NOT DESIGNATED FOR PUBLICATION

GEORGE E. STANLEY, ET AL

VERSUS

MONSANTO COMPANY, ET AL

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 01-CA-1089

APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 40,808, DIVISION "D"
HONORABLE KIRK R. GRANIER, JUDGE

FEBRUARY 13, 2002

MARION F. EDWARDS
JUDGE

Panel composed of Judges James L. Cannella,
Marion F. Edwards and Susan M. Chehardy

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AFFIRMED

Third-party defendant, Brown and Root, Inc., appeals from the trial court's ruling which granted defendant, Monsanto Company's, Motion for Summary Judgment on an issue of contractual indemnity. For the following reasons, the judgment of the trial court is affirmed.

On February 15, 1993, George Stanley, Barbara Stanley, Kevin W. Stanley, Terri Stanley Deville, and Richie Stanley filed the instant action, alleging that George Stanley had contracted the lung disease mesothelioma as a result of his occupational exposure to asbestos. Numerous defendants were named in the original suit, and in supplemental petitions, consisting of manufacturers and suppliers of asbestos containing products, as well as the owners of several industrial sites where Stanley believed he was exposed to asbestos while working throughout his career. Monsanto Company, ("Monsanto"), was one of the defendants named in their capacity as owner of a

facility located in Luling, Louisiana, where Stanley had worked and allegedly sustained asbestos exposure. In addition to specific acts of negligence listed in the petition, plaintiffs also alleged against Monsanto "any and all other acts of negligence" that would be shown at trial.

In his deposition, George Stanley recounted the various sites where he believed he was exposed to asbestos containing products. He testified that in 1969 he went to work for Monsanto at its Luling plant for a period of nine months. Stanley believed that it was possible he had come into contact with asbestos during this period of time while driving a dumpster truck. Stanley further testified that in the mid 1970's, he worked part-time for Brown and Root at the Monsanto plant as a rigger. His work as a rigger required that he work side by side with insulation crews that were applying and removing insulation, such as block and pipe covering, that he believed contained asbestos. Stanley was not provided with respiratory protection at that time, was not warned of the dangers of asbestos, nor was he given safety training at any time that he was employed by Brown and Root.

In August of 1993, after Stanley's deposition was taken, Monsanto filed a third-party demand against Brown and Root. Monsanto asserted that it had entered into a construction contract with Brown and Root that was in effect at the time that Stanley worked at Monsanto for Brown and Root. Monsanto further claimed that the contract required Brown and Root to defend and indemnify it against any and all claims arising out of or resulting from the performance of work described in the contract, concluding that claims made against it by Stanley fell within the scope of the contract. Brown and Root specifically denied that there was a contract in existence and denied that it was required to indemnify

Monsanto against Stanley's claim as stated in his petition. On June 6, 1996, plaintiffs filed their fifth amended petition in which they named as defendants seven executive officers of Brown and Root, alleging that these individuals negligently or intentionally failed to provide Stanley with a safe place to work and failed to prevent the improper use or misuse of asbestos containing products.

Plaintiffs ultimately settled their claims with all defendants, including Brown and Root and Monsanto, who both paid $150,000.00. On December 16, 1997, plaintiffs dismissed their suit against Monsanto and Brown and Root, which left only Monsanto's third party demand against Brown and Root pending. Subsequently, Monsanto and Brown and Root both filed motions for summary judgment on the issue of indemnity under the terms of their construction contract. After a hearing, the trial court granted Monsanto's motion and denied Brown and Root's motion on February 7, 2001. Brown and Root timely filed this appeal.

LAW AND ANALYSIS

Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate.[1] An appellate court must ask the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is a genuine issue of material fact remaining to be decided, and whether the appellant is entitled to judgment as a matter of law.[2] The appellate court must consider whether the summary judgment is appropriate under the circumstances

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[1] *Bua v. Dressel*, 96-79 (La.App. 5th Cir. 5/28/96), 675 So.2d 1191; *writ denied*, 96-1598 (La.9/27/96), 679 So.2d 1348; citing *Reynolds v. Select Properties, Ltd.*, 93-1480 (La.4/11/94), 634 So.2d 1180.

[2] *Tassin v. City of Westwego*, 95-307 (La.App. 5th Cir. 12/13/95), 665 So.2d 1272.

of the case.[3] There must be a "genuine" or "triable" issue on which reasonable persons could disagree.[4] Under the amended version of LSA-C.C.P. art. 966, the burden of proof remains on the mover to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law."[5] A material fact is one that would matter on the trial of the merits.[6]

The contract in question was signed between Monsanto and Brown and Root on August 26, 1974. The indemnity provision at issue, contained therein, reads as follows:

