IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIRGINIA EDMISTEN, Individually and as Executrix of the Estate of FRANK EDMISTEN,	§	No. 114, 2012
Plaintiff Below, Appellant,	§	Court Below: Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. N10C-06-249
GREYHOUND LINES, INC.,	§	
Defendant Below, Appellee.	§	

Submitted: July 5, 2012
Decided: August 13, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 13th day of August 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Virginia Edmisten, the plaintiff-below ("Mrs. Edmisten"), appeals from the Superior Court's grant of summary judgment in favor of the defendant-below, Greyhound Lines, Inc. ("Greyhound"). Mrs. Edmisten sued Greyhound alleging that her now-deceased husband, Frank Edmisten ("Frank"), was tortiously exposed to asbestos contained in Greyhound products. On appeal, Mrs. Edmisten claims

that the Superior Court reversibly erred by impeaching the credibility of witnesses in order to grant summary judgment. We disagree and affirm.

2. Frank Edmisten is alleged to have worked with products containing asbestos from 1965 to 1977 at O'Neal's Bus Service ("O'Neal's") in Wilmington and Smyrna, Delaware. In 2010, Frank and Virginia Edmisten sued Greyhound, among other defendants, claiming that Greyhound's products exposed Mr. Edmisten to asbestos, causing his mesothelioma. Before his death later that year, Frank testified in a discovery deposition that O'Neal's owned two Greyhound buses—purchased "from a Greyhound location in North Carolina"—while he worked there, and that he (Frank) was responsible for ordering parts for those buses. Frank also testified that he ordered replacement clutches and brakes for those buses from that same North Carolina business, and that he installed Greyhound brakes and clutches on each bus. Frank acknowledged that he did not know whether in fact those parts contained asbestos, but testified that he "would think so."

3. Roger O'Neal ("O'Neal"), a coworker of Frank's, was also deposed. O'Neal testified that the replacement brakes generally used at O'Neal's during Mr. Edmisten's employ contained asbestos. He stated that: "Absolutely. Sure. I mean . . . in that time there, I wasn't a mechanic. But I know [the replacement brakes contained asbestos]." O'Neal also testified that, "as far as my knowledge [goes],"

replacement clutches also "probably" contained asbestos, but again added the caveat that, "I didn't work on them. . . . I drove them."

4. While this action was pending, Frank died of mesothelioma.[1] The action proceeded with only Mrs. Edmisten as plaintiff, both individually and on behalf of Frank's estate. On October 3, 2011, the Superior Court granted summary judgment to Greyhound.[2] The court held that Frank's "uncorroborated and speculative testimony that he was exposed to asbestos while replacing parts on two used coach buses, which he claims were purchased from Greyhound" did not raise a genuine factual issue as to whether "his injures were [in fact] the result of exposure to Greyhound asbestos-containing products."[3] In footnotes, the Superior Court described Frank's testimony as "confusing and somewhat equivocal," and observed that one "portion of the transcript gives the impression that [he] does not have a clear recollection of the buses' provenance."[4] The court noted that O'Neal's recollection about where his business purchased replacement parts

[1] *In re Asbestos Litig., Lmt. to Edmisten, Frank,* 2011 WL 5326263, at *1 (Del. Super. Oct. 3, 2011).

[2] *Id.*

[3] *Id.* at *2.

[4] *Id*. at *1, n. 1, n. 7. For example, Frank testified at one point that O'Neal's bought the "1957" Greyhound buses in "55," but later stated that O'Neal's "bought them in 1965," and that 1957 "was the year of the chassis." He also stated that the clutches came from a "regular Greyhound company" in North Carolina, but later admitted that Greyhound's operation there "was a bus terminal." Frank also later "speculated that the buses themselves may have been purchased in Georgia," not North Carolina.

differed from Frank's, meaning Mrs. Edmisten "has presented conflicting evidence as to whether [Frank] ever came into contact with any Greyhound products at all." That inconsistency, in particular, led the Court to conclude that Frank's claims that he was exposed to Greyhound products "are merely speculative and not evidence of a genuine factual dispute."[5] This appeal followed.

