



Over the course of his employment, Fisher primarily worked as a plumber and boiler repairman. Id. Fisher admitted to smoking approximately 1 ½ - 2 packs of cigarettes per day for approximately twenty four (24) years. The current action involves claims against alleged manufacturers and suppliers of asbestos products. Complaint, ¶10.

Fisher was deposed over three days, September 11, 12 and 13, 2006, to determine whether he was exposed to Defendants' asbestos products.

On October 9, 2007, Defendants individually moved for Summary Judgment. Defendants' Motions asserted lack of sufficient product identification as required by *Eckenrod* and its progeny. *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988). On October 26 and 29, 2007, Plaintiff filed oppositions to Defendants' Motions.

After consideration of the Motions and Responses thereto this Court granted Defendants' Motions for Summary Judgment and dismissed with prejudice all claims against moving Defendants.<sup>1</sup> On July 16, 2010 the Plaintiffs settled with all remaining Defendants prior to assignment for trial. (Civil Trial Worksheet, July 16, 2010). On August 16, 2010, Plaintiff timely filed their Appeal of this Court's Orders granting Summary Judgment. Plaintiff thereafter filed their Concise Statements of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b).

## **II. LEGAL DISCUSSION**

"In determining whether to grant a Motion for Summary Judgment, the trial court must view the record in the light most favorable to the non-moving party and resolve any doubts as to the existence of a genuine issue of material fact against the moving party." *Gilbert v. Monsey Prods. Co.*, 861 A.2d 275, 276 (Pa. Super. 2004). In reviewing a grant of summary judgment, an appellate court's scope of review is plenary

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<sup>1</sup> Summary judgment was entered on behalf of J.A. Sexauer and Kentile on November 27, 2007, and on behalf of Precora on November 28, 2007.

and will reverse only upon finding that the trial court abused its discretion or erred as a matter of law. *Harahan v. AC & S, Inc.*, 816 A.2d 296, 297-298 (Pa. Super. 2003). Our Superior Court has determined that:

There is an inherent three-step process involved in determining whether ... to preclude a grant of summary judgment. Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the jury by resolving any material issues of fact.

*Dudley v. USX Corp.*, 606 A.2d 916, 920 (Pa. Super. 1992).

To set forth a *prima facie* asbestos case, “plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product.” *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. 1988). The mere presence of an asbestos product in the workplace is not enough; plaintiff must show that he inhaled asbestos fibers from defendant’s specific product. *Id.* at 53. Additionally, plaintiff’s “evidence must demonstrate that the plaintiff worked, on a regular basis, in physical proximity with the product, and that his contact with it was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it.” *Andaloro v. Armstrong World Indus.*, 799 A.2d 71 (Pa. Super. 2002); see also *Donoughe v. Lincoln Elec. Co.*, 936 A.2d 52 (Pa. Super. 2007).

In addition, our Supreme Court has determined that:

[I]t is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's/decendent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

*Gregg v. V-J Auto Parts Co.*, 943 A.2d 216, 227 (Pa. 2007).

Mere speculation that Plaintiff inhaled asbestos from Defendant's product is insufficient, as "*Eckenrod* makes clear that [the court] cannot enter such a guessing game." *Samarin v. GAF Corp.*, 571 A.2d 398, 408 (Pa. Super. 1989). "Summary judgment is proper when the plaintiff has failed to establish that the defendants' [asbestos] products were the cause of plaintiff's injury." *Eckenrod* at 52.

### **Pecora Corporation**

In support of its Summary Judgment Motion, Defendant Pecora argued that Plaintiff failed to establish a *prima facie* case of asbestos liability because there was insufficient evidence that Mr. Fisher was ever exposed to any dust from Pecora furnace cement. (Pecora's Motion for Summary Judgment, 10/9/2007, p.1).

Mr. Fisher's testimony of his work with Pecora cement are speculative and therefore do not meet the standard set forth in *Eckenrod*.

At his deposition on September 11, 2006 – September 13, 2006, Mr. Fisher admitted that he did not use Pecora cement often:

Q: You picked out this picture, I-6. Do you recall that particular item as we sit here right now?

A: Yeah, I recall Pecora.

Q: What is that? Tell me what that is.

Ms. Smyth: Objection. He's already testified—

A: Asbestos furnace cement.

Q: And do you recognize anything on that particular container that makes it familiar?

A: *No, I didn't recognize the name. Like I said, I didn't use a whole lot of this. I recognize this red devil.*

Fisher Deposition, pg. 540. (emphasis added).

Q: Did you use that material as a journeyman plumber at times?

A: I would imagine I did, yes, use that product.

Fisher Deposition, pg. 541.

Mr. Fisher also admits that the application of the Pecora cement did not create any

dust which could be inhaled.

