[Cite as *Cantrell v. Adience, Inc.*, 2010-Ohio-3614.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93944

ALICE CANTRELL, ET AL.

PLAINTIFFS-APPELLANTS

vs.

ADIENCE, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-645666

BEFORE: Gallagher, A.J., Boyle, J., and Jones, J.

RELEASED AND JOURNALIZED: August 5, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellants, Alice and Bernard Cantrell, appeal the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellee, Borg-Warner Corporation. For the reasons stated herein, we affirm.

{¶ 2} Alice Cantrell (hereafter "Cantrell") and her husband, Bernard Cantrell ("Bernard"), filed a complaint against Borg-Warner and several other entities. The complaint asserted numerous claims arising from Cantrell's alleged exposure to asbestos and asbestos-containing materials during her employment with the General Motors Company, Chevrolet plant in Parma, Ohio ("the GM plant"), from 1977 through 1979. She alleges this exposure caused her to develop malignant pleural mesothelioma. She was made aware of this condition on or about January 30, 2006.

{¶ 3} Cantrell claims that Borg-Warner was the manufacturer of asbestos-containing clutch plates supplied to the GM plant. Cantrell worked in the transmission department of the GM plant from the spring of 1978 until the fall of 1979, for a period of 16 or 17 months. She spent the majority of that time working in the transmission assembly room. Although she never directly handled a clutch plate, she worked within 20 to 40 feet of where clutch assembly work took place. She submitted expert reports to support

her claim that her occupational exposure to asbestos at the GM plant was a substantial cause of her mesothelioma.

{¶ 4} Cantrell's husband, Bernard, worked for the GM plant from 1953 until 1992. He worked in the transmission division from 1953 until 1977, and then transferred to the prop-shaft division. He was able to identify Borg-Warner as a manufacturer of clutch plates that were supplied to the GM plant because he saw the name "Borg-Warner" on bills of lading in the 1950s and 1960s. He also testified that he was not aware of any other manufacturer for the clutch plates during his time in the transmission division.

{¶ 5} Borg-Warner and another supplier, Delco-Remy, were identified as suppliers of asbestos-containing, automatic transmission clutch plates in internal documents from General Motors in early 1977. These documents related to a "Hygiene Survey" that involved air sampling for asbestos dust. Importantly, Mrs. Cantrell did not begin working in the transmission division until the following year.

{¶ 6} Richard Anderson, a retired vice president of Borg & Beck, a division of Borg-Warner, testified that he worked for the company from 1960 until 1982. He was familiar with Borg-Warner's manual transmission clutch parts, but was not knowledgeable about whether Borg-Warner supplied any asbestos-containing clutch parts for automatic transmissions to General

Motors. He indicated that General Motors was one of Borg-Warner's major customers, and he conceded that the 1977 Hygiene Survey established Borg-Warner as a supplier of asbestos-containing, automatic clutch packs.[1]

{¶ 7} Borg-Warner filed a motion for summary judgment, claiming there was no evidence of the presence of a Borg-Warner clutch part for automatic transmissions in the GM plant during Cantrell's employment, no evidence that Cantrell was exposed to asbestos from a Borg-Warner supplied or manufactured product, and no evidence that any such product was a substantial factor in causing Cantrell's disease.[2] Cantrell opposed the motion. She argued that Borg-Warner's history as a supplier of asbestos-containing clutch plates creates an inference that it continued to supply these parts during her employment, that this exposure was a substantial cause of her mesothelioma, and that this was her only significant occupational exposure to asbestos.

{¶ 8} Following a hearing, the trial court granted Borg-Warner's motion and provided there was no just cause for delay. The court reasoned as follows: "Plaintiff has failed to provide evidence that a Borg-Warner

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[1] Borg-Warner sold the division responsible for its clutches and transmission line of products in 1989 and no longer possesses the old sales records.

[2] Amicus curiae briefs in support of Borg-Warner were filed by (1) the Coalition for Litigation Justice, Inc., and (2) General Electric Company, CBS Corporation, Fairmont Supply Company, Osram Sylvania, Inc., and Mallinckrodt, Inc.

product was supplied to the General Motors facility during plaintiff's employment. The jury would have to infer that General Motors continued ordering clutches from Borg-Warner. Furthermore, a jury would have to make another inference that the plaintiff was exposed to a Borg-Warner product from work 20 to 40 feet away in the transmission assembly room. For these reasons, the court grants defendant's motion for summary judgment."

{¶ 9} Cantrell timely filed this appeal. She raises two assignments of error for our review that provide as follows:

{¶ 10} "[I.] It was error for the trial court to grant Borg-Warner's motion for summary judgment when there was sufficient evidence that appellant was injuriously exposed to Borg-Warner asbestos-containing clutch plates, so as to raise a genuine issue for trial."

{¶ 11} "[II.] The trial court erred in concluding that appellant's proof against Borg-Warner depended on an impermissible stacking of one inference upon another."

{¶ 12} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d

282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. As in any case, summary judgment is appropriate in an asbestos case "when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party." *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286, 653 N.E.2d 1196.

