[Cite as *Rahmes v. Adience Inc.*, 2007-Ohio-4298.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88427

ETHEL RAHMES, EXECUTOR OF THE ESTATE OF ROBERT RAHMES, DECEASED

PLAINTIFF-APPELLANT

vs.

ADIENCE INC., FKA, BMI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT: AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-543596

BEFORE: Kilbane, J., Gallagher, P.J., and Dyke, J.

RELEASED: August 23, 2007

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} The Estate of plaintiff-appellant Robert Rahmes ("Estate") appeals from summary judgment granted in favor of defendants-appellees Oglebay Norton Company, Owens-Illinois, Inc., McGraw Construction Company, Inc. And R.E. Kramig & Company, Inc. ("Kramig"). Subsequently, the following defendants-appellees settled all claims with the Estate: Oglebay Norton Company, Owens-Illinois, Inc., and McGraw Construction Company. Thus, Kramig is the only

remaining defendant-appellee upon appeal. The Estate appeals the trial court's decision to grant Kramig's motion for summary judgment. Upon review of the record, we affirm.

{¶ 2} On September 22, 2004, Robert Rahmes ("Rahmes") filed a complaint against multiple defendants including Kramig, alleging defendants' liability for Rahmes' asbestos exposure and his subsequent diagnosis with mesothelioma. Rahmes passed away from mesothelioma on December 27, 2004, while the instant action was pending with the trial court. Asbestos exposure is the sole cause of mesothelioma.

{¶ 3} Rahmes worked for Armco Steel in both its Hamilton, Ohio, and Middletown, Ohio plants from approximately 1965 to 1982. Rahmes worked as a front-end loader operator in the blast furnace department. Rahmes testified that his occupation entailed removing materials from the front-end loader, including pipe insulation materials. Rahmes testified that there was very little space in the Armco facilities that he did not cover. The Estate alleges that Rahmes was exposed to asbestos while working at Armco Steel. Specifically, the Estate alleges that Rahmes was exposed to asbestos via products supplied and installed by Kramig at Armco Steel. Kramig distributed Philip Carey insulation products throughout the Cincinnati area and possibly north to Dayton and Columbus.

{¶ 4} Appellate courts review motions for summary judgment de novo. *Retting v. General Motors Corp*., Cuyahoga App. No. 86837, 2006-Ohio-6576. Pursuant to Civ.R. 56(C), summary judgment is appropriate when: first, there exists no genuine issue as to any material fact; second, the moving party is entitled to judgment as a matter of law; and third, based on evidence or stipulation, reasonable minds can come to but one conclusion and said conclusion is adverse to the party against whom the motion for summary judgment is made. In *Potts v. 3M Co.,* Cuyahoga App. No. 87977, 2007-Ohio-1144, the Eighth District Court of Appeals held the following:

> "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." (Internal citations omitted.)

"The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings." Id. "The nonmoving party must set forth 'specific facts' by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists." Id.

{¶ 5} When making an asbestos claim where multiple defendants exist, as here, the plaintiff has the burden to prove exposure to each defendant's product and that the product was a substantial factor in causing plaintiff's injury. *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286. "The word 'substantial' is used to denote the fact that the defendant's conduct has such an

effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in a popular sense, in which there always lurks the idea of responsibility, rather than the so-called 'philosophical sense,' which includes every one of the great number of events without which any happening would not have occurred." *Horton,* citing Restatement of the Law 2d, Torts (1965), Section 431, Comment a. The General Assembly, effective September 2, 2004, set forth factors that will satisfy plaintiff's burden in R.C. 2307.96(B):

> "A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:
>
> (1) The manner in which the plaintiff was exposed to the defendant's asbestos;
>
> (2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;
>
> (3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;
>
> (4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos."

{¶ 6} In adopting R.C. 2307.96(B), the General Assembly effectively overruled paragraph two of the *Horton* syllabus which states, "A plaintiff need not prove that he

was exposed to a specific product on a regular basis over some extended period of time in close proximity to where the plaintiff actually worked in order to prove that the product was a substantial factor in causing his injury." *Vince v. Crane Co., Goodyear Tire & Rubber Co. And Owens-Illinois, Inc.,* Cuyahoga App. No. 87955, 2007-Ohio-1155. As such, proof of substantial harm need not be proven solely by substantial exposure to the product in question. Id.

{¶ 7} However, the Ohio Supreme Court did not establish what other forms of proof would constitute a "substantial factor." Id. The Eighth District Court of Appeals held: "[T]he mere assertion that the plaintiff had worked in the vicinity of a product containing asbestos cannot be considered a substantial factor in causing the injury." Id. In making its determination, the *Horton* and *Vince* courts took the "fiber drift" phenomenon into consideration, in which asbestos dust, when released into the air, can travel distances with air currents. Despite this phenomenon, the Ohio Supreme Court still chose to adhere to the "substantial factor" test. *Vince*, supra.

{¶ 8} In applying the law to the facts of this case, there exists no genuine issue of material fact. A review of the entire record reveals that the Estate failed to demonstrate that Rahmes was not only exposed to asbestos via products supplied and installed by Kramig but that said asbestos exposure was a substantial factor in causing Rahmes' injury. As such, reasonable minds can come to but one conclusion and said conclusion is adverse to the Estate.

