

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

ELAINE R. MILONE, INDIVIDUALLY :
AND AS EXECUTOR OF THE ESTATE :
OF DURWOOD C. MILONE, ET AL., :

Plaintiffs-Appellants, :

No. 110579

v. :

AII ACQUISITION CORPORATION, :
L.L.C., ET AL., :

Defendants-Appellees.

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: June 30, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-901390

Appearances:

Bevan and Associates LPA, Inc., and Joshua P. Grunda;
Belluck & Fox, LLP, Michael A. Macrides, and Seth A.
Dymond, *pro hac vice, for appellant.*

Tucker Ellis LLP, Laura Kingsley Hong, and Sarena M.
Holder, *for appellee.*

LISA B. FORBES, P.J.:

{¶ 1} Appellant Elaine R. Milone (“Elaine”), individually and as executor for the Estate of Durwood C. Milone (“Durwood”), appeals the trial court’s order granting summary judgment in favor of appellee AII Acquisition Corporation, L.L.C. as successor in interest to Holland Furnace Company (collectively referred to as “Holland”). After reviewing the facts of the case and the pertinent law, we affirm.

I. Facts and Procedural History

{¶ 2} Durwood was diagnosed with malignant mesothelioma in June 2015. Durwood subsequently died on August 11, 2016, at 89 years old.

{¶ 3} Durwood initially brought his claims against Holland in New York state court on August 20, 2015. Those claims against Holland were subsequently dismissed and refiled in Cuyahoga County. On July 27, 2018, Elaine filed a complaint against Holland, alleging personal injury, wrongful death, and loss of consortium resulting from Durwood’s death. Holland moved for summary judgment on June 11, 2020, which was ultimately granted on May 11, 2021. In support of its motion, Holland provided the trial court with Durwood’s testimony. Elaine opposed the motion, relying on Durwood’s testimony, documents from the New York litigation, an affidavit and expert report from Dr. Jacqueline Moline, and documents purporting to be from Holland that Elaine claimed demonstrated that Holland furnaces contained asbestos.

A. Durwood Milone's Deposition Testimony

{¶ 4} Durwood gave testimony twice: once in a discovery deposition and a second time to preserve his testimony. Durwood testified regarding his residential, education, military, and work history. Through that testimony, Durwood stated that he had no reason to believe he was exposed to asbestos from any of those positions or locations other than his work on furnaces during his employment with the East Ohio Gas Company ("EOGC") and his employment with IBM in New York City offices. Only the alleged exposure through EOGC will be discussed as pertinent to this appeal.

{¶ 5} According to Durwood, he was exposed to asbestos during his two-and-a-half-year employment with EOGC between 1949 and 1952. Durwood explained that when he began working at EOGC he thought he "probably had a week's education in various appliances, furnaces mainly." This training occurred in EOGC's "offices on East 55th Street." During this training, Durwood learned "[h]ow to make * * * the furnaces work properly. Just how to adjust the inputs, pilot lights, limit controls, various aspects of controlling the furnace for its proper operation." Further, Durwood testified that during his first two weeks on the job he would go to service calls "with a partner who had experience[.]" Aside from the week of classroom training and two weeks of working with a partner, the skills required to do the job were learned on the job.

{¶ 6} Durwood testified that his main task at EOGC was furnace repair, estimating that it was 60-70 percent of his work and that during his two-and-a-half-

year employment he serviced between 400 and 500 furnaces. His other responsibilities consisted of installing gas meters, calibrating kitchen ranges, and repairing water heaters. Durwood did not have reason to believe that anything other than his work on furnaces exposed him to asbestos.

{¶ 7} Durwood identified five furnace manufactures that he serviced during that time: Lennox, Bryant, Rheem, Sunbeam, and Holland. Durwood recalled servicing each of the five manufacturers' furnaces "one-fifth of the time."

{¶ 8} Durwood described the Holland furnaces that he serviced as "[r]ectangular box[es], metal box[es], 2, 2 and a half feet wide, 3, 3 and a half feet deep, 4 and a half to 5 foot high." Durwood knew when he was working on a Holland furnace because the name "Holland" was written on a metal plate on the front panel of the furnace. "There were two panels. One panel was on the top which, when removed, showed the firebox, and the lower panel when removed, was where the motor and the blower were."

{¶ 9} Holland furnaces, according to Durwood, were forced air, meaning the blower forced "air through the furnace and up, and then gravity would bring the air back down." Durwood described the firebox of a Holland furnace as the part "where the gas comes into the burners * * *, and also in there is the pilot light, the control to feed the gas into the furnace and to shut it off or to allow it to flow, and the asbestos boards * * * on either side." According to Durwood, asbestos was used as an insulator.

{¶ 10} Describing the way the furnace delivered warm air to the rest of the house, Durwood explained that air “goes out through the flue and into the air ducts that go to the various rooms” those ducts were made of sheet metal and were “attached to the furnace * * * [o]n the upper side where the heat was generated.” The ducts were described as “[p]robably about 4 inches by 10 to 12 inches[,]” rectangular in shape, and made of sheet metal. Each furnace had “several” of these rectangular ducts coming from the top. Durwood also described a “cold air return,” which was also made of metal, “[b]ut it was larger” than the other ducts and connected “to the lower compartment where the fan was located.”

{¶ 11} Durwood testified that he was exposed to asbestos when sweeping dark brown dust from deteriorating asbestos boards out of the fireboxes of Holland furnaces:

Q. And you’ve explained to us that it’s your — and I believe you characterized it as being an assumption, correct me if I’m wrong, but that you assumed it was asbestos, that it was from the deteriorating boards, correct?

A. Correct.

{¶ 12} Durwood did not “believe” that the dust was carbon residue from the combustion inside the furnace “because the gas was very efficient in its burning. I believe 98 percent to 99 percent of the gas was completely burned.” When asked, “Well, you say you believe so, but you’re not certain, are you?” Durwood responded, “Well, that’s what we — no. We were informed that by the gas company.” To Durwood’s knowledge, the dust found inside the fireboxes was never tested to determine its composition.

{¶ 13} With regard to the other four manufacturers, Durwood testified that he knew the boards inside the fireboxes of the furnaces were made of asbestos because “that was generally known at the gas companies. People referred to it all the time as being asbestos board.” He explained that referring to the material inside the firebox as asbestos board was “[j]ust a general term used by all of the employees that worked on the furnaces.” Durwood then described the material he referred to as asbestos board as approximately half an inch to three-eighths inch thick and it was found on the right and left sides of the firebox. When asked how he knew the dust and debris in the firebox of a furnace was asbestos, Durwood answered, “[T]he boards would deteriorate, and you could see the discoloration and the deterioration of the board, and it would drop down in the firebox, and that’s how it was determined.” Durwood was further asked whether the insulation inside the fireboxes was fiberglass, to which he replied “[n]o.”

{¶ 14} When questioned about Holland furnaces specifically, Durwood was never asked how he knew the boards inside the firebox of a Holland furnace were made of asbestos. However, Durwood was asked whether the testimony and descriptions he gave regarding the other four manufacturers would “be the same with respect to a Holland furnace that [he] observed?” Durwood responded, “Yes.”

B. Dr. Moline’s Expert Report

{¶ 15} Dr. Jacqueline Moline (“Dr. Moline”), “a Diplomat of the American Board of Internal Medicine,” provided an affidavit and expert report regarding Durwood’s mesothelioma. Through those documents, Dr. Moline stated that

Durwood died from “malignant mesothelioma as a result of his cumulative exposures to asbestos.” She asserted in her affidavit that Durwood’s “regular and frequent exposure to asbestos from Holland furnaces was a substantial contributing factor to the development of his mesothelioma.” Her expert report stated that he had “regular and frequent exposure to asbestos from each of the brands” identified in Durwood’s testimony.

{¶ 16} The opinions Dr. Moline gave in her affidavit and expert report regarding the source of Durwood’s asbestos exposure were based solely on Durwood’s deposition testimony.

C. Holland’s Documents

{¶ 17} Elaine offered numerous purported Holland documents from the 1920s that she argued establish Holland’s use of asbestos inside its furnaces. These documents discuss the use of asbestos paper, asbestos cement, and asbestos wicking inside Holland furnaces. Nothing introduced into evidence connected the devices discussed in the documents to any of the furnaces that Durwood serviced during his employment with EOGC.

II. Law and Analysis

{¶ 18} On appeal, Elaine raises the following assignment of error: “The trial court erred as a matter of law by granting summary judgment in favor of [Holland].” We disagree.

{¶ 19} Appellate review of an order granting summary judgment is *de novo*. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7.

Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are 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. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶ 20} A plaintiff alleging asbestos-related injuries must demonstrate “that (1) he or she was ‘exposed to asbestos’ that was ‘manufactured, supplied, installed, or used by the defendant’ and (2) the plaintiff’s exposure to the defendant’s asbestos-containing product was a ‘substantial factor’ in causing the plaintiff’s asbestos-related injuries.” *Maddy v. Honeywell Internatl. Inc.*, 8th Dist. Cuyahoga Nos. 108698 and 109066, 2020-Ohio-3969, ¶ 74, quoting R.C. 2307.96(B).

{¶ 21} R.C. 2307.96(B) provides that “[i]n 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.

{¶ 22} The legislature explained in the uncodified portion of the statute that “[w]here specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant’s asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail.” Am.Sub.H.B. No. 292, Section 5, 150 Ohio Laws, Part III, 3993.

{¶ 23} Here, Durwood’s deposition testimony demonstrated that he worked on Holland furnaces while working for EOGC from 1949 to 1952. While working on those furnaces, he swept out dust and debris from deteriorated boards that lined the fireboxes of those furnaces. Elaine claimed this was a substantial factor in causing Durwood’s mesothelioma. In support, she relied on the expert report of Dr. Moline, which concluded that Durwood’s “regular and frequent exposure to asbestos from each of the brands and types of equipment identified above was a substantial contributing factor to the development of his mesothelioma.”

