

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CATHERINE HASSEY, Individually and as : CIVIL ACTION
Administratrix of the Estate of Harry :
R. Hassey, Dec'd :
vs. : FILED FEB 2 1981
UNIROYAL, INC, et al. : NO. 80-43

MEMORANDUM

GREEN, J.

FEBRUARY 2, 1981

This matter is once again before me on defendant Uniroyal's motion for summary judgment. Having carefully considered both the arguments made by Uniroyal and those made in opposition by plaintiff, I will deny the motion.

This diversity action originally was instituted by Harry R. Hassey and his wife, Catherine Hassey, against one defendant, Uniroyal. Mr. Hassey has since died, and the sole plaintiff is now his wife, suing individually and as the administratrix of his estate. She has filed an amended complaint, which names four additional defendants, B.F. Goodrich Company, Firestone Tire and Rubber Company, Union Carbide Corporation and Air Products and Chemicals, Incorporated. The amended complaint alleges that during the period from 1951 to 1978 the defendants sold a chemical known as polyvinyl chloride (PVC) to the Masland Duralenather Company (Masland), which used the chemical as part of its process for manufacturing vinyl sheets. Further, it is claimed that Harry Hassey, who was an employee of Masland:

URL 12567

throughout that twenty-seven year period, developed the lung cancer which eventually killed him as a result of his exposure to the PVC supplied Masland by the defendants. The amended complaint alleges causes of actions against the defendants for negligence, breach of warranty and strict liability.

Before bringing this suit, Harry Hassey filed a claim, which is still pending, against defendant Uniroyal under the Pennsylvania Workmen's Compensation Act. It is undisputed that from December, 1972 to August, 1978, Uniroyal, which had taken over and liquidated the Masland Company while continuing to operate it under the fictitious name of Masland, was Mr. Hassey's statutory employer for purposes of workmen's compensation. Similarly, the parties agree that during the period from 1951 to 1962, Uniroyal was not the statutory employer of plaintiff's decedent. In dispute, however, is the period from January, 1963 to December, 1972, after Uniroyal had acquired 100% ownership of the stock of Masland and began operating the company as a wholly-owned subsidiary. Plaintiff maintains that Uniroyal was not her husband's employer during that period while Uniroyal argues that it was. These contrary assertions present a mixed question of law and fact which need not be resolved to decide the instant motion.

The issue raised by Uniroyal's motion for summary judgment is whether a court can grant summary judgment on

URL 12568

law for damages and a claim under the Workmen's Compensation Act against his employer who at one time acted as a third party supplier of a purportedly dangerous substance to his original employer. In Pennsylvania, workmen's compensation is the exclusive remedy of an employee or his representative against an employer for any injury, occupational disease or death resulting from the conditions of employment.

77 P.S. §481(a). However, an employee or his representative may bring a civil action against any third party who causes or contributes to the cause of such injury, disease or death. 77 P.S. §481(b).

Defendant Uniroyal argues that despite the fact that it may have at one time acted as a third party supplier of PVC to Masland, plaintiff's only remedy against Uniroyal, should she be able to show its liability, is under the workmen's compensation statute. While conceding that there is no Pennsylvania law directly supporting this position, Uniroyal asserts that plaintiff has "bifurcated" her husband's alleged occupational disease and that such bifurcation represents a novel theory which should not be accepted by the courts. Uniroyal offers four reasons which it contends compel the rejection of plaintiff's theory. I do not find any of these reasons persuasive.

17
Indeed, defendant claims that it has not been able to find any caselaw from any jurisdiction dealing with this issue. It maintains that this very absence of authority underscores the validity of plaintiff's position.

URL 12569

The first reason cited by defendants is that the language of the Pennsylvania Workmen's Compensation Act "neither mandates or even suggests" that an employee can sue his employer both as an employer and as a third party supplier. Stated another way, because the statute is silent as to the question presented here, Uniroyal urges that I must conclude that the legislature intended to prohibit what Uniroyal has described as bifurcation. I do not construe this silence in the same way as the defendant does. 77 P.S. §481(b), the Pennsylvania workmen's compensation statute, clearly allows an employee to bring a civil action against a third party; during some part of Mr. Hassey's term of employment at Masland, Uniroyal may have acted as a third party supplier of PVC to that plant. As Uniroyal has failed to point to specific language in the statute and in the legislative history which would prohibit Mr. Hassey's widow from suing Uniroyal under §481(b), I must reject the first reason cited by Uniroyal.

