

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2002 CA 1293

MAURICE C. KEMP AND WENDY B. KEMP

VS.

ARMSTRONG WORLD INDUSTRIES, ET AL

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 451,072 DIVISION J)
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE CURTIS CALLOWAY, JUDGE

JUDGMENT RENDERED MAY 28 2003

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PHILIP MORRIS INCORPORATED

BEFORE: MCDONALD, MCCLENDON, AND CIACCIO,¹ JJ.

¹ Judge Philip Ciacco, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court

McClendon, J. Dissents with Reasons.

MCDONALD, J

Plaintiffs appeal the trial court's granting of partial summary judgment in favor of defendant tobacco company, limiting their claims to those governed by the Louisiana Product Liability Act. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Maurice Kemp was diagnosed in November 1997 with adenocarcinoma. At the time he was 46 years old, had been smoking since age 14, and had worked for many years in chemical plants where he was allegedly exposed to asbestos. In June 1998, suit was filed on behalf of Mr. Kemp and his wife, Wendy, against numerous asbestos manufacturers, an asbestos supplier, and cigarette manufacturers, R. J. Reynolds Tobacco Company and Philip Morris Incorporated.² The claims against several asbestos manufacturers were settled and/or dismissed in 1999, 2000, and 2001. In October 2001, the tobacco company defendants filed an omnibus motion for summary judgment on all claims, and motions for partial summary judgment based on federal preemption, first amendment of the U. S. Constitution, lack of causation evidence, and any claims not based on the Louisiana Products Liability Act. In January 2002, the tobacco defendants filed a motion to exclude the testimony of Dr. James H. Lutsch, M.D. Also, in January 2002, R.J. Reynolds Tobacco Company filed a motion for summary judgment asserting that plaintiffs had not and could not produce any evidence that Reynolds was a substantial contributing factor in causing Mr. Kemp's lung cancer.

On January 29, 2002, the trial court heard the pending motions. R. J. Reynolds' motion for summary judgment was granted and they were dismissed. The motion to exclude the testimony of Dr. Lutsch was denied. The partial summary judgment on the basis of federal preemption was granted on the issues of negligent misrepresentation, violation of consumer protection statutes, and redhibition. On the issues of fraud and deceit, and the liability claims: absolute, unreasonably dangerous,

² In December 1998, following the death of Mr. Kemp, the suit was amended to a survival action and wrongful death action and the deceased's children were added as plaintiffs.

unreasonably dangerous per se, and unreasonably dangerous in design, the motion was denied. The motion based on the first amendment of the constitution was passed. The court heard argument on the issue of the application of the LPLA that primarily turned on when the tort accrued. The defendants argued that until there was a convergence of fault, causation, and damage there was no cause of action and in this case that was not until November 1997 when Mr. Kemp was diagnosed with lung cancer. Therefore, the law to be applied was that in effect in November 1997, which would mean that the only claims available to plaintiff were those provided by La. R.S. 9:2800.52, the Louisiana Products Liability Act. Plaintiffs argued that the date of manifestation of the disease was not the proper date, but rather the date of significant exposure to the carcinogens should be applied, which was prior to the passage of the products liability act. The court allowed the parties time to submit additional briefs and the matter was continued until then.

The court reconvened on February 15, 2002. After additional argument, partial summary judgment was granted in favor of the defendant, Phillip Morris, dismissing all plaintiffs' non-LPLA claims. The ruling was found to constitute a final judgment pursuant to La. C. C. P. art. 1915(B) and plaintiffs appealed.³

ASSIGNMENT OF ERRORS

Appellants urge four assignments of error: 1. "[T]he trial court erred in ruling that both Mr. Kemp's survival and wrongful death actions are governed by the LPLA; 2. [T]he trial court erred in dismissing all non-LPLA causes of action in Mr. Kemp's survival action; 3. [T]he trial court erred in retroactively applying the LPLA to Mr. Kemp's survival action; 4. [T]he trial court erred in ruling that there was no question of material fact as to when Mr. Kemp's survival cause of action arose." Appellant briefed assignments of error number two and three together. Determination of whether the LPLA governs appellants' claims will dispose of both assignments, and we will likewise consider them together. Assignment of error number 4 raises the issue that

appellees assert is the only one before this court: whether the trial court correctly determined that, for purposes of the application of the LPLA to this matter, plaintiffs failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proving that Mr. Kemp's lung cancer existed before September 1, 1988.

