Circuit Court for Baltimore City
Case No. 24-X-04-00693

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1204

September Term, 2016

KATHRYN A. DAVENPORT, ET AL.

v.

MCIC, INC., ET AL.

Eyler, Deborah S.,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: November 20, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case is before us on appeal from an order of the Circuit Court for Baltimore City granting summary judgment in favor of two defendants, MCIC, Inc., (formerly the McCormick Asbestos Company) ("McCormick") and Wallace & Gale Asbestos Settlement Trust (formerly the Wallace & Gale Company) ("W&G") (collectively, "the Appellees"). The complaint giving rise to the instant appeal alleged that Joseph W. Davenport suffered from mesothelioma and asbestosis as a result of occupational exposure to asbestos-containing products associated with McCormick and W&G. The circuit court found that the plaintiffs had not produced evidence that was sufficient to create an issue of fact for the jury and granted the Appellees' summary judgment motion. This appeal raises the single issue of whether the circuit court erred in granting summary judgment to the Appellees. For the following reasons, we affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On June 28, 2004, Mr. Davenport filed an initial complaint against the Appellees. Mr. Davenport died on August 3, 2013. On October 18, 2013, the case was amended to include a survival action claim and a wrongful death claim on behalf of Mr. Davenport's surviving spouse, Kathryn A. Davenport, and surviving son, Joseph W. Davenport (collectively, "the Appellants"). The Appellees filed separate motions for summary judgment on December 22, 2014, arguing that the Appellants had not produced evidence specifically linking either W&G or McCormick's installers to Davenport at any particular time or place. We summarize the evidence presented in the circuit court in the light most favorable to the Appellants, the non-moving party below.

Joseph Davenport worked at Bethlehem Steel's Key Highway Shipyard ("KHS") from 1956-1958 and 1960-1972, as a laborer and outside machinist. After leaving KHS, he was employed at the Glen L. Martin Company and thereafter at Baltimore Gas & Electric Company, until his retirement in 2000 at the age of 62. As an outside machinist, Mr. Davenport worked as a mechanic on ships while they were being repaired. Mr. Davenport's coworker, John McCray, testified that he and Mr. Davenport worked together every day between 1963 and 1972. Mr. McCray initially testified that Mr. Davenport worked on all of the ships at KHS, but later testified that Mr. Davenport worked on all of the ships at some point between 1963 and 1972. Mr. McCray identified certain ships on which he specifically recalled Mr. Davenport working, and Mr. McCray further testified about insulation work on five of those ships. Mr. McCray acknowledged that he could not recall whether Mr. Davenport had worked on the S.S. *Philadelphia* or the conversion of the U.S.N.S. *Brewster*.

KHS was a large facility for ship repair work and "jumbo-sizing" of ships to larger types. KHS consisted of two non-contiguous shipyards. The upper shipyard was located near Federal Hill, and the lower shipyard was located near Fort McHenry. Each shipyard contained multiple piers and dry docks and could service multiple ships at a time. According to Mr. McCray, Mr. Davenport worked at the upper shipyard approximately ninety percent of the time and at the lower shipyard approximately ten percent of the time. Repair work ranged from minor repairs to substantial repairs and modifications lasting several months. During 1963-1972, KHS employed 150 outside machinists and 2500 workers.

The repair work performed at KHS frequently involved removing and replacing insulation, which often contained asbestos, on large commercial and military ships. Insulation work was done both by Bethlehem Steel employees and various outside contractors, including McCormick, W&G, Armstrong, Hopeman Brothers, and Lloyd E. Mitchell. Asbestos dust was generated during this process, and, as a result, various workers in the engine rooms were exposed to asbestos dust. Mr. McCray testified that Davenport primarily worked in the engine rooms of ships in close proximity to pipe insulation installers.

W&G and McCormick were two installer-suppliers of both asbestos and non-asbestos-containing insulation products. Both W&G and McCormick were based in Baltimore and both provided installation services at KHS. Harry Myers, a pipefitter at KHS, testified about W&G and McCormick's presence at KHS, explaining that both companies had trailers at KHS, used trucks to deliver their products to KHS, and generally had a permanent presence at KHS. Mr. Myers testified that contractor Porter Hayden was at KHS "a little bit less than" W&G and McCormick. Mr. Myers testified that he saw an Armstrong trailer "once in a while" but acknowledged that he did "not remember how often." Mr. Myers did not testify as to the actual relative volume of ships serviced by each insulation contractor. Electrician Ed Pipken testified that W&G did the majority of the insulation work at KHS and was "almost like a Bethlehem Steel worker." Additional witnesses testified to the presence of McCormick and W&G workers and trucks at KHS during the relevant time period.

