RENDERED: SEPTEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001350-MR

THELMA B. ANDERSON
(AS ADMINISTRATRIX OF THE ESTATE
OF KENNETH W. ANDERSON) APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 12-CI-00184

MOTOROLA SOLUTIONS, INC. AND
ZENITH ELECTRONICS, LLC APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

JONES, JUDGE: This appeal arises out of the Campbell Circuit Court's orders granting summary judgment in favor of Motorola Solutions, Inc. ("Motorola") and Zenith Electronics, LLC ("Zenith"). Appellant, Thelma B. Anderson, as administratrix of the estate of Kenneth Anderson, asserts that neither Motorola nor

Zenith was entitled to judgment as a matter of law. Zenith and Motorola argue otherwise. Specifically, the Appellees maintain that summary judgment was proper because Appellant failed to prove that Kenneth was exposed to asbestos from any of their products during his career as a radio repairman, or, that if such exposure occurred, it was a substantial factor in his death from mesothelioma.

Having closely reviewed the record, the parties' arguments, and the relevant authority, we conclude that the circuit court erred in granting summary judgment to Zenith and Motorola. We believe that Appellant produced enough evidence in the form of lay and expert testimony to make it probable, as opposed to merely possible, that Kenneth was exposed to asbestos from radios manufactured by Zenith and Motorola and that such exposure was a substantial factor in his death. Therefore, we believe that in this case, the issue of causation is one that should be made by a jury instead of a judge on summary judgment. Accordingly, we REVERSE and REMAND.

I. Procedural Background

In November of 2011, Kenneth Anderson ("Kenneth") was diagnosed with mesothelioma, a form of lung cancer. Mesothelioma has been linked to asbestos exposure. On February 7, 2012, Kenneth and his wife, Thelma, filed an action in the Campbell Circuit against Motorola, Zenith, and eighteen other corporate defendants.[1] The Andersons' complaint sought to hold these defendants liable under theories of negligence, strict liability, and breach of implied warranty.

[1] Kenneth died while this matter was pending on appeal. Afterwards, his estate was substituted as the real party in interest.

Specifically, the Andersons alleged that these defendants manufactured radios containing asbestos, to which Kenneth was exposed over the years he worked as a radio and television repairman. Kenneth and Thelma either settled with or voluntarily dismissed each defendant except Motorola and Zenith.

Prior to trial, both Zenith and Motorola moved for summary judgment. The trial court granted their motions on the basis that the Andersons could not "establish the requisite product identification in an asbestos case, particularly since not all radios contained asbestos." The trial court explained that:

> Plaintiffs have identified no evidence by which they could make the threshold showing that Anderson actually worked on radios with asbestos-containing parts that either of the remaining Defendants manufactured or distributed. Because it is uncontroverted that Plaintiffs cannot provide evidence regarding what radios Anderson actually repaired, whether those radios contained asbestos, and if so, who manufactured or distributed those asbestos-containing parts, Defendants are entitled to judgment as a matter of law.

This appeal followed.

II. Standard of Review

Pursuant to Kentucky Rule of Civil Procedure ("CR") 56.03, summary judgment shall be granted 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." The purpose of CR 56.03 is to terminate litigation where there are no genuine issues of material fact. "Instead of deciding an issue of fact, the trial court reviews the evidence to determine whether a real issue of fact exists. And in performing this review, the trial court must view the evidence through a lens colored in favor of the party opposing summary judgment." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 604 (Ky. 2014).

The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)). "The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480. In essence, for summary judgment to be proper, the movant must show that the adverse party

cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

When reviewing a motion for summary judgment, the trial court must be ever mindful of its very limited role. That role is to determine whether disputed material facts exist; it is not to decide factual disputes. The trial court should not weigh the evidence because that is the role of the jury, not the judge. *Shelton v. Ky. Easter Seals Soc., Inc.*, 413 S.W.3d 901, 905 (Ky. 2013). "It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try." *Steelvest*, 807 S.W.2d at 480.

On appeal, we consider the evidence of record in the light most favorable to the non-movant, and further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves no fact finding by the trial court, we accord no deference to the trial court's decision; our review is *de novo*. *See Davis v. Scott*, 320 S.W. 3d 87, 90 (Ky. 2010) (citing *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)).

III. FACTUAL SUMMARY

Kenneth worked as a radio and television repairman from approximately 1964 to 1978.[2] He repaired radios that were manufactured in the

[2] In April of 1964, Kenneth opened up his own television and radio repair shop in Moss, Tennessee, which he named Anderson's TV. In 1965 and 1966, he also "moonlighted" as a

1940s, 1950s, 1960s, and 1970s. On average, he repaired two to four radios per week during the relevant time period. This works out to his having repaired somewhere between 1,456 and 2,912 radios during his career. Kenneth identified Zenith and Motorola radios as two of the main brands he serviced.

