

JOSEPH E. BOURDA, JR.

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NO. 2004-C-1092

VERSUS

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COURT OF APPEAL

**A.P. GREEN INDUSTRIES,
INC., ET AL.**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 00-9548, DIVISION "D"
HONORABLE LLOYD J. MEDLEY, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Judge Patricia Rivet Murray, Judge Michael E. Kirby,
Judge Roland L. Belsome)

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STATEMENT OF THE CASE

The defendant, Entergy Louisiana, Inc., seeks review of the trial court's denial of its motion for summary judgment.

This is an asbestos case. Plaintiff has sued numerous defendants, alleging exposure to asbestos resulting in lung cancer, and ultimately his death. Defendant, Entergy Louisiana, Inc. was named a defendant because the plaintiff claimed he was exposed to asbestos while he worked as an electrician at Entergy's facilities, including the Nine Mile Point Plant. Entergy filed a motion for summary judgment asserting that plaintiff cannot prove that he ever worked at Entergy's facilities and/or that he was exposed to asbestos at Entergy's facilities.

The plaintiff alleged in his petition, filed on June 19, 2000, that he was exposed to asbestos when he worked as an electrician at the defendant's facilities from October 1959 to March 1960 and from January 1965 to June 1965 while he was employed by Fischbach & Moore, Inc. The defendant answered the petition denying plaintiff's allegations and subsequently filed a motion for summary judgment arguing that the plaintiff could not prove that he worked at the defendant's facilities as alleged. The plaintiff objected to the motion for summary judgment on the basis that discovery was not complete. The trial court conducted a hearing on the motion on June 4, 2004

and denied the defendant's motion for summary judgment. In denying the motion, the trial court noted that the defendant did not produce any documentation in support of its motion for summary judgment.

Entergy contends that the trial court erred when it denied the subject motion for summary judgment. In denying the motion for summary judgment, the trial court noted that the defendant had no supporting affidavits, exhibits or testimony in support of its motion for summary judgment.

STANDARD OF REVIEW

Appellate courts review summary judgments de novo. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. Procedurally, the court's first task on a motion for summary judgment is determining whether the moving party's supporting documents--pleadings, deposition, answers to interrogatories, admissions and affidavits--are sufficient to resolve all material factual issues. La. C.C.P. art. 966(B);

Oakley v. Thebault, 96-0937 (La. App. 4 Cir. 11/12/96), 684 So.2d 488.

If the court finds that a genuine issue of material fact exists, summary judgment must be rejected. Thus, the burden does not shift to the party opposing the summary judgment until the moving party first presents a prima facie case that no genuine issues of material fact exist. Id. At that point, the party opposing the motion must "make a showing sufficient to establish the existence of proof of an element essential to his claim, action, or defense and on which he will bear the burden of proof at trial." La. C.C.P. art. 966(C).

This court has previously stated that the 1996 amendments to La. C.C.P. art. 966(C) did not change the existing law concerning genuine issues of material fact and burdens of proof applied to a summary judgment proceeding. See Short v. Giffin, 96-0361, slip op. at 2 (La.App. 4 Cir. 8/21/96), 682 So.2d 249, 251. However, the amendment did make a change in the law to the extent that it now proclaims that summary judgments are "favored" and thus the rules should be liberally applied, which requires courts to change their attitudes when reviewing motions for summary judgment. The pre-amendment jurisprudence had proclaimed just the opposite--that summary judgment was not favored and thus should be strictly construed. The language of the amendment tracks the language of

Federal Rule of Civil Procedure 56, and is designed to allow courts to decide whether enough evidence exists to go to trial, thus giving judges an opportunity to weed out meritless litigation. Oakley v. Thebault, 684 So.2d at 490.

Moreover, once a party seeking a summary judgment properly supports the motion and carries his burden of proof, the new law requires the non-moving party who opposes the motion for summary judgment to submit evidence showing the existence of specific facts establishing a genuine issue of material fact, effectively shifting the burden of proof to the non-moving party as does the federal rule. This creates a problem because La. C.C.P. art. 966(G) declares that "notwithstanding any other provision of this Article to the contrary, the burden of proof shall remain with the mover." The effect of the amendment, however, is that the non-moving party is no longer allowed to rely on the allegations of its pleadings in opposition to a properly-supported motion for summary judgment. Id.

DISCUSSION

In the present case, the defendant alleges in its motion for summary judgment that the plaintiff cannot prove that he worked at the defendant's facilities and/or was exposed to asbestos at the defendant's facilities. In

order for plaintiffs in asbestos cases to prevail, they must prove their exposure to asbestos was done repeatedly, resulting in continuous, on-going damages. In other words, the plaintiff must prove to the trier of fact that his exposure to asbestos was consistent, regular and frequent, and that his damages resulted from his exposure. Asbestos v. Bordelon, Inc., 96-0525 (La. App. 4 Cir. 10/21/98), 726 So.2d 926.

While the defendant is correct that the plaintiff has the burden of proving his employment and exposure to asbestos, the defendant, in order to succeed in its motion for summary judgment, must put forth some evidence to suggest that the plaintiff will not be able to meet his burden. Once the defendant puts forth evidence to indicate that the plaintiff cannot meet at least one element of his burden, then the plaintiff must produce evidence in support of his allegations of employment and exposure. In the case at bar, the defendant has not produced any evidence, such as an affidavit, in support of its allegations that the plaintiff cannot prove his employment and exposure. The trial court did not err when it denied the defendant's motion for summary judgment, as the defendant did not meet its initial burden under La. C.C.P. article 966.

Accordingly, we grant the defendant's writ application to consider its claims but deny relief.

WRIT APPLICATION GRANTED; RELIEF DENIED