

No. 09-CV-1527

In the
District of Columbia
Court of Appeals

GARY E. COLBERT,

Appellant,

v.

UNION CARBIDE CORPORATION,

Appellee.

*On Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2008 CA 006816 A (Hon. Judith Bartnoff, Judge)*

BRIEF FOR APPELLANT

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March 30, 2010

PARTIES AND COUNSEL

Plaintiff Gary E. Colbert was represented in the trial court, and is represented in this forum, by Peter T. Enslein, Law Offices of Peter T. Enslein, P.C., 1738 Wisconsin Avenue, NW, Washington, DC 20007. Earlier in the litigation, Plaintiff was represented in the trial court by Daniel A. Brown, Brown & Gould, LLP, 7700 Old Georgetown Road, Suite 500, Bethesda, MD 20814.

The defendants were represented in the trial court as follows: AC & R Insulation Company, Inc. by Katherine S. Duyer, Geoffrey S. Gavett, Genevieve G. Marshall, Gavett and Datt, P.C., 15850 Crabbs Branch Way, Suite 180, Rockville, MD 20855; Georgia-Pacific Corporation by Robin Silver, Laura A. Cellucci, Miles & Stockbridge P.C., 10 Light Street, Baltimore, MD 21202; Kaiser Gypsum Company, Inc. by Margaret Fonshell Ward, Moore & Jackson, LLC, 305 Washington Avenue, Suite 401, Towson, MD 21204; Krafft-Murphy Company by Neil MacDonald, Hartel, Kane, DeSantis, MacDonald & Howie, LLP, 11720 Beltsville Drive, Suite 500, Beltsville, MD 20705; Metropolitan Life Insurance, Company by Richard D. Albert and Steven A. Fennell, Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW, Washington, DC 20036; Union Carbide Corporation by R. Thomas Radcliffe, Jr., Steven J. Parrott and Laura Higgs, DeHay & Elliston, LLP, 36 South Charles Street, Suite 1300, Baltimore, MD 21201; The Walter E. Campbell Company, Inc. by Richard L. Flax, Law Offices of Richard L. Flax, LLC, 29 West Susquehanna Avenue, Suite 500, Baltimore, MD 21204.

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ISSUE PRESENTED FOR REVIEW

Did the trial court err when it ignored this Court's holding in *Weakley v. Burnham* that, in an asbestos case, summary judgment should not be granted where a plaintiff remembers the identity of the manufacturer but cannot recall where and when he came into contact with that manufacturer's product?

STATEMENT OF THE CASE

On September 16, 2008, Plaintiff-Appellant Gary E. Colbert ("Mr. Colbert") brought this product liability action against Union Carbide Corporation ("Union Carbide") and six other manufacturers and distributors of asbestos products. Following the close of discovery, Union Carbide moved for summary judgment.¹ The trial court granted the motion, a ruling from which Plaintiff now appeals.

STATEMENT OF FACTS

Mr. Colbert is 60 years of age; he has a tenth-grade education. A34. Mr. Colbert was employed as a drywall mechanic from the late 1960's through 1975. A235-36. Throughout this time period, Mr. Colbert was exposed to Georgia-Pacific Ready Mix joint compound while working at local construction sites. A235-36. This joint compound came premixed in five-gallon buckets and drywall workers applied the product directly to taped wall joints. A48, 81. After it dried, the Ready Mix joint compound was sanded smooth, creating dust that Mr. Colbert inhaled.

¹ Plaintiff resolved his claims against the other defendants by settlement or voluntary dismissal.

A28, 51. It is undisputed that, from June 21, 1973 until January 20, 1975, the Ready Mix to which Mr. Colbert was exposed contained only Union Carbide asbestos. A239.

Mr. Colbert never wore a mask or other respiratory protection when he worked with Ready Mix and was never warned by anyone of the dangers of exposure to asbestos. A29, A60. Mr. Colbert developed severe pulmonary asbestosis as a result of this asbestos exposure.² A94-103.

In the trial court, Mr. Colbert sought to prove his exposure to Union Carbide's asbestos by offering these sworn evidentiary materials: his declaration and deposition testimony and interrogatory answers. The declaration stated, in pertinent part:

During my career, Ready Mix was a popular and frequently used drywall product because it was easy to apply. Ready Mix was easily available to drywall contractors through local supply houses. **From the late-1960's through and including 1975, I used Ready Mix on a regular and frequent basis at jobsites located in the District of Columbia, Maryland and Virginia** (emphasis supplied).

A236.

² M. Anthony Casolaro, M.D., a pulmonologist, examined Mr. Colbert and made the following findings:

Based on the patient's history of exposure to asbestos, chest x-ray with interstitial fibrosis and pleural plaques, and pulmonary function studies showing severe restrictive defect, it is my opinion that Gary Colbert remains with pulmonary asbestosis. The patient's physiologic impairment is severe and his prognosis is guarded. A103.

In his interrogatory answers, Mr. Colbert could remember only five specific jobsites at which he worked during his decade-long drywall mechanic career. Five jobs listed Ready Mix as the joint compound used -- all but one was outside the period in which the product contained Union Carbide asbestos. A30. Mr. Colbert explained: “The passage of time (more than thirty years) has faded my memory and the work history therefore lists only a small fraction of the many jobsites at which I worked.” A235.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, this Court “conducts an independent, *de novo* review of the record in a light most favorable to the opposing party” and “accord[ing] that party the benefit of all reasonable inferences.” *Hill v. Metropolitan African Methodist Episcopal Church*, 779 A.2d 906 (D.C. 2001); *Thompson v. Seton Investments*, 533 A.2d 1255, 1256 (D.C. 1987); *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The Court’s standard of review “is the same as the trial court’s standard for initially resolving the underlying motion for summary judgment.” *Klock v. Miller & Long Co.*, 763 A.2d 1147, 1149-50 (D.C. 2000).

Summary judgment is appropriate only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law.” Super. Ct. Civ. R. 56(c).³ There is a genuine issue as to a material fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248 (trial court's task, in deciding whether there is a “genuine” issue of fact, is to determine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”). To avoid summary judgment, the nonmoving party need not “produce evidence in a form that would be admissible at trial” but merely to “designate specific facts [in the record] showing that there is a genuine issue for trial.” *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).

If factual issues can “reasonably be resolved in favor of either party,” a trial must ensue. *Anderson*, 477 U.S. at 250. The moving party carries the ultimate burden of establishing the absence of a genuine issue of material fact and their entitlement to summary judgment as a matter of law. *Klock*, 763 A.2d at 1150; *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).

“On summary judgment, the Court does not make credibility determinations or weigh the evidence.” *Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008).

Moreover, the Court cannot try issues of fact; it can only determine whether there

³ A declaration is an “affidavit” within the meaning of Super. Ct. Civ. R. 56(c). *See Cormier v. D.C. Water and Sewer Auth.*, 959 A.2d 658, 664-65 (D.C. 2008).

are issues to be tried. *3145 Deauville, L.L.C. v. First American Title Ins. Co.*, 881 A.2d 624, 627 (D.C. 2005).

ARGUMENT

The Trial Court Erred When It Ignored This Court’s Holding In *Weakley v. Burnham* That, In An Asbestos Case, Summary Judgment Should Not Be Granted Where A Plaintiff Remembers The Identity Of The Manufacturer But Cannot Recall Where And When He Came Into Contact With That Manufacturer's Product.

The trial court cleaves to the wrongheaded notion that in order to avoid summary judgment Mr. Colbert must prove that he used Ready Mix at a specific jobsite and at a specific time. A242. The trial court’s decision ignores the controlling case, in fact situations identical to the instant one: *Weakley v. Burnham Corp.*, 871 A.2d 1167 (D.C. 2005).

There, the Court rejected the asbestos-defendants’ contention that a plaintiff must “recall and specify a *particular* time and a *particular* place [where exposure occurred.]” (emphasis in original). *Id.* at 1175. Unfazed by this controlling precedent, the trial court thus framed Plaintiff’s burden on summary judgment (turning back the clock to the now-inapplicable *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986), a precedent unequivocally rejected by the *Weakley* Court): “But the key question before the Court, for purposes of the instant motion for summary judgment, is not whether Mr. Colbert used or was exposed to Ready Mix, but where and when.” A242.

Weakley makes it abundantly clear that a plaintiff need only show that he was in “the same place at the same time” as the offending asbestos product. *Id.* This Court reasoned that “[w]here a plaintiff remembers the identity of the manufacturer, but cannot recall, decades after the fact, where and when he came into contact with that manufacturer’s product, that understandable incompleteness of recollection should not end the case for the plaintiff” *Id.* Thus, a plaintiff who is not a memory expert gets his day in court. The “incompleteness of recollection” that burdens asbestos victims is well illustrated by the instant case.

The pivotal assertions of Mr. Colbert’s declaration are these: “From the late-1960’s through and including 1975, I used Ready Mix on a regular and frequent basis at jobsites located in the District of Columbia, Maryland and Virginia.” A236. These assertions satisfy Plaintiff’s burden to establish that he was in “the same place at the same time” as Union Carbide’s asbestos. The time span attributed to Mr. Colbert’s work with Ready Mix (late-1960’s through 1975) necessarily includes the period (June 1973 through January 1975) in which Ready Mix contained Union Carbide asbestos.

The trial court thinks that Plaintiff’s assertions about Berry Farms boil down to this: “The plaintiff himself now concedes that he cannot show that he was exposed to asbestos supplied by Union Carbide at any site other than Berry Farms.” A242. This is not true. In his sur-reply, Plaintiff made it abundantly

clear that Berry Farms was one of five sites where he actually recalled using Ready Mix.⁴ The greater context of Plaintiff's declaration commands the conclusion that Mr. Colbert knows that he was exposed to Ready Mix at many jobsites during the period in which the material contained Union Carbide asbestos but cannot recall the names of the sites.

CONCLUSION

A fair assessment of the facts at issue here reveals that there is nothing novel about this case. This case is plainly one of the progeny of *Weakley* and like *Weakley* stands for the idea that a plaintiff achieves trial by satisfying not the total recall that the trial court would require, but a relaxed and realistic test that recognizes the fairness of not allowing the long latency of a plaintiff's disease to thwart justice being done.

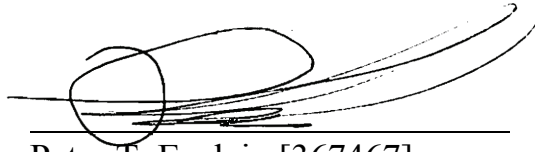
For the foregoing reasons, the Court should vacate the trial court's grant of summary judgment and remand the case for trial.

⁴ The trial court mischaracterized the following passage concerning Berry Farms in Plaintiff's sur-reply:

Mr. Colbert could *remember* only five jobsites at which he worked during his decade-long drywall mechanic career. Four jobs listed Ready Mix among the materials -- all were outside the period in which Union Carbide supplied asbestos to the Milford. There was one exception -- Berry Farms . . . (emphasis supplied).

Plaintiff's Sur-Reply Brief (filed July 2, 2009) at 2-3.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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ADDENDUM

Rule 56. Summary judgment.

(a) For claimant.

A party seeking to recover upon a claim, a counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 20 days from service of a pleading on the adverse party or after service of a motion for summary judgment by the adverse party, but within the time prescribed by Court order, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, within the time prescribed by Court order, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion.

If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When affidavits are unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith.

Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