LAW AND ANALYSIS

In September 2002, the Louisiana Supreme Court decided *Austin v. Abney Mills, Inc.*, 2001-1598 (La. 9/4/02), 824 So.2d 1137. Thereafter, appellants submitted a supplemental brief asserting that the decision answers all of the issues raised in this appeal. We do not agree that the *Austin* decision has such a sweeping effect. It does, however, definitively dispose of the appellee's argument that Mr. Kemp's tort action accrued in November 1997. In *Austin*, the Supreme Court held that "the date of disability is not the relevant date to decide the issue of when a tort cause of action under La. C.C. art. 2315 accrues in a long-latency occupational disease case in which the individual suffers from the disease." *Austin*, supra. Whether Mr. Kemp's cancer was an occupational disease has yet to be determined; at this point we are dealing only with the alleged effects of tobacco smoke exposure. Whether this is a tort action pursuant to La. C.C. art. 2315 or to the LPLA is one of the issues before us. While we recognize that the context in which claims arise can distinguish them from other similar actions, we do not find that to be the case here.

Further, this court has already decided the issue of which date, that of exposure, or that of manifestation, should be controlling in this type of case in *Pitre v. GAF Corp.*, 97-1024, (La. App. 1 Cir. 12/29/97), 705 So.2d 1149; writ denied, 98-0723 (La. 11/19/99), 749 So.2d 666. The *Pitre* case also involved a plaintiff who smoked for many years and additionally was exposed to asbestos in the workplace. Also similarly, the plaintiff was diagnosed with lung cancer after the effective date of the LPLA, and the tobacco defendants argued that the LPLA provided the exclusive remedy for claims against cigarette manufacturers. In finding that the "exposure rule"

³ The trial court denied the defense motion for summary judgment on the issue of causation; however, as this

set forth in *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992) was applicable in *Pitre* the court noted:

Although Mr. Pitre's disease, if caused solely by cigarette smoking, would not be an occupational disease, we recognize that plaintiffs allege Mr. Pitre developed lung cancer as a result of exposure to asbestos in the workplace and exposure to tobacco smoke. Where a long-latency disease is alleged to have been caused by repeated tortious exposures to more than one substance, we see no logical rationale for applying different rules to determine the applicable law governing each claim. *Pitre*, at 1156

Therefore, the "exposure rule" is to be applied in determining the date of the accrual of this tort action.

The decision in *Pitre*, however, did not reach the issue of whether or not the LPLA provided the exclusive remedy to Mr. Pitre.⁴ The appeal was of the trial court's granting of summary judgment in favor of the tobacco company defendants on June 3, 1996 - prior to the effective date of the legislative amendments to the Code of Civil Procedure articles on summary judgment. Because those amendments radically changed the way in which courts ruled on summary judgment motions, it was believed that justice was best served by remanding the case to allow the parties the opportunity to introduce additional evidence into the record in contemplation of any differences they perceived in the burdens of proof under the new law. The case does make clear that "[b]ecause plaintiffs urge that pre-LPLA tort law is applicable to this action, plaintiffs have the burden of proving, pursuant to amended La. C.C.P. art. 966 C (2), that significant 'repeated tortious exposures resulting in continuous, on-going damages' occurred prior to the effective date of the LPLA, and that such exposures later resulted in the manifestation of damages in order to prevail." *Pitre*, at 1157.

In the context of a defense motion for summary judgment, "repeated tortious exposure resulting in continuous, on-going damage" requires more than proof of a

decision was not appealed, we do not address it.

⁴ The Louisiana Supreme Court in *Walls v. American Optical Corp.*, No. 98-0455 (La. (9/8/99), 740 So.2d 1262, 1268 and also in *Anderson v. Avondale Industries, Inc.*, No. 2000-2799 (La 10/16/01), 798 So.2d 93, 99 cites *Pitre*, noting, incorrectly, that the LPLA was not applied. The issue in *Walls* was retroactivity in a survival and wrongful death action in the context of workers' compensation not alleging tobacco exposure; in *Anderson*, also not a tobacco case, the Court's approval of *Pitre* was because the plaintiff's exposure was prior to the enactment of the LPLA and a retroactive application would be in violation of Plainol's first test.

significant history of cigarette smoking prior to September 1988 and knowledge that smoking causes lung disease. La. C.C.P. art. 966 C (2) provides:

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. **Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.** *Emphasis added.*

To satisfy his evidentiary burden at trial, plaintiff will have to prove that the exposures prior to September 1988 were "significant and such exposures later resulted[ed] in the manifestation of damages... ." *Austin*, 824 So.2d at 1153, citing *Cole* at 1066.