> 2.1 Except as set forth in paragraph 2.3 hereof, **Contractor agrees to indemnify and save Monsanto and its employees harmless against** any and all liabilities, penalties, demands, claims, **causes of action**, suits, losses, damages, costs and expenses (including cost of defense, settlement and reasonable attorney's fees), **which any or all of them** may hereafter suffer, incur, be responsible for, or **pay out** (whether the same arise out of or are in connection with the Work, or from any operations by Contractor or any other Subcontractors under or in connection with the Contract) **as a result of bodily injuries** (including death) **to any person** or damage (including loss of use) to any property occurring to, or caused in whole or in part by, Contractor (or any of his employees), any of his Subcontractors (or employee thereof), or any person, firm or corporation (or any employee thereof) **directly or indirectly employed or engaged by either Contractor or any of his Subcontractors. Upon the request of Monsanto, Contractor, shall properly defend and such demand, claim, cause of action or suit.** [Emphasis provided].
>
> 2.3 Monsanto agrees that Contractor shall not be liable to Monsanto under the Contract for:
>
> 2.3.2 Liabilities, penalties, demands, claims, cause of action, suits, losses, damages, costs and expenses arising out of bodily injury (including death) to any person or damage (including loss of use) to any property caused by or **resulting from the sole**

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[3] *Rowley v. Loupe*, 96-918 (La.App. 5th Cir. 4/9/97), 694 So.2d 1006.

[4] *Id.* at 1008.

[5] *Id.* at 974

[6] *J.W. Rombach, Inc. v. Parish of Jefferson*, 95-829 (La.App. 5th Cir. 2/14/96), 670 So.2d 1305.

> **negligence of Monsanto, its employees or its agent**. [Emphasis provided].

In its second assignment of error, Brown and Root asserts that the trial court erred in applying the terms of the 1974 contract between itself and Monsanto. Specifically, Brown and Root first argues that the only claims asserted by the plaintiffs in this matter against Monsanto are not within the period of the 1974 contract on which Monsanto relies in asserting a claim for indemnity. Brown and Root argues that the plaintiffs sued Monsanto for acts of negligence and strict liability which occurred in 1969 and 1970, a period of time before the contract was in effect. Brown and Root concludes that since there was no contract in existence at the time that Stanley suffered damages, there can be no claim for indemnity by Monsanto.

Conversely, Monsanto argues that its third party demand does not specify the years that Stanley worked for Brown and Root but simply requests indemnity for all claims arising out of or resulting from work described in the contract between the parties, including claims asserted by the plaintiffs. Monsanto further argues that the provision in the plaintiffs' petition that alleges "any and all other acts of negligence [by Monsanto] which will be shown at the trial of this matter," is sufficient to encompass Stanley's work at Monsanto for Brown and Root in the mid-1970's, in spite of the fact that damage arising from the work in the mid-1970's was not specifically alleged.

A review of the record, as well as Monsanto's own admission, leads to the conclusion that Stanley erroneously alleged in his petition that he was employed by Brown and Root at Monsanto from 1969 to 1970. However, pleadings must be construed reasonably to afford litigants their day in court, to arrive at truth

and to do substantial justice.[7] Accordingly, as Stanley's petition provides for damages caused by additional unspecified acts of negligence by Monsanto, and Stanley's own testimony indicates his belief that he was exposed to asbestos at Monsanto while working for Brown and Root in the mid-1970's, we find that the trial court correctly concluded that claims asserted by the plaintiffs in this matter against Monsanto can be construed to fall within the period of the 1974 contract.

Brown and Root next argues under its second assignment of error that the trial court incorrectly found that the indemnity provision in the 1974 contract expressed the parties' unequivocal intent for indemnification of Monsanto for claims arising from occupational illness or sickness. Brown and Root asserts that the parties did not contemplate the term "bodily injury" to include a disease process such as mesothelioma which has a long latency period that would extend the obligations many years beyond the limited term of the work entailed in the contract. Brown and Root's contention in this regard, however, is inconsistent with the Louisiana Supreme Court's holding in *Cole v. Celotex*.[8]

In *Cole*, the Court, quoting *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[9] found that the term "bodily injury" should be construed to include "tissue damage which takes place upon initial inhalation of asbestos." The Court in *Cole* further noted:

> "[T]he exposure theory is more accurately analyzed as positing not that each inhalation of asbestos fibers results in bodily injury, but rather that every asbestos-related injury results from inhalation of asbestos fibers. Because such inhalation can occur only upon exposure to asbestos, and because it is impossible practically to determine the point at which the

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[7] *Kuebler v. Martin*, 578 So.2d 113 (La. 1991).

[8] 599 So.2d 1058 (La. 1992).

[9] 633 F.2d 1212, 1218-1219 (6th Cir. 1980), *reh'g granted, in part clarified*, 657 F.2d 814 (6th Cir.), *cert. denied* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981).

> fibers actually embed themselves in the victim's lungs, to equate exposure to asbestos with "bodily injury" caused by the inhalation of the asbestos is the "superior interpretation of the contract provisions."[10]

Based on the foregoing, we find that any asbestos inhalation by Stanley which occurred during the time he worked at Monsanto while employed by Brown and Root in the mid-1970's, was sufficient to constitute "bodily injury" for the purpose of triggering the indemnity provision of the construction contract.

For the foregoing reasons, we find the entirety of Brown and Root's second assignment of error to be without merit.

