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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002601-MR

PAUL T. VAN LANDINGHAM — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 07-CI-00030

GEORGIA-PACIFIC CORPORATION;
CLAY-INGELS COMPANY; AND
UNION CARBIDE CORPORATION — APPELLEES

OPINION REVERSING
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: The appellant, Paul T. Van Landingham ("Van Landingham"), appeals an opinion and order of the Pulaski Circuit Court granting summary judgment in favor of the appellees, Georgia-Pacific Corporation ("Georgia-Pacific"), Clay-Ingels Company ("Clay-Ingels"), and Union Carbide Corporation

("Union Carbide") (hereinafter, collectively referred to as the "appellees"). The trial court dismissed Van Landingham's claims against the appellees on the ground that the claims were time-barred by the applicable statute of limitations. We hold that summary judgment was improper and reverse the judgment of the Pulaski Circuit Court.

Background

Van Landingham worked as a drywall, tile and plaster worker from 1960 until he retired in 1997. During this time he worked for his father's company, Van Landingham Tile and Terrazzo Company, and for his own company, Kentucky Mosaics. Van Landingham worked as a subcontractor on numerous job sites in eastern and southern Kentucky where Georgia-Pacific and Union Carbide supplied asbestos-containing materials. Additionally, most of the plaster products that Van Landingham Tile and Terrazzo Company purchased directly during this period were from Clay-Ingels. Van Landingham developed an asbestos-related disease from his workplace exposure to asbestos during these years.

After suffering a heart attack in 1999, Van Landingham had a coronary-artery bypass graft ("CABG"). Dr. Sibu Saha ("Dr. Saha"), the surgeon performing the CABG, noticed that there were pleural plaques on Van Landingham's lungs during this procedure. While performing the CABG, Dr. Saha took tissue samples from the plaques and ordered pathology on them. The plaques were determined to be benign and Van Landingham was informed that

they were not cancerous. The parties dispute whether Van Landingham was informed at this time that the pleural plaques were likely caused by exposure to asbestos. Dr. Saha testified that normal practice would be for him to talk with the patient about pleural plaques, including possible causes for them, although he could not specifically remember if he spoke with Van Landingham about them.

Subsequent to the CABG procedure, Van Landingham visited with his primary physician, Dr. Lee Durham ("Dr. Durham"), on August 18, 1999. Dr. Durham's medical records for this particular visit include a notation referencing Dr. Saha's findings, stating "asbestosis found at time of CABG [?]."[1] Dr. Durham testified he only would have known this information if it was included in the records he was provided by Dr. Saha or if Van Landingham personally relayed it to him. He further testified that, upon a review of the attendant medical records, he did not see a notation referencing asbestosis; however, he could not be sure that Van Landingham had personally relayed the information to him.

Finally, Van Landingham visited Dr. Keith Kelly ("Dr. Kelly"), the physician who diagnosed him with asbestosis, on August 1, 2002. During that visit, Van Landingham was requested to fill out a "new patient intake form." Van Landingham partially completed the intake form and a nurse on staff in the office completed the rest. One entry on the form stated as follows: "told by [heart] surgeon [around] 3 yrs ago that he had removed 2 spots of asbestos from his lungs

[1] The entry "asbestosis found at time of CABG" was followed by a question mark, giving the impression that the scrivener of the note was unsure of whether asbestosis was found at the time of the CABG.

during CABG." Van Landingham indicated in response to another query on the form that he was interested in pursuing legal action if he, indeed, had an asbestos-related disease.

Van Landingham filed suit against the appellees and other defendants on April 17, 2003, in Jackson Circuit Court. The complaint included claims based in strict liability, tort, negligence, and breach of the implied warranty of merchantability. Extensive discovery was conducted on both sides, including numerous depositions. On September 13, 2006, Georgia-Pacific filed a motion for summary judgment based upon the applicable statute of limitations. Union Carbide and Clay-Ingels, who also filed separate motions for summary judgment, joined in the motion. On or about October 11, 2006, Van Landingham supplemented the record with an affidavit claiming that prior to August 2002, he had not been diagnosed with nor did he suspect that he suffered from asbestosis or any other disease caused by asbestos exposure.

On January 5, 2008, after the dismissal of certain defendants, the case was transferred to the Pulaski Circuit Court because of lack of venue in Jackson County as to the remaining defendants (the appellees herein). As of that date, the Jackson Circuit Court had not yet ruled on the motions, although the parties had fully briefed the court. On October 20, 2007, the Pulaski Circuit Court heard arguments on the pending motions for summary judgment. Summary judgment was granted by an opinion and order of the court dated November 26, 2007, on the grounds that the action was barred by the applicable statute of limitations.

