

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002182-MR

ALICE WHITE, INDIVIDUALLY, AND
AS ANCILLARY EXECUTRIX
OF THE ESTATE OF ELDON WHITE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 04-CI-006196

CARDINAL INDUSTRIAL INSULATION
CO., INC.

APPELLEE

OPINION VACATING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Alice White, individually, and as ancillary executrix of the estate of Eldon White, appeals from a summary judgment of the Jefferson Circuit Court of September 28, 2005, dismissing this action against Cardinal Industrial Insulation Co., Inc. White contends that the trial court erred in summarily concluding that Cardinal was

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

entitled to judgment as a matter of law. We agree. Accordingly, we vacate and remand for further proceedings.

Eldon White was employed at General Electric's Appliance Park in Louisville from the early 1950's through the mid-1990's. During his forty-year tenure, White worked in various capacities: as a production worker, in central maintenance and rotary vac maintenance, and as a pipe-fitter. After his retirement, he was diagnosed with asbestosis and malignant mesothelioma, a cancer associated solely with the inhalation of asbestos bodies or fibers. He died on August 1, 2004. Both asbestos bodies and asbestos fibers were found in lung tissue taken at the time of autopsy. The autopsy confirmed the diagnoses of asbestosis and mesothelioma resulting from White's exposure to asbestos.

Cardinal is an insulation distributor-contractor and asbestos abatement contractor. Along with several other insulation distributor-contractors, Cardinal worked at Appliance Park between the mid-50's and the mid-80's on hundreds of insulation construction and maintenance projects as well as asbestos abatement projects. Cardinal was involved with the handling of asbestos-containing products at Appliance Park during the period of White's employment.

Before his death, White filed a complaint against Cardinal and alleged that his exposure to asbestos was attributable -- at least in part -- to Cardinal's work at Appliance park. Cardinal denied the claim, and the parties embarked upon a considerable period of discovery. On August 11, 2005, Cardinal filed a lengthy motion for summary

judgment, arguing that White's estate had failed to show that Cardinal's work at Appliance Park was the legal cause of his death.

On September 28, 2005, the trial court granted Cardinal's motion for summary judgment, reasoning as follows:

Plaintiff has established . . . that Mr. White worked around asbestos during his employment with GE. The evidence in the record also indicates that, while Cardinal Industrial installed asbestos and performed asbestos abatement at GE's Appliance Park, it was not the exclusive source of the product. Plaintiff has failed to produce any evidence that Mr. White was exposed to asbestos due to Cardinal's activities [I]t appears that Plaintiff's claim must fail for failure to show causation. . . .

The court held that a mere *possibility* of causation is insufficient to prove causation, and where the "probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Memorandum and Order at 3, *citing Savill v. Hodges*, 460 S.W.2d 828, 830 (Ky. 1970). This appeal followed.

White's estate contends that the presence of genuine issues of material fact in this case precludes the entry of summary judgment. Cardinal counters by arguing that White's estate failed to prove that his exposure to asbestos was linked to Cardinal. Since it failed to establish that Cardinal's activities were the legal cause of his death, entry of summary judgment was warranted.

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ky.R.Civ.P. (CR) 56. "The record must be viewed in a light most favorable to the party opposing the

motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only where the movant shows that the adverse party could not prevail under any circumstances. *Id. citing Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). Thus, Kentucky's stringent standard governing a court in reviewing the propriety of summary judgment dictates that it may be granted only where it appears **impossible** for the non-moving party to produce evidence at trial warranting judgment in his favor. *Id. at 482*.

An actor's negligent conduct is a legal cause of harm to another if that conduct is a substantial factor in bringing about the injury and if there is no rule of law relieving him from liability under the circumstances. *Bailey v. North American Refractories Co.*, 95 S.W.3d 868, 871 (Ky.App. 2001). The existence of legal cause is generally intertwined with facts that must be resolved by a jury. *Id. at 872*. It becomes a question of law for the court **only where the facts are undisputed and are susceptible of only one inference**. *Id.* (Emphasis added). While the claimant bears the burden of proving legal causation, it may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product (or activity) was a legal cause of the harm. *Id. citing Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970).

Having carefully reviewed the record, we are persuaded that White's estate presented a genuine issue of material fact with respect to whether Cardinal's work at Appliance Park might have been a substantial factor in White's death. Cardinal is correct

that no direct evidence appears to link its activities to White's exposure to asbestos. Nonetheless, we are persuaded that adequate circumstantial evidence exists to create a question of fact as to linkage and causation. Whether that circumstantial evidence amounts to an adequate quantum from which a jury could actually infer causation remains to be seen. However, its existence is sufficient to withstand Cardinal's motion for summary judgment.