{¶ 13} The Ohio Supreme Court has held that "in a multidefendant asbestos case, the plaintiff has the burden of proving exposure to the defendant's product and that the product was a substantial factor in causing the plaintiff's injury." Id. R.C. 2307.96(B), applicable to cases filed on or after September 2, 2004, sets forth the plaintiff's burden of establishing how a particular defendant's conduct constitutes a substantial factor in any injury or loss:

> **"(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:**

"(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

"(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

"(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

"(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos."

{¶ 14} At issue in this matter is whether Cantrell provided evidence to identify Borg-Warner as the supplier of an asbestos product to which she was exposed during her time of employment at the GM plant. Without such evidence, she cannot establish a causal connection between Borg-Warner and her injuries from asbestos exposure. In a product liability case, "[t]he plaintiff must establish a causal connection between the defendant's actions and the plaintiff's injuries, which necessitates identification of the particular tortfeasor." *Sutowski v. Eli Lilly & Co.*, 82 Ohio St.3d 347, 351, 1998-Ohio-388, 696 N.E.2d 187.

{¶ 15} Borg-Warner asserts that there is no evidence in the record identifying a Borg-Warner, asbestos-containing product at the GM plant during Cantrell's time of employment. The last evidence of any such product at the GM plant dates back more than a year before Cantrell's employment. Instead, Borg-Warner asserts that the record contains evidence of other

sources of potential asbestos exposure, including in-place friable pipe insulation. Without evidence of product identification during the time frame of Cantrell's alleged exposure, Borg-Warner argues that Cantrell's claims must fail.

{¶ 16} Cantrell argues that there is direct evidence that identifies Borg-Warner as a supplier of clutch plates over a lengthy period of time prior to her employment. From this evidence, she asserts that proof of exposure during her time of employment can be drawn from inference and circumstantial evidence. Cantrell also argues that Evid.R. 406 may be applied to show that Borg-Warner's past pattern and practice of supplying the clutch plates continued during the time of her employment. We are not persuaded by her argument.

{¶ 17} Evid.R. 406 provides the following: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." "Evid.R. 406 does not define habit. 'Habit,' however, has been defined as a 'person's regular practice of meeting a particular kind of situation with a specific type of conduct.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 131 (internal citation omitted). "'Habit evidence is normally used in the

stimulus-response format. The proponent of habit evidence usually seeks to establish that a habitual response occurred on a particular occasion.'" *State v. Smith* (Dec. 5, 1995), Morgan App. No. CA 95 08, quoting Weissenberger's, Ohio Evidence 111, Chapter 406.

{¶ 18} Thus, Evid.R. 406 contemplates a routine practice of an organization in response to a specific recurring situation. Such evidence is relevant to prove that the conduct of the organization on a particular occasion was in conformity with its routine practice. To lay the proper foundation, the proponent of the evidence must show that a routine practice in fact exists and that the stimulus for the habitual response occurred on the particular occasion. See *Bollinger, Inc. v. Mayerson* (1996), 116 Ohio App.3d 702, 715, 689 N.E.2d 62, 70-71.

{¶ 19} This is not a case where a routine practice of an organization is used to prove conduct in conformity on a particular occasion. Rather, Cantrell seeks to use Evid.R. 406 to establish that a business relationship continued to exist between the parties. This is not an appropriate use of the rule.

{¶ 20} Here, there is no regular and routine response to a specific situation on a particular occasion as contemplated by the rule. Moreover, Borg-Warner products were not supplied as a course of habit or "routine

practice," but rather they were supplied as part of a contractual business relationship. We simply find no basis for the application of Evid.R. 406.

{¶ 21} Insofar as Cantrell argues that she may prove exposure through circumstantial evidence and inference, we do not disagree with her. However, there still needs to be some evidence that the product was at the GM plant at or near the time of the alleged exposure. See *Barone v. GATX Corp.*, 167 Ohio App.3d 744, 2006-Ohio-3221, 857 N.E.2d 155, ¶ 45. In this case, there simply was no evidence presented, circumstantial or direct, to establish that Cantrell was actually exposed to Borg-Warner products.[3] The evidence here was simply too remote in time. Additionally, we must recognize that the mere presence of a past business relationship, no matter how lengthy, does not mean that it continued into the indefinite future. We find nothing in the law that supports the inferences to be drawn as argued by Cantrell.

{¶ 22} Accordingly, we find Cantrell failed to present sufficient evidence to establish that she was actually exposed to a Borg-Warner asbestos-containing product during the course of her employment at the GM plant. Without such evidence, Cantrell also cannot establish causation.

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[3] *DiCenzo v. A-Best Prods. Co., Inc.*, Cuyahoga App. No. 88583, 2007-Ohio-3270, reversed on other grounds at 120 Ohio St.3d 149, 2008-Ohio-5327, is distinguishable from the instant matter. The evidence in *DiCenzo* established that Borg-Warner products were used at the plant during the alleged time of exposure. Id.

Absent evidence to identify Borg-Warner as a supplier of an asbestos product responsible for Cantrell's injury, we find that Borg-Warner was entitled to summary judgment.

{¶ 23} Cantrell's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR