NOT DESIGNATED FOR PUBLICATION

LINDWARD FREMIN, ET AL.	*	**NO. 2002-C-2759**
VERSUS	*	**COURT OF APPEAL**
ENTERGY NEW ORLEANS, INC., ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPLICATION FOR SUPERVISORY WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-6848, DIVISION "M"
Honorable C. Hunter King, Judge
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Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard)

MURRAY, J., CONCURS IN THE RESULT

J. Michael Crimley, Jr.,
Channing R. King
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WRIT APPLICATION GRANTED; RELIEF DENIED

Defendant Walter Barnes Electric Company, Inc. seeks review of an October 29, 2002 judgment, which denied its exception of no cause of action and/or alternatively motion for summary judgment. For the following reasons, we grant the writ application, but deny the relief requested.

FACTS

Linward Fremin and his wife, Gail Rolland Fremin, initially filed the instant action seeking damages suffered as a result of Mr. Fremin's alleged exposure to asbestos while employed by different companies, including Entergy, Dixie Machine Welding & Metal Works, Inc., Fischbach & Moore, Inc., Pflueger Electric Co., American Cyanamid Company, Gulf Best Electric, Inc., and the relator, Walter J. Barnes Electric Co. Mr. and Mrs. Fremin alleged that the relator, Walter J. Barnes Electric Company, Inc., employed Mr. Fremin for a short time in 1971 and for a longer period of time from 1984 through 1999. As a result of his exposure to asbestos while working for the relator and for various other companies, Mr. Fremin

allegedly contracted mesothelioma. He was first diagnosed with the illness on May 8, 2000. He and his wife filed suit in April of 2001 alleging causes of action in negligence, intentional tort, fraud, strict liability and absolute liability. They sought numerous types of damages, including punitive damages and damages for loss of consortium on behalf of Mrs. Fremin.

Following Mr. Fremin's death on October 7, 2001, the suit was amended to convert the action to a wrongful death and survival action on behalf of Mrs. Fremin and the decedent's children. The amended petition also included a claim for loss of consortium and a claim for punitive damages.

In response to the plaintiffs' amended petition, the relator filed an exception of no cause of action and/or alternatively a motion for summary judgment seeking dismissal of the wrongful death claims, the survival claims, the intentional tort claims, and the claims for loss of consortium and punitive damages. The relator argued that the exclusive provisions of the Louisiana Workers' Compensation Act barred the wrongful death and survival claims and there was no evidence to support the intentional tort claim. They further argued that the plaintiffs' loss of consortium claims were barred by the exclusivity provisions of the Workers' Compensation Act and/or alternatively that that the claims arose prior to the amendment

permitting such claims. Finally, the relator argued that the plaintiffs failed to state a cause of action for punitive damages. Following a hearing, the trial court allegedly denied the exception and motion. The relator seeks review of that judgment.

DISCUSSION

The relator raises five issues in this writ application. More specifically the relator argues: 1) the trial court erred by failing to dismiss the plaintiffs' negligence based survival claims arising out of Mr. Fremin's death; 2) the trial court erred in failing to dismiss the plaintiffs' intentional tort claims; 3) the trial court erred by failing to dismiss the plaintiffs' negligence based wrongful death claims; 4) the trial court erred in failing to dismiss the plaintiffs' claims for loss of consortium; 5) the trial court erred in failing to dismiss the plaintiffs' claims for punitive damages. Based on these arguments, the relator argues that this court should reverse the ruling of the trial court and enter summary judgment in its favor dismissing all of plaintiffs' claims against it.

In cases wherein reversal of a trial court judgment will terminate the litigation as to a defendant, this court has exercised its supervisory jurisdiction in order to dismiss a defendant from pending litigation. Jones v. Allstate Insurance Co, 2002-0638 (La. App. 4 Cir. 4/26/02), 817 So. 2d 332.

If in fact, the trial court erred in failing to dismiss all claims against the relator, reversal of the judgment will terminate the litigation as to this defendant. Accordingly, we will exercise our supervisory jurisdiction to review the merits of the relator's claims.

The relator's claims are based on three premises. The first premise is that the plaintiffs are barred from maintaining their wrongful death and survival claims by the exclusivity provisions of the Worker's Compensation Act. The second premise is that the plaintiffs have no claim for intentional tort. The third premise is that the plaintiffs have no causes of action for loss of consortium and/or punitive damages because no such rights were recognized at the time the plaintiffs' causes of action accrued.

Survival Claims

The relator argues that the plaintiffs' survival claims should have been dismissed. In this assignment of error, the relator mounts a three-fold attack on the plaintiffs' survival claims. First, the relator notes that Mr. Fremin only worked for it for a brief period of time in 1971, and that he only worked regularly for it from 1984 through 1998. For this reason, the relator argues that to the extent that the survival claims arose during the years of 1984 through 1998, they are barred by the exclusive remedy provisions of LA. R.S. 23:1032 as amended in 1976.

By this argument the relator is basically seeking to maintain a partial exception of no cause of action. Partial judgments on exceptions are implicitly allowed pursuant to La. C.C.P. art. 1915. However, this court has previously stated that partial judgments on exceptions of no cause of action are prohibited unless there are two or more distinct causes of action. Simmons v Templeton, 99-1978 (La. App. 4 Cir. 4/12/00), 762 So. 2d 63, 66; Pape v. ODECO, Inc., 93-1005, p. 7 (La.App. 4 Cir. 9/21/94), 643 So.2d 229, 232. The reason for this prohibition, as noted in Prestage v. Clark, 1997-0524 (La. App. 1 Cir. 12/28/98), 723 So.2d 1086, is to prevent a multiplicity of appeals which forces an appellate court to consider the merits of the action in a piecemeal fashion. Id. at p. 5, 723 So. 2d at 1089.

Moreover, a cause of action is interpreted to mean the operative facts that give rise to the plaintiff's right to assert his action. Id. at p.7, 643 So.2d at 232, citing Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So.2d 1234 (La. 1993). In the instant case we are not dealing with two or more distinct causes of action. Rather, the operative facts giving rise to the plaintiffs' right to assert their action include Mr. Fremin's exposure to asbestos during his employment for various employers at various times. The relator cites no legal authority for allowing the court to carve out an exception for work performed for the relator from 1984 to 1998.

Accordingly, the court correctly rejected the relator's request for a partial judgment on its exception of no cause of action.

Second, the relator argues that even if Mr. Fremin was exposed to asbestos while working for it in 1971, the provisions of La. R.S. 23:1032, as it existed at that time, still mandates that the plaintiffs' claims are barred by the exclusive remedy provisions of the Louisiana Workers' Compensation Act because asbestos-related diseases, such as mesothelioma, were covered occupational diseases under La. R.S. 23:1031.1. In support of this claim, the relator relies on Brunet v. Avondale Industries, Inc., 99-1354 (La. App. 5 Cir. 12/5/00), 772 So. 2d 974, writ not considered, 2001-0171 (La. 3/23/01), wherein the Fifth Circuit concluded that an occupational disease is covered under the worker's compensation statute even if the disease is not specifically listed. The plaintiff in Brunet was diagnosed with lung cancer and alleged that he contracted the disease as a result of his exposure to asbestos during his employment with Avondale from 1950 to 1978. The Fifth Circuit acknowledged that lung cancer was not listed as an occupational disease nor was asbestos listed as a pathogen prior to the 1976 amendment of the worker's compensation statute. However, the court concluded that because oxygen and metal were both listed as substances prior to 1976, and asbestos is a compound of both oxygen and metal, then

asbestos was covered under the statute prior to 1976.

While the Brunet case is supportive of the defendant's argument, this court has repeatedly declined to follow Brunet, which directly conflicts with Gauthreaux v. Rheem Mfg. Co., 96-2193 (La. App. 4 Cir. 12/27/96), 694 So. 2d 977, writ denied, 97-0222 (La. 3/14/97). In Gauthreaux, this court recognized that asbestos was not a listed substance in La. R.S. 23:1031.1 prior to the pre-1975 amendments to the Louisiana Workers Compensation Act. Because this pre-1975 statute did not include mesothelioma as a covered disease or asbestos as a substance that caused disease, this court concluded that causes of actions for mesothelioma arising prior to the effective date of the amendments are not covered by the exclusive remedy of the workers compensation statute. Accordingly, a plaintiff who contracts mesothelioma as a result of pre-1975 exposures to asbestos may pursue negligence actions against their employers. Also see Matrana v. Avondale Industries, Inc., 2001-1505 (La. App. 4 Cir. 8/27/01), 803 So. 2d 59 and Callaway v. Anco Insulation, Inc., 98-0397 (La. App. 4 Cir. 3/25/98), 714 So. 2d 730, writ denied, 98-1034 (La. 11/19/99), 749 So. 2d 666. Accordingly, the relator's argument that the exclusivity provisions of the Workers Compensation Act bar the plaintiffs' survival claims has no merit.