5. On appeal, Mrs. Edmisten claims that the Superior Court erroneously granted summary judgment to Greyhound, because the court improperly impeached witness testimony and resolved factual disputes that it should have left for a jury. Greyhound counters that the trial court correctly found that the relevant testimony was "speculative," and that there also "is no [other] non-speculative . . . evidence that [Frank] was exposed to an asbestos-containing product attributable to [Greyhound]."

6. This Court reviews the grant of summary judgment *de novo*.[6] Viewing the facts and reasonable inferences in the light most favorable to the non-moving party,[7] if an essential element of the non-movant's claim is unsupported by sufficient evidence for a reasonable juror to find in that party's favor, then

[5] *Id.* at *2.

[6] *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008).

[7] *Nack v. Charles A. Wagner Co., Inc.*, 803 A.2d 428 (Del. 2002).

summary judgment is appropriate.[8] In asbestos-related products liability tort litigation, the plaintiff's burden is to show "that a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used."[9]

7. In *Smith v. Delaware State University*,[10] this Court held recently that "where the plaintiff's testimony is so inconsistent that no reasonable juror could accept it,"[11] that testimony will not be credited as raising a genuine issue of material fact, to overcome a defendant's summary judgment motion. The Superior Court decided Edmisten's case before our decision in *Smith*, but applied similar reasoning to reach its conclusion. The trial court found that Frank Edmisten's inconsistent testimony about his company's purchases of Greyhound buses and parts suggested that he did not truly remember those facts, and instead was speculating. The Superior Court did not err by finding that Edmisten's

[8] *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991).

[9] *In re Asbestos Litig.*, 509 A.2d 1116, 1117 (Del. Super. 1986) (citation omitted). *See also Nack*, 803 A.2d 428 ("Among the elements that a plaintiff must prove in an asbestos-related products liability action is the existence of a sufficient nexus between the defendant and the injury-causing asbestos products.").

[10] __ A.3d __, 2012 WL 2583394 (Del. 2012).

[11] *Id.* at *4.

"inconsistent and confusing" testimony was so flawed "that no reasonable juror could accept it."[12]

8. To the extent the Superior Court found that a jury could accept Frank's testimony, but erroneously chose to credit O'Neal's conflicting testimony instead,[13] that error was harmless. There is insufficient record evidence that any Greyhound product to which Frank testified that he was exposed, actually contained asbestos. Frank testified that he did not know whether the Greyhound replacement brakes and clutches he installed contained asbestos. O'Neal testified that he believed that the replacement brakes and clutches generally used in his

[12] *Id.*

[13] In relevant part, the trial court reasoned as follows:

> While it is true that the Court must make allowances for lapses in witnesses' memories, *the conflicting testimony presented by the Plaintiff, as well as the inconsistent and confusing nature of [Edmisten's] own testimony*, leads the Court to conclude that [Edmisten's] claims that he was exposed to Greyhound products are merely speculative and not evidence of a genuine factual dispute.

In re Asbestos Litig., Lmt. to Edmisten, Frank, 2011 WL 5326263, at *2 (Del. Super. Oct. 3, 2011); *see also Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) ("The role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but *not to decide such issues*.") (italics added); *id.* at 99-100 ("[V]iew[ing] the evidence in the light most favorable to the non-moving party . . . means [the court will] . . . accept the non-movant's version of *any disputed facts*.") (italics added).

business contained asbestos, but he also appeared to disavow any personal knowledge of that fact, and did not identify any Greyhound product specifically.[14]

9. Because Mrs. Edmisten provided no evidence indicating that Greyhound, specifically, sold or supplied asbestos-containing brakes and clutches to O'Neal's, she failed to present sufficient evidence to support an essential element of her claim. Therefore, any error by the Superior Court was harmless, and the court's grant of summary judgment to Greyhound was correct.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[14] O'Neal's testimony is plainly distinguishable from the evidence presented in *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737 (Del. 2003), upon which Edmisten relies. In *Cain*, the plaintiff remembered using a particular product which he knew contained asbestos. *Id.* at 741-42.