

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

BOBBY FREEMAN and : CIVIL ACTION  
JULIE FREEMAN :  
 :  
 v. :  
 :  
 :  
 PACO CORP. : NO. 99-5906

JUDGMENT

AND NOW, this 31<sup>st</sup> day of May, 2000, after a nonjury trial yesterday, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. JUDGMENT IS ENTERED in favor of defendant Paco Corporation and against plaintiffs Bobby Freeman and Julie Freeman; and
2. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.

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MEMORANDUM

Dalzell, J.

May 31, 2000

Plaintiffs brought this negligence and products liability action after Bobby Freeman was injured while cleaning part of a concrete block production system. After a nonjury trial yesterday, this Memorandum will constitute our findings of fact and conclusions of law under Fed. R. Civ. P. 52(a). For the reasons that follow, we hold that the Pennsylvania statute of repose bars plaintiffs' action.<sup>1</sup>

### Facts

Defendant Paco Corporation, a Canadian corporation based in Montreal, designed and manufactured the "Rotoclave", an elaborate structure that helps to fabricate concrete blocks used in construction. Pierre Gagnon, who testified yesterday, and two others formed Paco in 1960. M. Gagnon is a certified mechanical, electrical, and nuclear engineer. One of Paco's founders, M. Gagnon is no longer one of the company's owners, but continues to work for it.

Paco developed the Rotoclave in 1962. It is an imposing integrated production system used for improving the productivity of concrete block manufacturing plants. More specifically, the Rotoclave allows concrete blocks to "cure" in a warm, moist atmosphere for sixteen to eighteen hours. This prevents the heavy blocks from cracking after they are newly formed. Paco sold a total of fifteen Rotoclaves worldwide

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1. We have jurisdiction based on diversity of citizenship.

similar to the system at issue here,<sup>2</sup> and M. Gagnon testified that each was customized to fit its particular location.

In 1968, Fizzano Brothers ("Fizzano"), a concrete block manufacturer, contracted with Paco for the purchase of a Rotoclave for use at its Exton, Pennsylvania plant. M. Gagnon testified<sup>3</sup> that he and other Paco employees then set to work designing a system that would suit the Fizzanos' needs. Because Fizzano Brothers was worried about interrupting its production during the installation of the Rotoclave, Paco had to devise a method for building on the site that would cause as little disruption as possible. Fizzano Brothers paid \$500,000 for the system.

The Rotoclave at the Exton plant includes both an aboveground and an underground portion. The underground portion is one hundred feet in diameter, fourteen feet deep, and shaped like a large doughnut. This part of the Rotoclave is filled with warm water (the "moat") and has a steel "boat" floating in it. Transfer racks on the plant floor move wet cement blocks to an elevator that then lowers them into the boat, where they cure in this humid environment for about sixteen hours. The entire

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2. Paco in 1975 redesigned the system so that it no longer requires an underground "moat".

3. The Freemans suggest that M. Gagnon's testimony is suspect, as Paco has proffered no documents to support his statements. M. Gagnon credibly testified that the drawings for this particular job are no longer extant, as one might expect to be the case three decades after installation. In any event, we found M. Gagnon at all times forthright, and thus credit his testimony in its entirety.

"doughnut" is constantly turning in a slow circle. After the blocks are cured, the machine picks them up out of the trench and transfers them to a "palletizer" or "cuber". See Def.'s Trial Ex. 1. M. Gagnon testified that the whole system weighs five million pounds when loaded with blocks.

Paco made preliminary drawings and engineering plans for the Exton Rotoclave, which the late Mr. Fizzano<sup>4</sup> then approved and used to obtain building permits. M. Gagnon testified that Paco spent one thousand hours of engineering time designing and preparing for the Exton installation. Thereafter, Fizzano used those Paco drawings to obtain the requisite permits. The Fizzanos also hired someone to perform soil tests to ensure that the land could support a Rotoclave.

Paco spent about two months at the Exton plant installing the underground portion of the Rotoclave. It manufactured the aboveground portion in Montreal, then disassembled it and sent two employees to the Exton plant to oversee its installation by Fizzano employees, which took about two weeks. Paco's employees also remained on the site to supervise the start-up of the production system.

Bobby Freeman was injured on October 2, 1997 while cleaning the area near the aboveground portion of the Rotoclave. He thereafter filed this action. On April 3, 2000, we denied Paco's eleventh-hour motion for summary judgment on the statute

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4. Both Fizzano brothers are now deceased.

of repose defense, holding that there was a genuine issue of material fact as to whether Paco was within the class of people the statute of repose was designed to protect.

After an arbitration, Mr. and Mrs. Freeman demanded a trial de novo pursuant to Local R. Civ. P. 53.2.7.A. Because a determination that the statute of repose applies to this claim would obviate the need for further proceedings, we by Order on May 26, 2000 bifurcated the trial on that issue, pursuant to Fed. R. Civ. P. 42(b). The parties agreed to try that issue to the Court rather than to a jury. M. Gagnon was the only witness to testify during this threshold phase.

