Smith v. Carlisle Indus. Brake & Friction

Court of Appeal of Florida, First District

August 2, 2023, Decided

No. 1D21-2753

Reporter
2023 Fla. App. LEXIS 5417 *

LARRY D. SMITH, as Personal Representative of the Estate of Joan Smith, Appellant, v. CARLISLE INDUSTRIAL BRAKE & FRICTION, INC., Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF ANY TIMELY AND AUTHORIZED MOTION UNDER *FLA. R. APP. P. 9.330* OR 9.331.

Prior History: **[*1]** On appeal from the Circuit Court for Okaloosa County. Michael A. Flowers, Judge.

Core Terms

brake, linings, suppliers, products, manufactured, ***asbestos***, summary judgment, supplying, exposure, exposed, nonmoving party, ***asbestos***-containing, trucks, brake shoe, light most favorable, directed verdict, no evidence, identification, probabilities, axles

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Mary J. Street, Eduardo Medina, and Timothy Ferguson, Foley & Mansfield PLLP, Miami, for Appellee.

Judges: B.L. THOMAS, J. KELSEY and NORBY, JJ., concur.

Opinion by: B.L. THOMAS

Opinion

B.L. THOMAS, J.

The trial court granted summary judgment in favor of Carlisle Industrial Brake & Friction on the issue of product identification, a threshold issue in establishing causation. Because Appellant produced sufficient evidence to establish that the decedent was exposed to Carlisle's product, we reverse.

After filing suit, the decedent, Joan Smith, passed away from mesothelioma, a cancer of the lining of the lungs caused by exposure to ***asbestos***. The complaint alleged the decedent was exposed to ***asbestos*** and developed mesothelioma from laundering her now-deceased husband's work clothing. Mr. Smith was a mechanic who worked with brake products that contained ***asbestos***. This work released ***asbestos***-laden dust into the air and onto his clothing. When Appellant's decedent would wash Mr. Smith's clothing, she would "shake out" the dusty clothing. While performing this task she allegedly **[*2]** inhaled the dust.

Carlisle manufactured and sold ***asbestos***-containing brake linings to automotive brake manufacturers who then sold Carlisle's brake linings as their own. The question on appeal is whether Smith's estate offered sufficient evidence to support a factual finding that Smith had some interaction with, or exposure to, ***asbestos*** from Carlisle's brake linings.

From 1969 through 1993, Mr. Smith performed brake work on Mack heavy trucks using only Mack branded brakes and brake linings purchased from an authorized Mack seller. Mack did not manufacture its own brake products but purchased them from approved third-party manufacturers, which included Carlisle.

Carlisle testified that it sold brake linings to Mack from 1974 through 1979. All of these brake linings contained ***asbestos***. This is the only evidence of any third-party manufacturer actually supplying brake linings to Mack between 1974 and 1979. Mack was only able to state that, at unspecified points "in the past," several manufacturers had been approved suppliers for brake linings. Mack did not know which, if any, of these approved suppliers actually sold brake linings to Mack at any point during the 1970s.

When answering interrogatories **[*3]** about selling brake linings between 1965 and 1999, Mack Trucks stated:

> [T]he following [twelve] manufacturers [including Carlisle] were approved suppliers for brake linings to Mack Trucks in the past. These products may not have contained any ***asbestos*** or may have contained encapsulated chrysotile ***asbestos***:
>
> . . . .
>
> Mack Trucks does not know the dates, if any, that it purchased, sold or distributed any particular ***asbestos*** containing products.

A Mack representative testified that in the 60's or 70's Abex and Raybestos-Manhatten supplied brake linings in addition to Carlisle. A second Mack representative also identified other friction-material suppliers to Mack "at times": Abex, Porter, Eaton, Rockwell, and others. A third Mack representative testified that in 1974 Carlisle, Abex, and Raybestos were brake lining suppliers to Mack.

A Honeywell/Bendix representative also testified that it provided "very limited sales of some [Bendix] products" to Mack "over the span of 30 years."

Appellant also possessed four brake linings from two brake shoes that Mr. Smith installed sometime in the mid-1980s. Appellant's expert identified these as being manufactured by "Abex," not Carlisle.

Carlisle argued below **[*4]** that "none of Plaintiff's fact witnesses" mentioned "Carlisle" by name, offered testimony about "Carlisle" products, or "indicated that [Mrs. Smith] worked with or around any Carlisle products." Carlisle contended that because none of Plaintiff's witnesses identified Carlisle by name "as a source of the exposure to Decedent or her husband," there was "no evidence showing that any Carlisle products were among the sources of Decedent's alleged ***asbestos*** exposure."

