

SUPREME COURT OF GEORGIA

Remittitur, Case No. S12C0616

Atlanta, September 10, 2012

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM E. HAILEY v. WILLIAM T. JONES

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby writ denied.

All the Justices concur.

Court of Appeals Case No.
A10A1870

RECEIVED IN OFFICE
2012 OCT 19 PM 2:52
CLERK OF SUPREME COURT
COURT OF APPEALS OF GA.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta October 18, 2012

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.



Sw C. Pittor, Chief Deputy Clerk

IN THE COURT OF APPEALS

STATE OF GEORGIA

FILED IN OFFICE

OCT 02 2009

CLERK, COURT OF
APPEALS OF GEORGIA

JOHN D. ADAMSON as Executor of)
the Estate of JOHN H. ADAMSON,)
)
Plaintiff/Appellant,)
)
v.)
)
GENERAL ELECTRIC CO., et al.,)
)
Defendants/Appellees.)
_____)

CASE NO. A09A2302

BRIEF OF DEFENDANT/APPELLEE GENERAL ELECTRIC COMPANY

John D. Dalbey
Georgia Bar No. 003150
Chilivis, Cochran, Larkins & Bever LLP
3127 Maple Drive, N.E.
Atlanta, Georgia 30305
(404) 233-4171
Attorney for Defendant/Appellee
General Electric Company

PART ONE

I. INTRODUCTION.

The captioned case was filed in September, 2003, seeking to recover for personal injury of Mr. John Adamson (“Mr. Adamson”), now deceased. The complaint subsequently was amended to add a claim for wrongful death. R-2456-2467. Plaintiff alleges that Mr. Adamson’s illness, and his subsequent death, were caused by exposure to asbestos. The complaint originally named over 100 defendants, including appellee General Electric Company (“GE”).¹ R-77.

Mr. Adamson was deposed extensively prior to his death, and could not testify that any GE product he worked with or around contained asbestos. R-Vol. 63. Plaintiff also identified and produced for deposition over twenty witnesses. As Mr. Adamson never resided, worked or alleged exposure to asbestos in Georgia, Defendants traveled to Utah, Idaho (twice) and North Carolina, to depose

¹ Mr. Adamson’s complaint originally was filed in Mississippi, but was dismissed and re-filed in this state. While this case was pending in the trial court, Plaintiff also filed claims against certain of these defendants, and others, in the State of Idaho.

these witnesses. At deposition, most of these “witnesses” did not even know Mr. Adamson. Moreover, not a single witness could testify that he ever saw Mr. Adamson work with, around or in proximity to any GE product that contained asbestos.

Accordingly, GE moved for summary judgment. Plaintiff filed multiple briefs in response to GE’s motion. *See* R-2451, 4956, 8845, 14596. In addition, Plaintiff filed thousands of pages of materials, including affidavits and depositions taken by Plaintiff’s counsel in other cases, in response to summary judgment motions. R-4944 (Plaintiff’s Index of Exhibits in response to summary judgment motions); R-4981-8838; 14285-14539; 14599-15240. The Court eventually held two **full** days’ of hearings on the defendants’ summary judgment motions. R-Vols. 61, 62. Having afforded Plaintiff this extensive opportunity to respond to GE’s motion for summary judgment, and carefully sifting the incredibly voluminous record generated by Plaintiff, the Court granted GE’s motion in April, 2006. R-15379.

Rather than appeal that summary judgment, Plaintiff waited two years, moved the Court to enter judgment in favor of GE, and then sought to appeal the trial court’s grant of Plaintiff’s motion.

II. STATEMENT OF FACTS.

Plaintiff's statement of facts is inaccurate or incomplete, as pointed out below in GE's statement of facts. GE further sets forth in its statement of facts additional facts necessary for the Court's determination of this appeal.

Mr. Adamson became an electrician following World War II. R-Vol. 63 at 99. Mr. Adamson then worked in the initial construction and set up of the chemical processing plant at the national nuclear test reactor site in Idaho, beginning in 1951. *Id.* Throughout the 1950's and 1960's, Mr. Adamson worked at various mining operations in Idaho and Utah, as well as at the national nuclear test reactor site. *Id.* at 101 – 187. His duties were primarily running electrical wire and cable, “terminating” connections of the electrical wire and cable, and helping to install and connect various types of electrical equipment. *Id.* at 103-104, 125-26, 132, 41-43, 150.

In 1967, Mr. Adamson left Idaho. *Id.* at 174, 189. After that, Mr. Adamson became involved in power plant construction in North Carolina, Missouri, Michigan, Colorado, Wyoming, Texas and Florida. *Id.* at 189-240. By the time Mr. Adamson began working in the construction of power plants in the late 1960's, he was an electrical supervisor, who did not perform “hands-on” work. *Id.* at 189.