The Appellants acknowledge that they did not present direct evidence of which specific insulation companies worked in close proximity to Mr. Davenport. Rather, the Appellants' argument before the circuit court and before this Court on appeal relies upon inferential reasoning. The Appellants argued that evidence relating to the number of ships in which Mr. Davenport worked in the engine room in close proximity to pipe insulators, combined with evidence the Appellants presented as to McCormick and W&G's presence at KHS, is sufficient to permit the case to survive the Appellees' motion for summary judgment.

The circuit court held two hearings on the Appellees' motion for summary judgment. The first hearing occurred on February 5, 2015. The Appellants conceded that they lacked evidence placing Mr. Davenport near the Appellees' asbestos-containing products, but emphasized that because Mr. Davenport had worked on all or most of the ships at KHS at some point in time in close proximity to pipe insulators, he must have worked nearby the Appellees' employees at some point. The court expressed concern with the Appellants' theory, commenting that whether the Appellants had established any frequency or proximity to the Appellees was "all very murky" and "shrouded in murk and haze without much specificity." The court did not rule upon the summary judgment motion at that time.[1]

[1] The Davenport case was, at that point, severed from its trial group.

The circuit court held a second summary judgment hearing on June 23, 2016. After hearing argument from the parties and considering the evidentiary record, the circuit court granted summary judgment to the Appellees. The court explained its ruling as follows:

> I am going to grant summary judgment [to both Appellees]. I think that the jurors would have to actually guess what the evidence would be. And they would have to reach conclusions that are simply not warranted by the evidence in the case.
>
> And in making this decision, I am drawing the inferences in the light most favorable to the plaintiff. I am accepting that plaintiff's evidence would be completely as they stated it would be.
>
> * * *
>
> I feel there is definitely no genuine dispute as to a material fact in this case. And I stress the word "material fact." There may be some other fact, but not material facts.
>
> I don't think there is enough specificity as to the time and place. I think that the fact that Mr. Davenport was said by Mr. McCray not to have worked on some of the ships, a clear inference from that is we don't know what ships he was working on. And the jurors would have to make a bizarre conclusion if they actually believed that Mr. Davenport worked on all the ships. He couldn't work on all the ships at the same time. He had to be on the ships one by one daily. He just had to be. So I think we can discount that. And the logical juror would have to discount that testimony and say that he didn't work on all the ships at the same time.
>
> I feel that there is just an insufficient link between asbestos product produced by [McCormick] and [W&G] and the exposure that there would have been, as plaintiff stated, in the engine room on some ship at some time. So I find that the jurors could not make any rational inferences that would be able to sustain the plaintiff's case.
>
> I find that there is not enough evidence of regularity, proximity, and frequency, based on the evidence that we have.

> And so for . . . those reasons, I am going to grant summary judgment as to both [W&G] and [McCormick].

This timely appeal followed.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides: "The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "The court is to consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 598 (2013). "Because a circuit court's decision turns on a question of law, not a dispute of fact, an appellate court is to review whether the circuit court was legally correct in awarding summary judgment without according any special deference to the circuit court's conclusions." *Id.* (citation omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Hamilton v. Kirson*, 439 Md. 501, 523 (2014) (citations and internal quotations marks omitted).

DISCUSSION

In an asbestos case, a plaintiff seeking recovery must show that his or her exposure to the asbestos-containing product was a substantial factor in the development of his injury.

See Eagle-Pichter Industries, Inc. v. Balbos, 326 Md. 179, 2010 (1992). Mr. Davenport, who worked in close proximity to insulation contractors but did not himself perform insulation work, is what the Court of Appeals has "termed a 'bystander,' in that he did not work directly with the asbestos products but was in the vicinity of where such products were used." *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 526 (1996). In order for Mr. Davenport to have a legally sufficient cause of action against W&G and McCormick, "he must prove that [the Appellees'] products were a substantial causative factor in his illness and ultimate death." *Id.* The Court of Appeals set forth the "frequency, regularity, proximity" test for substantial factor causation in *Balbos*, *supra*:

> Whether the exposure of any given bystander to any particular supplier's product will be legally sufficient to permit a finding of substantial-factor causation is fact specific to each case. The finding involves the interrelationship between the use of a defendant's product at the workplace and the activities of the plaintiff at the workplace. This requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff. Within that context, the factors to be evaluated include *the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff* to the use of that product.

