[Cite as *Jackson v. Glidden Co.*, 2007-Ohio-277.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87779

RENITA JACKSON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

THE GLIDDEN COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-236835

BEFORE: Blackmon, J., Calabrese, P.J., and Nahra, J.

RELEASED: January 25, 2007

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Renita Jackson appeals the trial court's decision granting summary judgment in favor of the Glidden Company. ("Glidden"). Jackson assigns ten errors for our review.[1]

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The history of this litigation and more details of the relationship between the parties are contained in prior decisions of this court and that of the Cuyahoga County Common Pleas Court.[2] The apposite facts follow.

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[1]See Appendix.

[2]*Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100; *Jackson v. Glidden Co.* (Mar. 30, 2001), Cuyahoga C.P. 236835.

{¶3} Appellants are three mothers and their six children. The family units consist of Renita Jackson, her three children, Ramon, Manuel, and Maria; Janice Lascko, her daughter Janessa; and Selina Gainer, her daughters Latoya and Zinzi. ("Jackson"). Appellees are lead paint and lead pigment manufacturers namely: Atlantic Richfield Co., Fuller O'Brien, Sherwin-Williams Co., NL Industries, PPG Industries/E. I Du Pont de Nemours & Co., and SCM/Glidden ("Glidden").

{¶4} On August 11, 1992, Jackson, along with the other mothers, filed suit individually on behalf of their respective children, and all other children similarly situated. The complaint alleged the children were poisoned as a result of ingesting deteriorated lead-based paint in their residences, which were manufactured or processed by Glidden. The complaint asserted causes of action for strict liability, negligence per se, negligence, breach of implied warranties, breach of express warranties, fraud by misrepresentation, nuisance, enterprise liability, alternative liability, market share liability, and punitive damages.

{¶5} The complaint alleged that the paint manufacturers knew of the severe hazards of lead paint since the early 1900's, long before this information was widely circulated to the public. Further, the paint manufacturers were aware that non-toxic pigments, such as zinc-oxide pigment, were available as substitutes for lead pigments in paint. Despite this knowledge, the paint manufacturers continued to promote their product for use in paint intended for residential interior surfaces and refused to warn potential consumers of the known hazards.

{¶6} Glidden filed a motion to dismiss the complaint and a motion to hold Jackson's motion for class certification in abeyance. On July 29, 1993, the trial court granted Glidden's motion to dismiss, but held Jackson's motion for class certification in abeyance. On appeal, we affirmed the dismissal of the complaint as to the claim of enterprise liability, but reversed the dismissal as to the claims of alternative liability and market share liability.[3]

{¶7} On March 30, 2001, the trial court denied class certification. Jackson did not appeal the trial court's decision regarding class certification, but continued to prosecute the individual claims. On December 13, 2002, Glidden filed a motion for summary judgment. On January 20, 2006, the trial court granted Glidden's motion for summary judgment.

Summary Judgment

{¶8} We review an appeal from summary judgment under a de novo standard of review.[4] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.[5] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary

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[3] *Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100.

[4] *Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

[5] Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion, which is adverse to the non-moving party.[6]

{¶9} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.[7] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.[8]

{¶10} With these principles in mind, we proceed to address Jackson's assigned errors, which will be discussed together and out of order where appropriate.

Market Share Liability

{¶11} In the third assigned error, Jackson argues the trial court erred in granting summary judgment in favor of Glidden on her market share claim. We disagree.

{¶12} In *Sutowski v. Eli Lilly & Company,*[9] the Ohio Supreme Court stated in its syllabus:

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[6]*Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

[7]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

[8]Id. at 293.

[9] (1998), 82 Ohio St.3d 347.

> **"In Ohio market-share liability is not an available theory of recovery in a products liability action."**

{¶13} Notwithstanding the above pronouncements, Jackson urges this court to reverse the *Sutowski* decision and recognize market share liability. However, in *State ex rel. Heck v. Kessler,*[10] the court stated:

> **"It is axiomatic that the syllabus of an opinion issued by the Supreme Court of Ohio states the law of the case, and as such, all lower courts in this state are bound to adhere to the principles set forth therein."**

{¶14} Further, in *World Diamond, Inc. v. Hyatt Corp.,*[11] the court stated:

> **"All trial courts and intermediate courts of appeals are charged with accepting and enforcing the law as promulgated by the Supreme Court and are bound by and must follow the Supreme Court's decisions."**[12]

{¶15} Our review reveals the trial court followed the mandate of the Supreme Court in granting summary judgment in favor of Glidden on Jackson's market share liability claim. We are likewise constrained to follow the law as determined by the Supreme Court in *Sutowski*. Accordingly, we overrule the third assigned error.