During his career, Mr. Adamson worked with and around all sorts of electrical equipment and products. This included equipment involved in the generation of electricity, such as turbines and generators; equipment which required electricity to operate, such as electric motors; and equipment which carries and regulates the flow of electricity, such as wire and cable, switchgear and panels. During its history GE has made these types of products. R-5665 (interrogatory responses of GE).² As an electrician and an electrical supervisor, Mr. Adamson undoubtedly worked with and around GE electrical products. However, there is no evidence that any of the GE products that Mr. Adamson worked with or around contained any asbestos.

² Plaintiff characterizes GE's interrogatory responses as "grudging." Brief of Appellant at 19. As a discussion regarding the adequacy of parties' interrogatory responses will not aid the Court in resolving this appeal, GE will not engage in such discussion. However, it should be noted that Plaintiff's interrogatories were deficient in a number of ways, and notably, Plaintiff never moved to compel any further or "less grudging" responses to his interrogatories.

To the extent that GE made any products such as the type that Plaintiff worked with or around that contained any asbestos, the percentage of such products manufactured by GE that may have contained asbestos was extremely small. For instance, only “a small percentage of [GE wire and cable] contained encapsulated chrysotile.” R-5665. Furthermore, “only a small fraction of [GE electric motors] (less than one percent) may have contained certain internal component materials that may have contained some quantity of encapsulated chrysotile.” R-5668. Thus, no presumption can exist that any particular GE product that Mr. Adamson may have worked with, around or in proximity to, may have contained asbestos.

Throughout extensive deposition, Mr. Adamson was asked about products he worked with or around at each job site where he had worked, and to identify products or equipment that he believed contained asbestos. R-Vol. 63. Mr. Adamson could not identify any GE product which he worked with or around that he believed contained asbestos. *Id.* at pages 62, 131, 133, 145, 186, 199, 209, 222, 395-96, 399. In fact, when Mr. Adamson was asked “did you know [if products contained asbestos] when you were on those jobs in the fifties, sixties or seventies,” he confessed “I didn’t know whether it was asbestos or what it was.”

Id. at 62. Even during his video-taped evidence deposition, in response to questioning from his own attorney, Mr. Adamson did not identify any GE product that he worked with or around or in proximity to, that he believed contained asbestos. R-6508.

In addition, during the discovery period two dozen witnesses, from Utah to Idaho to North Carolina, were identified by Plaintiff and deposed. R-Vols. 64, 66-83. Of the witnesses who actually knew Mr. Adamson (less than half), none of them could testify that any GE product Mr. Adamson worked with or around contained asbestos. This includes Leo Hoffman, the witness whose testimony Plaintiff cites as supposedly providing evidence in support of Plaintiff's claim. R-Vol. 68 at 72-73, 134.

Thus, GE moved for summary judgment. In response, Plaintiff filed multiple briefs, and submitted into the record thousands of pages of material. R-4956-8747; 12930-14094; 14285-14539. Much of Plaintiff's submissions had nothing whatsoever to do with Plaintiff's claims. These materials included dozens of affidavits from persons who did not know Mr. Adamson or depositions given in

other cases where Mr. Adamson's name was not even mentioned. R-4953-4954.³ Accordingly, on April 6, 2006, the trial court granted GE's motion. Plaintiff filed no notice of appeal within thirty days from the entry of summary judgment in favor of GE. Instead, two years later, Plaintiff asked the Court to enter judgment in favor of GE, which motion was granted, and which Plaintiff now seeks to appeal.

After six years of litigation, in the half-dozen briefs Plaintiff filed in the trial court and now in the Brief of Appellant, Plaintiff still has yet to identify a single sentence of deposition testimony where any witness testifies that Mr. Adamson worked with or around, or in proximity to, a GE product that contained asbestos. Nor has Plaintiff introduced a single document showing that any GE product Mr. Adamson worked with or around contained asbestos. For that reason, the trial court's grant of summary judgment to GE, was correct, and must be affirmed.

³ It is unclear whether all of these depositions taken in other cases are included within the record on appeal; however, all are listed in the Index of Plaintiff's exhibits at R-4945. Plaintiff has supplemented the record on appeal to add one such deposition; merely reviewing the word index to that deposition shows that Mr. Adamson's name is never mentioned.

PART TWO

I. STANDARD OF REVIEW.

As this appeal is from the grant of summary judgment, the standard of review is *de novo*, with this Court determining as a matter of law whether Plaintiff produced any evidence that Plaintiff's decedent worked in proximity to any asbestos-containing product of GE.