#### The Pennsylvania Statute of Repose

Pennsylvania's statute of repose, 42 Pa. Cons. Stat. Ann. § 5536 (West 1981), provides that

[A] civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

. . . .

(3) Injury to the person or for wrongful death arising out of any such deficiency.

A party moving for protection under the statute of repose must prove three elements: first, that what is supplied is

an improvement to real property; second, that more than twelve years have elapsed between the completion of the improvements to the real estate and the injury; and third, that it is within the class that is protected under the statute. See Noll v. Harrisburg Area YMCA, 643 A.2d 81, 84 (Pa. 1994).

There is no dispute that more than twelve years elapsed between the completion of the Rotoclave and the accident. In fact, twenty-nine years had passed. Plaintiffs do, however, take issue with the first and third elements.

A. Improvement to Real Property

For purposes of the statute of repose, the Pennsylvania Supreme Court has defined an improvement to real property as

A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes.

McCormick v. Columbus Conveyor Co., 564 A.2d 907, 909 (Pa. 1989) (quoting Black's Law Dictionary 682 (5<sup>th</sup> ed. 1979)). In Noll, the Supreme Court expanded on that definition, stating that an improvement "includes everything that permanently enhances the value of real property," 643 A.2d at 87.

We look at three factors to determine whether a chattel or personalty that becomes attached to real property constitutes a fixture, i.e., an improvement to real property: "(1) the relative permanence of attachment to realty; (2) the extent to

which the chattel is necessary or essential to the use of the realty; and (3) the intention of the parties to make a permanent addition to the realty." Id. The last factor - the intent of the parties - is an objective inquiry; their actual state of mind is of little consequence. Id. In making this objective inquiry, we look to various factors, including the degree to which and the manner in which the object is attached to real property; the ease of removing the object; whether the object may be removed without damaging the real property; how long the object has been attached to the real property; whether the object is necessary or essential to the real property; and the conduct of the party and whether it evidences an intent to permanently attach the object to the realty. Id. at 88; see also Vargo v. Koppers Co., 715 A.2d 423, 426 (Pa. 1998).

There is little doubt here that the Rotoclave constitutes an improvement to the Fizzanos' real property. It is not merely attached to the land. Rather, it is incorporated into the land and cannot be removed without destroying the machine and changing the entire structure of the land. M. Gagnon testified that if Fizzano Brothers wanted to get rid of the Rotoclave, its only option would be to fill in the hole. Both the underground and aboveground portions have been in place for more than thirty years and are still in use today, and M. Gagnon stated that no Rotoclave has ever been moved from one location to another.

Nor is there any doubt that the Rotoclave enhanced the value of the Fizzanos' property and "adapted it for . . . further

purposes." M. Gagnon testified that Fizzano derived a threefold benefit from the installation of the Rotoclave. First, it increased the output of the Exton plant from 850 or 900 blocks per hour to 1100 blocks per hour, or between 22% and 29%. Second, it allowed one maintenance worker to work half-time on a job that without the Rotoclave system required five or six workers performing hard labor, thereby eliminating at least four-and-a-half jobs. Third, it allowed Fizzano to produce a better product: before installing the Rotoclave, Fizzano had to discard four percent of its blocks because of cracking problems, but the Rotoclave installation reduced the wastage by a factor of eight, so that it only constituted one-half of one percent of total block production.

We therefore conclude that the Rotoclave adds great value to the Fizzano real property and is without question an improvement to it.

B. The Class Protected Under the Statute

A manufacturer who does no more than supply a defective product that later is incorporated into an improvement to real property by others is not within the statute's purview. See McConnaughey v. Building Components, Inc., 637 A.2d 1331, 1334 (Pa. 1994) ("The . . . statute of repose was not intended to apply to manufacturers and suppliers of products, but only to the kinds of economic actors who perform acts of 'individual expertise' akin to those commonly thought to be performed by

builders." ). The mere fact that a party manufactures a product, however, will not automatically remove it from the statute's protection; rather, the proper focus is on the activity performed, "particularly, whether any 'individual expertise' has been supplied." Noll, 643 A.2d at 86.