Appellant argued that Mack did not manufacture its own brake products, but instead purchased them from third-party suppliers, and that from 1974-1979, Carlisle sold ***asbestos***-containing brake linings to Mack to sell as its own products.

Carlisle emphasized that none of Plaintiff's product-identification witnesses identified Carlisle by name, and that the total of Plaintiff's evidence was that "Carlisle was one of twelve suppliers" to Mack. Carlisle argued this was not sufficient to survive summary judgment, because it was "pure speculation or conjecture" whether Carlisle manufactured the Mack brakes used by Mr. Smith and "the probabilities are at best evenly balanced." Appellant argued the evidence was sufficient for product identification, **[*5]** because there was evidence that only Carlisle supplied brake linings from 1974-1979, and there was no evidence that all twelve suppliers were supplying brakes at the same time.

The trial court entered summary judgment in favor of Carlisle, indicating that there was no evidence, testimonial or otherwise, that decedent, Joan Smith, was ever exposed to ***asbestos*** from any Carlisle products.

This Court "review[s] de novo a grant of summary judgment." *Cmty. Power Network Corp. v. JEA, 327 So. 3d 412, 414 (Fla. 1st DCA 2021)*. Summary judgment is proper when the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. *Fla. R. Civ. P. 1.510(a)*.

The Florida Supreme Court recently amended Florida's standard for summary judgment. *In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d 72, 73 (Fla. 2021)*. Florida now mirrors the federal standard. *Fla. R. Civ. P. 1.510(a)*. "[T]hose applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard." *In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d at 75* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986)*). We recently held that:

> In reviewing an order granting a motion for directed verdict, "an appellate court . . . must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain **[*6]** a verdict in favor of the nonmoving party."

Dep't of Child. & Fams. v. A.L., 307 So. 3d 978, 982 (Fla. 1st DCA 2020) (citing *Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362, 365 (Fla. 2013)*).

A moving party that does *not* bear the burden of persuasion may obtain summary judgment by "produc[ing] evidence that *X* is not so or point[ing] out that the nonmoving party lacks the evidence to prove *X*." *In re Amendments to Florida Rule of Civil Procedure 1.510, 317 So. 3d at 75* (citing *Bedford v. Doe, 880 F.3d 993, 996-97 (8th Cir. 2018)*).

"It is well established under Florida law and elsewhere

that identification of the product that caused the harm as the one sold or manufactured by the defendant is an essential element of traditional tort law." *Pulte Home Corp., Inc. v. Ply Gem Indus., Inc., 804 F. Supp. 1471, 1484-85 (M.D. Fla. 1992)*. In ***asbestos*** cases, the plaintiff can establish exposure to the defendant's ***asbestos***-containing products by presenting evidence that a particular defendant's ***asbestos***-containing product was used at a job site and the victim "was in proximity" to that product. *Odum v. Celotex Corp., 764 F.2d 1486, 1488 (11th Cir. 1985)* ("In this case, a record review reveals genuine issues of material fact as to whether defendant's ***asbestos***-containing product was used at plaintiff's decedent's job site and whether plaintiff's decedent worked in proximity to the use of defendant's ***asbestos***-containing product."); *see also Hoffman v. Allied Corp., 912 F.2d 1379, 1383 (11th Cir. 1990)* (a material fact issue existed as to whether a shipyard worker who worked in a repair shop in which ***asbestos*** products were not used was nonetheless exposed to the defendant's **[*7]** ***asbestos*** products used in other areas of the shipyard 300-400 feet away, precluding summary judgment for the manufacturer on a personal injury claim). Where there is no direct evidence of the identity of a product's manufacturer, circumstantial evidence may suffice. The Rhode Island Supreme Court has stated that "circumstantial evidence may be used to establish the identity of the manufacturer or the seller" of the product so long as the evidence shows "that it is reasonably probable, not merely possible, that the defendant was the source of the offending product." *Clift v. Vose Hardware, Inc., 848 A.2d 1130, 1132 (R.I. 2004)*. We agree.

The standard for evaluating product identification is no different than the causation standard articulated by the Florida Supreme Court in *Gooding v. University Hospital*.

> [T]he plaintiff . . . must introduce evidence which affords a reasonable basis for the conclusion that it is *more likely than not* that the *conduct of the defendant* was a substantial factor in bringing about the result. A mere possibility . . . is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant. **[*8]**

Gooding v. Univ. Hosp. Bldg., Inc., 445 So. 2d 1015, 1018 (Fla. 1984) (emphasis added) (citation omitted).