II. ARGUMENT AND CITATIONS OF AUTHORITY.

A. The Trial Court Correctly Granted Summary Judgment Because There was no Evidence that Mr. Adamson Worked in Proximity to an Asbestos-Containing Product of GE.

Plaintiff in this case seeks to recover for injuries allegedly caused by exposure to asbestos. Whether a plaintiff is proceeding under a strict liability or negligence theory, proximate cause is a necessary element of a products liability case alleging exposure to asbestos. Williams v. The Flintkote Co., 256 Ga. App. 205, 208 (2002); Hoffman v. AC&S, Inc., 248 Ga. App. 608 (2001); Blackston v. Shook and Fletcher Insulation Co., 764 F.2d 1480 (11th Cir. 1985). There is no presumption that a plaintiff was exposed to asbestos from a defendant's product simply because he worked at a job location where the defendant's asbestos-containing product was used

or located. Rather, the plaintiff must show that he was directly exposed to the defendant's asbestos-containing product. Lee v. Celotex Corp., 764 F.2d 1489, 1490 (11th Cir. 1985). As the party with the burden of proof at trial, Plaintiff may not simply rest upon the allegations of his pleadings, but instead, must present **evidence** sufficient to establish each element of his claims. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 495 (1991); Harrison v. Golden, 219 Ga. App. 772, 773-4 (1995).

To meet this standard of causation, the plaintiff in an asbestos-related lawsuit must present evidence that a particular defendant's asbestos-containing product was used at the job site and that the plaintiff was in proximity to that product at the time it was being used. Hoffman, 248 Ga. App. at 611. Thus, in Williams, this Court held that "to survive summary judgment, an asbestos plaintiff must present evidence that the defendant's asbestos-containing product was used at the job site *and* that he or she was *in proximity to* that product during its use." Williams, 256 Ga. App. at 208.

Accordingly, it is not merely working with a defendant's product that would give rise to a cause of action; it is working with a defendant's **asbestos-containing** product that gives rise to a claim. Therefore, Plaintiff only could survive GE's motion for summary judgment if Plaintiff submitted **evidence** that Mr. Adamson ever was in proximity to an **asbestos-containing** product of GE. Williams, 256 Ga.

App. at 208; Hoffman, 248 Ga. App. at 611. As there was no such evidence, the trial court correctly granted summary judgment in favor of GE.

Plaintiff first argues that “GE too could not deny that asbestos was pervasive until recent years in the products around which [Mr. Adamson] worked,” and cites as support for this argument interrogatory responses of GE. Brief of Appellant at 19. In particular, Plaintiff cites to pages 33, 36, 40, 41 and 42 of GE’s interrogatory responses, that “GE gear ‘contained encapsulated chrysotile.’” *Id.* These pages of the responses are contained in the record at R-5665, R-5668, and R-5672-5674, respectively.

A quick glance at the responses to which Plaintiff cites, however, shows that contrary to the statements in Plaintiff’s brief, GE does deny that asbestos was pervasive in these products – in fact, GE’s interrogatory responses actually state that asbestos was **not** pervasive in such products. Thus, on page 33 of its responses GE states that during certain periods of time only, GE “manufactured and sold electrical wire and cable products, **a small percentage of which** contained encapsulated chrysotile” (emphasis added). R- 5665. Then, on page 36 of its responses, GE states that it has manufactured “hundreds of millions” of electric motors, “**only a small fraction of which (less than one percent) may have contained...some quantity of**

encapsulated chrysotile” (emphasis added). R-5668. On page 40 of its responses, GE is describing “overhead crane drive systems,” which are simply irrelevant because there is no evidence in this case that Mr. Adamson ever was in proximity to any GE overhead crane drive system. Finally, on pages 41 and 42 of its responses, GE states that “**some**” of its switchgear and control panels “**may** have contained some quantity of encapsulated chrysotile” (emphasis added), “depending upon the time period, the particular specifications, uses, applications, and customer requirements.” R-5673, 5674.

Accordingly, it is clear that the interrogatory responses to which Plaintiff cites in no way support Plaintiff’s bald assertion that GE “could not deny that asbestos was pervasive until recent years in the products around which [Mr. Adamson] worked.” In fact, those interrogatory responses flatly contradict Plaintiff’s assertion.⁴

Plaintiff next cites to page eleven of the report of Jerry Lauderdale as supposedly providing evidence that Mr. Adamson worked with or was in proximity to an asbestos-containing product of GE. Brief of Appellant at 19. However, Mr.

⁴ Plaintiff’s reliance in the trial court upon unsupported assertions and speculation is what led to the grant of summary judgment in the first place. R-15379.

Lauderdale's report is not evidence – it is not an affidavit, it is not in deposition testimony. It is nothing but unsubstantiated hearsay, and therefore, may not be relied upon (by either the trial court or this court) to deny GE's motion for summary judgment. *E.g., Valentin v. Six Flags Over Ga., L.P.*, 286 Ga. App. 508 (2007).

Moreover, in any event, Mr. Lauderdale's "report" says nothing other than his opinion that some of the kinds of products that were made by GE and dozens of other companies sometimes may have contained asbestos. R-8676. Nowhere in Mr. Lauderdale's report is there a statement, nor could there be, that Mr. Adamson ever was in proximity to a GE product that contained asbestos. Obviously, unless Mr. Lauderdale actually was provided information sufficient to identify a **specific** product around which Mr. Adamson worked (such as a model number), Mr. Lauderdale simply would be guessing that a GE product around which Mr. Adamson may have worked contained asbestos.⁵ Such an unsubstantiated, and irrelevant, conclusion cannot be relied upon in opposition to GE's motion for summary judgment, nor

⁵ Again, only a small percentage of the types of GE products around which Mr. Adamson worked ever contained asbestos.

support the denial of GE's motion for summary judgment.⁶ *E.g.*, Dews v. Ratteree, 246 Ga. App. 324 (2000).

Plaintiff next cites to certain pages of the deposition of Mr. Adamson, in which Mr. Adamson testified that he worked with and around "GE turbines and switchgears." Brief of Appellant at 19. As an electrician, it is possible that Mr. Adamson worked, at points in time, with products manufactured by the General Electric Company. Yet despite his apparent familiarity with GE products, nowhere in his deposition does Mr. Adamson testify that any of the GE products he worked with or around contained asbestos. In fact, even when providing his video evidence deposition, responding to questions from his own lawyer, Mr. Adamson never testified that any GE product he worked with or around contained asbestos. Again, the basis of a claim for personal injury based upon alleged exposure to asbestos is that the plaintiff was "in proximity to" the "defendant's **asbestos-containing** product" (emphasis added). Williams, 256 Ga. App. at 208; Hoffman, 248 Ga. App. at 611. The cited deposition testimony of Mr. Adamson is not

⁶ Again, Plaintiff's continued reliance on mere speculation is what led the trial court to grant summary judgment in the first place. R-15379.

evidence that Mr. Adamson ever was in proximity to an “asbestos-containing product” of GE. Accordingly, the trial court correctly granted summary judgment in favor of GE.

Finally, Plaintiff cites to a deposition of witness Leo Hoffman, who Plaintiff argues testifies that GE motors and breaker boxes were at a particular job site, “the FMC plant.” Brief of Appellant at 20. However, Mr. Hoffman could not testify he ever met or worked with Mr. Adamson. R-Vol. 68 at 73. Mr. Hoffman further testified that the FMC plant was comprised of multiple buildings, covering several hundred acres, and employed nearly one thousand people during his time working there. *Id.* at 12. Thus, Mr. Hoffman’s testimony provides no evidence as to particular products or equipment which Mr. Adamson may have worked with or around.

Moreover, again, only a very small percentage of GE motors may have contained asbestos in any event. R- 5668. Mr. Hoffman admitted he did not know whether any of the GE motors at FMC contained asbestos. R- Vol. 68 at 134. And only “some” GE breaker boxes, “depending upon the time period, the particular specifications, uses, applications, and customer requirements,” may have contained asbestos. R-5673, 5674. Mr. Hoffman provides no testimony that any GE breaker

box or any other electrical product at FMC, or that Mr. Adamson may have worked in proximity to, contained asbestos. Accordingly, Mr. Hoffman's deposition testimony provides no basis for the denial of GE's motion for summary judgment.

Plaintiff argues at length that Mr. Adamson was exposed to asbestos; Plaintiff further argues at length that Mr. Adamson may have worked with certain GE products. What Plaintiff does not, and cannot, argue is that there evidence showing that Mr. Adamson worked in proximity to a GE product **that contained asbestos**. In the absence of such evidence, the trial court properly granted summary judgment in favor of GE, and dismissed Plaintiff's complaint with prejudice.

B. Plaintiff Asked the Trial Court to Enter Judgment in Favor of GE, and Therefore Cannot Appeal that Judgment.

On April 6, 2006, the trial court granted summary judgment in favor of GE. R-15379. Plaintiff did not file a notice of appeal from that order, nor otherwise file a notice of appeal within thirty days from the date on which the April 6 order was entered. Instead, two years later, Plaintiff asked the trial court to enter judgment in favor of GE pursuant to O.C.G.A. § 9-11-54(b), which motion was granted by order and judgment entered on May 30, 2008. Supplemental Record, attached to Consent Motion of Plaintiff to Supplement Record, at Exhibit B ("Plaintiff's

Motion for Entry of Final Judgment having been read and considered....

Plaintiff's Motion is granted and judgment dismissing with prejudice Plaintiff's Complaint against [GE] is entered...."). Plaintiff filed his Notice of Appeal from the May 30, 2008 Order and Judgment.

It is well-established that a party may not appeal from an order or judgment which that party asks the Court to enter. Printup v. Smith, 212 Ga. 501, 502 (1956)("[h]aving voluntarily prayed for precisely the judgment granted him, it would be trifling with the law to allow him to secure a reversal of the judgment sought with full knowledge of all relevant facts."). Accordingly, the judgment dismissing Plaintiff's complaint against GE must be affirmed.

CONCLUSION

The claims of John Adamson, now deceased, originally were filed in Mississippi in 2002. After Plaintiff dismissed those claims and re-filed them in this state, Mr. Adamson was deposed extensively. Mr. Adamson also gave a video deposition for the preservation of evidence. Over twenty (20) witnesses were identified by Plaintiff and deposed. When none of these witnesses could testify that Mr. Adamson worked with, around or otherwise in proximity to any asbestos-containing product of GE, GE filed its motion for summary judgment.

In responding to summary judgment motions, Plaintiff filed well over 5,000 pages of exhibits, including several thousand pages of deposition transcripts, from this case and other litigation. Plaintiff also filed multiple briefs. The Court allowed Plaintiff two full days for hearing the defendants' summary judgment motions.

Yet through all of this, after two years of discovery in the trial court, Plaintiff still cannot cite to a single sentence of deposition testimony or a single exhibit which shows that Mr. Adamson worked in proximity to any product of the General Electric Company **that contained asbestos**. In other words, having had since 2002, Plaintiff still has not shown that there is any evidence that Mr. Adamson worked in proximity to any asbestos-containing product of GE. Accordingly, the trial court correctly granted summary judgment in favor of GE, and that grant of summary judgment must be affirmed.

Finally, Plaintiff seeks to appeal an order and judgment which Plaintiff asked the Court to enter. This, Plaintiff cannot do. Accordingly, and for all the foregoing reasons, the order and judgment of the trial court dismissing Plaintiff's Complaint, must be affirmed.

Respectfully submitted, this 2nd day of October, 2009.

JD Dalbey

John D. Dalbey
Georgia Bar No. 003150
Chilivis, Cochran, Larkins & Bever LLP
3127 Maple Drive, N.E.
Atlanta, Georgia 30305
(404) 233-4171

Attorney for Appellee/Defendant
General Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF DEFENDANT/APPELLEE GENERAL ELECTRIC COMPANY** upon opposing parties by mailing copies, with sufficient postage attached, to:

G. Patterson Keahey, Esq.
G. Patterson Keahey, P.C.
One Independence Plaza, Suite 612
Birmingham, AL 35209
Counsel for Plaintiff/Appellant

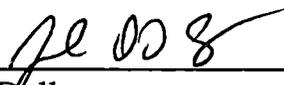
David A. Webster, Esq.
127 Peachtree Street, N.E.
415 Candler Building
Atlanta, GA 30303-1810
Counsel for Plaintiff/Appellant

Chris G. Conley, Esq.
Evert Weathersby Houff
200 Cleveland Road, #6
Bogart, GA 30622
Counsel for Defendant/Appellee CBS Corporation, a Delaware Corporation, f/k/a Viacom Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation

E. Elaine Shofner, Esq.
Hawkins & Parnell, LLP
4000 SunTrust Plaza
303 Peachtree Street, N.E.
Atlanta, GA 30308-3243
Counsel for Defendant/Appellee Union Carbide Corporation

Robert A. Barnaby, II, Esq.
Donahue, Nelson & Cohen, LLC
1050 Crown Pointe Parkway, Suite 1600
Atlanta, GA 30338
Counsel for Defendant/Appellee Garlock Sealing Technologies, LLC

This 2nd day of October, 2009.



John D. Dalbey
Georgia Bar No. 003150
Chilivis, Cochran, Larkins & Bever LLP
3127 Maple Drive, N.E.
Atlanta, Georgia 30305
(404) 233-4171

Attorney for Appellee/Defendant
General Electric Company