Finally, the relator argues alternatively that the plaintiffs' claims

against it should be dismissed because Mr. Fremin could not recall any instance in which he worked with asbestosis or was exposed to asbestos while working for Walter J. Barnes. In support of this argument the relator attaches photocopies of four pages allegedly transcribed from a video deposition taken of Mr. Fremin on May 14, 2001. However, having reviewed the four pages, it is not clear that the plaintiffs have no evidence that Mr. Fremin was exposed to asbestos while working for the relator in 1971. On the referenced pages of the deposition, Mr. Fremin merely states that he recalled working for the relator on a bridge job in 1971. When asked if he specifically recalled working for the relator at American Cyanamid in 1971, Mr. Fremin answered, "To be specific, no." Assuming that some evidence appears to support the implied assumption that American Cyanamid was the only alleged source of asbestos while Mr. Fremin was working for the relator, it could be said that absent some type of circumstantial evidence establishing that Mr. Fremin was exposed to asbestos while working for the relator during that time period, the plaintiffs could not prove their case. Yet the documents before this court contain nothing to suggest that the plaintiffs have asserted that the asbestos to which Mr. Fremin was exposed was located only at American Cyanamid. Accordingly, we find that relator failed to present sufficient proof that the

plaintiffs cannot show Mr. Fremin was exposed to asbestos while working for it.

The next argument made by the relator is that the trial court erred in denying its exception of no cause of action and/or motion for summary judgment seeking dismissal of the plaintiffs' intentional tort claims. In this assignment, the relator argues that the plaintiffs merely attempted to state a claim for an intentional tort to circumvent the exclusivity provisions of the workers' compensation law. However, the relator argues that: 1) the allegations of the petition are insufficient to maintain an intentional cause of action and 2) the evidence demonstrates that the plaintiffs cannot show that they will prevail on the intentional tort issue.

No cause of action exception for intentional tort

The exception of no cause of action tests the legal sufficiency of the petition; therefore, the court must determine whether the law affords a remedy for the particular harm alleged by the plaintiff. DeBlanc v. International Marine Carriers, 99-0482 (La. App. 4 Cir. 12/15/99), 748 So. 2d 649, 652, writ denied, 2000-0470 (La. 3/31/00), 759 So. 2d 75. When an exception of no cause of action has been asserted, all well pleaded factual allegations must be accepted as true. Id.

"Intentional act" within the meaning of La.R.S. 23:1032(B) means

"intentional tort." Micele v. CPC of Louisiana, Inc., 1998-0044, p.5 (La.App. 4 Cir. 3/25/98), 709 So.2d 1065, 1068. Intent means, "that the defendant either desired to bring about the physical results of his act or believed they were substantially certain to follow from what he did." Id. citing Bazley v. Tortorich, 397 So.2d 475, 482 (La.1981). Also see, Callaway v. Anco Insulation, Inc., 98-0397, (La. 4 Cir. 3/25/98), 714 So. 2d 730, 733. Moreover, "'Certain' means inevitable or incapable of failing." Casto v. Fred's Painting, Inc., 96-405, p. 3 (La. App. 5 Cir. 1/15/97), 688 So. 2d 72, 74, reversed on other grounds, 97-0374 (La. 4/4/97), 692 So. 2d 408.

