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

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	:	
		RE-SUBMITTED: May 30, 2007

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: December 28, 2007**

Because I agree with Mr. Chief Justice Cappy's conclusion that the Majority is erroneously invading the province of the fact finder, I wholly join him and respectfully dissent. Further, I take issue with the Majority's discussion of expert testimony related to the quantum of exposure necessary for asbestos to become a substantial contributing factor in causing mesothelioma. I am particularly troubled by the majority's reference to Judge Klein's leading opinion in Summers v. Certainteed Corp., 886 A.2d 240 (Pa. Super. 2005) (equally divided court) (discussing the difficulties in assessing the credibility of expert testimony in an asbestos case) and the majority's observation that, "one of the difficulties courts face in the mass tort cases arises on account of a willingness on the part of some experts to offer opinions that are not fairly grounded in a reasonable belief concerning the underlying facts and/or opinions that are not couched within accepted scientific methodology." Maj. Slip Op. at 17.

It appears that the Majority, in expounding on what it labels as "Judge Klein's perspective," paints the entire spectrum of experts with a broad brush of quackery regarding the issuance of their respective opinions. Moreover, this approach suggests that the trial court is obligated to ferret out opinions of arguable scientific merit from those of a dubious nature, and everything in between, even where Appellant never challenged the methodology of Appellee's expert as being outside the accepted scientific methodology of asbestos cases and never requested a Frye hearing (to determine whether the general scientific community has reached a general acceptance of the principles and methodology employed by the expert witness before the trial court will allow the expert to testify regarding his conclusions).[1]

This case is before us on Appellant/Defendant's motion for summary judgment. Of course, we must consequently view the facts in the light most favorable to the Appellee/Plaintiff, who is the non-moving party. See Pa.R.Civ.P. 1035.2; see also Atcovitz v. Gulph Mills Tennis Club, Inc., 812 A.2d 1218, 1221 (Pa. 2002). Viewed in that light, we find that Appellee/Plaintiff has posited that, Dr. Harvey Specter, M.D., a board certified pathologist, confirmed Decedent's diagnosis of mesothelioma. In his supplemental report, Dr. Specter stated that Decedent's exposure to brake linings which contained asbestos substantially contributed to his malignant disease. Additionally, expert affidavits of Dr. James Girard, a chemist; Dr. Arthur Frank, an occupational disease physician; and, Dr. Richard Lamen, an epidemiologist and former deputy director of OSHA, concluded that it is

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[1] See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (setting forth an exclusionary rule of evidence that applies only when a party wishes to introduce novel scientific evidence obtained from the conclusions of an expert scientific witness). We first adopted the Frye test in Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977) and more recently reaffirmed it in Grady v. Frito-Lay, 839 A.2d 1038 (Pa. 2003), notwithstanding the United States Supreme Court's departure from Frye in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

generally accepted that relatively small amounts of asbestos exposure can cause mesothelioma and that regular and frequent exposure need not occur to cause this form of cancer.

Relying on the Tragarz test,[2] the Majority has completely disregarded all of this proffered medical evidence. Tragarz held that when direct evidence of exposure to asbestos cannot be proven, a putative plaintiff must show frequent, regular, and proximate contact with asbestos to state a cause of action. Here, however, Appellee/Plaintiff does not need such circumstantial evidence as he has asserted a sufficient factual basis of direct exposure to overcome summary judgment. Hence, summary judgment should be denied and any challenge to the sufficiency of Appellee/Plaintiff's evidence should occur either at a Frye hearing, as discussed supra, or at trial, through the cross-examination of Appellee/Plaintiff's experts or presentation to a jury of opposing expert views.

Madame Justice Baldwin joins this dissenting opinion.

[2] Tragarz v. Keene Corp., 980 F.2d 411 (7th Cir. 1992).