RENDERED: NOVEMBER 7, 2003; 2:00 P.M.
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
AUGUST 18, 2004 (2004-SC-0175-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001328-MR

MICHAEL A. KLEINHENZ,
EXECUTOR OF THE ESTATE
OF ALVIN J. KLEINHENZ;
AND MARGARET M. KLEINHENZ — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-004776

QUIGLEY COMPANY, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellants, Michael Kleinhenz, Executor of the Estate of Alvin J. Kleinhenz, and Margaret Kleinhenz ("Kleinhenz"), seek review of a summary judgment of the Jefferson Circuit Court in favor of the Appellee, Quigley Company, Inc. ("Quigley"), in this asbestos claim. Kleinhenz contends that the trial court erred, by not affording the

opportunity to complete discovery, and by failing to adhere to its own deadlines set forth in the asbestos litigation master order. We vacate and remand.

On July 12, 2001, Alvin J. and Margaret Kleinhenz filed a complaint in the Jefferson Circuit Court against Quigley, and others, alleging that Alvin Kleinhenz had contracted asbestos-related diseases as a result of his occupational exposure to asbestos products manufactured or sold by the defendants. On July 12, 2001, a Master Order was entered, stating that:

> Pursuant to CR 42 and in the interests of justice and judicial economy **IT IS HEREBY ORDERED** that all asbestos personal injury lawsuits, as defined herein, shall be governed by this Master Order.
>
> **I. SCOPE OF MASTER ORDER**. Asbestos personal injury litigation shall be defined to include all personal injury lawsuits, filed in Jefferson Circuit Court, alleging injury as a result of exposure to asbestos or asbestos-containing products. The purpose of this Master Order is to consolidate discovery and other matters as stated herein which are common to all asbestos personal injury litigation and to facilitate and expedite trials in these cases. This Master Order shall be deemed to be entered in each asbestos personal injury lawsuit and a copy shall be placed in each individual case file by the Clerk.
>
> **II. ASBESTOS DOCKET MANAGEMENT.**
> **A. Trials.** Asbestos personal injury lawsuits shall be scheduled for trial according to the following guidelines.
>
> 1. **Scheduling of Trial Groups.** The Asbestos Administrative Judge shall identify and schedule individual cases for trial in trial groups pursuant to scheduling orders entered no later than eleven months prior to the trial date. . . .

> . . . .
>
> **IV. DISCOVERY.** In addition to the discovery requirements imposed by the Civil Rules of Procedure, this Master Order imposes additional deadlines for disclosure of information particular to asbestos personal injury litigation. Failure to meet these deadlines may result in exclusion at trial of the untimely disclosed evidence. Relief from these deadlines will only be granted for good cause.
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> . . . .
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> **B. Disclosure of Witnesses**
>
> **1. Product Identification Witnesses.** Parties shall designate in writing all product identification witnesses. A product identification witness is anyone who will identify a particular asbestos-containing product or the manufacturer, distributor, installer or remover of asbestos or asbestos-containing products.
>
> **a. Disclosure Deadline.** Plaintiff shall disclose these witnesses **150 days** before trial. Defendants shall disclose their witnesses **105 days** before trial. No additional product identification witnesses shall be added without good cause shown.

In the case *sub judice* no trial date had been set when summary judgment was entered for Quigley on May 21, 2002 – approximately ten months after the Complaint was filed.

Alvin Kleinhenz died on November 5, 2001. On January 9, 2002, Michael Kleinhenz was appointed Executor of the Estate. On January 23, 2002, the trial court granted leave to file an amended complaint, substituting the Estate as plaintiff. On February 2, 2002, Quigley filed an answer to the amended

complaint. On February 26, 2002, Kleinhenz filed answers to Quigley's discovery request.

On April 2, 2002, Quigley filed a motion for summary judgment, on grounds that Kleinhenz could not prove exposure to its products.

On April 26, 2002, Kleinhenz filed a response, including documentation that Quigley had produced asbestos-containing products and an affidavit from Harry M. Tretter. Tretter was formerly a bricklayer superintendent and part-owner of J. Gordon English, a company that had used "Quigley Company's Panelag Refractory Cement on a frequent basis during the 1950's until the 1970's." Tretter's affidavit lists numerous job sites where he worked, including General Electric, Kleinhenz's former employer. Tretter explained that Quigley's Panelag cement was used for many purposes, including covering pipe insulation and smoothing joints and seams of block insulation, and that it created a visible dust when mixed, used and applied.

Kleinhenz also submitted a consult report from Douglas A. Pohl, M.D., who had performed an examination on July 17, 2001. History related was that Kleinhenz had worked at Louisville & Nashville Railroad from 1946-67; at International Harvester from 1947-52; at Reynolds Metals from 1952-55; and at General Electric from 1955-85 "with exposure to asbestos." Dr.

