

RENDERED: APRIL 11, 2014; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000405-MR

JANE COLLEEN YOUNGER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CI-01767

WEHR CONSTRUCTORS, INC.;
EVERGREEN GROUP, INC.;
S.D. ENVIRONMENTAL, INC.;
AND UNIVERSITY MEDICAL
CENTER, INC.

APPELLEES

AND

NO. 2009-CA-000572-MR

WEHR CONSTRUCTORS, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 05-CI-01767

EVERGREEN GROUP, INC.;
S.D. ENVIRONMENTAL, INC; AND
UNIVERSITY MEDICAL
CENTER, INC.

CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING IN APPEAL NO. 2009-CA-000405;
DISMISSING IN APPEAL 2009-CA-000572

** ** * * * * *

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

MAZE, JUDGE: Jane Colleen Younger (Younger) appeals from summary judgment orders by the Jefferson Circuit Court which dismissed her negligence claims against Wehr Constructors, Inc. (Wehr), Evergreen Group, Inc. (Evergreen), S.D. Environmental, Inc. (SDE), and University Medical Center, Inc. (UMC). Younger's appeal focuses on sufficiency of the evidence that her injuries were proximately caused by the alleged negligence of the Appellees.

We first find that the trial court erred in holding that Younger was bound by judicial admissions which she made in a prior Workers' Compensation claim regarding the onset of her symptoms. Consequently, this issue is not dispositive of Younger's claims against the Appellees, and in particular against Wehr and UMC. Second, we conclude that Younger presented sufficient circumstantial evidence of causation to support her claims against Wehr. Third and finally, we conclude that Younger failed to present sufficient evidence of causation to support her negligence claims against Evergreen and SDE.

Wehr filed a protective cross-appeal from the trial court's summary judgments dismissing Evergreen, SDE and UMC. However, we conclude that Wehr lacks standing to appeal from the dismissal of these co-defendants.

Therefore, we affirm the trial court's summary judgments dismissing Younger's claims against Evergreen and SDE, but we reverse the summary judgments dismissing her claims against Wehr and UMC and remand for additional proceedings.

I. Facts

UMC is a non-profit organization that owns the premises occupied by the University of Louisville Hospital. The Brown Cancer Center (BCC) occupies a portion of the Hospital premises. Younger was employed at the BCC as a program assistant to the grant coordinator beginning in July 2003, initially working on BCC's third floor. Beginning in late 2003 and early 2004, UMC began a renovation project on the third floor. In January of 2004, Younger's office was moved to the fourth floor.

On March 1, 2004, UMC hired Wehr as the general contractor for the renovation project. However, there was evidence that Wehr had performed some work in other areas of the BCC for several months preceding that date. After the date of the contract, Wehr subcontracted with Realm Construction to do demolition work. Wehr and Realm began this work on March 22, 2004.

UMC separately contracted with Evergreen to perform asbestos-abatement work. This work included the removal of floor tiles and mastic, an asbestos-containing substance used to adhere floor tiles to concrete. Evergreen subcontracted with SDE to remove the mastic. SDE worked on this project from March 23 through March 26, 2004.

In removing the mastic, SDE used a product known as “Attack! 2000” (Attack). The Material Safety Data Sheet for Attack states that the product has a “soapy” odor. The Material Safety Data Sheet further cautions that the product should be used only with “adequate ventilation;” is an eye and skin irritant, with excessive vapor inhalation causing irritation of the respiratory tract; and finally notes that persons with allergies or preexisting skin conditions should avoid contact with Attack.

Around the same time, Younger and several other employees who worked on the fourth floor began complaining of a strong, irritating odor. Younger and other employees also reported a significant amount of dust in their work areas. There were additional reports that the odor returned in April of 2004. A number of employees stated that they developed nausea, dizziness, burning eyes and respiratory irritation during this period

Younger reported similar symptoms at this time. However, in a separate Workers’ Compensation claim, she alleged that she began to experience symptoms around the first week of February. In that action, Younger stated that she went to her doctor twice in February 2004 with a rash on her chest, arms and legs and with severe coughing. She also testified that she did not notice the irritating odor until mid-March of 2004. Younger stated that this later exposure caused additional symptoms, including burning eyes, rashes, nasal irritation, a bitter taste in her mouth, dizziness and labored breathing. She further alleged that

this condition persisted for several months, culminating in a disabling fatigue in August 2004.