As noted by the relator, our courts have narrowly construed the intentional tort exception, holding that mere knowledge and appreciation of a risk does not constitute intent; nor does reckless or wanton conduct, gross negligence, disregard of safety regulation or the failure to use safety equipment by an employer constitute intentional wrongdoing. Reeves, 1998-1798 (La. 3/12/99), 731 So. 2d 208, 212; Micele, 98-0044. 709 So. 2d 1068 quoting Bridges v. Carl E. Woodward, Inc., 94-2675 (La.App. 4 Cir. 10/21/95).

The relator notes that Louisiana courts have held that acts such as the ones complained of in the plaintiffs' petition do not fall within the intentional act exception. More specifically the courts have held that the

following acts are not considered intentional acts: (1) allegations of failure to provide a safe place to work; (2) poorly designed machinery and failure to follow governmental provisions and/or safety standards in the industry; 3) failure to provide requested safety equipment or providing deficiently designed machinery; and (4) failure to correct unsafe working conditions. See Reeves, pp. 7-8, 731 So. 2d at 211-212 and Micele, p. 6, 709 So. 2d at 1068.

The relator argues that the plaintiff's allegations of an intentional tort consists of allegations that 1) the relator willfully withheld and knowingly concealed information from Mr. Fremin concerning the hazards of working around asbestos-containing products; 2) the relator failed to protect Mr. Fremin from the dangers of asbestos and failed to provide him with a safe workplace; 3) the relator failed to provide Mr. Fremin with protective clothing and equipment; 4) the relator knowingly concealed critical medical information and information concerning the inherent dangers of asbestos to Mr. Fremin and to his family members; and 5) other acts which may be revealed at trial. Citing Bazley v. Tortorich, 397 So. 2d 475 (La. 1981) and Reeves v. Structural Preservation Sys., 98-1795 (La. 3/12/99), 731 So. 2d 208. The relator argues that even if these allegations are true, they are insufficient to maintain an intentional act cause of action.

However, the allegations in the plaintiffs' petition seem to go a little further than the allegations contained in the cases cited by the Reeves Court. The plaintiffs in the instant case allege a failure to provide a safe working condition free from asbestos and safety equipment to protect the worker from asbestos at a time when it was widely known in the industry and in the United States that exposure to asbestos could cause asbestosis and other asbestos related illnesses. In this regard, the instant case is more similar to DeBlanc v. International Marine Carriers, 99-0482 (La. App. 4 Cir. 12/15/99), 748 So. 2d 649, writ denied, 2000-0470 (La. 3/31/00), 759 So. 2d 75, wherein this court reversed a judgment of the trial court finding that an employee failed to state a cause of action for intentional tort. In DeBlanc this court found that a petition sufficiently alleged an intentional tort under the pleading requirements of Bazley v Tortorich where 1) the defendant had been warned of the danger of asbestos exposure and 2) the defendant knew respiratory disease was substantially certain to result; yet, the defendant still required his employees to work without proper protective equipment, thereby causing plaintiff injury and damage.

Moreover, it also appears that the allegations in the instant case go even further than the allegations in DeBlanc. Rather, the plaintiffs also allege a conspiracy on the part of all the defendants to actually misrepresent

the safety of asbestos and a practice of requiring the workers to work with asbestos without proper equipment knowing full well that the employees would develop asbestosis or some other type of asbestos related disease. In this regard, the plaintiffs note that premiums with insurers were negotiated taking this inevitability into consideration, suggesting that the defendants simply viewed the eventual contraction of an asbestos related illness as a mere cost of doing business. Accordingly, we find that the trial court did not err in denying the relator's exception of no cause of action.

Summary Judgment Motion

Alternatively, the relator argues that if the plaintiffs stated a cause of action, it demonstrated that it was entitled to summary judgment dismissing the plaintiffs' claims.

Some courts have expressed some concern as to whether a motion for summary judgment is appropriate for disposing of cases requiring a judicial determination of subjective facts such as intent. However, assuming that summary judgment motions are proper in cases involving intentional torts, which are strictly construed, the issue to be determined by this court is whether the relator proved that no genuine issues of material facts exists on the issue of intent.

Appellate courts review the grant or denial of a motion for summary

judgment de novo. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230. Pursuant to La. C.C.P. art. 966(B) a summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law.

