[Cite as *Fagerholm v. Gen. Elec. Co., Inc.*, 2009-Ohio-2390.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91986

BEVERLY FAGERHOLM, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE FAGERHOLM

PLAINTIFF-APPELLANT

vs.

GENERAL ELECTRIC COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CV-593306

BEFORE: Celebrezze, J., Cooney, A.J., and Jones, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant Beverly Fagerholm brings this appeal challenging the trial court's granting of both a protective order and summary judgment in favor of appellee General Electric Company ("GE").

{¶2} On June 5, 2006, George Fagerholm filed a complaint against numerous defendants stating several causes of action, including employer intentional tort, from his exposure to asbestos at GE's Ivanhoe Road facility in Cleveland, Ohio. Mr. Fagerholm worked for GE at its Ivanhoe Road facility for 39 years. He worked in the factory making experimental furnaces from 1950 to 1955, and he held a management position at the same facility from 1955 to 1989. Mr. Fagerholm was diagnosed with malignant mesothelioma, a cancer of the pleura (lining of the lung), which is caused by exposure to asbestos. He died from his malignant mesothelioma on September 5, 2006. Mrs. Fagerholm, as the executrix of her husband's estate, was substituted as the party plaintiff in this case.

{¶3} Prior to his death, a videotaped discovery deposition of Mr. Fagerholm was taken on July 21, 2006, and a videotaped trial deposition of Mr. Fagerholm was taken on August 1, 2006. Counsel for GE was present at both depositions and had an opportunity to cross-examine him.

{¶4} During the course of discovery, GE filed a motion for a protective order on the scope of inquiry as to its Civ.R. 30(B)(5) designee. The trial court held a hearing on GE's motion and granted the motion in part, thereby limiting

Mrs. Fagerholm's inquiry about GE's general corporate knowledge during the time of Mr. Fagerholm's employ. On May 22, 2008, at the deposition of GE's designated corporate representative, Marjorie Drucker, counsel for the parties argued over the scope of the questions being asked of Ms. Drucker, and the trial court was asked to intervene to reiterate the scope of inquiry.

{¶5} After discovery was completed, GE filed its motion for summary judgment. The trial court held a hearing on the motion after both sides had fully briefed the issue of employee intentional tort. On July 22, 2008, the trial court granted summary judgment in favor of GE. On August 21, 2008, Mrs. Fagerholm filed a notice of appeal.

Review and Analysis

{¶6} Appellant cites two assignments of error for our review.

Grant of Protective Order

{¶7} "I. The trial court erred in granting defendant-appellee General Electric Company's motion for protective order."

{¶8} In her first assignment of error, Mrs. Fagerholm argues that the trial court abused its discretion by granting a protective order that improperly limited discovery of relevant information. She specifically argues that the trial court prevented her from obtaining information on the extent of GE's corporate knowledge about asbestos exposure and whether preventative measures were

being taken at other GE facilities, but were not being taken at the Ivanhoe Road facility while Mr. Fagerholm worked there.

{¶9} Civ.R. 26(C) allows the trial court to grant protective orders regarding discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Fifth Third Bank v. Jones-Williams*, Franklin App. No. 04AP-935, 2005-Ohio-4070. The decision to grant or deny a protective order is within the trial court's discretion. *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, 806 N.E.2d 567, citing *Van-American Ins. Co. v. Schiappa* (1999), 132 Ohio App.3d 325, 724 N.E.2d 1232. Absent an abuse of discretion, an appellate court may not overturn the trial court's ruling on discovery matters. *Feichtner v. City of Cleveland* (1994), 95 Ohio App.3d 388, 642 N.E.2d 657, citing *Vinci v. Ceraolo* (1992), 79 Ohio App.3d 640, 607 N.E.2d 1079.

{¶10}Mrs. Fagerholm cites to the portion of the trial court's protective order that reads: "Defendant's motion for a protective order is hereby GRANTED IN PART. While Plaintiff is not strictly limited to matters exclusive to the Ivanhoe Rd. facility, all inquiries regarding corporate knowledge, for example, are limited to products, hazards and conditions actually present at the Ivanhoe Rd. facility during Mr. Fagerholm's tenure."