After receiving complaints in March and April, UMC conducted an investigation of the odor. UMC hired Environmental Safety Technologies to conduct air sampling in the BCC, but those samples were within normal limits for toxins. The Occupational Safety and Health Administration (OSHA) and the state Health Department were called anonymously and asked to test the air toxicity levels at the BCC. After testing, neither agency found hazardous levels of any chemical in the air on the third floor of the BCC. Younger takes issue with the sufficiency of that testing.

Although the use of Attack was suggested as a possible cause of the odor, the reported odor was not consistent with the smell of that product. In addition, discovery later revealed that Realm had broken several acid lines and traps on the third floor during its demolition work. There was also evidence that Realm had ruptured a gas line in early April. While the source of the odor on the fourth floor was never determined definitely, UMC concluded that it was likely caused by the broken acid lines. UMC also concluded that ductwork and ventilation issues contributed to the problem.

II. Procedural History

On February 23, 2005, Younger filed this action against UMC, Wehr, Evergreen and SDE. She alleged that she suffered permanent injury in the form of occupational extrinsic asthma contracted as a result of her exposure to fumes from

Attack. The parties engaged in discovery, including the taking of Younger's deposition in January of 2006. Shortly thereafter, Wehr moved for summary judgment. Wehr noted that the asbestos-abatement work was performed exclusively by Evergreen and SDE, and that it had no involvement in the use of Attack. The trial court agreed, granting Wehr's motion for summary judgment on July 20, 2006.

Following additional discovery, Younger moved to set aside the summary judgment for Wehr. Younger pointed to newly discovered evidence that the broken acid and gas lines could have been the source of the fumes and her injury. On October 10, 2007, the trial court set aside its prior summary judgment order and reinstated Wehr as a defendant. Wehr filed a motion to alter, amend or vacate, Kentucky Rules of Civil Procedure (CR) 59.05, which the trial court denied on March 17, 2008.

Wehr filed a renewed motion for summary judgment on September 10, 2008. In support of the motion, Wehr pointed to Younger's testimony in the Workers' Compensation action stating that her symptoms began in February of 2004. Wehr also submitted an affidavit by its Vice President, Scott Smith, stating that Wehr began demolition work on the third floor of the BCC on or about March 22, 2004. Since Younger's symptoms began before this date, Wehr argued that its actions could not have been the cause of Younger's injuries. In the alternative, Wehr argued that Younger had failed to establish that any exposure to fumes caused her injuries. In response, Younger pointed to evidence showing that Wehr

began some renovation work at the BCC in December of 2003. Consequently, Younger contended that summary judgment was premature and requested an opportunity to depose several other witnesses.

Evergreen, SDE and UMC each had motions for summary judgment pending at the time Wehr was reinstated as a party. Like Wehr, all three pointed to Younger's statements in her Workers' Compensation action that her symptoms began in February of 2004. Evergreen and SDE also argued that Younger had failed to present any evidence showing either that she was exposed to Attack or that her symptoms were caused by that exposure. In its motion, UMC argued that it could not be held liable for the actions of independent contractors.

On June 10, 2008, the trial court entered an order addressing the motions for summary judgment by Evergreen, SDE and UMC. With respect to Evergreen and SDE, the court held that Younger judicially admitted in her Workers' Compensation claim that her symptoms began prior to these parties' presence at the BCC. The court further held that Younger had failed to present evidence showing that her symptoms were caused by either Attack or by any negligence in their use of that product. The trial court also granted UMC's motion for summary judgment, agreeing that it could not be held liable for the alleged negligence of any of the independent contractors.

In a separate order entered on October 18, 2008, the trial court denied Wehr's motion for summary judgment. However, the court directed any further discovery would be limited to the single issue of when Wehr actually began

renovation work at the BCC. In response to this order, Wehr reiterated that it had begun work on the third floor renovation project on March 22, 2004. However, Wehr submitted an affidavit by another Vice President, Virgil Parish, stating that it was engaged in renovation work on the fourth floor of the BCC under two separate contracts. Wehr worked on the first contract from December 29, 2003, through March 16, 2004, and on the second contract from February 10, 2004, through March 16, 2004. Nevertheless, Wehr argued that this work was not relevant because Younger never alleged that her symptoms were caused by this work. Younger responded that Wehr's admissions were sufficient to create a genuine issue of material fact regarding causation.

After considering the additional evidence and the arguments of counsel, the trial court granted Wehr's motion for summary judgment on November 12, 2008. The trial court expressed displeasure at Wehr for withholding information about its work at the BCC prior to March of 2004. However, the court concluded that this new information was insufficient to create a factual issue regarding either Wehr's negligence or the cause of Younger's injuries.

The trial court designated this order as final and appealable. A second order entered that same day designated the prior summary judgments to Evergreen, SDE and UMC as final and appealable. Finally, on November 24, an "Agreed Order of Dismissal" was entered dismissing a cross-claim against the manufacturer of Attack, Quest Environmental Safety Products, Inc.¹ However, Younger had

¹ Evergreen and SDE filed a cross-claim against Quest for indemnity and contribution in the event that Attack was found to be a cause of Younger's symptoms. Quest is not a party to this

recently changed counsel and these orders were not circulated to her current counsel. On February 11, 2009, Younger filed a CR 60.02 motion for relief from the judgments based upon the lack of notice. After reviewing the motion and the response, the trial court entered an order granting the motion for relief, vacating the summary judgments and reentering the judgments effective February 26, 2009.

Thereafter, Younger filed a notice of appeal from this latest order. Wehr also filed a protective cross-appeal from the summary judgment dismissing Evergreen and SDE as parties. All of the Appellees moved to dismiss Younger's appeal as untimely. They argued that the trial court lacked jurisdiction to grant the CR 60.02 motion in February 2009. They argued that Younger's time for appeal ran from the final summary judgments in November 2008 rather than the judgment entered on February 26, 2009. Consequently, they maintained that her appeal was now time-barred under CR 73.02(1)(a). This Court agreed and dismissed the appeal and cross-appeal.

Younger appealed that dismissal to the Kentucky Supreme Court. Subsequently, the Supreme Court reversed the dismissal, finding that the trial court was within its jurisdiction and did not abuse its discretion in granting relief under CR 60.02. *Younger v. Evergreen Group, Inc.*, 363 S.W.3d 337 (Ky. 2012). The matter was then returned to this Court for consideration on the merits.

III. Jurisdiction

appeal and the dismissal of the cross-claim is not an issue presented to this Court.

As a preliminary matter, Wehr argues that the trial court lacked jurisdiction to set aside its July 20, 2006 summary judgment which dismissed it as a party to the case. Wehr contends that the trial court lost jurisdiction ten days after entry of the judgment dismissing it as a party. In the absence of any grounds under CR 60.02, Wehr asserts that the trial court had no authority to reinstate Younger's claims against it.

We agree with Wehr that a trial court's jurisdiction to modify a judgment expires ten days from the date the final order was entered by the court. *See* CR 59.05. However, "[a] final and appealable judgment is a final order adjudicating all of the rights of all of the parties in an action or proceeding, or a judgment made final under CR 54.02." Although the trial court dismissed Wehr as a party, the other defendants remained as parties to the action. Furthermore, the trial court did not include any finality language in its July 20, 2006 order, as required by CR 54.02. Consequently, the July 20, 2006 summary judgment for Wehr was not a final order and the trial court retained jurisdiction to set aside the order. *See Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 418-19 (Ky. 2010).

IV. Summary Judgment Issues

A. Standard of Review

In her direct appeal, Younger argues that the trial court improperly granted summary judgment to Wehr, Evergreen, SDE and UMC before she had an opportunity to complete discovery on her claims. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. In making this determination, the trial court must consider all evidence of record, including depositions, answers to interrogatories, stipulations and admissions on file. “[S]ummary judgment ... is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky.1985). Furthermore, “[t]he 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*, 807 S.W.2d at 480.