Kenneth explained that many of the radios he serviced contained protective heat shields. These protective heat shields were generally either metal or fiber. Kenneth recalls repairing Zenith and Motorola radios that contained fiber heat shields. While Kenneth did not recall the exact model numbers of the radios he repaired, he was able to identify several radios manufactured by both Zenith and Motorola that looked like radios he recalled repairing. These radios were later identified by model number. Some of these radios had fiber heat shields.

Both Zenith and Motorola admit that they manufactured radios containing asbestos fiber heat shields. Additionally, independent studies have detected asbestos fiber heat shields in vintage radios manufactured by both Zenith and Motorola, including some of the model numbers identified by Kenneth. Additionally, testing has revealed some of these models to contain heat shields with very high concentrations of asbestos. For example, Kenneth identified pictures of Zenith Model 5-R-316, Zenith Model 6-D-510W, Motorola Model 5R1, Motorola Model 51X20, Motorola Model 52T1, and Motorola Model 62T2.

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repairman for Ray Lyons TV and Pick's TV. Shortly after closing Anderson's TV in April of 1967, Kenneth bought a television and radio repair shop in Gamaliel, Kentucky, which he re-named Gamaliel Service Center. He operated that shop continuously until 1978.

Through either independent testing or internal documents, each of these models has been shown to have had fiber heat shields comprised of asbestos.

With respect to the independent studies, it is true that no one was able to testify with one-hundred percent certainty that the heat shields tested in these vintage radios were original to them. However, witnesses for both sides agree that heat shields are not customarily replaced. Heat shields are generally intended to remain intact throughout the life of the radio.

As part of the repair process, Kenneth regularly cleaned the interior of the radios he serviced by blowing out the dust. He explained that during this process additional dust particles would come off the fiber heat shields. Expert witness, William Ewing, a board certified industrial hygienist with an emphasis on asbestos exposure, provided his opinion that "cleaning of radio interiors with asbestos-containing heat shields using compressed air results in a significant exposure to asbestos." Based on his review, it is Mr. Ewing's opinion that "Mr. Anderson had similar exposures [PCME exposures in a range of .2f/cc - 3.3 f/cc] when performing this work on radios with asbestos-containing heat shields." Mr. Ewing also indicated that various studies he has reviewed have shown radios manufactured by Motorola and Zenith to contain heat shields with very high levels of asbestos. Some of these reports found asbestos even though the manufacturer data did not mention the existence of any asbestos. Mr. Ewing believes that Kenneth was exposed to significant asbestos during his fourteen years as a radio repairman.

Dr. Edwin Holstein is board certified in internal and preventive medicine with a subspecialty in occupation medicine. He has studied the effects of asbestos exposure on the human body since the late 1970s. After a review of several records pertinent to Kenneth's case, Dr. Holstein opined, with a reasonable degree of medical certainty, that Kenneth has malignant mesothelioma, which will ultimately prove fatal; Kenneth experienced repeated exposures to chrysotile asbestos from cleaning radios with asbestos heat shields; those exposures would have been in the range of .2 f/cc to 3.3 f/cc; and each exposure contributed to and was substantial in Kenneth developing malignant mesothelioma.

IV. ANALYSIS

"[L]egal 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." *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). The burden is on the plaintiff to show that the circumstances are such to justify a reasonable inference of probability rather than a mere possibility that defendants are the cause of the plaintiff's harm. *Perkins v. Trailco Mfg. and Sales Co*., 613 S.W.2d 855, 857 -858 (Ky. 1981).

"'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Thus, conclusory allegations based upon

conjecture and speculation are insufficient to swing the pendulum from possibility to probability. However, the fact that an inference must be drawn from the evidence presented does not render the proof speculative. "Essential facts may be proved by circumstantial evidence in which event it is not necessary that proof rise to a degree of certainty which will exclude every other reasonable conclusion[.]" *Coleman v. Baker*, 382 S.W.2d 843, 848 (Ky. 1964). "Reasonable probability is all that is required of evidence in order to support a factual conclusion." *Id.* at 847.

The nexus between an asbestos product and the plaintiff may be established by direct or circumstantial evidence. Whether direct or circumstantial evidence is relied upon, our inquiry, under a motion for summary judgment, must be whether plaintiff has pointed to sufficient material facts in the record to indicate that there is a genuine issue of material fact as to the causation of decedent's disease by the product of each particular defendant. In an asbestos case, what is minimally required is proof (either circumstantial or direct) that the plaintiff and the defendants' asbestos-containing products were in the same place at the same time and that plaintiff inhaled asbestos fibers which inhalation was a substantial factor in causing plaintiff's disease. *See Bailey v. North Am. Refractories Co.*, 95 S.W.3d 868 (Ky. App. 2001).

