

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CAROL BRUMLEY et al.,

Plaintiffs and Appellants,

v.

FDCC CALIFORNIA, INC., et al.,

Defendants and Respondents.

A114840

(San Francisco City & County
Super. Ct. No. 314479)

THE COURT:

It is ordered that the opinion filed herein on October 22, 2007, be modified as follows:

1. On page 1, delete the second sentence of the second paragraph, and replace it with the following sentence:

Plaintiffs concede that the original noncancer survivorship claims are barred by the five-year rule, but they contend that the wrongful death claims, Mrs. Brumley's loss of consortium claim, and the cancer survivorship claim should not have been dismissed.

2. On page 3, delete the first sentence of the final paragraph, and replace it with the following sentence:

Plaintiffs concede that the survivorship claims seeking recovery for Brumley's noncancer asbestos disease are barred by the five-year rule, but they argue that the remaining claims, including the wrongful death claims and the cancer survivorship claim, should not have been dismissed because those causes of action do not relate back to Brumley's original personal injury claims.

3. On page 7, in the second sentence of the first complete paragraph, insert the phrase “, cancer survivorship,” after the words “wrongful death” so that the sentence reads:

There is no doubt that plaintiffs could have filed their wrongful death, cancer survivorship, and loss of consortium claims in a separate action; had they followed that course, they would not have faced section 583.310 on these claims until 2010.

4. On page 8, delete the second, third, and fourth sentences of the first full paragraph and existing footnote 3, and replace them with the following sentences and amended footnote 3:

Had plaintiffs filed a separate lawsuit with their new claims, consolidated it with the original action, and demonstrated that it was impractical to bring the consolidated action to trial within the time allotted the original action, under *General Motors* they would have been able to insulate the noncancer survivorship claims from the five-year rule, as well as their new claims.³ As a result of their choosing the alternate course of an amended complaint, they have already been forced to concede the loss of the original survivorship claims. If we affirm, plaintiffs will also lose their new claims, the precise opposite of the result reached in *General Motors*.

³ In applying the section 583 exception for impracticability, *General Motors* focused solely on the wrongful death action. Plaintiffs here made no separate attempt to demonstrate that it would have been impractical to bring their new claims for cancer, wrongful death, and loss of consortium to trial within the time allotted the original noncancer survivorship claims, since, unlike the situation in *General Motors*, the former claims were not the subject of a separate action.

5. On page 13, insert the following paragraph at the end of section II.B.:

Plaintiffs also contend that the cancer survivorship claim should not have been dismissed because it does not relate back to the original claims for asbestosis and pleural disease. As noted above, a new claim relates back only if it “involve[s] the *same injury* . . . as the original one.” (*Norgart, supra*, 21 Cal.4th at p. 409.) Exposure to asbestos can cause a variety of different physical conditions that manifest themselves at different times. Asbestosis, although a progressive disease, “is not a cancerous process.” (*Wilson v. Johns-Manville Sales Corp.* (D.C. Cir. 1982) 684 F.2d 111, 113, fn. 3.) It

is generally accepted that the different distinct illnesses caused by asbestos constitute different injuries, despite their occurrence in the same person as a result of the same exposure. (E.g., *Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal.App.4th 1444, 1451–1453.) Defendants do not argue that asbestosis and cancer are in fact the same injury, but only that the language of Brumley’s original complaint, which referred generally to “lung damage,” can be read to include cancer. While this may be true, there is no dispute that Brumley’s lung cancer did not manifest itself until several years after the original complaint was filed. Regardless of its language, the original complaint cannot plausibly be read to refer to a disease of which Brumley was unaware at the time of its filing. Accordingly, the cancer survivorship claim does not relate back to the original complaint and should not have been dismissed.

6. On page 13, delete section III., and replace it with the following:

The trial court’s judgment is reversed in part. Although Brumley’s original asbestosis and pleural disease claims, now asserted as survivorship claims, are concededly barred by section 583.310, plaintiffs’ wrongful death claims, Mrs. Brumley’s loss of consortium claim, and the cancer survivorship claim are not barred. The matter is remanded for further proceedings consistent with this decision. Plaintiffs shall recover their costs on appeal.

7. There is no change in the judgment.
8. Appellants’ petition for rehearing is denied.

Dated:

Margulies, Acting P.J.