In reviewing an order granting summary judgment, “[t]he standard of review on appeal ... is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996), *citing* CR 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

Younger’s claims against each of the Appellees sound in negligence. The trial court correctly identified the necessary elements to establish a cause of action for negligence in Kentucky: a plaintiff must prove the existence of a duty, breach thereof, causation, and damages. *Boland-Maloney Lumber Co., Inc. v.*

Burnett, 302 S.W.3d 680, 686 (Ky. App. 2009), citing *Illinois Central Railroad v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967); *Mullins v. Commonwealth Life Insurance Company*, 839 S.W.2d 245, 247 (Ky. 1992). The existence of a duty is a question of law for the court, while breach and injury are questions of fact for the jury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Causation presents a mixed question of law and fact. *Id.*

B. Effect of Judicial Admissions

The primary issue in this appeal is whether Younger presented sufficient evidence showing that her injuries were caused by the negligence of any or all of the Appellees. The Appellees first contend that this issue is foreclosed by Younger's judicial admissions in her prior Workers' Compensation claim against the University of Louisville. In a 2005 deposition given in that action, Younger testified that she began experiencing symptoms on February 2, 2004. As part of the settlement of that claim, Younger stipulated that her injury occurred on that date.

Although Wehr was conducting demolition work elsewhere at the BCC from December 2003 through mid-March 2004, there is no dispute that Wehr began its demolition work on the third floor of the BCC on March 22. Likewise, Evergreen and SDE were only on site from March 23 until March 26. Given her prior testimony and admissions under oath, the Appellees maintain that Younger should be stopped from claiming that her injuries were incurred after February 2. The trial court agreed, finding that Younger's deposition testimony constitutes a

judicial admission that her injury was suffered on February 2, 2004. The trial court did not address whether the stipulation in Younger's settlement agreement also constituted a judicial admission.

By definition, a judicial admission "is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question." *Nolin Production Credit Association v. Canmer Deposit Bank*, 726 S.W.2d 693, 701 (Ky. App. 1986). Statements made under oath in a pretrial deposition have been repeatedly held sufficient to constitute a judicial admission. *Fletcher v. Indianapolis and Southeastern Trailways, Inc.*, 386 S.W.2d 264 (Ky. 1965). But in order to be conclusive upon a party, such statements, in the light of all the conditions and circumstances proven, must also not give rise to the probability of error in the party's own testimony. *Moore v. Roberts by and through Roberts*, 684 S.W.2d 276, 277 (Ky. 1985), and *Nolin Production*, 726 S.W.2d at 701.

When considered in context, Younger's deposition testimony only indicates that her symptoms began on February 2, 2004, not that her injury occurred solely on that date. In her 2005 deposition, Younger testified that she began experiencing symptoms February 2. "I think that's the date I first realized any symptoms at all and I did to go the doctor twice in February. I had – I woke up one morning and had a rash all over my neck, and chest, and my arms – just that part of my body, and I was coughing a lot and that's – that's when I first went to

the doctor.” *Deposition of Jane Colleen Younger*, July 20, 2005, at 6. She also stated that she began having headaches, throat and nasal irritation and “labored breathing,” and dizziness around this time. *Id.* at 7-8, 12.

However, she attributed these symptoms to exposure to dust at work. *Id.* at 12, 14-15. She further added that she began noticing a “rancid” odor and a bitter taste in her mouth in mid-March through mid-April. Younger testified that the other symptoms intensified after this exposure, and she began to experience shortness of breath and fatigue. *Id.* at 17-27. Younger’s symptoms continued to grow worse until they became occupationally disabling in August. *Id.* at 28-30.

We agree with the trial court that Younger’s testimony is relevant to the question of causation. But when considered in context, Younger’s testimony is consistent with her current allegations regarding the onset and *progression or aggravation* of her symptoms. Although her prior testimony raises legitimate questions about the cause of her symptoms, we disagree with the trial court that her statements would absolutely foreclose her from establishing that the subsequent conduct by Wehr and Evergreen contributed to her injury.