In its third assignment of error, Brown and Root asserts that there was no evidence presented to support a finding that Stanley's mesothelioma was caused in whole or in part by Monsanto or Brown and Root. Monsanto argues, however, that the trial court was presented with abundant evidence that Stanley's mesothelioma was caused in part by exposure to asbestos while employed by Brown and Root at Monsanto in the mid-1970's.

The language in the construction contract between Monsanto and Brown and Root states in unequivocal terms that a pre-requisite to indemnity is a finding of bodily injury or death caused in whole or in part by Brown and Root or the indemnitee, Monsanto. As a general rule, the party seeking indemnity must establish its actual liability to recover.[11] When in cases such as this, however, where the indemnity claim is supported by a valid written contract of indemnity, the indemnitee only need prove potential liability.[12] Based on our finding that the construction contract between the parties is applicable to the present case, we

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[10] Cole, *supra*, at 1077, *quoting Commercial Union Insurance Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) *citing Forty-Eight Insulations*, 633 F.2d at 1223.

[11] *Rovira v. LaGoDa, Inc.*, 551 So.2d 790; *writ denied* 556 So.2d 36 (La. 1990).

[12] *Id.*

next consider whether Stanley's petition was sufficient to allege the potential liability of Monsanto and Brown and Root.

Stanley specifically testified regarding his employment with Brown and Root at Monsanto. Specifically, Stanley stated that in the mid-1970's he worked at Monsanto for Brown and Root as a rigger who hung steel pipe for construction that was taking place at the Luling plant. This work placed him next to insulators, who he believed were removing and applying asbestos insulation. Stanley further testified that was never provided with any respiratory protection while working at Monsanto for Brown and Root, nor was he ever given safety training by Brown and Root. We find that this testimony by Stanley was sufficient grounds by which the trial court could have concluded that Brown and Root had failed to provide Stanley with a safe place to work, thereby becoming potentially liable to him. This assignment likewise is without merit.

In its fourth assignment of error, Brown and Root claims that the indemnity provision is vague, ambiguous, and unenforceable because it can be interpreted to require Brown and Root to indemnify Monsanto for acts outside the contract. Brown and Root argues that there is no way to pinpoint when Stanley's mesothelioma was contracted, and more specifically, whether it was contracted during a period in which the contract with the indemnity language was effective.

As previously discussed, because Monsanto's indemnity claim is supported by a valid written contract of indemnity, only potential liability need be shown. Monsanto's, as well as Brown and Root's potential liability is established through Stanley's own testimony for the reasons previously assigned. The fact that Stanley may have been exposed to asbestos at other sites, besides Monsanto, and other times, besides the mid-1970's, does not diminish the legitimacy of his claim

against Monsanto. The court in *Egan v. Kaiser Aluminum & Chemical Corp.*,[13] noted in regard to mesothelioma that a plaintiff's exposure to asbestos containing products over a short period of time could not be disregarded as a substantial contributing factor, even in light of the fact that the plaintiff had considerable long-term exposure to other products. Similarly, in this case, we find no merit in Brown and Root's argument and inference that Stanley's disease was likely caused only by his possible exposure to asbestos while working as a Monsanto employee in 1969 and 1970.

In its first assignment of error, Brown and Root contends that the lower court erred in granting the summary judgment after relying either wholly, or in part, on the fact that Brown and Root settled with the plaintiffs. In support of its argument, Brown and Root cites to a portion of the transcript from the hearing on the motion where the court stated that it did not believe Brown and Root would have contributed $150,000.00 to the settlement if they did not think that they had "some responsibility." In its reasons for judgment, however, the court stated in that its ruling was based on a review of the contract between Monsanto and Brown and Root. Brown and Root is correct in its assertion that, from an evidentiary standpoint, there can be no inference of admission of liability on behalf of a compromising party from the fact of settlement.[14] In that regard, the trial court clearly would have been in error to rely solely on Brown and Root's settlement as a reason to grant Monsanto's Motion for Summary Judgment.

Louisiana courts have noted that despite a trial court's "flawed" reasons for

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[13] 94-1939 (La.App. 4th Cir. 5/22/96), 677 So.2d 1027; *writ denied*, 96-2401 (La. 12/6/96), 684 So.2d 930.

[14] *Stockstill v. C.F. Industries, Inc.*, 94 2072 (La.App. 1 Cir. 12/15/95), 665 So.2d 802.

judgment, the judgment itself may still be deemed correct.[15] In this case, as discussed above, we find that the trial court had several other key pieces of evidence before it from which it correctly granted Monsanto's summary judgment. We therefore find Brown and Root's first assignment to be without merit as well.

For the foregoing reasons, we find that the trial court properly granted Monsanto's Motion for Summary Judgment, while denying Brown and Root's cross Motion for Summary Judgment. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED

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[15] *Melton v. General Elec. Co., Inc.*, 625 So.2d 265, 268, (La.App. 4 Cir. 1993).

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
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THOMAS F. DALEY
MARION F. EDWARDS
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FIFTH CIRCUIT

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY FEBRUARY 13, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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