URL 12570

Uniroyal's second reason, that "bifurcation" unfairly would subject an employer to double liability, is also unconvincing. While it is true that if Mrs. Hassey were able to establish liability on the part of Uniroyal as a third party supplier, it will have to pay her damages in addition to any payments she might be entitled to from Uniroyal under workmen's compensation, this does not amount to double liability. The situation is no different

than if plaintiff were to sue another third party, as indeed Mrs. Hassey is doing in this case, and Uniroyal remained liable under the Workmen's Compensation Act.

The third argument against "bifurcation" made by Uniroyal is that Pennsylvania law treats an occupational disease as a single injury which cannot be divided into separate parts for purposes of determining causation and liability. Based on the cases cited by defendant, I am not convinced that Uniroyal has correctly stated Pennsylvania law on this question. More importantly, I think this argument must fail because it is beside the point. 77 P.S. §481(b) allows an employee to sue a third party as well as maintain a workmen's compensation claim against his employer. Problems of proving causation are not altered by the fact one of the third parties sued also happens to be the claimant's statutory employer. Mrs. Hassey may indeed have difficulty proving what part of her husband's fatal illness can be ascribed to Uniroyal's activities as a third party supplier of PVC; however, she faces this same difficulty in proving her case against the other third parties which she has sued. At any rate, this problem raises a factual question which cannot be resolved appropriately at the summary judgment level.

The fourth and final reason why I find Uniroyal's motion for summary judgment to be without merit is that Uniroyal's motion is based on a misstatement of the law. Uniroyal's motion is based on the fact that Uniroyal is not a third party under the Workmen's Compensation Act.

URL 12571

"bifurcation" because of its "practical effects" which, according to Uniroyal, is the fact that plaintiff will not be able to separate and prove each defendant's responsibility and liability for Mr. Hassey's illness. I already have explained why I reject this line of reasoning.

Like defendant, I have not found any cases involving the precise issue presented here; however, there are cases dealing with a closely related issue, known as the dual capacity doctrine. This doctrine has been described as follows:

. . . an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.

Larson, Law of Workmen's Compensation (1976), Vol. 2a, 572.80, at 14-112.

URL 12572

In the cases in which this doctrine has been applied, employees have sued their employers in their capacities as landowners or manufacturers in addition to bringing workmen's compensation claims.^{2/} These cases are factually distinguishable from the instant matter as they involve situations where the employer functions in two capacities simultaneously while in this case it is alleged that Uniroyal first had the role of third party supplier and later became the plaintiff's employer. Although the dual capacity doctrine does not govern the issue raised here, it does show that there

^{2/} See, e.g., Douglas v. W. & L. Little Winery, et al., 39 Cal. 2d 197, 247 Cal. Rptr. 197 (1970); Barker v. W. Winery, et al., 44 Cal. 2d 373, 284 P.2d 492 (1955).

are jurisdictions, albeit a minority, which have rejected the position taken by Uniroyal that in all situations an employee's exclusive remedy against a party who is his employer lies in workmen's compensation. See Kohn v. Raybestos-Manhattan, Inc., No. 78-3942 (E.D. Pa. January 14, 1981) (Troutman, J.) (district court, predicting that Pennsylvania will follow the dual capacity doctrine, allows plaintiff to sue his employer in its capacity as manufacturer of an allegedly defective product which has injured plaintiff).

As defendant Uniroyal has failed to prove that it is entitled to judgment as a matter of law, I enter the attached order denying its motion for summary judgment.

In its supporting memorandum, Uniroyal has asked the Court not to foreclose Uniroyal at this stage from asserting that it was Mr. Hassey's statutory employer for the period from 1962 to 1972. I will grant that request.

URL 12573

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O R D E R

AND NOW, this 2nd day of February, 1981, upon
consideration of defendant Uniroyal's motion for summary
judgment and plaintiff's opposition thereto, IT IS ORDERED
that said motion is DENIED.

BY THE COURT:

CLIFFORD SCOTT GREEN, J.

URL 12574

CLERK OF COURT