{¶ 9} During the hearing held March 13, 2006, the trial court granted Kramig's previously filed motion to strike. In doing so, the trial court struck nine depositions that the Estate submitted to the court. The nine depositions support the Estate's contention that Kramig acted as a supplier of Philip Carey Products to Armco Steel during the years in question. Regrettably, the Estate appeals only the trial court's ruling on Kramig's motion for summary judgment and not the trial court's ruling on Kramig's oral motion to strike the nine depositions. Thus, we are limited on appeal to reviewing Kramig's motion for summary judgment in light of the trial court striking nine of the Estate's depositions. We are not assigned on appeal, to review whether the nine depositions should have been stricken or whether the nine depositions establish that Kramig acted as a supplier of Philip Carey products to Armco Steel. Since we may not consider whether the nine depositions established that Kramig acted as supplier of Philip Carey products to Armco Steel, we must conclude that no genuine issue of material fact exists.

{¶ 10} The record reveals that Kramig was the major supplier of Philip Carey products to the Cincinnati area and as far north as Dayton and Columbus during the years at issue in the instant case. Philip Carey products contained asbestos. However, there is no conclusive evidence that Kramig supplied Philip Carey products to Armco Steel plants in Hamilton, Ohio or Middletown, Ohio.

{¶ 11} Second, the record reveals that Philip Carey products were used in the Armco Steel facilities in both Hamilton, Ohio and Middletown, Ohio. However, there exists no conclusive evidence that Kramig supplied these products to Armco Steel.

{¶ 12} Third, not a single co-worker testified to seeing Rahmes near products supplied specifically by Kramig.

{¶ 13} Finally, the Estate argues that because of fiber drift within the Armco Steel plants, Rahmes was exposed to asbestos via products supplied and installed by Kramig. Again, however, there lacks demonstrable evidence connecting Kramig to Rahmes' injuries.

{¶ 14} As such, the Estate failed to demonstrate Rahmes' exposure to asbestos via Kramig's supply and installation of Philip Carey products. Nor has the Estate established that Rahmes' exposure to asbestos via Kramig was a substantial factor in causing Rahmes' final illness through any of the four factors delineated in R.C. 2307.96(B)**.**

{¶ 15} Therefore, the Estate's single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS
ANN DYKE, J., DISSENTS (SEE ATTACHED DISSENTING OPINION)

ANN DYKE, J., DISSENTING:

{¶ 16} I respectfully dissent, and would find a genuine issue of material fact as to whether the movant Kramig supplied products to Armco Steel.

{¶ 17} Pursuant to Civ.R. 56(C), the party moving for summary judgment bears the initial burden of showing that "there are no genuine issues of material fact concerning an essential element of the opponent's case." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264. To satisfy this burden, the movant must specifically point to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action" that demonstrate that the nonmovant lacks evidence to support his claims. Civ.R. 56(C); *Dresher,* 75 Ohio St.3d at 292-293. When the movant's burden is satisfied, the nonmovant "may not rest upon the mere allegations or denials of the party's pleadings, but the party's

response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 18} Although the movant need not support motion with affidavits negating opponent's claims, the movant cannot discharge its initial burden simply by making conclusory assertions that the opposing party has no evidence to prove its case and instead must point to specific evidence affirmatively demonstrating that the opposing party lacks evidence to support its claims. *Doe v. Hi-Stat Manufacturing Co., Inc*. (April 2, 2001), Richland App. No. 00-CA-53. Furthermore, summary judgment is generally not well suited for cases in which motive and intent are at issue and in which one party is in control of the proof. *Perry v. McGinnis* (C.A.6, 2000), 209 F.3d 597.

{¶ 19} In this matter, Kramig argues that plaintiff's evidence fails to establish that the decedent was exposed to asbestos-containing products supplied by R.E. Kramig. In support of this assertion, R.E. Kramig asserts that John Kramig's deposition testimony is insufficient to establish that R.E. Kramig distributed the products to the Armco plants in Hamilton and Middletown, Ohio, where the decedent worked.

{¶ 20} I would conclude that R.E. Kramig, the movant and party in control of evidence as to this issue, did not affirmatively establish that it was not a distributor of asbestos-containing products to the Armco Hamilton and Middletown plants.

{¶ 21} Plaintiff's evidence, included John Kramig's deposition which, in relevant part, provides:

{¶ 22} "Q. Okay. Are there areas outside of the Cincinnati area where the company would have performed either contracting or selling or installation business?

{¶ 23} "A. Yes.

{¶ 24} "Q. And general idea, how far outside of Cincinnati, Cincinnati area would some of these operations take place?

{¶ 25} "A. Do you have a time framework on that?

{¶ 26} "Q. Well, let's start with like the '40s, '50s and '60s.

{¶ 27} "A. Yes, we were primarily Cincinnati, but we did get into southeastern Indiana, northern Kentucky. In Ohio probably as far North as Dayton, Columbus, but we generally were a very regional local operation."

{¶ 28} I would conclude that R.E. Kramig did not establish that it was entitled to judgment as a matter of law as there are genuine issues of material fact as to whether R.E. Kramig distributed asbestos-containing products to the Armco plants. Accordingly, I would reverse and remand for further proceedings as to this issue.