RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY SUPREME COURT: AUGUST 15, 2007
(FILE NO. 2007-SC-0366-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002681-MR

CHARLES E. BREWSTER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 01-CI-005444

COLGATE-PALMOLIVE COMPANY AND
JEWISH HOSPITAL HEALTHCARE
SERVICES, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND McANULTY,[1] JUDGES; BUCKINGHAM, SENIOR JUDGE.[2]

BUCKINGHAM, SENIOR JUDGE: Charles E. Brewster appeals from separate summary judgments entered by the Jefferson Circuit

[1] Judge William E. McAnulty, Jr. dissented in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

[2] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Court in favor of Jewish Hospital HealthCare Services, Inc., and Colgate-Palmolive Company. Brewster's claims were filed against Jewish Hospital and Colgate in 2001 following his being diagnosed with asbestosis. We affirm.

Brewster worked for numerous employers at various locations during his employment from approximately 1950 until 1979 when he suffered a back injury. In 1970, he began working for Wilhelm Construction Company. While working for Wilhelm, he worked on a construction project at Jewish Hospital for approximately one to two years. The construction project was a nine-story addition that involved tearing out portions of old construction and constructing the new addition. Brewster does not know if he was exposed to asbestos while working on the project.

Brewster worked for Dahlem Construction Co., Inc., from the third quarter of 1966 through the second quarter of 1970 and from the second quarter of 1974 through the third quarter of 1976. While employed by Dahlem, he worked at a Colgate facility in Indiana on at least one occasion and probably more than once. While working at Colgate, he tore out some construction material using a cutting torch. He also poured concrete for construction involving a new facility. Brewster does not know if he was exposed to asbestos while working at Colgate.

After being diagnosed with asbestosis in 2001, Brewster filed a civil action in the Jefferson Circuit Court against Jewish Hospital, Colgate, and other defendants. In late December 2004, the court awarded summary judgments to Jewish Hospital and Colgate, and it dismissed Brewster's claims against both parties. This appeal by Brewster followed.

The court awarded summary judgment to Jewish Hospital for two reasons. First, the court determined that Brewster did not present sufficient evidence that Jewish Hospital caused him to have asbestosis. The court noted that Brewster was unable to state whether he had been exposed to asbestos while working on the construction project at Jewish Hospital and also noted that Brewster had not presented any witness to say that he had been exposed to asbestos at the construction site. The court concluded that the evidence was insufficient for a jury to draw a reasonable inference that Brewster had actually been exposed to asbestos while working on the project. The court concluded that any verdict in favor of Brewster "would, of necessity, be the product of speculation and supposition." Therefore, the court awarded summary judgment to Jewish Hospital on that basis.

The court also awarded summary judgment to Jewish Hospital on an alternative ground. The court concluded that Brewster failed to demonstrate that Jewish Hospital, as a premise owner, breached a duty owed to him. The court rejected

Brewster's reliance on the burden-shifting approach in Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003), and concluded that "this case should be decided based on the duty of a premise owner to employees of independent contractors not the duty owed to patrons or customers of a business." The court based its decision on Ralston Purina Co. v. Farley, 759 S.W.2d 588 (Ky. 1988), and Owens v. Clary, 256 Ky. 44, 75 S.W.2d 536 (1934).

In its order awarding summary judgment to Colgate, the court addressed two issues. First, the court rejected Colgate's argument that it was entitled to summary judgment based on the defense of "up-the-ladder" workers' compensation coverage. The court concluded that fact issues remained concerning whether Colgate had secured such coverage in connection with Brewster and whether the work performed by Brewster at Colgate was a regular or recurrent part of Colgate's business. However, the court awarded summary judgment to Colgate on the ground that Brewster had failed to prove that Colgate, as a premise owner, breached any duty owed to him. Again, the court based its decision on the Ralston Purina and Owens, cases.

There are several issues that have been raised by the parties on appeal. These include the sufficiency of Brewster's proof regarding his exposure to asbestos, Colgate's up-the-ladder immunity defense under workers' compensation law, and the circuit court's personal jurisdiction over Colgate in this case.

However, we believe the summary judgments of the court may be affirmed based solely on the premise liability issue without regard to the other issues that have been raised.

In resolving the premise liability issue in favor of Jewish Hospital and Colgate as a matter of law, the court relied on the Ralston Purina and Owens cases. In the Ralston Purina case, Ralston Purina, the owner and occupier of a building, employed an independent contractor to construct an addition to the building. The independent contractor subcontracted with another company to perform a portion of the work. An employee of the subcontractor fell through a weak section of the roof and was injured.

The Kentucky Supreme Court in the Ralston Purina case held that Ralston Purina discharged any duty it owed to the employee of the subcontractor by warning the contractor of the weak roof. Id. at 590. The court did not reach the issue of whether there was a duty to warn because it was clear that Ralston Purina had discharged any such duty it may have had. Id.

The court in Ralston Purina discussed the Owens case. Ralston Purina, 759 S.W.2d at 590. In Owens, the court stated the rule as follows:

> The owner of premises is not responsible to an independent contractor for injury from defects or dangers which the contractor knows of, or ought to know of. But if the defect or danger is hidden and known to the

> owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury. The same rule applies to the servants of the contractor, and to the subcontractor and his servants.

75 S.W.2d at 537. In that case the court held that the owner of premises was liable for injuries suffered by an independent contractor who fell through a defective floor, where the owner knew of the defect and the independent contractor had neither actual nor constructive notice of it. Id.

The court in the case *sub judice* found that there was no evidence that either Jewish Hospital or Colgate was aware of or should have known about asbestos-containing building materials during the time Brewster worked at those locations. The court reasoned that under the Owens case Brewster had the burden to show that Jewish Hospital and Colgate had knowledge of asbestos construction materials superior to that of the contractors (Wilhelm and Dahlem) hired to perform the work. The court stated that "[i]t is entirely appropriate for a premise owner to assume that construction companies capable of large scale commercial work are knowledgeable about products that have been used in prior construction and about products that are currently being used." The court also cited cases from other

jurisdictions that focused on the superior knowledge of contractors with regard to any dangers on the premises.

Although the trial court concluded that Brewster was required by the Owens case to prove that Jewish Hospital or Colgate had knowledge superior to that of Wilhelm or Dahlem of the presence of asbestos materials, we fail to find such a requirement by the court in that case. However, the Owens case does clearly hold that if the danger is hidden and not known by the contractor but known by the owner, then the owner has a duty to warn the contractor of the hidden danger. Id. at 537. Because of the absence of evidence that either Jewish Hospital or Colgate knew of any hidden danger during the times Brewster claims he was exposed to asbestos, we conclude the court properly awarded summary judgments on that ground.

Brewster also argues that the circuit court erred in relying on the Ralston Purina and Owens cases rather than the burden-shifting approach adopted by the Kentucky Supreme Court in the Lanier case. See Lanier, 99 S.W.3d at 436. See also Martin v. Mekanhart Corp., 113 S.W.3d 95 (Ky. 2003), and Bartley v. Educ. Training Sys., 134 S.W.3d 612 (Ky. 2004).

The Kentucky Supreme Court discussed the Lanier case in the Martin case as follows:

> Under Lanier, the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other

> dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. Id. at 435-36. Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, id. at 435, and "shifts the burden of proving the absence of negligence, *i.e.*, the exercise of reasonable care, to the party who invited the injured customer to its business premises." Id. at 437.

Martin, 113 S.W.3d at 98.

The Lanier case involved a business customer who slipped and fell in a Wal-Mart store. The Martin case involved a customer of a Frisch's Restaurant who slipped and fell in the restaurant parking lot. The Bartley case involved a student of a real estate school who slipped and fell after tripping on a carpet remnant used as a floor runner at the school. The circuit court in the case *sub judice* noted that each of these cases involved a plaintiff who slipped or tripped and fell. The court distinguished the facts in this case from those in Lanier, Martin, and Bartley by noting that Brewster was an employee of an independent contractor who had been hired to perform construction work. The court concluded that "this case should be decided based on the duty of a premises owner to employees of

independent contractors not the duty owed to patrons or customers of a business."

Brewster points to language in the Bartley case where the court declined to limit the application of the new burden-shifting approach to slip and fall cases involving invitees of self-service retail shops. See Bartley, 134 S.W.3d at 616. The court therein stated that "[a]lthough the particular facts of Lanier certainly involved a self-serving business, we recognize no such constraint on our new burden-shifting approach."

There is no precedent in Kentucky for expanding this new approach to cases involving asbestos-exposure by an employee of an independent contractor. If the approach is to be expanded to include cases such as this, we believe it is best left to the Kentucky Supreme Court to do so. Therefore, we agree with the circuit court that the new burden-shifting approach is not applicable under these circumstances.

The judgments of the Jefferson Circuit Court are affirmed.

BARBER, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully I dissent. I concur in the majority's decision not to extend Lanier, as I agree that case was limited on its facts to "slip and fall" litigation, and more to the point it is premature at the stage

of summary judgment to discuss shifting of the burden of proof. However, I would not have granted summary judgment to Jewish Hospital, because I believe there exist genuine issues of material fact.

A party does not have to meet their burden of proof in order to survive a motion for summary judgment. Summary judgment is not a substitute for trial nor is it the functional equivalent of a motion for directed verdict. Steelvest, Inc. v. Scansteel Service Center, 807 S.W.2d 476, 480 (Ky. 1991). The proper function of summary judgment is to terminate litigation when as a matter of law it appears that it would be "impossible" for the respondent to produce evidence at trial warranting judgment in his favor. Id. at 480. Moreover, reviewing courts are charged with viewing the record in a light most favorable to the party opposing the motion for summary judgment and resolving all doubts in his favor. Id. at 480.

Jewish Hospital conceded that there were asbestos-containing materials on its premises in the 1950s through the 1970s. The evidence showed that Brewster worked on widespread demolition of the original building at Jewish Hospital. He was able to identify the areas in which he worked. Brewster was further able to identify areas containing asbestos from documents taken from Jewish Hospital's asbestos abatement efforts in the 1980s. I believe that this evidence established

a genuine issue of fact whether Brewster was exposed to asbestos in the areas where he was involved in demolition. The issue is the existence of asbestos at the worksite rather than identifying the moment of exposure. Moreover, it does not appear impossible that Brewster could provide additional evidence to identify the locations of asbestos with more specificity. In addition, the question of premises liability raises an issue of fact whether Jewish Hospital warned its contractor of the existence of asbestos and an issue of fact whether Wilhelm Construction was in a greater position to identify asbestos materials or whether they needed to rely on the knowledge of the premises owner. Therefore, I would vacate in part the summary judgment.

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