Standard of Review

On review of the grant or denial of a motion for summary judgment, we must determine whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Steelvest, Inc v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). As "findings of fact are not involved in the summary judgment process, the trial court's decision is entitled to no deference." *Combs v. Albert Kahn Associates, Inc*., 183 S.W.3d 190, 194 (Ky. App. 2006). We review such judgments *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Analysis

On appeal, Van Landingham argues that summary judgment was inappropriate because genuine issues of material fact remained as to whether he knew in 1999 that he had been harmed by asbestos exposure.

The parties agree that this action is governed by the one-year statue of limitations contained in Kentucky Revised Statute(s) ("KRS") 413.140(1)(a). However, Van Landingham urges that the statutory period did not begin to run until he was diagnosed with asbestosis in 2002. He contends that the "discovery rule," as adopted by *Louisville Trust Co. v. Johns-Manville Products Corp*., 580 S.W.2d 497 (Ky. 1979), tolls the statute until the time of his diagnosis. While it is true that our highest court has adopted the discovery rule in the case of latent diseases caused by exposure to harmful substances, the rule established actually states: "[a] cause of action will not accrue under the discovery rule until the

plaintiff discovers *or in the exercise of reasonable diligence should have discovered* not only that he has been injured, but also that his injury may have been caused by the defendant's conduct." *Id*. at 501, quoting *Raymond v. Eli Lilly & Co*., 117 N.H. 164, 371 A.2d 170, 174 (1977) (emphasis added). As such, a diagnosis is not required per se. Rather, the statute begins to run when the plaintiff knows (or should know through the exercise of reasonable diligence) that he has suffered an injury. Once an individual realizes that he has been injured, his cause of action begins to accrue even if he does not yet realize the extent of his injury. *Caudill v. Arnett*, 481 S.W.2d 668, 669 (Ky. 1972). Therefore, if Van Landingham knew in 1999 that he had been injured by asbestos exposure, the statute would have begun to run in 1999.

We find that a material issue of fact exists as to whether the statute began to run in 1999 because it is unclear whether Van Landingham knew he had suffered an injury in 1999. To begin, the plaques were found to be benign, which may easily have lead Van Landingham to believe that had not suffered an injury. Further, although a diagnosis is not required per se, the fact that Van Landingham had not been definitively diagnosed with asbestosis or an asbestos-related disease makes it less clear whether he was aware he had suffered an injury. It is also not apparent from the record whether either Dr. Saha or Dr. Durham explained to Van Landingham that the plaques were likely caused by asbestos exposure. As we are required to resolve all factual inferences in favor of Van Landingham, we cannot assume that Van Landingham was told in 1999 that he had been harmed by his

exposure to asbestos. *See, e.g., Bennett v. Nicholas,* 250 S.W.3d 673, 675 (Ky. App. 2007). Moreover, the record does not definitively show that Van Landingham provided Dr. Durham with the information that he had "asbestos" removed from his lungs in 1999. Rather, Dr. Durham stated that he could have either obtained the information from Van Landingham's medical records or from Van Landingham himself. While we do not find Van Landingham's affidavit alone to be enough to create an issue of material fact,[2] we do find the record is sufficient to call into question whether Van Landingham was ever informed that the plaques were caused by asbestos exposure. While it is clear that Van Landingham believed he had been harmed by asbestos exposure in August of 2002 when he first visited Dr. Kelly, it is not clear that he had formed such a belief, or had reason to form such a belief, in 1999. Therefore, a material issue of fact exists as to whether Van Landingham knew or should have known that he had suffered an injury in 1999.

As our Courts have previously acknowledged, the validity of the defense of statute of limitations "should be determined by the court as a matter of law." *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965). However, where "there is a factual issue upon which the application of the statute depends, it is proper to submit the question to the jury." *Id*. As such, we note that it is not within the province of this court to determine whether Van Landingham knew or

[2] *See, e.g., Lipsteuer v. CSX Transportation, Inc.,* 37 S.W.3d 732 (Ky. 2000) (holding that a post-deposition affidavit cannot be used to create an issue of material fact in order to defeat summary judgment unless it is used to resolve inconsistencies in prior testimony).

should have known of that he was harmed by asbestos in 1999. Rather, a material issue of fact exists as to his knowledge or lack thereof, and such a determination is within the particular province of the jury. *Id*. For this reason, entry of summary judgment was improper.

Conclusion

For the foregoing reasons, we reverse the entry of summary judgment by the Pulaski Circuit Court and remand with instructions that the issue of whether Van Landingham "knew or should have known he suffered an injury" is a question for the jury, which may properly be decided by special verdict. *See, Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759, 761 (Ky. App. 1987); *and Lynn Mining Co., supra.*

ALL CONCUR.

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