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*Bonsie
Report*

NUMBER 99-1387

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

*
OUTHER COLE, ET AL

Plaintiffs-Appellants

Versus

LOTEX CORPORATION, ET AL

Defendants-Appellants

On appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana; the Honorable L. E. Hawsey, Jr., District Judge, Presiding.

Before FORET, DOUCET and CULPEPPER,* Judges.

CULPEPPER, Judge.

This is a suit for damages sustained from an occupational disease caused by exposure to asbestos.

Plaintiffs, John Perry, Wilson James Cormier and Dewey Derouen, worked for Cities Service at its refinery in Calcasieu Parish. They allege that during their employment they were exposed to asbestos material, used as insulation at the refinery, and had been diagnosed as having asbestosis. Numerous manufacturers of products containing asbestos, and INA, the liability insurer of certain named executive officers of Cities Service, were named

*Judge William A. Culpepper, Retired, participated in this decision as Judge Pro Tempore.

as defendants. Plaintiffs alleged that the named executive officers negligently failed to provide them with a safe place to work between 1945, the year they began work, and 1976, the year that, effective October 1, the Louisiana legislature amended La. R.S. 23:1032 and barred suits against executive officers unless the conduct amounts to an intentional tort. Prior to trial, plaintiffs settled with the manufacturers. The sole defendant at trial was INA, as insurer of eleven executive officers.

After a two week trial, the jury found nine of the eleven executive officers had been negligent and awarded damages in the sum of \$300,000.00 to each plaintiff. In apportioning fault, the jury found the executive officers were 95% at fault and the asbestos manufacturers 5%. Consequently, the trial judge awarded each plaintiff \$285,000.00 plus legal interest.

The jury did not decide the insurance coverage issues because plaintiffs and INA agreed to allow the trial judge to decide. In written reasons for judgment, the trial judge ruled that INA provided coverage for the nine Cities Service executive officers found to be negligent. A judgment incorporating the jury's verdict and the trial judge's ruling was signed on March 21, 1990. INA appeals asserting thirteen assignments of error.

ASSIGNMENT OF ERROR NUMBER 1

The jury verdicts are erroneous, as a matter of law, for lack of factual findings that each plaintiff's negligence cause of action accrued prior to October 1, 1976 (when employees' negligence actions against executive officers were abolished).

In response to this assignment of error, plaintiffs first argue that INA has waived its right to object to the lack of a jury interrogatory by failing to object specifically thereto, as required by La. C.C.P. art. 1793(C). Our review of the record shows that INA did not properly object.

La. C.C.P. art. 1793(C) provides in pertinent part:

operated by Cities Service throughout the years that Derouen worked there, 1945-1976. After a review of the evidence, we find that Derouen was employed by Cities Service from 1945 to 1976. Thus, we find this assignment of error to be without merit.

ASSIGNMENT OF ERROR NUMBER 3

The trial court erred by admitting into evidence a 1937 report entitled "Dust Producing Operations in the Production of Petroleum Products and Associated Activities."

This report, which was published in 1937, is based on available literature on the subject, field investigations, conferences with technical specialists, and actual dust counts. Its general purpose is to show the relative hazards of dusts and the duration of exposure which may prove harmful to workers. The report was published by Standard Oil Company of New Jersey and was compiled by their chief safety inspector, Roy Bonsit.

Plaintiffs' witness, Professor J. W. Hammond, who was qualified at the trial as an expert industrial hygienist, testified that he began working for Humble Oil in 1947 or 1948 and the report was in the files of Humble's safety department at that time.

INA argues that the report is irrelevant, is not an original, and is hearsay.

Plaintiffs introduced the report to corroborate Hammond, and to show that the petrochemical industry in general knew, as far back as 1937, that exposure to asbestos dust could harm workers. This purpose is certainly relevant to the issue of whether the executive officers knew or should have known that asbestos dust was harmful. C.E. art. 401.

The report introduced is a photocopy and not the original. Under C.E. art. 1002, it must be excluded unless it falls within an exception provided by the code or other legislation. Plaintiffs argue the report falls within the provisions of C.E.

art. 1003(1), that a duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original. La. C.E. art. 901A states that the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claim. Hammond's testimony is sufficient evidence to support a finding that the copy introduced into evidence is a copy of the original 1937 report published by Standard Oil. The record does not present a genuine issue to the contrary. Thus, the requirements for admissibility under C.E. arts. 1003(1) and 901A are met.

Although we find the copy is sufficiently authenticated and identified, it must also overcome defendant's objection that it is hearsay. C.E. art. 801C defines hearsay as follows:

"Hearsay" is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."

The Bonsit report is a collection of data and opinions not made by the declarants in court under oath and subject to cross examination. Thus, it is hearsay unless it was offered for some valid purpose other than the truth of the matter asserted in the report. Plaintiffs contend the report is not hearsay because it was not introduced to prove the truth of the matter asserted, i.e., that asbestos dust is harmful, but to show general knowledge throughout the industry as to the hazards of asbestos exposure, and to corroborate the testimony of Professor Hammond.

The Comment to Article 801(C) states in pertinent part:

"Paragraph C also makes clear that a non-assertive use (to prove anything other than the truth of the out-of-court statement) is not hearsay."

In their brief in this court, plaintiffs argue that even if the Bonsit report was inadmissible to prove the truth of its contents, i.e., the matter asserted, it was admissible to show the state of knowledge concerning the hazards of asbestos in the petroleum industry. This argument demonstrates the fallacy of plaintiffs' position. The "matter asserted" in the Bonsit report is the hazard of asbestos in the petroleum industry. The report was offered in evidence to prove this. Thus it is clearly hearsay.

Plaintiffs next argue that, even if it is hearsay, it falls within the ancient document exception to the hearsay rule. C.E. art. 803(16) provides:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established, or statements in a recorded document as provided by other legislation."

Comment (c) under C.E. art. 803(16) states that, to be admissible under this paragraph, a document must be authenticated as provided in C.E. arts. 901(A), 901(B), and 901(B)(8), which provide:

"A. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

B. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this [rule] Article:

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form:

(a) Is in such condition as to create no suspicion concerning its authenticity;

(b) Was in a place where it, if authentic, would likely be; and

(c) Has been in existence thirty years or more at the time it is offered."

The evidence satisfies the requirements of C.E. art. 901(B)(8). There is nothing about the condition of the report to create suspicion as to its authenticity. It does not appear to have been altered or forged or changed in any way. At trial, defendant made no serious attempt to create such a suspicion. The report was found by Dr. Hammond in the files of Humble Oil & Refining Company when he went to work there in 1947. This is a place where it would likely be. Clearly, as shown by Dr. Hammond's testimony and the report itself, it is over thirty years old.

Defendant cites *Dartez v. Fibreboard Corp.*, 765 F.2d 465 (5th Cir. 1985), for its holding that a document found in the private files of a witness is suspicious. That case is distinguished on the facts. Here, the document was not found in the private files of Dr. Hammond but in the files of Humble Oil & Refining Company, a place where it would likely be.

We conclude the report is admissible as an ancient document and that the statements therein are not excluded by the hearsay rule.

ASSIGNMENT OF ERROR NUMBER 4

The jury finding that nine Cities Service executive officers negligently failed to provide these three plaintiffs with a safe work place between 1945 and 1976 amounts to a clear