Alternative Liability

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[10](1995), 72 Ohio St.3d 98.

[11](1997), 121 Ohio App.3d 297.

[12]Id. at 306.

{¶16} In the first assigned error, Jackson argues the trial court erred in granting summary judgment in favor of Glidden on her alternative liability claim. We disagree.

{¶17} In the case of *Minnich v. Ashland Oil Co.,*[13] the Supreme Court of Ohio first adopted the theory of alternative liability. The court held:

> **"Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm."**[14]

{¶18} The shifting of the burden of proof brought about by this doctrine avoids the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.[15]

{¶19} However, in order for a plaintiff to shift the burden to the defendants to prove that they were not the cause of the plaintiff's injuries under an alternative liability theory, the plaintiff is required to prove each of the following:

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[13](1984), 15 Ohio St.3d 396.

[14]Id. at syllabus, adopting 2 Restatement of the Law 2d (1965), Torts, Section 433B(3).

[15]Id. at 397.

> **"(1) that two or more defendants committed tortious acts, and (2) that plaintiff was injured as a proximate result of the wrongdoing of one of the defendants."**[16]

{¶20} The Supreme Court of Ohio applied the first prong of the *Minnich* two-pronged test in *Goldman v. Johns-Manville Sales Corp.,*[17] where the court held:

> **"[A]lternative liability theory in an asbestos litigation case will be rejected where the plaintiff is unable to prove that the injury was caused by the asbestos-containing products of any of the defendants before the court."**[18]

{¶21} In *Goldman*, the court specifically found that the alternative theory of liability was inapplicable, stating:

> **"In this case, it is clear that Goldman has not been able to show that any of the defendants acted tortiously, because she is unable to show that any of the defendants remaining in this case supplied any asbestos products to [plaintiff's employer]."**[19]

{¶22} In the instant case, Jackson alleged that her three children ingested lead paint at two houses built in 1917 and 1926, respectively. Lascko's daughter ingested lead paint at a house built in 1900, and Gainer's daughters ingested lead paint at a house built in 1930.[20] However, the record is devoid of any indication that Jackson knew what type of paint was on the walls or the pigment the paint

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[16]Id.

[17](1987), 33 Ohio St.3d 40.

[18]Id. at paragraph two of the syllabus.

[19]Id. at 45.

[20]Third Amended Complaint.

contained. Jackson did not know who manufactured the paint or who supplied the pigment the paint contained. The record also indicates that Jackson and Lascko identified their former landlords, but when the landlords were deposed, neither of them could identify the type of paint on the walls or who manufactured the paint.[21]

{¶23} The Supreme Court of Ohio has continued to limit the application of alternative liability to unique situations, all of which have required a plaintiff to satisfy a threshold burden of proving that all the defendants acted tortiously.[22] The doctrine of alternative liability has never relieved plaintiffs of this burden.[23] It is the plaintiff's fulfillment of this burden that triggers the application of the doctrine in the first instance. Then and only then, the doctrine of alternative liability operates to shift to the two-defendant tortfeasors the burden of disproving that their negligence has a causal link to the plaintiff's injuries.[24]

{¶24} Our review of the record indicates that the injuries Jackson claimed are from different products, by different manufacturers, some of whom incorporated the lead pigment into paint and some who merely provided the lead pigment for third parties to incorporate into paint.[25] In addition, the paint manufacturers utilized their

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[21]Gainer's former landlord is deceased.

[22]*Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 687-688.

[23] *Peck v. Serio* (2003), 155 Ohio App.3d 471.

[24]Id. at 476.

[25]Heitmann Affidavit at 21, 22, 34-37.

own formulas for incorporating white lead into paint.[26] Further, there are a variety of lead pigments other than white lead carbonate that were used in paint formulations.[27] Moreover, there is no single, defined injury that results from lead poisoning.

{¶25} In viewing the facts and inferences in a light most favorable to Jackson, we conclude the inability to identify the type of paint or the manufacturer of the paint the children allegedly ingested is fatal to satisfying the first prong of the *Minnich* two-pronged test.