{¶11}Mrs. Fagerholm does not cite, however, the trial court's language that sets forth more precisely the scope of the protective order, which reads: "***

[The court] also agrees that Plaintiff is also entitled to reasonable inquiry as to General Electric's general knowledge *beyond* the Ivanhoe Rd. facility itself. *** [T]he relevant time period is the 39-year period that Mr. Fagerholm worked for General Electric at the Ivanhoe Rd. facility. The relevant scope of facilities is the Ivanhoe Rd. facility, or *any facility that performed the same primary function* (i.e. the fabrication of phosphors used in manufacture of neon bulbs). The relevant corporation is General Electric. Plaintiff *may inquire as to knowledge that may be imputed to the corporation as a whole*, but only with respect to products, conditions and hazards specifically present at the Ivanhoe Rd. facility during Mr. Fagerholm's employ." (Emphasis added.)

{¶12}The trial court clearly stated in its order that allowing Mrs. Fagerholm unlimited inquiry into every product manufactured, distributed, or sold by GE and its affiliates or subsidiaries would be overly broad and unduly burdensome, in contravention of Civ.R. 26(C).

{¶13}During Ms. Drucker's deposition, counsel for GE made numerous objections to the questions being asked by counsel for Mrs. Fagerholm, and yet Ms. Drucker still answered the questions. At one point in the deposition, the parties contacted the judge, who reminded the parties that any information not germane to the case would not be admitted into evidence and would be stricken. Furthermore, Ms. Drucker testified that no other GE plant had similar chemical

operations (i.e. manufacturing of fluorescent powders for fluorescent fixtures) to that of the Ivanhoe Road facility.

{¶14}We do not find that the trial court abused its discretion by granting a protective order and limiting the scope of discovery. GE's operations are multinational and quite extensive. Allowing unlimited inquiry into every aspect of GE's operations would have been unduly burdensome and over broad.

{¶15}Mrs. Fagerholm's first assignment of error is overruled.

Grant of Summary Judgment

{¶16}"II. The trial court erred in granting summary judgment for defendant-appellee General Electric Company on plaintiff-appellant Beverly Fagerholm's intentional tort claim."

{¶17}In her second assignment of error, Mrs. Fagerholm argues that summary judgment was improper because she had met all three prongs of the test in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, at paragraph two of the syllabus, to establish the element of intent in proving that an employer committed an intentional tort against an employee. We disagree.

{¶18}Appellate review of summary judgments is de novo. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equipment Co.* (1998), 124 Ohio App.3d 581, 706 N.E.2d 860. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d

201: "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, 273-274."

{¶19}Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶20}Generally, when an employee is injured in the course of his employment, his only recourse for compensation is the Ohio Workers' Compensation system. See, generally, *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004. An exception exists,

however, where the employee is injured due to an intentional tort by the employer. In this situation, the injured employee may seek compensation directly from the employer. *Boyd v. S. E. Johnson Co.*, 3rd Dist. No. 11-01-01, 2001-Ohio-2223, citing *Blankenship v. Cincinnati Milacron Chems.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572.

{¶21} In 1991, the Ohio Supreme Court established a three-part test that a proponent must satisfy in order to show the element of intent in proving that an employer committed an intentional tort against his employee: "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe*, supra, at paragraph one of the syllabus (superseded by R.C. 2745.01 for injuries occurring after April 7, 2005, as stated in *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶17, 885 N.E.2d 204, holding that the *Fyffe* standard still applies in accidents predating the enactment of R.C. 2745.01). Moreover, a plaintiff must demonstrate all three parts of the test. *Flynn v. Herbert E. Orr Co.*, 3d Dist. No. 11-02-04, 2002-Ohio-6598.

{¶22}In order to satisfy the first prong of the *Fyffe* test, Mrs. Fagerholm must establish that GE possessed the knowledge of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation. A dangerous condition, as defined in the employer intentional tort doctrine, must be something beyond the natural hazard of employment. *Youngbird v. Whirlpool Corp*. (1994), 99 Ohio App.3d 740, 747, 651 N.E.2d 1314, 1318.

{¶23}The mere existence of a dangerous condition alone, however, is not sufficient to satisfy the first prong. Nor is knowledge of the mere possibility of a dangerous condition sufficient. "The employee bears the burden of proving by a preponderance of the evidence that the employer had actual knowledge of the exact dangers which ultimately caused the injury." *Reed v. BFI Waste Systems* (Oct. 23, 1995), Warren App. No. CA95-06-062.

{¶24}In her deposition testimony, Ms. Drucker admitted that GE was aware that some amount of asbestos was present at its Ivanhoe Road facility. She also admitted that GE was aware that asbestos was a danger that could lead to injury. We are not convinced that, even with Ms. Drucker's testimony, Mrs. Fagerholm has demonstrated by a preponderance of the evidence that GE had actual knowledge of the exact dangers that would lead to Mr. Fagerholm's malignant mesothelioma. Even if we were to find that Mrs. Fagerholm has met the first prong of the *Fyffe* test, we do not find there is a genuine issue of material fact regarding the second prong.

{¶25}It is Mrs. Fagerholm's failure to meet the second prong of *Fyffe* that prompted the trial court to grant summary judgment. The second prong of the *Fyffe* test requires that Mrs. Fagerholm must establish that GE possessed actual knowledge that if an employee is subjected by his employment to such a dangerous process or procedure, then harm to the employee would be substantially certain to occur. See *New Hampshire Insurance Group v. Frost* (1995), 110 Ohio App.3d 514, 517, 674 N.E.2d 1189.

{¶26}The *Fyffe* Court elaborated on what constitutes an intentional tort, declaring that: "To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure, or condition, and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk -- something short of substantial certainty -- is not intent." *Fyffe*, supra.

{¶27}The Ohio Supreme Court has "defined the breadth of employer intentional torts very narrowly out of a concern 'that an expansive interpretation

could thwart the legislative bargain underlying workers' compensation by eroding the exclusivity of both the liability and the recovery provided by workers' compensation.'" Id., quoting *Kincer v. American Brick & Block, Inc.* (Jan. 24, 1997), Montgomery App. No. 16073.

{¶28}In its order granting summary judgment, the trial court found "[t]here is not sufficient evidence from which a jury could conclude that G.E. possessed actual knowledge that Mr. Fagerholm was being exposed to levels of asbestos fiber which G.E. knew was substantially certain to result in the development of asbestos-related disease. Plaintiff's evidence that G.E. may have been on the forefront of investigation into industrial hazards of asbestos still cannot prove the requisite knowledge of a substantially certain incidence of asbestos-related disease to workers at the Ivanhoe Rd. facility." Order, July 14, 2008.

{¶29}We agree with the trial court that no genuine issue of material fact exists as to whether GE knew with substantial certainty that Mr. Fagerholm would suffer from an asbestos-related disease.

{¶30}At her deposition, Ms. Drucker's testimony was that no other GE plant engaged in similar chemical operations to that of the Ivanhoe Road facility. She testified that she was not aware of another GE plant, other than the Ivanhoe Road facility, that engaged in the making of fluorescent powders for fluorescent fixtures. Ms. Drucker testified that GE complied with all Ohio safety

regulations based on the information available to GE in the 1950's and beyond, when Mr. Fagerholm was employed building experimental furnaces and may have been exposed to asbestos. She testified that the methods and materials used by GE during Mr. Fagerholm's early years with GE were in compliance with state law and were state of the art for the times.

{¶31}Mr. Fagerholm, in his videotaped trial deposition, testified that masks were available, but that he and his coworkers did not use them, and GE did not require them to wear them. He testified that there was adequate ventilation in his workspace. He also made repeated statements that he believed GE was concerned about safety in the workplace and up to date on safety training and that he participated in the training GE provided. Mr. Fagerholm's testimony significantly undercuts his theory of liability.

{¶32}We are also not persuaded by Mr. Fagerholm's expert, William Ewing, a certified industrial hygienist, who submitted a report that essentially compared apples to oranges. See *GE v. Joiner* (1997), 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508. Specifically, Mr. Ewing bases his opinion -- that the Threshold Limit Values ("TLV") at the Ivanhoe Road facility were excessive -- on data taken from years other than those when Mr. Fagerholm worked there making experimental furnaces. He also compared the conditions at the Ivanhoe Road facility with those in naval dockyards, which is not persuasive. Mr.

Ewing's report does not create a genuine issue of material fact that GE knew with substantial certainty that Mr. Fagerholm would suffer from mesothelioma.

{¶33}Mrs. Fagerholm has not demonstrated that a genuine issue of material fact exists to defeat summary judgment under the second prong of *Fyffe*. Having so found, we do not need to address the third prong.

{¶34}Mrs. Fagerholm's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

COLLEEN CONWAY COONEY, A.J., and
LARRY A. JONES, J., CONCUR