[Cite as *Dean v. Bur. of Workers' Comp.*, 2010-Ohio-2545.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
BEATRICE DEAN	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. CT2010-0003
ADMINISTRATOR,	:	
BUREAU OF WORKERS'	:	
COMPENSATION, ET AL	:	O P I N I O N

Defendants-Appellees

CHARACTER OF PROCEEDING:	Administrative Appeal from the Muksingum County Common Pleas Court, Case No. CD2008-0717
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 3, 2010

APPEARANCES:

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Gwin, J.

{¶1} Plaintiff-appellant, Beatrice Dean, appeals a summary judgment of the Court of Common Pleas of Muskingum County, Ohio, entered in favor of defendants-appellees Conesville Coal Preparation Company [“Conesville”], American Electric Power [“AEP] and the Administrator of Ohio Bureau of Workers' Compensation.

STATEMENT OF THE FACTS AND CASE

{¶2} James Dean worked as an electrician from 1958 to 2003, approximately 45 years. He was often dispatched out of his local union hall and thus worked for numerous employers, including Conesville and AEP. On January 15, 2006, James Dean, husband of Plaintiff-Appellant Beatrice Dean passed away due to lung cancer. Mr. Dean smoked ½ to 1 pack of cigarettes per day for 45 years.

{¶3} On January 15, 2008, appellant filed a claim with the Ohio Bureau of Workers’ Compensation seeking to participate in the Workers’ Compensation Fund for the death of her husband. Her claim was denied at all administrative levels, and pursuant to R.C. 4123.512, she appealed to the Court of Common Pleas of Muskingum County on September 10, 2008.

{¶4} Appellant’s petition alleged that her husband’s cancer was caused by his exposure to asbestos during employment at various employers. The appellees took Beatrice Dean’s deposition on September 18, 2009, after which the appellees filed motions for summary judgment. Appellant filed a memorandum in opposition asserting that the Bureau and Conesville did not meet their initial burden. The trial court granted summary judgment in favor of all appellees on December 29, 2009.

{¶5} Appellant filed a timely notice of appeal to this Court. Appellant assigns one error to the trial court:

{¶6} "THE TRIAL COURT ERRED BY GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WHERE THE DEFENDANTS FAILED TO MEET THEIR INITIAL BURDEN BY SUPPORTING THEIR MOTIONS WITH CREDIBLE, COMPETENT EVIDENCE."

I.

{¶7} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases provides in pertinent part:

{¶8} "(C) Briefs. Briefs shall be in the form specified by App. R. 16. Appellant shall serve and file his brief within fifteen days after the date on which the record is filed. The appellee shall serve and file his brief within fifteen days after service of the brief of the appellant. Reply briefs shall not be filed unless ordered by the court.

{¶9} "(E) Determination and judgment on appeal. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

{¶10} Additionally, Fifth District Local Appellate Rule 6 provides:

{¶11} "(B). Accelerated Calendar. Pursuant to App.R. 11.1, this Court has adopted an accelerated calendar. The Court shall determine from the docketing statement whether the appeal will be assigned to the accelerated or regular calendar. If the appeal is assigned to the accelerated calendar, oral arguments shall not be scheduled and the matter will be determined upon submission of all briefs."

{¶12} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158, 463 N.E.2d 655.

{¶13} This appeal shall be considered in accordance with the aforementioned rules.

STANDARD OF REVIEW

{¶14} This matter reaches us upon a grant of summary judgment. . Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C).

{¶15} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶16} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to

judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶17} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt (*1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. Id. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. Id. However, once the moving party satisfies its initial burden, the nonmoving party bears the burden of offering specific facts showing that there is a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

{¶18} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the non-movant's favor. Civ.R. 56(C). Even the inferences to be

drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127.

{¶19} Appellate review of summary judgments is *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, 641 N.E.2d 265; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327.

{¶20} Appellant’s sole assignment of error relates to the propriety of the trial court’s granting of summary judgment in favor of the appellees.

{¶21} Under the Workers' Compensation Act, an occupational disease claim can be pursued if it is established that the decedent was exposed to asbestos, that exposure took place at any employer's facility, and that it was the proximate cause of the claimant's injury. *Gradwell v. A.S. Helbig Constr. Co*. (Sept. 19, 1990), Summit App. No. 14520, [Citing *State ex rel. The Hall China Co. v. Indus. Comm.* (1962), 120 Ohio App. 374, 29 O.O.2d 241, 202 N.E.2d 628]; *Gomez v. Sauder Woodworking Co.* (2008), 176 Ohio App.3d 453, 458, 892 N.E.2d 493, 497, 2008-Ohio-2377 at ¶ 17 *Snyder v. Ford Motor Co*., Third Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 31. As a prerequisite to the allowance of an occupational disease claim, a claimant must demonstrate an injurious

exposure in the course of his employment. *State, ex rel. Burnett v. Indus. Comm*. (1983), 6 Ohio St.3d 266, 268, 6 OBR 332, 333, 452 N.E.2d 1341, 1343.

