

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000568-MR

CYNTHIA CASH BRANON,
EXECUTRIX of the ESTATE of
WILLIAM CASH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 98-CI-00637

GENERAL ELECTRIC COMPANY

APPELLEE

AND: NO. 2004-CA-001755-MR

CYNTHIA CASH BRANON,
EXECUTRIX of the ESTATE of
WILLIAM CASH

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v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 98-CI-00637

NATIONAL SERVICE INDUSTRIES, INC.
(F/K/A NORTH BROTHERS, INC.)

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM AND JOHNSON JUDGES; EMBERTON, SENIOR JUDGE.¹

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BUCKINGHAM, JUDGE: Cynthia Cash Branon, executrix of the estate of William Cash, appeals from separate orders of the McCracken Circuit Court awarding summary judgments to General Electric Company (GE) and National Service Industries, Inc., f/k/a North Brothers, Inc. (North Brothers), on Branon's wrongful death claims against them. Because we conclude the court erred in awarding summary judgment to GE and North Brothers, we reverse and remand.

William Cash was a union electrician who lived in Paducah, Kentucky, and worked at numerous job sites in western Kentucky, southern Illinois, and elsewhere between 1945 and 1987. He was diagnosed with asbestos-related lung disease in 1998, and he filed suit against GE and North Brothers for negligently using asbestos-containing insulation on the turbines used in the Tennessee Valley Authority's Paradise Steam Plant in Drakesboro, Kentucky.² Cash died of lung cancer on July 15, 2001, and the prosecution of his action against GE, North Brothers, and others was continued thereafter by his daughter, Cynthia Cash Branon, as executrix of his estate.

Before his death, Cash testified in his deposition that he worked at times within ten feet of the steam turbines when they were being installed at Paradise. Bobby Gibson, who

² His complaint also named other defendants in connection with his exposure to asbestos at other work sites.

worked at the plant from 1961 through 1976, testified that he helped install Kaylo insulation, which is widely known to contain asbestos, on the GE turbines at Paradise. He further testified that the asbestos insulation was cut and applied during the installation of the turbines and that the amount of dust released from the cutting of the insulation was so extensive that the floor had to be regularly swept with a machine. Gibson also stated that he remembered electricians working nearby during the installation process.

Branon also presented a 1964 TVA report that contains a timeline of the plant construction. The report indicates that turbogenerator Unit 1 was insulated from September 19, 1962, through October 1963. The report also indicates that electrical work was performed simultaneously with the insulation of the turbogenerators during that time. This evidence corroborates Gibson's testimony that electricians such as Cash were present when the turbogenerators were being insulated.

Additionally, Branon presented records from the Social Security Administration that indicated Cash worked at the plant at various times, including from January 1962 through March 1963.³ These reports are evidence that Cash was performing

³ Cash also believed that he was exposed to asbestos at other work sites during his work life.

electrical work at the plant during the same time the turbogenerators were being insulated.

Cash's primary treating physician for his lung disease was Dr. William Culbertson, a pulmonologist. Dr. Culbertson testified in his deposition that, within a reasonable degree of medical probability, Cash died from cancer caused by exposure to asbestos. He also testified that asbestos exposure is a cumulative occupational injury and that each and every exposure contributes to the development of the disease. Branon also identified Dr. Arthur L. Frank as an expert who would testify at trial. Dr. Frank stated in his report that Cash died from lung disease resulting from his exposure to asbestos.

North Brothers was an insulation contractor that applied asbestos thermal insulation on the GE turbogenerators at the Drakesboro plant in the early 1960s. It does not dispute that Cash worked in the plant at that time.

GE and North Brothers moved the court to award them summary judgment. In an order entered on February 20, 2004, the court awarded GE summary judgment on the ground that "there is insufficient evidence to demonstrate that plaintiff's decedent, William Cash, was exposed to any asbestos-containing GE product or that any GE product could have caused Mr. Cash's alleged asbestos-related disease." On August 18, 2004, the court granted summary judgment to North Brothers. The court stated

that it “finds no evidence in the record that Plaintiff was exposed to North Brothers insulation at the Paradise Steam Plant.” Branon filed separate appeals from the two orders.⁴

CR⁵ 56.03 provides in part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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.” Appellate courts will not defer to the trial court’s decision on summary judgment, and the issue will be reviewed *de novo* because only legal questions are involved. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky.App. 2004). The standard of review of the appellate court is to determine whether the trial court erred by concluding that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996). “The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor.” Hallahan, 138 S.W.3d at 705.

“[T]he movant should not succeed unless his right to judgment is shown with such clarity that there is no room left

⁴ We have elected to consider the two appeals together.

⁵ Kentucky Rules of Civil Procedure.

for controversy." Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476, 482 (Ky. 1991). "Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." Id. If the movant bears its burden of convincing the court that no genuine issue of fact is in dispute, the burden shifts to the party opposing the motion to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. J.H. Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001).

Turning first to the summary judgment in favor of GE, we note that the court ruled that there was insufficient evidence that Cash was exposed to any asbestos-containing GE product and insufficient evidence that any GE product could have caused Cash's alleged asbestos-related disease.⁶ We conclude that the evidence concerning each determination was sufficient to overcome GE's summary judgment motion.

As for evidence that Cash was exposed to an asbestos-containing product, it is true, as argued by GE, that Cash did

⁶ Branon is not alleging that Cash was exposed to an asbestos-containing "GE product." Rather, she is alleging that GE specified the use of an asbestos-containing product as insulation on its turbines.

not testify that he was ever present in the plant when someone was either installing or removing insulation on any turbine. However, there was sufficient circumstantial evidence to indicate that he was present in the plant in the vicinity of the installation and insulation of the turbines and thus was exposed to asbestos.

Cash testified that he worked within ten feet of the turbines when they were being installed in the plant, and Gibson testified that the asbestos insulation was cut and applied during the installation of the turbines and that a considerable amount of dust was released from the cutting of the insulation. Gibson further testified that electricians worked nearby during the installation process, and Branon's Social Security records and plant employee records show that he worked at Paradise for several months while the turbines were being installed. Further, the TVA report indicated that the turbines were being installed at the plant during the same period of time that the other records indicate Cash was working there. In short, we believe that there was a genuine issue of material fact concerning whether Cash was exposed to an asbestos-containing product being used to insulate the GE turbines while employed at the plant. Thus, we conclude that the court erred in awarding GE summary judgment in connection with this issue.

The court also held that there was insufficient evidence that any GE product could have caused Cash's alleged asbestos-related disease. Dr. Culbertson testified in his deposition that, within a reasonable degree of medical probability, Cash died from cancer caused by exposure to asbestos. He also testified that asbestos exposure is a cumulative occupational injury and that each and every exposure contributes to the development of the disease. Dr. Frank stated in his report that Cash died from lung disease resulting from his exposure to asbestos.

This court has addressed the issue of causation in an asbestos case in Bailey v. North American Refractories Co., 95 S.W.3d 868 (Ky.App. 2001). Therein we stated as follows:

Generally, the existence of legal cause is a question of fact for the jury. It only becomes a question of law for the Court where the facts are undisputed and are susceptible of but one inference. The claimant has the burden to prove legal causation; however, it is well recognized that "legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." To find causation, the jury naturally draws inferences from circumstantial evidence. These inferences, however, must be reasonable, that is they must "indicate the *probable*, as distinguished from a *possible* cause." [Citations omitted.]

Id. at 872-73. We believe the "quantum of circumstantial evidence" as set forth above was sufficient to create a fact

issue as to causation. Thus, we conclude that the court erred in awarding summary judgment to GE.

In granting summary judgment in favor of North Brothers, the circuit court stated it could find no evidence that Cash had been exposed to North Brothers insulation at the plant. North Brothers was the insulation subcontractor that applied asbestos insulation on the GE turbine units at the plant in the early 1960s. Like GE, North Brothers argues that the circuit court correctly determined that there is no evidence establishing that Cash was exposed to asbestos insulation at the time it was being applied to the turbines. As we have noted above, however, we conclude that there are fact issues in this regard. There is evidence that Cash was working at the plant during this time, and he testified that he worked within ten feet of the turbines when they were being installed.

North Brothers argues that Cash testified only that he worked near the turbines when they were being installed and did not testify that he worked near the turbines when they were being insulated. Although Cash may have no specific memory of being present when insulation was being applied, Gibson testified that electricians were present at that time. Further, the documentation presented by Branon indicates that Cash worked in the plant during those times. We conclude that the

circumstantial evidence described above creates a fact issue in this regard.

North Brothers also argues that even if Cash worked at the plant while a turbine was being insulated, it would not create a permissible inference that he sustained a substantial exposure to asbestos fibers. In other words, North Brothers argues that the evidence "does not establish causation in the probable sense as opposed to the possible sense." In Robert Simmons Constr. Co. v. Powers Regulator Co., 390 S.W.3d 901, 905 (Ky. 1965), the court held that "one party cannot compel the other to try his case on a motion for summary judgment." We believe this principle defeats this argument by North Brothers. Regardless of whether Branon can prove her case at trial, there are fact issues at this time. Based upon evidence of exposure and Dr. Culbertson's testimony concerning causation, we conclude that the circuit court erred in awarding summary judgment to North Brothers.

The summary judgment orders of the McCracken Circuit Court are reversed, and this matter is remanded for further proceedings.

ALL CONCUR.

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