Taken in a light most favorable to White's estate, the record before the trial court indicates that White was routinely exposed (both directly and indirectly) to asbestos-containing materials during his employment with General Electric. Over a period of many years, he worked in several of the facilities that comprise the Appliance Park complex. Although White died before he was deposed, the sworn testimony of his co-workers indicates that he worked throughout Building 5 -- where insulation-containing asbestos was found in catwalks, in ceilings, and on steam-lines. Louis Bishop, who worked side-by-side with White in maintenance, was certain that the insulation in the steam-piping contained asbestos. Oscar McCamant, another co-worker, worked beside White in production at Building 5. McCamant testified that during the winter, the pipes would "snow" insulation -- thus, exposing the workers to asbestos.

Other evidence indicates that Cardinal installed and repaired asbestos insulation throughout Appliance Park. In deposition testimony associated with another proceeding, James Hunter, a former Cardinal employee, testified that Cardinal installed

asbestos insulation on steam and plumbing pipes in each and every building at Appliance Park in the late 1950's and 1960's.

White's medical expert, Dr. Arthur Frank, agreed with the diagnoses of asbestosis and malignant mesothelioma. Within a reasonable degree of medical certainty, Dr. Frank opined that White's condition was "caused by his inhalation of asbestos in his workplace." Furthermore, Dr. Frank was convinced that "[e]ach and every product, with each and every type of asbestos, would have contributed to the development of these two diseases." According to Dr. Frank, the exposure -- regardless of its manner and no matter how slight in degree -- contributed to White's fatal condition. Other evidence tended to show that Cardinal was aware of the hazardous nature of any exposure to asbestos very early in its operation.

Our review of the record indicates that far more is involved than a mere question of law for the court's determination. On the contrary, resolving all doubts in favor of the estate -- as we must at this juncture, we conclude that the evidence presented to the trial court was sufficient to permit a reasonable inference that Cardinal's activities might have been a legal cause of White's exposure to asbestos and his resulting death. The estate succeeded in demonstrating that a genuine issue of material fact exists with respect to causation. Consequently, we conclude that summary judgment was improperly (or at least prematurely) entered.

Cardinal argues that we have an alternate basis to affirm the summary judgment. Cardinal asserts that as a matter of law (relying upon *Consolidated*

Contractors Inc. v. Wilcoxon, 252 S.W.2d 429 (Ky. 1952)), it cannot be held liable for White's injuries because the disputed insulation was installed in conformity with the specifications included in its construction contract with General Electric. In *Wilcoxon*, the building contractor sued a plumbing sub-contractor for negligence after a basement was flooded. The contractor alleged that the plumbers should not have brought water into the building until after the fixtures had been connected or that they should have safeguarded the water line against vandals. The court held that a contractor could not be held liable for the willful or negligent acts of third persons where he had no reason to anticipate the wrongful conduct. Additionally, since there was no obvious defect in the specifications of the plumbing contract and the plumbers were not otherwise negligent, they could not be held liable for damages resulting from the installation of the water line.

We are not persuaded that *Wilcoxon* is either pertinent or analogous to the case before us. Cardinal's work was not simply a matter of installing materials in proper fashion; that is not the issue. Instead, its liability is premised upon whether it supplied and installed a **hazardous material** to areas where General Electric's employees were likely to suffer the effects of exposure. White alleged that the dangers associated with exposure to asbestos became widely known in the insulation distribution and installation industry at the very time that Cardinal was engaged in the many projects undertaken throughout Appliance Park. He also alleged that Cardinal negligently handled the asbestos and that it failed to protect him from dangerous exposure. Facts in support of these allegations can be reasonably inferred from the material that White submitted for

the court's review in challenging Cardinal's motion for summary judgment. We cannot agree that Cardinal's status as an independent contractor shields it from liability under these circumstances. *See Garland v. Tennessee Valley Authority*, 336 F.3d 455 (6th Cir. 2003). Consequently, Cardinal was not entitled to judgment as a matter of law on this basis.

Finally, Cardinal contends that it is not subject to a products liability action since it is not a seller or manufacturer of goods. We disagree. The Supreme Court of Kentucky has concluded that products liability standards apply to “**any person** engaged in the business of **supplying** products for use or consumption, including any manufacturer of such a product and any wholesale or retail **dealer or distributor**.” *See Embs v. Pepsi Cola Bottling Co.*, 528 S.W.2d 703, 704-705 (Ky. 1975) (Emphasis added). The evidence before the trial court reveals that Cardinal regularly distributed asbestos-containing materials that were regarded as unreasonably dangerous by the scientific and medical community -- as well as by the industry. Consequently, Cardinal was not entitled to judgment as a matter of law on this basis.

Cardinal's motion to strike the estate's reply brief is hereby DENIED. The summary judgment dismissing the claims of Alice White, individually, and as ancillary executrix of the estate of Eldon White, against Cardinal is vacated. We remand this case for further proceedings.

ALL CONCUR.

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