In Austin v Abney Mills, Inc., 2001-1598 (La. 9/4/02), 824 So. 2d 1137, our highest court summed up the burden to be met by employer defendants invoking immunity under La. R.S. 23:1032 as follows:

> [T]o prevail in their motion for summary judgment, the employer defendants must, in addition to showing that there are no genuine issues of material fact, establish the applicable law governing the issue raised and that they are entitled to summary judgment *as a matter of law*. . . . (Emphasis in original) (citation omitted).

Id. p. 8, 824 So. 2d at 1143.

Pursuant to La. C.C.P. art. 966 (C), the initial burden of proof remains with the movant to show that no genuine issue of material fact exists. Once the movant has made a prima facie showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that material factual issues remain. If the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine

issue of material fact. La. C.C.P. art. 966 C(2); Smith v. Our Lady of the Lake Hosp., Inc., 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. Thus, once the movant has properly supported the motion for summary judgment, the failure of the non-moving to produce evidence of a material factual dispute mandates the granting of the motion. Coates v. Anco Insulations, Inc., 2000-1331, p.6 (La. App. 4 Cir. 3/21/01), 786 So.2d 749, 753.

In its motion for summary judgment the relator argued that the plaintiffs have no evidence to show that it consciously desired that Mr. Fremin contract any asbestos-related disease or knew that the contraction of any such disease was substantially certain to occur as a result of Mr. Fremin's employment by or at the relator's work place. In support of this argument, the relator attached the affidavit of Mr. William Conner Ellis, Jr., an electrical engineer who began working for it in 1965. Mr. Ellis alleged that he became vice-president of the company in 1971 and president of the company in "the mid-1980's." Mr. Ellis further stated that 1) he is a part owner of the company; 2) he never intended for any employee to sustain an occupational disease or injury; 3) he did not know or believe that any employee would become sick as a result of any work performed for it; 4) he never knowingly or intentionally withheld any information regarding potential health hazards such as asbestos from any employee. Finally, he

stated that to his knowledge, Mr. Fremin was never exposed to asbestos-containing products during his employment with the relator's company.

We find that this affidavit, standing alone, is insufficient to show the plaintiffs cannot establish an intentional tort because all the affidavit purports to show is that a part owner of the company, who previously worked for the company, never intended for anyone to get sick; that he never knowingly or intentionally withheld information regarding the hazards of asbestos; and that he had no knowledge of Mr. Fremin being exposed to asbestos-containing products during his employment. The "substantial certainty" requirement needed to show an intentional tort does not appear to be one based on subjective intent. Moreover, while Mr. Ellis is certainly competent to state information based on his personal knowledge, it is not clear that he would be in a position to know whether Mr. Fremin was exposed to asbestos in 1971. Mr. Fremin's Itemized Statement of Earnings indicates that he worked for the relator sometime between April through September of 1971. In the affidavit Mr. Ellis states that he became vice president in 1971. However, he does not state when in 1971 he became vice-president. Thus it is unknown whether Mr. Fremin was already employed by the company at the time Mr. Ellis assumed his position or whether he subsequently became employed by the company.

Moreover, we find the writ application is incomplete in that it does not contain all the pleadings upon which the judgment was based as required by Rule 4-5(h) of the Uniform Rules Courts of Appeal. The relator attached the plaintiffs' opposition to its motion for summary judgment as Exhibit 2. However, in that opposition, the plaintiffs refer to numerous depositions (totaling in excess of 25 documents) as exhibits to their opposition. These exhibits, according to the plaintiffs' opposition, show that during the time Mr. Fremin was employed for the relator, the relator knew that asbestos caused fatal lung disease and that it knew what steps could be taken to protect its employees, yet relator concealed the hazards from its employees and refrained from implementing protective measures. If in fact the exhibits referred to in the plaintiffs' opposition show these facts to be true, it cannot be said that the plaintiffs will be unable to show an intentional tort.

Our analysis thus far leads this Court to the conclusion that the plaintiffs' survival claims are not barred by the exclusivity provisions of the Workers' Compensation Act and that the relator failes to show that the trial court erred in denying its exception of no cause of action and/or motion for summary judgment seeking dismissal of the intentional tort claims. Because we find no merit to these arguments, we pretermit a discussion of the remaining issues.

WRIT APPLICATION GRANTED; RELIEF DENIED