Q: I see that the stuff comes in a can. I take it was wet and a putty-like substance when you put it on; is that right?

Ms. Smyth: Objection to Eliot testifying.

Q: Is that correct?

A: As far as I can remember, yes.

Q: So, it didn't create any dust when you actually put it on, did it?

A: Evidently not.

Fisher Deposition, pg. 542.

Lastly, when discussing the issue of the cement drying and the possibility of it becoming airborne for inhalation Mr. Fisher's speculation is evident by his testimony.

Q: How about when you would do that, either with a trowel or with your hands or whatever you used to apply it [sic], did there ever come a time when any of that material might dry, either on your equipment, on your clothing on where would you put it?

Ms. Smyth: Objection; leading.

A: I *imagine* it would.

Q: And when it would dry, would you have to take it off your hands or your equipment?

A: *I got to get it clean some way.*

Fisher Deposition, pgs. 542-543. (emphasis added).

A: Okay. You just shake it off and throw it away.

Q: Did that process create any dust from your memory? Do you remember it creating dust?

Ms. Smyth: Objection.

A: *I can't say that I remember specifically if it did, but I imagine that it did.*

Fisher Deposition, pg. 543. (emphasis added).

Q: And after you had been using that [cement] for some time during the week and you brought all the different overalls home, or whatever, the Dickies that you were wearing, would you shake that stuff out?

Ms. Smyth: Objection.

A: That was just a normal operation of life.

Q: Right. And that create [sic] dust when you did that?

Ms. Smyth: Objection.

A: *I would imagine it did.*

Fisher Deposition, pgs.544-545. (emphasis added).

In order to prove a causal connection between the inhalation of asbestos and his lung cancer, *Eckenrod* requires Mr. Fisher to establish that he inhaled asbestos fibers shed by the specific manufacturer's (Pecora). Additionally, evidence must demonstrate that he worked, on a regular basis, in physical proximity with the product. *Andaloro*, supra. The use of speculation testimony does not satisfy the standard set forth in *Eckenrod*. *Samarin*, supra. Mr. Fisher's testimony clearly established: 1) that he did not work on a regular basis with Pecora furnace cement, and 2) that he could only guess as to whether he inhaled any dust from when he did use Pecora cement.

After review of the record, Plaintiff has failed to establish that Mr. Fisher frequently and regularly inhaled asbestos fibers from furnace cement manufactured, supplied, or distributed by Pecora.

### **Sexauer**

In support of its Summary Judgment Motion, Defendant Sexauer argued that Plaintiff failed to establish a *prima facie* case against it, because Plaintiff did not prove that Mr. Fisher inhaled asbestos dust from wicking material manufactured, supplied or distributed by Sexauer. (Sexauer's Motion for Summary Judgment, 10/9/2007, p.2).

In response, Plaintiff argued that Mr. Fisher testified that he used Sexauer wicking and graphite packing. (Plaintiff's Opposition to Motion for Summary Judgment, 10/24/07, Exhibit A, pgs. 303-304). However, Mr. Fisher's testimony does not establish that he inhaled asbestos from the Sexauer wicking and graphite packing products on a regular basis as is required.

Mr. Fisher initially denied ever having inhaled any dust from Sexauer wicking and did not know whether Sexauer wicking even contained asbestos.

Q: Do you believe J.A. Sexauer wicking contained asbestos?

A: I never thought of it.

Q: So, you don't know one way or another?

A: No, I don't know one way or another?

Q: Do you know who manufactured J.A. Sexauer products

A: No.

Q: And you used the J.A. Sexauer wicking on stems of faucets; correct?

A: Certainly, yes. That's what it is made for.

Q: And you would just wrap it around the stem, correct?

A: Yes.

Q: And you didn't have to cut it or anything, correct?

A: Oh, yeah. Sure, you cut it.

Fisher Deposition, pgs. 296-297

Q: So, when you cut it, it didn't create much excess material?

A: *No, I don't think so.*

Q: Did you ever see dust come off of it?

A: *I didn't look for any dust so I don't see any.*

Q: So, you didn't see any dust.

A: *No.*

Fisher Deposition, pg. 297. (emphasis added).

As Plaintiff's only support for her argument that Mr. Fisher inhaled asbestos from Sexauer wicking or graphite packing, she cites Mr. Fisher's testimony that would sometimes he would put the graphite packing in the tool chest of his truck and it would dry out. When he would clean out his toolbox and that would create dust. (Fisher Deposition, pgs. 303-304).

Q: Did you keep some of that [Sexauer packing] in your tool chest or truck or whatever?

A: Yes, it's a common product.

Q: Yesterday I though you said this and I am sure you will correct me if I'm wrong that sometimes it would sit at the bottom of the container and dry out?