We have little difficulty concluding that Paco is much more than a mere manufacturer of a component product. M. Gagnon testified that more than one thousand hours of engineering went into the unique design and adaptation of the Rotoclave for the Fizzanos' Exton plant. Paco spent two months installing the underground portion and sent two highly skilled employees to oversee the construction of the entire aboveground portion.<sup>5</sup> These supervisors were responsible for ensuring that the aboveground portion was correctly assembled, positioned, bolted, and welded, as the tolerances involved were less than one inch. Clearly, Paco employees provided "individual expertise" to every phase of the Rotoclave's design, construction, and installation. See Noll, 643 A.2d at 87 (holding that the manufacturer of swimming pool starting blocks who examined and approved drawings of the pool area was within the protected class and stating that "when a manufacturer is asked for its 'individual expertise' in

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5. M. Gagnon also testified that Paco employees were heavily involved in the actual construction of the aboveground portion. As these employees were Canadian citizens, however, their construction work may have violated United States immigration laws, and for that reason such work is not documented. We will assume for our purposes that the Paco employees did nothing more than supervise the construction of the aboveground portion.

evaluating whether its product is appropriate as part of a larger improvement to real property it is expending the type of expertise contemplated under the statute"); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 115-16 (3d Cir. 1992) (holding that the manufacturer of an aboveground pool who contracted with someone to construct the pool was entitled to protection under the statute). Even if Paco did no more than supervise the construction, that is enough to bring it within the purview of the statute. See 42 Pa. Cons. Stat. Ann. § 5536.

Plaintiffs argue that the part of the Rotoclave where Bobby Freeman was injured was nothing more than a standard component part, manufactured in Montreal and not altered in any way for the Fizzano plant. They claim that there actually are two separate machines involved here: an underground machine, which is built to individual specifications at every site, and a standard, modular aboveground machine. They contend that Paco is a mere manufacturer, outside the purview of the statute, with respect to the aboveground, modular pieces.

In reality, however, there is only one Rotoclave. It is a single, integrated system that can only work as a whole unit. While plaintiffs argue that a forklift could do the work of the aboveground components, the very reason the Fizzanos installed the Rotoclave was to eliminate the need for precisely such manual labor. Furthermore, M. Gagnon testified that the underground and aboveground portions are interlocked electrically and mechanically and must be precisely calibrated to one another,

because if they are off by even an inch the system will not operate. There is no doubt that what Fizzano purchased was an integrated production system, not two separate machines.

Plaintiffs argue that Paco is not entitled to protection because of the decision of our Court of Appeals in Luzadder v. Despatch Oven Co., 834 F.2d 355, 359 (3d Cir. 1987), and an opinion by former Chief Judge Cahn in Vasquez v. Whiting Corp., 660 F. Supp. 685 (E.D. Pa. 1987). The Freemans' reliance on these cases is misplaced. In Luzadder, our Court of Appeals (incorrectly) predicted<sup>6</sup> that the Pennsylvania Supreme Court would not extend the statute of repose to manufacturers of component parts of improvements to real property. As we conclude above, however, Paco did much more than merely supply component parts of the Rotoclave.

In Vasquez, former Chief Judge Cahn, also predicting how the Pennsylvania Supreme Court would rule, concluded that the manufacturer of a crane who had no role in its installation was not within the purview of the statute. Again, even to the extent that Vasquez is viable after the Pennsylvania Supreme Court's later pronouncements on this subject, it is distinguishable from this case, where Paco was heavily involved in installation.

Our conclusions as to Luzadder's relevance and Vasquez's vitality are fortified by a comparison of the elaborate

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6. Thereby providing further evidence for Judge Sloviter's catalogue of incorrect Erie guesses. See Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671 (1992).

Rotoclave system with the product found to be within the protected class identified in Noll. In Noll, the swimming pool contractor ordered diving blocks from the defendant, the manufacturer of the blocks, and included drawings of the pool that related to an unusual deck-to-water dimension. The defendant shipped the standard-stock blocks with an invoice reading, "per their drawing." The Pennsylvania Supreme Court concluded that, even if the defendant did no more than examine the drawings and determine that its standard product was appropriate with modifications, it still had expended "individual expertise" and therefore was involved in the design of the alleged improvement. Thus, the Court concluded that the defendant was within the class protected under the statute. See Noll, 643 A.2d at 86.

Paco is a much more compelling candidate for protection under the statute of repose than the diving block manufacturer in Noll. Paco's employees supervised and observed all phases of the Rotoclave's construction, were on-site during the entire process, and shouldered much of the responsibility for designing and installing the system in Fizzano's plant. If the manufacturer in Noll is protected, there can be no doubt that Paco is also protected.<sup>7</sup>

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7. Similarly, in Fleck, the defendant, the seller of an \$875 above-ground swimming pool, merely "contracted with someone to construct the pool." 981 F.2d at 115. Our Court of Appeals held that, under the plain reading of the statute of repose, the pool seller was within the protected class. When Fleck was decided, (continued...)

We therefore conclude that plaintiffs' action is barred under the Pennsylvania statute of repose. An Order follows.

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7. (...continued)

Noll was only a decision of the Pennsylvania Superior Court. Nevertheless, our Court of Appeals correctly predicted that the Pennsylvania Supreme Court would hold that a supplier of a product need not assist in its installation in order to be protected. Again, for the reasons noted above, Paco is a much stronger candidate for protection under the statute than the seller of the pool in Fleck.