In opposition to the motion for summary judgment, plaintiffs submitted the affidavit of Dr. Gerald Liuzza, a clinical pathologist, and excerpts from the deposition of Dr. David Hanson, Mr. Kemp's treating physician, an oncologist. Dr. Liuzza's affidavit was based on review of the November 7, 1997 pathology report on Maurice Kemp prepared by Dr. Lim from Earl K. Long Hospital. The affidavit contains several opinions concerning the development of adenocarcinoma in general and applies those opinions to the development of Mr. Kemp's disease. Similarly, Dr. Hanson's testimony was based on his understanding of the risk of contracting lung cancer based on a significant history of smoking. Neither of these opinions was based on specific medical facts regarding Mr. Kemp.

The affidavit of Dr. George Hensley, a physician, board certified in anatomical pathology was submitted by defendants. Dr. Hensley examined lung and brain tissue surgically removed from Mr. Kemp in 1997 and 1998. His opinion on the evolution of Mr. Kemp's lung cancer, expressed to a reasonable degree of medical certainty, was that Mr. Kemp's cancer was relatively aggressive and fast-growing and there was no reliable scientific evidence to support an assertion that Mr. Kemp suffered irreversible cellular changes that remained indolent for a decade before developing into clinically detectable lung cancer.

Similarly, after examining Mr. Kemp's medical records, Dr. Steven Stogner, a physician, board certified in Internal Medicine, Pulmonary Medicine and Critical Care Medicine, testified that Mr. Kemp's malignancy was aggressive. Dr. Stogner's affidavit also noted that unlike asbestos, smoking is not an exposure that deposits fibers into the lungs, and that respiratory epithelium is regenerated, repaired, and replaced. This distinction between long-latency occupational diseases, e.g. asbestosis (as in *Cole*), silicosis (as in *Walls*), and mesothelioma (as in *Austin*), and Mr. Kemp's lung cancer, allegedly caused by exposure to tobacco smoke, is significant, especially in view of the fact that he is required to establish a pre-1988 causative connection between cigarette smoking and his 1997 diagnosis of adenocarcinoma. Mr. Kemp cannot rely on showing that he was exposed and later manifested damages. It is not an arithmetical formulation of exposure plus damage; but rather an equation whereby one proves that exposure equals damage.

Appellate courts are to review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Potter v. First Federal Savings and Loan Association of Scotlandville*, 615 So.2d 318 (La. 1993). The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action...The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966A(2); *Pitre*, supra at 1152.

Our review of the record fails to reveal sufficient factual support to establish that appellant's exposure to tobacco smoke prior to September 1988 was a significant cause of damage that manifested in lung cancer in November 1997 and resulted in his death one year later. Therefore, we affirm the trial court's decision that Mr. Kemp's claims against Philip Morris are those provided by the LPLA and granting the defendant's motion for summary judgment on all non-LPLA claims. Costs of this appeal are assessed against appellants, Wendy B. Kemp, Johnny Lee Kemp, Jesse K. Kemp, and Jalacee O. Kemp.

AFFIRMED.



McCLENDON, Judge, dissenting.

I respectfully dissent from the majority opinion in the instant case. I believe the trial court erred in granting summary judgment dismissing all non-LPLA claims, which finding was based on the premise that Maurice C. Kemp's cancer and/or damage therefrom accrued after September 1, 1988, which was the effective date of the LPLA.

In support of their motion for summary judgment, defendants submitted the affidavits of Dr. George Hensley and Dr. Steven Stogner.

Dr. Hensley, a pathologist, stated in his affidavit that he had examined the slide preparations made from the lung and brain tissue surgically removed from Mr. Kemp in 1997 and 1998, respectively. Dr. Hensley stated that his examination of the lung tissue revealed no cellular abnormalities that could be considered pre-malignant. It was the opinion of Dr. Hensley that "Mr. Kemp's cancer was relatively aggressive and therefore fast-growing." Dr. Hensley further stated, "There is simply no reliable scientific evidence to support the assertion that Mr. Kemp suffered irreversible cellular changes which remained indolent for a decade before developing into clinically detectable lung cancer." However, Dr. Hensley admitted that "it is sheer speculation to hypothesize a particular time frame for the evolution of the disease process that culminated in Mr. Kemp's cancer."

Dr. Steven W. Stogner, an internist practicing pulmonary and critical care medicine, testified by affidavit that he "reviewed the medical history of Maurice C. Kemp," and that based on these records, "there is no evidence of any lung changes or lung disease before 1987." Dr. Stogner further stated that "Mr. Kemp's malignancy was aggressive and, in [his] experience and

training, it is more reasonable to conclude that his disease process started some time immediately prior to diagnosis." However, Dr. Stogner, like Dr. Hensley, admitted that there is "no medically sound way to determine when Mr. Kemp's lung cancer started or from what source."

In opposition, plaintiffs presented excerpts of the deposition of Dr. David S. Hanson and the affidavit of Dr. Gerald Liuzza. Dr. Hanson treated Mr. Kemp as an oncologist. Dr. Hanson stated that the duration and severity of cigarette usage were factors in the risk of contracting cancer, and that his "understanding" was that "there's a period of time between the insult from the carcinogen and whatever cofactors that are required for the overt cancer to develop." Dr. Hanson noted that Mr. Kemp had started smoking as a teenager and since that time had regularly smoked multiple packs per day. Dr. Hanson further noted that normally he sees lung cancer manifested in patients closer to age sixty, whereas Mr. Kemp was only in his thirties.

Dr. Gerald Liuzza, a pathologist, testified via affidavit that he had examined the "pathology report of Dr. Juanito Lim from Earl K. Long Hospital in Baton Rouge, pertaining to Mr. Maurice Kemp, dated on or about November 7, 1997." This report diagnosed Mr. Kemp as having been afflicted with an "adenocarcinoma." In the opinion of Dr. Liuzza, "[a]denocarcinomas, such as that suffered by Mr. Kemp, develop over a period of many years or decades." Further, Dr. Liuzza stated that "[a]denocarcinomas begin at a cellular level and therefore can exist for a substantial period of time in the body before they are detectable by current medical technologies." Dr. Liuzza opined that, given Mr. Kemp's history of heavy cigarette smoking beginning at a young age and extending through the time he was discovered to have cancer at age thirty-seven, it was "more

likely than not that in 1987, Mr. Kemp had significant and latent, pre-malignant cellular changes that later developed into his lung cancer."

This Court has held that to defeat a motion for summary judgment seeking to exclude the application of pre-LPLA tort law, "plaintiffs have the burden of proving ... that significant 'repeated tortious exposures resulting in continuous, on-going damages' occurred prior to the effective date of the LPLA, and that such exposures later resulted in the manifestation of damages in order to prevail." **Pitre v. GAF Corporation**, 97-1024, p. 17 (La. App. 1 Cir. 12/29/97), 705 So.2d 1149, 1157. The testimony presented on the motion for summary judgment is conflicting on this point. Defendants' experts aver that Mr. Kemp's disease process was fast-growing and of relatively short duration, while admitting that the actual length of time that it took the cancer to develop cannot be stated with scientific certainty. Plaintiffs' experts take the opposite position that cancers of the type acquired by Mr. Kemp begin on a cellular level with an asymptomatic latency period that very likely extended back to 1987 in this case.

We are mindful that if the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact and summary judgment should be granted. La. C.C.P. arts. 966 and 967; **Bergeron v. Williams**, 99-0886 at p. 5, 764 So.2d at 1087; **LeJeune v. Brewster**, 97-2342, pp. 3-4 (La. App. 1 Cir. 11/6/98), 722 So.2d 74, 76. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or

weigh evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751.

A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. **Hardy v. Bowie**, 98-2821, p. 6 (La. 9/8/99), 744 So.2d 606, 610, **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 at p. 27, 639 So.2d at 751. Simply put, a "material" fact is one that would matter on the trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 at p. 27, 639 So.2d at 751.

In the instant case, resolution of the conflicting expert testimony necessitates a credibility determination. Although the expert testimony presented by defendants may be more convincing, it is not the court's duty on a motion for summary judgment to weigh credibility, as long as the expert testimony has a rational basis and connexity to the facts of the case.¹ Plaintiffs in this case have produced factual support sufficient to meet their burden to show Mr. Kemp's disease process began prior to the enactment of the LPLA. Therefore, there is a genuine issue of material fact such that summary judgment was inappropriate.

Therefore, I respectfully dissent.

¹While a court is entitled to assess whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue, under **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), I am unable to find any **Daubert** defect in the expert testimony presented herein.