Pohl opined that Mr. Kleinhenz's tumor was a malignant pleural mesothelioma, and explained that:

> Prior to the twentieth century, mesothelioma was an exceedingly rare cancer whose existence was sometimes questioned. This reflects the protected nature of the pleural space, a space that is normally inaccessible to environmental carcinogens. The use of asbestos would change all that. Asbestos, a mineral fiber mined from the earth, was used in increasing amounts in industrial applications where thermal insulation and thermally resistant binders were required. Asbestos was inexpensive and readily manufactured into a variety of different products. Unfortunately, asbestos products released particles of aerodynamic asbestos dust that could be breathed by individuals in the vicinity of the product. By 1924, it was recognized that the inhalation of asbestos dust could produce a progressive and often fatal fibrosis of the lungs called asbestosis. In the 1930's asbestos was also found to cause lung cancer. In the 1940's, reports began to appear linking asbestos exposure to mesothelioma. In 1953, Weiss published his belief that mesothelioma was an asbestos related cancer. Weiss' assertion is widely accepted today. In fact, asbestos is recognized as cause of more than 95% of all cases of mesothelioma worldwide.
>
> Asbestos produces mesothelioma through its transmigration from the lungs into the pleural space. . . .
>
> No other carcinogen has yet been identified that is capable of naturally accessing the pleural space as does asbestos. For this reason, asbestos is in large part the only cause of mesothelioma. Knowing that a patient suffers from a mesothelioma, a careful examination of the patient's occupational history will inevitably uncover the individual's past exposure to asbestos dust. In Mr. Kleinhenz's case, he had worked in occupational settings where he was exposed to considerable asbestos dust. As a result, Mr.

> Kleinhenz breathed asbestos dust over a long period of time.
> As reflected in the published literature, this type of exposure was more than sufficient to produce Mr. Kleinhenz's mesothelioma.

Based upon a reasonable medical probability, Dr. Pohl opined that "Mr. Kleinhenz's occupational exposure to asbestos was the specific cause of his incurable pleural mesothelioma."

On April 26, 2002, Kleinhenz also filed a "Request for Admissions, Interrogatories and Request for Production of Documents to Defendant, Quigley."

On April 29, 2002, a hearing was held on the motion for summary judgment. Despite its apparent conviction that Quigley would "get" its motion for summary judgment, the trial court declined to grant the motion at the hearing. "There's just enough there in the Tretter affidavit that I'm not going to sign off on your motion for summary today." The trial court was not prepared to throw the case out "in the initial stages in terms of discovery." Instead, the trial court gave Kleinhenz two weeks to find out what Tretter would say and schedule his deposition.

On May 1, 2002, the court entered the following Order that provides in relevant part:

> Plaintiff's counsel shall ascertain whether or not witness Harry Tretter can offer testimony sufficient to overcome Defendant Quigley's Motion for summary Judgment. If Plaintiff's counsel believes in good faith that Mr. Tretter can offer such testimony, then Plaintiff's counsel shall schedule, with Counsel for Quigley Company, the

> deposition of Harry Tretter. This determination shall be made, and either the deposition scheduled or the Court advised that it will not be scheduled, within two weeks of this Order. The deposition of this witness, or any other product identification witness named in the next two weeks, and any supplementation of discovery related to product identification, shall occur within 90 days of this Order.
>
> As the Court advised the parties on the record, without testimony linking this Plaintiff in time and location to an asbestos-containing product manufactured by the Defendant, Quigley, summary judgment will be entered in favor of Quigley Company.

On May 21, 2002, the trial court entered an order granting summary judgment in favor of Quigley.

On June 18, 2002, Kleinhenz filed a notice of appeal to this Court. On appeal, Kleinhenz contends that summary judgment was entered before the opportunity to complete discovery was afforded, and that the trial court failed to adhere to the discovery practices and deadlines set forth in the master order entered on May 1, 2002.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no

requirement that we defer to the trial court, because factual findings are not at issue.[1]

Kleinhenz cites numerous decisions in support of the argument that summary judgment was premature, because discovery was not complete. Quigley relies upon *Welch v. American Publishing,*[2] for the proposition that the focus should be on what is in the record at the time of the motion, rather than what could be presented at trial. *Welch* involved the review of an adverse judgment in a defamation lawsuit brought by a defeated mayoral candidate against the publishers of a political advertisement. There, the record was devoid of "any hint" that the defendants had any doubts about the truth of the published statements.

Focusing our attention on what was in the record at the time of Quigley's motion, we see that the trial court would not grant the motion, because there was "enough" in Tretter's affidavit to withstand summary judgment. Nevertheless, the trial court gave Kleinhenz only two weeks to name and schedule the depositions of product identification witnesses.

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[1] *Scifres v. Kraft,* Ky. App., 916 S.W.2d 779, 781 (1996).

[2] 3 S.W.3d 724 (1999).

We conclude that two weeks, under the facts of this case, was not a reasonable amount of time. On May 21, 2002, when the trial court entered summary judgment, Quigley's response to Kleinhenz's pending discovery request had not been filed and was not yet due. The time to identify a product identification witness under the master order (150 days for the plaintiff) had not started to run. This was an abuse of discretion.

Moreover, in determining that there was "enough" in Tretter's affidavit, the trial court implicitly concluded that Quigley, as the moving party, had failed to negate Kleinhenz's claim. At that point, the trial court should have simply denied Quigley's motion for summary judgment. Instead, the trial court delayed its ruling and directed Kleinhenz to come up with additional proof. In so doing, the trial court effectively shifted the burden of proof to Kleinhenz, the opponent of the motion. This was error.

> A summary judgment must be cautiously granted. "The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the

> movant and in favor of the party opposing the motion," Moore's Federal Practice, Vol. 6, pages 2124, 2125, and again at page 2128: **"On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence of the necessary certitude, which negatives the opposing party's (plaintiff's) claim. This is true because the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned** * * *." (Emphasis added.)[3]

Accordingly, we vacate and remand for completion of discovery and further proceedings in accordance with the master order and the Kentucky Rules of Civil Procedure.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kenneth L. Sales
Joseph D. Satterley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stephen M. Bowers
Atlanta, Georgia

[3] *Hoskins' Adm'r v. Kentucky Ridge Coal Co.*, Ky., 277 S.W.2d 57, 58-59 (1955).