Furthermore, Younger’s testimony in the prior Workers’ Compensation proceeding addressed a substantially different issue. The Workers’ Compensation Act defines “injury” to mean “any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” Kentucky Revised

Statutes (KRS) 342.0011(1). Since cumulative trauma is included within the statutory definition of injury, Younger's admissions and stipulation regarding the initial onset of her symptoms does not control a determination of causation in this action.

C. Summary Judgment on Causation

Therefore, we return to the central issue of causation. Younger presents no direct evidence showing that her symptoms or debilitating asthma were caused by any particular exposure or some combination of exposure to dust and chemicals. However, legal causation "may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). Nevertheless, "[a] mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant." *Texaco, Inc. v. Standard*, 536 S.W.2d 136, 138 (Ky. 1976). The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of a defendant was a substantial factor in bringing about the result. *Id.* In other words, the plaintiff must present sufficient evidence "to tilt the balance from possibility to probability." *Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970), citing *Highway Transport Co. v. Daniel Baker Co.*, 398 S.W.2d 501, 502 (Ky. 1966).

1. Claims against Wehr

Younger relies on circumstantial evidence to establish such a probability. Younger reported a significant amount of dust in her work area beginning in early February. The appearance of that dust coincided with Wehr's demolition work in areas of the BCC other than the third floor. Likewise, the onset of Younger's initial symptoms coincided with this work.

Wehr began conducting demolition work on the third floor on March 22. Evergreen and SDE began their asbestos-abatement work using Attack shortly afterward. Younger and other employees noted an increase in dust and the presence of the irritating odor about the same time and recurring in April. These odors coincided with the ruptures of the gas and acid lines. Younger alleges that her symptoms became progressively worse during and after this period. Younger's physicians attributed the onset and progression of her occupational asthma to her exposures to dust, gas fumes and chemical fumes.

The close temporal relation between the demolition work at the BCC and the development of Younger's symptoms is sufficient to create a reasonable inference of causation, particularly with respect to Wehr. Wehr was present at the BCC at the onset of her symptoms, although it was conducting demolition work under separate contracts in January and February. Wehr was conducting demolition work on the third floor after March 22. The dust issues and fumes were reported by Younger and other employees of the BCC shortly after that work began. Wehr or their subcontractors were involved in the damage to the acid and

gas lines on the third floor. In addition, Wehr was responsible for the ventilation and maintenance of ductwork in the construction area. We conclude that Younger presented sufficient circumstantial evidence to warrant a reasonable inference of causation as to Wehr.

2. Claims against Evergreen and SDE

Younger's circumstantial inferences regarding Evergreen and SDE are much weaker. The use of Attack was initially identified as a possible cause of the odor and Younger's symptoms. She also alleges that there were anecdotal reports of a similar odor accompanying the use of Attack during a renovation project at the University of Louisville Dental School. At first blush, the presence of the odor shortly after Evergreen and SDE used the product seems more than coincidental.

However, Younger did not present any evidence, other than the Material Safety Data Sheet, to show that the use of Attack could have been a contributing cause of her symptoms. Likewise, none of Younger's medical experts specifically identify Attack as a cause of her condition. In addition, Younger does not point to any expert testimony linking the use of Attack to the type of symptoms which she developed. Finally, there was no evidence connecting the use of Attack to the similar odor encountered during the renovation of the Dental School.

Indeed, even the circumstantial evidence fails to establish any connection between the use of Attack and Younger's symptoms. Younger admitted that her symptoms started at least six weeks before Evergreen and SDE worked at the BCC. Furthermore, while Evergreen and SDE used Attack at the

BCC only for four days in March, Younger's symptoms continued to grow worse for months after any possible exposure.

Furthermore, all of the evidence indicates that Attack has a mild, soapy odor and not the "bleach-like" odor described by employees on the fourth floor. The Material Safety Data Sheet warns that Attack is an eye, skin and respiratory irritant, and recommends use only in well-ventilated areas. However, SDE's co-owner, Steve Watson, testified the Environmental Protection Agency (EPA) and OSHA do not require the use of respirators when using Attack for low-level abatement work. In addition, Younger presented no evidence that Evergreen or SDE were negligent in their use or application of Attack.