{¶22} In the case at bar, the first question is whether the decedent was exposed to asbestos while employed at any employer's facility.

{¶23} In their motions for summary judgment, appellees cited the deposition testimony of appellant to establish that she has no personal knowledge that her husband had ever been exposed to asbestos during the course of his employment. (Deposition at 23-24). Nor did the decedent ever tell appellant that he was working with or had ever been exposed to asbestos. (Id. at 24). Appellant was unable to recall how long her husband worked at Conesville, or the period during which he worked there. (Deposition at 15-16). Mrs. Dean was not familiar with the job duties of her husband. In addition, the decedent was a ½ to one pack per day cigarette smoker for 45 years. (Id. at 19). He was diagnosed and eventually died of lung cancer. (Id. at 19).

{¶24} Although appellant alludes to “B-reader” x-rays and the opinions of Dr. Altmeyer and/or Dr. Lackey in her brief, appellant admits that this evidence is not in the trial court record. [Appellant’s Brief at 3]. In *State v. Hooks* (2001), 92 Ohio St.3d 83, 2001-Ohio-150, 748 N.E.2d 528, the Court noted, "a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. See, *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500. It is also a longstanding rule "that the record cannot be enlarged by factual assertions in the brief." *Dissolution of Doty v. Doty* (Feb. 28, 1980), Pickaway App. No. 411, citing *Scioto Bank v. Columbus Union Stock Yards* (1963), 120 Ohio App. 55, 59, 201 N.E.2d 227. Appellant's factual assertions

concerning this material may not be considered. See, *North v. Beightler,* 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 7.[Quoting *Dzina v. Celebrezze,* 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 16]; *State v. Conley*, Richland App. No. 2009-CA-19, 2009-Ohio-2903 at ¶ 57.

{¶25} After a proper motion for summary judgment is made, "the nonmoving party must do more than supply evidence of a possible inference that a material issue of fact exists; it must produce evidence of specific facts which establish the existence of an issue of material fact." *Carrier v. Weisheimer Companies, Inc.* (Feb. 22, 1996), Franklin App. No. 95AP-488, citing *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. "It is the nonmoving party's responsibility to produce evidence on any issue for which it bears the burden of production at trial." Id., citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798.

{¶26} Essentially, a motion for summary judgment forces the plaintiff to produce probative evidence on all essential elements of the case for which the plaintiff has the burden of production at trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548. The plaintiff's evidence must be such that a reasonable jury might return a verdict in the plaintiff's favor. *Seredick v. Karnok* (1994), 99 Ohio App.3d 502, 651 N.E.2d 44.

{¶27} This case arose when appellant filed a workers' compensation claim against multiple former employers of her husband. Appellant filed claims for widow's benefits, one against each employer, alleging that her husband died from mesothelioma, which was caused by asbestos exposure. In the summary judgment motion, the appellees, Conesville and AEP, argued that the appellant had failed to set

forth sufficient evidentiary material to prove each essential element of her case. First, appellees argued that the appellant failed to prove that her husband was exposed to asbestos during the course of his employment. Second, appellee argued that the appellant failed to prove that, even if appellant had proven an exposure to asbestos during the course of his employment, the exposure was an "injurious exposure." Finally, appellees argued that the appellant failed to produce any expert medical evidence establishing a causal connection between her husband's death and anything that occurred during the course of his employment.

{¶28} In response to appellee's summary judgment motion, the appellant produced no evidence; rather appellant argued that the appellees failed to submit credible, competent medical evidence in support of their motion. Therefore, appellant argued, without expert testimony as to diagnosis or proximate cause the appellees have submitted what amounts to an unsupported conclusory assertion. Appellant concludes that because appellees have not met their initial burden appellant was not required to set forth specific facts showing that there is a genuine issue for trial.

{¶29} Once the appellee established by reference to appellant's deposition that there was insufficient evidence to establish that the appellant had been exposed to asbestos during the course of his employment, the burden shifted to the appellant to demonstrate the existence of genuine issues of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. The appellant essentially presented nothing of evidentiary value to rebut appellee's argument and did not create a genuine issue of material fact. Although it is a harsh result, we find that the appellant's failure to follow the requirements of Civ.R. 56 put the trial court in a position in which it could only

come to one conclusion. *Worldwide Assets Purchasing, LLC v. Sandoval*, Stark App. No. 2007-CA-00159, 2008-Ohio-6343 at ¶ 30. That conclusion is that the appellee had affirmatively established that there was nothing of evidentiary value to support the essential elements of appellant's claim for workers compensation benefits.

{¶30} We therefore find that the trial court did not err in granting appellees' motions for summary judgment.

{¶31} Accordingly, appellant's first assignment of error is hereby denied.

{¶32} The judgment of the Muskingum County Court of Common Pleas is hereby affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0420

[Cite as *Dean v. Bur. of Workers' Comp.*, 2010-Ohio-2545.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BEATRICE DEAN Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, ET AL Defendants-Appellees	:	CASE NO. CT2010-0003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Muskingum County Court of Common Pleas is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY