

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-000169-MR

JAMES FULTON and  
LENNA FULTON

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE ROBERT J. HINES, JUDGE  
CIVIL ACTION NO. 98-CI-00661

VIACOM, INC., f/k/a  
VIACOM/WESTINGHOUSE ELECTRIC CORPORATION

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: BARBER AND MINTON,<sup>1</sup> JUDGES; HUDDLESTON,<sup>2</sup> SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: James Fulton began working as a carpenter in 1965 and retired in 2001. During his long career, Fulton was employed by numerous contractors in western Kentucky and primarily worked at industrial job sites such as power plants and large chemical plants. According to Fulton, he spent

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<sup>1</sup> Judge John D. Minton concurred in this opinion prior to his resignation to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

most of his time either building scaffolds for pipe workers, boilermakers and insulators or building forms in which to pour concrete. In 1998, Fulton was diagnosed with asbestosis. In that same year, Fulton filed a products liability lawsuit<sup>3</sup> in McCracken Circuit Court against numerous companies claiming that he had been exposed to insulation, as well as other building materials, that contained asbestos that caused him to develop asbestosis.

In his lawsuit, Fulton named Viacom, Inc., the successor to Viacom/Westinghouse Electric Corporation, as one of the defendants (hereinafter referred to as "Viacom/Westinghouse"). Viacom/Westinghouse manufactured electrical products including turbines. On January 4, 2005, Viacom/Westinghouse filed a motion for summary judgment arguing that the record contains no evidence that Fulton was ever exposed to products manufactured by Viacom/Westinghouse that also contained asbestos. Viacom/Westinghouse noticed its motion for a hearing to be held on January 21, 2005; however, the circuit court granted summary judgment in Viacom/Westinghouse's favor on January 7, 2005, three days after the motion was filed and served. Not surprisingly, Fulton did not file a response to Viacom/Westinghouse's motion.

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<sup>3</sup> Fulton's wife, Lenna, joined in his lawsuit seeking damages for loss of consortium.

Citing *Hoke v. Cullinan*<sup>4</sup> and *City of Florence v. Chipman*,<sup>5</sup> Fulton argues that before a circuit court can grant summary judgment, it must give the party opposing the motion an opportunity to present evidence that a dispute regarding material facts exists. In addition, Fulton argues that the circuit court violated his due process rights when it granted summary judgment without giving him an opportunity to respond to Viacom/Westinghouse's motion.

Fulton claims that he has in his possession evidence that would show that he had been exposed to turbines manufactured by Viacom/Westinghouse which also contained asbestos. In support of this argument, Fulton attached two documents to his brief. Fulton admits that these documents are not in the record, but he reasons that it is appropriate to attach and refer to them since they are merely examples of the kind of evidence he could have produced if the circuit court had given him the opportunity. Furthermore, Fulton cites to the deposition of Horace Garland, who testified in a prior asbestos-related lawsuit. Fulton admits that Garland's testimony is not in the record either but once again claims that he is only referring to it as an example of the evidence that he could have produced. Fulton insists that the circuit court erred when it

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<sup>4</sup> 914 S.W.2d 335, 338 (Ky. 1995).

<sup>5</sup> 38 S.W.3d 387 (Ky. 2001).

prematurely granted summary judgment in Viacom/Westinghouse's favor since he was never given an opportunity to respond to its motion and since he had proof of exposure to the corporation's turbines.

We agree with Fulton that he was deprived of his opportunity to respond to Viacom/Westinghouse's motion for summary judgment. The Supreme Court of Kentucky has said that

[c]ontrary to the view of some, our decision in *Steelvest, Inc. v. Scansteel Service Ctr.*, Ky., 807 S.W.2d 476 (1991), does not preclude summary judgment. **Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts**, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.<sup>6</sup>

In this case, summary judgment was not appropriate. As the record reflects, Viacom/Westinghouse filed its motion on January 4, 2005, noticing the motion for hearing on January 21. However, only three days after the motion was filed and nearly two weeks before the hearing date, the circuit court granted summary judgment in Viacom/Westinghouse's favor. The three days that the trial court waited before granting summary judgment was not sufficient to provide Fulton with an opportunity to respond to Viacom/Westinghouse's motion; thus, the court erred when it granted summary in Viacom/Westinghouse's favor. We are vacating

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<sup>6</sup> *Hoke v. Cullinan*, *supra*, note 3 (emphasis supplied).

the trial court's order strictly on procedural grounds, and we decline to address the merits of Viacom/Westinghouse's claim for summary judgment.

The summary judgment in favor of Viacom/Westinghouse is vacated and this case is remanded to McCracken Circuit Court with directions to set Viacom/Westinghouse's motion for summary judgment for a hearing and to give Fulton adequate time to respond to the motion.

ALL CONCUR.

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