[J-68-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

JOHN ANDREW GREGG, EXECUTOR OF THE ESTATE OF JOHN I. GREGG, JR., DECEASED,	:	No. 38 EAP 2005
	:	Appeal from the Judgment of the Superior Court entered on 4/25/05, at No. 3528 EDA 2003, reversing and remanding the order of the Court of Common Pleas, Philadelphia County, Civil Division entered on 11/10/03 at No. 3888, March Term 1999
Appellee	:	
v.	:	
V-J AUTO PARTS, INC.,	:	
Appellant		RESUBMITTED: May 30, 2007

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: December 28, 2007**

Because I believe that the Majority's disposition of this matter is little more than a credibility determination, and thus improperly invades the province of the fact finder, I respectfully dissent.

It can be tempting for a court in a summary judgment matter to determine whether it finds a party's evidence persuasive. Yet, the judiciary is forbidden from engaging in such an inquiry at the summary judgment phase. Our function in a summary judgment matter is simply to "view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party." Mountain Village v. Bd. of Supervisors of Longswamp Twp., 874 A.2d 1, 5-6 (Pa. 2005).

Credibility determinations are not properly made by a judge at summary judgment as credibility is an issue reserved to the fact finder. See Scalice v. Pennsylvania Employees Benefit Trust Fund, 883 A.2d 429, 432 n.5 (Pa. 2005).

In the matter sub judice, the evidence when taken in the light most favorable to Appellee as nonmoving party establishes that Decedent was exposed to Appellant's asbestos laden product. Furthermore, Appellee offered expert testimony that Decedent's mesothelioma was caused by occupational and nonoccupational exposure to asbestos, and that only the barest amounts of asbestos can cause mesothelioma.[1] This evidence, taken in the light most favorable to Appellee as the nonmoving party, establishes that Decedent was exposed to asbestos via Appellant's product at levels sufficient to cause mesothelioma, the disease which killed Decedent. Clearly, such evidence presents a jury

[1] In brief, Appellee claimed that Bendix brakes Decedent had purchased from Appellant contained asbestos fibers. In support of his claim, Appellee produced deposition testimony of two of the Decedent's children. Carolyn Morici ("Morici"), Decedent's daughter, stated that she bought Bendix brakes for Decedent at Appellant's store when she was a child. Deposition of Carolyn Morici at 37 and 39. Morici observed Decedent installing the brakes and that the procedure was dusty. Id. at 73. Appellee also recalled buying auto supplies for Decedent at Appellant's store and observing Decedent perform the dusty task of installing new brakes on the family's automobiles. Deposition of John Andrew Gregg at 93 and 124.

Appellee also adduced the testimony of Charles Schaefer ("Schaefer"), who was a neighbor of Decedent's in the 1950's and 1960's. Schaefer testified that he observed Decedent placing brake shoes in his cars and that the process was dusty. Deposition of Charles Schaefer at 39. Schaefer also testified that the Decedent, to his knowledge, bought his brakes only at V-J. Deposition of Charles Schaefer at 46.

Finally, Appellee produced a supplemental report by his medical expert which opined that all of Decedent's "asbestos exposures both occupational and non-occupational contributed to the development of his malignant mesothelioma." Supplemental Report of Harvey Spector, M.D., 8/20/2001, at 1. This supplemental report specifically noted that the expert had reviewed the Decedent's exposure to asbestos while installing brake linings on his automobile. Id. Another expert stated that "extremely low exposure levels are capable of producing mesothelioma and other malignancies. Both animal and human data exist that show as little as one day of exposure can lead to the development of mesothelioma . . . ." Affidavit of Arthur L. Frank, M.D., dated November 5, 2002.

question as to causation for if Appellee's evidence were credited in its entirety, the jury could award relief to Appellee.

The Majority, however, concludes that this evidence does not present a jury question. The Majority does not come to this conclusion by finding that this evidence, when credited in its entirety, would fail to support a jury verdict for Appellee. Rather, it acknowledges the evidence as adduced by Appellee but then finds that not all of Appellee's evidence is worthy of belief. Specifically, the Majority regards the opinion offered by Appellee's scientific expert to be of suspect quality; the Majority apparently cannot square the scientific expert's opinion regarding the causation of asbestosis with the Majority's own views on how asbestosis is caused.[2]

This simply is not the function of summary judgment. Summary judgment is designed to winnow out those matters in which the evidence as adduced by the party bearing the burden of proof, even if that evidence is believed in its entirety, is insufficient to establish the cause of action. In such matters, summary judgment should enter since it is wholly unnecessary to progress to the fact finding crucible of trial. Summary judgment is not, however, the conduit by which the judiciary can make credibility determinations by fiat. Accordingly, I respectfully dissent.

Madame Justice Baldwin joins this dissenting opinion.

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[2] I would caution that a determination of whether a certain amount of a pollutant can bring about an illness is not arrived at via an application of pedestrian common sense. This court has recognized that for such questions, scientific expert testimony is required as "it is generally acknowledged that the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson. " Hamil v. Bashline, 392 A.2d 1280, 1285 (Pa. 1978).