Having reviewed the record, we believe Kenneth met the minimal threshold necessary to survive summary judgment. Kenneth testified that Zenith and Motorola brand radios were two of the main brands he serviced; he testified that he worked on radios manufactured during the periods both defendants were

making asbestos-containing radios; he testified that he repaired Zenith and Motorola radios containing fiber heat shields that appeared chalky; he identified by picture several Zenith and Motorola radios that looked like radios he worked on during the relevant time period; he produced expert testimony showing that several of these same radio models tested positive for asbestos;[3] he testified that he blew out the radios while cleaning them emitting dust into the air; he produced expert testimony opining that blowing out radios with asbestos heat shields like the ones Kenneth described would release asbestos into the air; and he produced expert medical testimony opining that each exposure to an asbestos-containing radio would have been a substantial factor in Kenneth developing mesothelioma.

The Andersons have come forward with at least probative circumstantial evidence that, viewed in a light most favorable to them, creates genuine issues of material fact. Viewing the evidence in a light most favorable to them supports a permissible inference that Kenneth repaired Zenith and Motorola radios with original asbestos heat shields, that asbestos was released from the radios when Kenneth cleaned them, and that the asbestos dust Kenneth inhaled each time he repaired an asbestos-containing radio was a substantial factor in causing his mesothelioma.[4] Zenith's and Motorola's arguments to the contrary go

[3]Additionally, while Kenneth could not prove beyond all doubt that the heat shields were the original ones installed by Zenith and Motorola, every witness questioned on the subject testified that heat shields are not customarily replaced and are designed to remain with the radio for the duration of its useful life.

[4] While the trial court was required to view the evidence in a light most favorable to the Andersons, it failed to do so. For example, the trial court indicated that it was "reasonable to conclude that the absence of a reference to an asbestos-containing part in a Motorola's service manual or parts list for a radio meant that such a model, when manufactured, did not contain asbestos." While this is one inference that could be drawn from the evidence, one could argue

more to the weight and credibility to be afforded to the Andersons' evidence, and therefore, should be evaluated by a jury not by a judge as part of summary judgment.

Our conclusion that summary judgment was improperly granted is bolstered by *Bailey, supra*, another asbestos case we decided based on somewhat similar facts. 95 S.W.3d 868. 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.

The plaintiffs in *Bailey* were three steel workers. They brought an action against two manufacturers, NARCO and Westinghouse, for asbestos exposure. The circuit court granted the corporate defendants summary judgment. We reversed on appeal. Like Zenith and Motorola, Westinghouse maintained that summary judgment was appropriate because the record "was devoid of evidence

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that the absence of a reference is meaningless because some studies found asbestos heat shields in Motorola models where the service manuals were silent with respect to the heat shield composition. If viewed in a light most favorable to the Andersons, the evidence indicates that the manuals are not conclusive as to the presence of asbestos.

establishing that Westinghouse products exposed appellants to asbestos or that such exposure caused appellants' alleged asbestos-related diseases." Based solely on the testimony of one employee, we overruled the circuit court's grant of summary judgment as to Westinghouse. *Id.* at 875. Even though the plaintiff failed to provide a model number or show that all Westinghouse motors contained asbestos, we held that the evidence gave rise to a permissible inference that at least some of the early rewound motors were Westinghouse and that they contained asbestos. Thus, we determined that a material issue of fact existed upon whether asbestos was released into the air from Westinghouse products. *Id.*

We are persuaded that adequate circumstantial evidence exists to create a question of fact as to linkage and causation. Paraphrasing *Bailey*, the Andersons have presented evidence that, for purposes of summary judgment, could lead to the "permissible inference" that Zenith's and Motorola's products were a substantial cause of Kenneth's condition.[5] Whether that circumstantial evidence

[5] Certainly, there was evidence that Anderson may have been exposed to asbestos while repairing radios manufactured by other defendants. The Andersons sued, and ultimately settled with or dismissed the other defendants. In such a situation, Zenith and Motorola would be entitled to an apportionment instruction. In *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467 (Ky. 2001) our Supreme Court said:

> The law has now developed to the point that in tort actions involving the fault of more than one party, including third-party defendants and persons who have settled the claim against them, an apportionment instruction, if requested, must be given whereby the jury will determine the amount of the plaintiff's damage and the degree of fault to be allocated to each claimant, defendant, third-party defendant, and person who has been released from liability.

Id. at 481 fn40 (quoting *Stratton v. Parker*, 793 S.W.2d 817 (Ky. 1990)).

amounts to an adequate quantum from which a jury could actually infer causation remains to be seen.

While we can imagine stronger cases than the Andersons' case, it is not our job to weed out the weaker cases on summary judgment if they are supported by evidence of some probative value. At the end of the day, we must leave certain issues for the jury to decide and we must have faith in the jury's superior ability to resolve factual disputes. We believe this case raises serious and disputed causation issues that are inappropriate for resolution on summary judgment. The issues of causation should proceed to trial and be decided by a jury.

VI. Conclusion

Material issues of fact exist as to causation; thus, we hold that the circuit court erred by entering summary judgment in favor of Zenith and Motorola. Accordingly, we reverse and remand.

LAMBERT, D., JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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