determine the standard of care. The court granted Mrs. Mindel additional time to produce expert witnesses, and she later named Stephen Berger as an engineering expert.

After deposing Berger, Fluor renewed its Motion for Summary Judgment on the grounds that Berger lacked the expertise on the standard of care applicable to design engineers during the relevant time period. By way of an Opinion and Order rendered on November 1, 2013, the Jefferson Circuit Court determined that,

> After consideration of the arguments, and the cited testimony and authority, it is clear that Berger has not indicated that he can testify as to the standard of care as applied to *Fluor*. He has indicated no articles containing knowledge that may be imputed to Fluor. The testimony of Fluor's experts is confined to the design function of engineers and implicates no duty to warn. Under these circumstances there simply is no evidence which indicates that Fluor had any duty to Mindel's decedent and without such a duty, there can be no breach and no liability.

Enterprises, Inc. In keeping with the Appellant's usage of the term "Pioneer", the Appellee employs the same terminology in its brief. However, because the Jefferson Circuit Court and the record address that entity as "Fluor", we will employ the name "Fluor" for all Fluor-related entities unless otherwise noted.

The court went on to sustain Fluor's Motion for Summary Judgment, and this appeal followed.

This appeal centers on whether Fluor, or its predecessors in interest which provided design and engineering services to LG&E during the period of Mr. Mindel's employment, breached a duty of care to Mr. Mindel which resulted in his illness and death. Mrs. Mindel now argues that the court erred in excluding the testimony of its expert witness Stephen Berger, who would have testified to such a duty. She contends that Berger's impeccable qualifications were sufficient to permit him to opine that Fluor deviated from its standard of care. She argues that Berger was prepared to testify at trial as to the content of professional articles of the type reasonably relied upon by design engineers during the time that the LG&E plants were being designed and constructed, and that this testimony would have established at trial Fluor's duty to warn Mr. Mindel of the dangers of asbestos. Mrs. Mindel goes on to argue that she could have prevailed at trial even without such expert testimony, because the health risk to Mr. Mindel was obvious to a layperson. Finally, Mrs. Mindel contends that the trial court improperly construed the facts in a light most favorable to Fluor, and improperly relied on non-binding, inapplicable and unpublished case law.

In response, Fluor argues that expert testimony was essential to establish the existence of Fluor's duty, if any, to design LG&E's plants in a particular manner, and/or to warn employees of possible hazards arising from those designs. It maintains that Berger's deposition demonstrates that he could not

testify as to Fluor's duty, if any, during the applicable time period at issue, and that the court properly concluded therefrom that without a duty there can be no breach and no damages. Fluor also asserts that Mr. Mindel's lung cancer was caused by his longstanding smoking habit, but acknowledges that medical causation must be construed in Mrs. Mindel's favor for the limited purpose of a Summary Judgment analysis.

In concluding that Berger had no basis for testifying as to the standard of care had the matter gone to trial, the court found that "while [Mrs.] Mindel cites a number of articles which urge engineers to take the risk of asbestos into account in creating their *designs*, she fails to cite to this Court any materials reviewed and relied upon by Berger which state that an engineer has a duty to warn." (Emphasis in original). The first question for our consideration is whether this conclusion is supported by the record. We must answer this question in the affirmative. When Berger was deposed by Fluor, he expressed opinions on materials found in engineering publications such as the 1948 publication of the American Society of Heating and Ventilation Engineers ("ASHVE"). As found by the trial court, this publication addresses design parameters, but does not establish a standard of care. Berger did not articulate a standard of care for design engineers during the time frame at issue, and the Jefferson Circuit Court properly so found. Clearly, where no duty is articulated, there can be no breach and resultant damages.

Kentucky Rules of Evidence (KRE) 702 states,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

The application of KRE 702 lies within the sound discretion of the trial court. *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 677 (Ky. App. 1999).

In the matter before us, the record supports the Jefferson Circuit Court's conclusion that Berger was not prepared to testify as to Fluor's standard of care during the design of the LG&E facilities had the matter gone to trial. As such, we find no abuse of discretion and accordingly affirm the trial court on this issue. Mrs. Mindel's claim that Fluor's predecessor in interest, Pioneer, specified the asbestos-containing materials at LG&E's Cane Run and Mill Creek facilities, and its assertion that Pioneer knew or should have known that asbestos exposure caused lung cancer, do not alter this conclusion as neither claim establishes a duty of care applicable to Pioneer at the time the LG&E facilities were designed. Further, we are guided by our prior holdings in *Logsdon v. Cardinal Industrial Insulation Co., Inc.*, 2006 WL 2382501 (Ky. App. 2006), and *Strange v. Albert Kahn Associates, Inc.*, 2005 WL 3488280 (Ky. App. 2005), where in each case

Summary Judgment was affirmed when the plaintiff's expert could not establish the standard of care applicable at the time of the alleged breach.

Mrs. Mindel also contends that expert testimony is unnecessary to establish Fluor's negligence, because the risk is obvious to a lay person. We are not persuaded by this argument. The "duty of care in Kentucky of licensed professionals, such as engineers and architects, who present themselves as having special knowledge, skill or expertise is to perform according to the standards of the profession." *Logsdon*, *supra*, at p.4. As Fluor properly notes, the matter before us involves complex engineering decisions regarding the appropriate materials to be used in a variety of applications over a number of years. While the dangers of asbestos exposure are well known in contemporary society, we cannot retroactively impose contemporary standards of care on design engineers in the 1950s and '60s. We find no error in the Jefferson Circuit Court's conclusion that expert testimony is required to establish this standard.

Lastly, Mrs. Mindel argues that the trial court erred in construing the facts in a light most favorable to Fluor, and improperly relied on the unpublished decisions of *Logsdon* and *Strange*. Mrs. Mindel contends that *Logsdon* and *Strange* are distinguished from the matter at bar, because she demonstrated that Fluor was aware of asbestos hazards when it specified, designed and procured the insulation installed at LG&E's Cane Run and Mill Creek facilities and produced expert testimony that Fluor deviated from its standard of care. The focus of her claim of error on this issue is her contention that Fluor's witnesses established that it had a

duty to warn, and that the trial court improperly failed to construe these facts in a manner most favorable to her.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Mrs. Mindel and resolving all doubts in her favor, we cannot conclude that Summary Judgment was improperly rendered. Fluor's engineering expert, Gordon Hart, testified that worker safety is the responsibility of the employer and not design engineers, and

stated in deposition that a design engineer had no duty to warn of the risks of asbestos exposure before OSHA was enacted and information concerning the risks of asbestos exposure was published in Material Safety Data Sheets. Similarly, Fluor's corporate executive, Stanley P. Gil, never testified as to the duty of a 1960's design engineer to warn of potential asbestos hazards. Rather, he responded to a hypothetical question from Mrs. Mindel's counsel by answering that a design engineer would have a duty to warn *if he knew that asbestos were harmful.* However, nothing in the record demonstrates that Fluor was aware of the dangers of asbestos dust when the Cane Run and Mill Creek facilities were being designed, nor that such awareness gave rise to a standard of care. Finally, the Jefferson Circuit Court's reliance on the unpublished opinions of *Logsdon* and *Strange* was wholly proper. *See generally*, CR 76.28(4).

Ultimately, the Jefferson Circuit Court sustained Fluor's Motion for Summary Judgment based on Mrs. Mindel's inability to produce expert testimony as to the standard of care as it existed during the design phase of the LG&E facilities. This conclusion is supported by the record, and as such we find no error. For the foregoing reasons, we AFFIRM the Summary Judgment of the Jefferson Circuit Court.

ALL CONCUR.

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