Nevertheless, Younger argues that the trial court improperly limited her discovery into this matter and she should be given a further opportunity to complete discovery in order to establish a connection. We disagree. Younger had a full opportunity to obtain discovery and to produce evidence about Attack from the filing of this action in 2005 until discovery in 2007 revealed evidence of the broken acid and gas lines. However, she does not identify how the trial court denied her an opportunity to pursue discovery against Evergreen and SDE during this time. As discussed above, we conclude this evidence was insufficient to create a jury issue on the essential question of causation.

3. Wehr's Right to Appeal Dismissal of Co-Defendants

Along similar lines, Wehr notes that it was not a party to this case for nearly 15 months following the 2006 summary judgment. During this period,

Wehr did not have an opportunity to participate in discovery. If the final dismissal is set aside, Wehr argues that additional discovery is necessary to preserve its rights to apportion any potential liability against Evergreen and SDE.

Like Younger's claims against Evergreen and SDE, Wehr's attempt to create a jury question for apportionment purposes is undermined by the limited evidence showing any connection between the use of Attack and Younger's symptoms. Moreover, a defendant has no right to appeal a co-defendant's dismissal simply to maintain that defendant in the action for apportionment of damages. *Jenkins v. Best*, 250 S.W.3d 680, 686 (Ky. App. 2007). Although KRS 411.182 allows apportionment of liability between settling and non-settling defendants, the statute does not allow liability to be apportioned to parties who were dismissed because they were found not to be liable. *Id.* at 686-87. Furthermore, Wehr has never asserted any cross-claims against Evergreen or SDE. Consequently, we conclude that Wehr lacks standing to appeal from the trial court's order granting summary judgment to Evergreen and SDE. *Id.* at 687.

D. Summary Judgment on Claims against UMC

Finally, Younger argues that the trial court erred in granting summary judgment to UMC. As the trial court found, UMC cannot be liable for the negligence of independent contractors unless the acts of the independent contractors constitute a nuisance or the acts themselves are inherently dangerous. *Clemons v. Browning*, 715 S.W.2d 245, 246 (Ky. App. 1986). Younger concedes that she is not seeking to impose liability on UMC for the actions of independent

contractors such as Wehr, Evergreen, and SDE. Rather, she argues that UMC is liable for its own negligence in failing to conduct a prompt investigation of dust and chemical fumes reported on the fourth floor of the BCC in March and April of 2004.

The trial court concluded that Younger made judicial admissions which precluded her from claiming that exposures after February 2004 caused her injuries. As discussed above, we conclude that Younger's 2005 deposition testimony was not so broadly definitive as to bar any claim regarding causation during the period in question. At most, her prior testimony is merely relevant to the ultimate question of causation. Therefore, we conclude that UMC was not entitled to summary judgment on Younger's claims on this ground.

The trial court did not address any further grounds for dismissing Younger's claims of independent negligence by UMC, and such questions are beyond the scope of this appeal. We need only state that Younger bears the burden of establishing the elements of her negligence claim against UMC. To the extent that there may be a factual issue concerning UMC's liability for its own negligence, it would remain as a defendant in the action for purposes of apportionment of fault.

V. Conclusion

Accordingly, the summary judgments entered by the Jefferson Circuit Court on February 26, 2009, are affirmed in part and reversed in part. While we affirm the summary judgments dismissing Younger's claims against Evergreen and

SDE, we reverse the summary judgments dismissing her claims against Wehr and UMC and remand those matters for additional proceedings as set forth in this opinion. Wehr's cross-appeal of the summary judgments granted to Evergreen and SDE is dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT
JANE COLLEEN YOUNGER:

Joseph D. Satterley
Paul J. Kelley
Paul J. Ivie
Louisville, Kentucky

BRIEFS FOR APPELLEE/
CROSS-APPELLANT WEHR
CONSTRUCTORS, INC:

John A. Sheffer
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLEE EVERGREEN GROUP,
INC:

Joseph P. Hummell
Peterson S. Thomas
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLEE UNIVERSITY
MEDICAL CENTER, INC.

Carol Dan Browning
Jamie K. Neal
Louisville, Kentucky