A: Uh-huh.

Q: And when that would happen, what would happen to the material when it would dry out?

A: When I would clean out my tool box, I would shake it out, take it [the toolbox] outside and shake it out.

Q: Would that process create a dust?

A: Oh sure.

Q: Do you think any of the dust came from Sexauer product?

A: I'm sure it did.

(Fisher Deposition, pgs. 303-304).

Plaintiff's argument that Mr. Fisher's testimony meets its burden of proving that Mr. Fisher inhaled asbestos dust from Sexauer packing is erroneous because it was never established, absent complete speculation by Mr. Fisher, that the dust in his toolbox was asbestos dust and not the result of other contents in his truck toolbox.

As with the argument advanced by Plaintiff against Pecora, Plaintiff has failed to prove, without speculation, that Mr. Fisher inhaled asbestos fibers from a product manufactured, supplied, or distributed by J. A. Sexauer.

### **Kentile**

Lastly, Plaintiff asserts that Mr. Fisher was exposed to asbestos from Kentile floor tile because Fisher testified that he worked around others who when installing the flooring were cutting and sawing the tile thereby creating dust which he inhaled.

(Plaintiff's Motion in Opposition to Kentile's Motion for Summary Judgment, pg.1).

Kentile argues that Mr. Fisher testified that although working around others who would install Kentile flooring, he was unsure whether he himself ever worked with Kentile flooring. He can only speculate that he has used it in the past.

Q: I believe you testified that you worked around people who worked with Kentile floor; correct?

A: Yes.

Q: But you didn't personally work with the flooring product; correct?  
A: Oh I *imagine* I have.  
Q: You may have?  
A: In my own personal work I've used tile. I got tile on my floor right now.  
Q: Did you ever personally use Kentile floor?  
A: I don't recall. I don't know whose make is on my floor now.

(Fisher Deposition, pgs. 296-297) (emphasis added).

Mr. Fisher also testified that at the time he did not see anything that led him to believe that the Kentile flooring that others were working with contained asbestos.

Q: Did you see anything about the Kentile [flooring] that made you believe back then it was made of asbestos?  
A: No, no.

(Fisher Deposition, pg. 299).

Mr. Fisher states that the media later made him aware that Kentile tile had asbestos in it. However, this speculative testimony is insufficient for Plaintiffs to meet their burden as the further evidence produced between the parties in discovery responses clearly showed that various tiles, both asbestos and non-asbestos containing tile, were produced by Kentile in given years. (Kentile Reply Memorandum In Support of Its Motion for Summary Judgement, pg. 1).

Mr. Fisher also reiterates that he was unaware that Kentile tile contained asbestos when he was working as a plumber. (Fisher Deposition, pg. 313-314).

Q: But do you know if any of the Kentile tile actually contained asbestos?  
Mr. Present: He just answered that. Asked and Answered. Go ahead, you can answer again if you want.  
A: At the time, I didn't care. It made no sense to me. I didn't look at their product. I was a plumber. I looked at the plumbing products on the job.  
Q: So you didn't know?  
A: Didn't know what?

Q: Whether the Kentile tile, just the Kentile tile, contained asbestos?

A: I know they had Kentile on the job. I never looked to see if it had asbestos in it. The only thing I know is now in later years I know that Kentile had asbestos in it.

(Fisher Deposition, pgs. 313-314).

Lastly, Mr. Fisher could not say that the dust that he was breathing in was from Kentile tile versus other construction activities that created dust.

Q: ...And the dust from the flooring, do you have any reason to believe that the dust from the flooring contained asbestos?

A: Only the fact that people were working with it then and we learned here in later years it contained asbestos. I breathed the dust whether they were pumping up at that time.

Q: But construction sites contain dust from lots of products; correct?

A: Yes.

Mr. Present: Objection.

Q: It is [sic] there any reason for you to believe that there was dust from the floor tile as opposed to dust from something else?

A: Yeah. There was no means of separating dust when you're at work. I mean, you breathe the dust that is there.

Q: So, you don't know if it was dust from floor tile as opposed to dust from another product?

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A: I can't separate and say I was breathing asbestos. I can't do that. But I can't say that I wasn't either.

(Fisher Deposition, pgs. 315-316).

Without Mr. Fisher's testimony identifying that he inhaled dust from Kentile flooring products which were specifically known to contain asbestos, Plaintiff's cause of action is based purely on speculation and therefore cannot be maintained as a matter of law.

### **III. CONCLUSION**

For the foregoing reasons this Court's Orders granting Summary Judgment in favor of Defendants, J.A. Sexauer, Kentile Flooring and Pecora Corporation should be **AFFIRMED.**

**BY THE COURT:**

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**Date**

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**ALLAN L. TERESHKO, J.**

cc:  
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