{¶26} Under the second prong of the *Minnich* two-pronged test, courts have generally read this prong to require all potential defendants to be joined in order to apply the alternative liability theory.[28] In *Huston v. Konieczny,*[29] the Ohio Supreme Court stated:

> **"In order for the burden of proof to shift from the plaintiffs under 2 Restatement of the Law, 2d, Torts, Section 433B(3), all tortfeasors should be before the court, if possible."**

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[26]Heitmann Affidavit at 33-37.

[27]Heitmann Affidavit at 5 and 32.

[28]See, *Marshall v. Celotex Corp*. (E.D.Mich.1987), 651 F.Supp. 389, 392; *Starling v. Seaboard Coast Line R. R. Co.* (S.D.Ga.1982), 533 F.Supp. 183, 188; *Sindell v. Abbot Laboratories* (1980), 26 Cal.3d 588, 603, 163 Cal.Rptr. 132, 139, 607 P.2d 924, 931.

[29](1990), 52 Ohio St.3d 214, 219.

{¶27} Although Jackson alleged that the named defendants manufactured and/or produced substantially all lead pigment,[30] we acknowledged, in a previous decision from this court, that not all defendants have been joined in the action.[31] The failure to join as defendants all potentially responsible tortfeasors precludes the application of alternative liability.[32]

{¶28} We conclude that the evidence submitted in this case fails to raise a genuine issue of material fact on the issue of proximate causation. Jackson's inability to identify the paint on the walls of the respective houses or the manufacturer of said paint, and her failure to join as defendants all potential tortfeasors, precludes the applicability of the alternative liability theory. Accordingly, we overrule the first assigned error.

Enterprise Liability, Conspiracy, Strict Liability, Failure to Warn, Express Warranty, Negligence, Fraud and Nuisance

{¶29} Through our analysis of Jackson's first assigned error, we have dispensed with the necessity of entering into a prolonged discourse with respect to the remaining assigned errors. In order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and

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[30]Third Amended Complaint.

[31]*Jackson v. Glidden Co.* (1995), 98 Ohio App.3d 100.

[32]*Fiorella v. Ashland Oil, Inc.* (1993), 92 Ohio App.3d 411.

injury resulting proximately therefrom.[33] Additionally, proximate causation is an essential element which Jackson is required to prove in each of the remaining causes of action.[34]

{¶30} In order for a plaintiff in a personal injury suit to have her case submitted to a jury, it is necessary that the plaintiff produce some evidence upon each element essential to establish liability, or produce evidence of a fact upon which a reasonable inference may be predicated to support such element.[35] As previously discussed, Jackson has failed to show that the paint manufacturers proximately caused the injuries alleged. Consequently, the trial court properly granted summary judgment in favor of the paint manufacturers. Accordingly, we overrule the remaining assigned errors.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

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[33] *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

[34] *State Auto. Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 156; *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, paragraph two of the syllabus; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55; *Hoffman v. Johnston* (1941), 68 Ohio App. 19, 29.

[35] *Strother*, supra, 67 Ohio St.2d at 285.

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

PATRICIA ANN BLACKMON, JUDGE

ANTHONY O. CALABRESE, JR., P.J., and
JOSEPH J. NAHRA, J.*, CONCUR

(*SITTING BY ASSIGNMENT: JOSEPH J. NAHRA, RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.)

APPENDIX

Assignments of Error

"**I. The trial court erred by granting summary judgment on appellant's alternative liability claim."**

“II. The trial court erred by granting summary judgment on appellant’s enterprise liability claim.”

“III. The trial court erred by granting summary judgment on appellant’s market share claim.”

“IV. The trial court erred by granting summary judgment on appellant’s conspiracy claim.”

“V. The trial court erred by granting summary judgment on appellant’s strict liability claim.”

“VI. The trial court erred by granting summary judgment on appellant’s failure to warn claim.”

“VII. The trial court erred by granting summary judgment on appellant’s breach of express warranty claim.”

“VIII. The trial court erred by granting summary judgment on appellant’s negligence claim.”

“IX. The trial court erred by granting summary judgment on appellant’s fraud claim.”

“X. The trial court erred by granting summary judgment on appellant’s nuisance claim.”