{¶ 24} Holland argues, in support of summary judgment, that “any testimony by [Durwood] that Holland furnaces incorporated asbestos-containing insulation boards is inadmissible lay witness testimony.” It claims that Durwood’s testimony is inadmissible under Evid.R. 602 and 701 because he lacks personal knowledge.

{¶ 25} Evid.R. 602, provides, in part, that a “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

{¶ 26} Pursuant to Evid.R. 701, a lay witness may testify as to his or her opinions or inferences, “which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

{¶ 27} In support of its position, Holland cites to *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St.3d 40, 514 N.E.2d 691 (1987). In *Goldman*, the Ohio Supreme Court found that several witnesses could not testify via affidavits and depositions to the presence of asbestos in a bakery because they did not have personal knowledge. One witness averred that he had entered the bakery where the plaintiff alleged he was exposed to asbestos on “numerous occasions,” “was employed at another bakery as a plant engineer,” and that while inside the bakery at issue in the case, he “observed steam pipes wrapped in insulation” that from his experience in the bakery industry he believed to be asbestos. *Id.* at 42. Another witness, who did remodeling work at the subject bakery, only testified that he believed “boards he placed on the ceiling were made of asbestos” with nothing more. *Id.* at 43. Finally, the court found that a maintenance man who worked at the subject bakery did not have personal knowledge regarding the alleged asbestos when his testimony only indicated that he was “told’ that the insulating boards above the ovens ‘probably was asbestos.’” *Id.* Further, when asked how the steam pipes were insulated the maintenance man responded, “I would say it was asbestos. I wouldn’t swear. I’m not an engineer or nothing, but that’s what they always told me it was asbestos insulation.” *Id.*

{¶ 28} Similarly, here Durwood testified that he knew the boards inside the firebox were made of asbestos because “[t]hat was generally known at the gas companies. People referred to it all the time as being an asbestos board.” Durwood had “not had any training to identify whether or not materials contain asbestos.” Rather, he assumed the material in the fireboxes was asbestos. The testimony offered by Durwood falls short of what this court has found to be sufficient to establish personal knowledge. *See Shesler v. CONRAIL*, 151 Ohio App.3d 462, 2003-Ohio-320, 784 N.E.2d 725, ¶ 20-21 (8th Dist.) (finding that “there is a marked difference in the testimony” presented than the testimony in *Goldman* when one witness became familiar with asbestos and its uses, unloaded bags labeled asbestos, and observed bills of lading labeled asbestos, and another witness had over 43 years of experience working with asbestos.); *Shepard v. Grand Trunk W.R.R.*, 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853, ¶ 73 (distinguishing the witness testimony in *Goldman* and finding witnesses had personal knowledge to testify based upon their “extensive” careers, testimony that “they knew what asbestos looked like, they knew it was used on the railroad, and it was present on the railroad throughout their careers”).

{¶ 29} Like the inadmissible affidavits and depositions in *Goldman*, Durwood’s deposition testimony is not sufficient to show that he had the requisite personal knowledge to establish that the boards inside the fireboxes were in fact made of asbestos or that he was exposed to asbestos when he worked on Holland furnaces.

{¶ 30} Dr. Moline’s affidavit and expert report regarding the source of Durwood’s exposure to asbestos relied wholly on his deposition testimony. For the reasons discussed above, she is not competent to establish the source of Durwood’s asbestos exposure. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.” Evid.R. 703. “As long as evidence admissible at trial is introduced and admitted through fact witnesses with personal knowledge, an expert witness without personal knowledge of the underlying event is permitted to testify to an opinion based on admitted facts.” *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec.*, 110 Ohio App.3d 732, 738, 675 N.E.2d 65 (2d Dist.1996). Durwood’s testimony did not establish that he had personal knowledge to testify regarding the composition of the boards inside Holland furnaces. Therefore, Dr. Moline’s expert report cannot be used to establish that Durwood was exposed to asbestos from Holland furnaces.

{¶ 31} Finally, without considering whether the documents relied upon by Elaine were properly authenticated or admissible, we find that the purported Holland documents do not demonstrate that Durwood was exposed to asbestos insulation boards inside the fireboxes of Holland furnaces. The documents date back to the 1920s and do not provide any evidence that any furnace Durwood worked on from 1949-1952 contained boards made from asbestos.

{¶ 32} We find the trial court did not err in granting summary judgment in favor of Holland. We are constrained by *Goldman* to conclude that Durwood’s

testimony is not competent to establish that he was exposed to asbestos “manufactured, supplied, installed or used by” Holland. Based on the record before us, there is no genuine issue of material fact with regard to that essential element for asbestos-related injury. Accordingly, Elaine’s sole assignment of error is overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellees 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.

LISA B. FORBES, PRESIDING JUDGE

EMANUELLA D. GROVES, J., and
SYLVIA S. HENDON, J.,* CONCUR

*(Sitting by assignment: Sylvia S. Hendon, J., retired, of the First District Court of Appeals.)