Based on this standard, Appellant produced sufficient circumstantial evidence to overcome summary judgment. Appellant offered evidence that: (1) from 1974 to 1979, Mrs. Smith was regularly exposed to dust from Mack-branded brake linings; (2) Mack did not manufacture its own brake linings, but purchased them from an "authorized supplier" and then sold them as "Mack" brake linings; (3) Carlisle was an "authorized supplier" of brake linings to Mack; and (4) Carlisle sold ***asbestos***-containing brake linings to Mack from 1974 to 1979.

Carlisle asserts that Appellant did not prove Carlisle was the *exclusive* supplier of brake linings and that there were eleven other authorizes suppliers at various points in time. But Carlisle's argument fails, because Appellant's decedent was more likely than not exposed to Carlisle's products.

In order for the probabilities to be "evenly balanced" for example, decedent would have had only one exposure to ***asbestos*** from only one brake lining and there would have to be two possible suppliers of that brake lining. However, if there are two exposures and two possible suppliers, including Carlisle, then the odds increase to 75% **[*9]** that one or both exposures were to a Carlisle product and only a 25% chance that *neither* exposure was to Carlisle product. Referring to a flipped-coin example: there is a 25% chance both flips result in heads, a 50% chance one or the other flip result is heads, and only a 25% chance that *neither* flip result is heads. Carlisle argues that three companies were supplying brake linings in 1974 and that there is only a 33% chance the lining came from Carlisle. But again, this argument rests on there only being one exposure. With every brake job, the probability that decedent was *not* exposed to Carlisle's product grew smaller and smaller.

Decedent was not exposed to dust from a single brake lining once or twice. Larry Smith, decedent's son, testified he performed at least two dozen brake jobs while working with his father between 1974 and 1979. The trucks worked on could have two axles or three axles. There are two sets of brakes per axle. On a two-axle trailer, there are four wheels, four sets of brakes, and anywhere between eight and sixteen actual linings. On a three-axle trailer there are between twelve and twenty-four linings. Each brake shoe contained two brake linings. The brakes would **[*10]** be changed at the same time on a given axle. Old brake shoes are removed and replaced with new brake shoes. In one brake job, the two back axles had eight brake shoes. Additionally, brake shoes may be relined. Between 1974

and 1979, Mr. Smith maintained trucks for various companies. In one such example, a company had eight to ten trucks requiring brake work every six months.

Due to the number of these exposures involving multiple brake linings, the odds favor plaintiff, even with the unlikely assumption that between 1974 and 1979, all twelve of Mack's "authorized suppliers" were supplying Mack with brake products. But that assumption that all twelve suppliers were supplying at the same time is an impermissible inference for at least three reasons.

First, the record does not support such a finding. There is no evidence that all of the suppliers were supplying brake linings at the same time as Carlisle. In 1974 there is evidence that Carlisle was one of only three authorized suppliers, and there is no evidence the other two actually supplied brake linings. Second, it is not a reasonable assumption based on the record evidence that all twelve suppliers were supplying brake linings from **[*11]** 1974 to 1979. Based on Mack's interrogatory answers, the testimony of several Mack representatives, and the testimony of another authorized supplier's representative, while Mack may have had twelve suppliers over the span of thirty years, the evidence suggests that only a few companies were authorized suppliers at any given time. Third, such an inference would be drawn in favor of Carlisle, contrary to law. *See* Cole Taylor Bank v. Shannon, 772 So. 2d 546, 550 (Fla. 1st DCA 2000) (noting that at summary judgment the evidence must be considered in a light most favorable to the nonmoving party and all competing inferences must be drawn in favor of the nonmoving party); *see also* Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329 (Fla. 2001) ("An appellate court reviewing the grant of a directed verdict must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party."); Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (noting that on a motion for summary judgment "all inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party").

In viewing the evidence and all inferences of fact in the light most favorable to the nonmoving party, Appellant established a **[*12]** genuine issue of material fact as to product identification. Appellant established that decedent was more likely than not exposed to Carlisle's ***asbestos***. That eleven other suppliers may have supplied ***asbestos***-containing brake linings at any given time is an argument on causation for the jury, when deciding whether Appellant ultimately proved by a preponderance of the evidence that Carlisle's products were a substantial contributing factor to Joan Smith's fatal disease. Gooding, 445 So. 2d at 1018.

REVERSED and REMANDED.

KELSEY and NORBY, JJ., concur.

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