326 Md. at 210-11 (citations omitted) (emphasis added). *Balbos* requires that the plaintiff prove (1) that the plaintiff was actually exposed to the defendant's asbestos-containing product, and (2) that the exposure was regular, proximate, and frequent. *Id. See also Reiter v. Pneumo Abex, LLC*, 417 Md. 57, 69 (2010) (commenting that a plaintiff is "required to present evidence of exposure to a '*specific product* [made or manufactured by the Respondents] on a regular basis, over some extended period of time, *in proximity to*

where the [decedents] actually worked.'") (emphasis and brackets in original) (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986)).

In the present case, the circuit court found that the Appellants had failed to present sufficient evidence to establish that Mr. Davenport was actually exposed to McCormick and/or W&G's asbestos-containing products. The Appellants aver that this was erroneous and that the circuit court failed to properly resolve inferences in its favor. The Appellants argue that because Mr. Davenport worked in close proximity to pipe insulation contractors in ship engine and boiler rooms on all or nearly all of the ships at KHS, an inference can be drawn that Mr. Davenport was exposed to the Appellees' products. The Appellants argue that the evidence presented demonstrates that Mr. Davenport "worked in proximity to virtually every pipe insulation job performed at the shipyard between 1963 and 1972" and that this evidence renders "it impossible for Mr. Davenport to not have been exposed to asbestos-containing products being installed by McCormick and [W&G] on scores of ships on a very frequent basis."

To be sure, when considering evidence in the context of a motion for summary judgment, a circuit court is required to draw all reasonable inferences in favor of the non-moving party. *Mathews*, *supra*, 435 Md. at 598 ("The court is to consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party."). Critically, however, all inferences drawn in favor of the non-moving party must be reasonable. *See Beatty v. Trailmaster*, 330 Md. 726, 739 (1993) ("We recognized in *Clea v. City of Baltimore*, 312 Md. 662, 678 (1988), that while a court must resolve all inferences in favor

of the party opposing summary judgment, "[t]hose inferences . . . must be *reasonable* ones.") (emphasis in original). "[M]ere general allegations or conclusory assertions which do not show facts in detail and with precision will not suffice to overcome a motion for summary judgment." *Educ. Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007) (citations omitted).

We agree with the circuit court that the evidence presented does not support the inferences posited by the Appellants. We recognize that Mr. McCray testified that Mr. Davenport worked on "all of" the ships at KHS, but, in our view, a literal interpretation of Mr. McCray's testimony is unreasonable. Mr. McCray's relevant deposition testimony occurred in the following context:

> QUESTION: During that timeframe from 1963 to 1972 how many different - how many of the ships that were in Key Highway Shipyard did you and Mr. Davenport work on?
>
> ANSWER: All of them.

Later on, Mr. McCray answered affirmatively when asked whether he had meant that he and Mr. Davenport had worked on all of the ships "at some point in time between '63 and '72." Counsel for the Appellants conceded before the circuit court that Mr. McCray meant "most of the ships" and did not mean that Mr. Davenport had, in fact, worked on every single ship at KHS. Furthermore, we observe that Mr. McCray testified that he did not recall whether Mr. Davenport had worked on the S.S. *Philadelphia* or the U.S.N.S. *Brewster*, thereby indicating that Mr. McCray could not have meant that he was certain that Mr. Davenport worked on every single ship at KHS. Indeed, Mr. McCray testified

that Mr. Davenport spent only ten percent of his time at the KHS lower shipyard, rendering it exceedingly unlikely that Mr. Davenport had, in fact, worked on every ship at KHS.

Mr. McCray did identify ten ships on which Mr. Davenport worked: the *Zula*, *Texaco Rhode Island*, *Brazil*, *Argentina*, *Brewster*, *Pioneer Mart*, *American Ace*, *Pennsylvania Sun*, *Falcon Countess*, and *Goethals*. Mr. McCray further testified about insulation work that was performed on the *Pioneer Mart*, *American Ace*, *Pennsylvania Sun*, *Falcon Countess*, and *Goethals.* Mr. McCray did not, however, testify as to whether McCormick or W&G performed any work on the identified ships at any time. Nor did the Appellants present any documentary evidence, such as invoices or order forms, linking W&G or McCormick to the specific ships identified by Mr. McCray.

Although the Appellants did not present evidence directly linking the Appellees to specific ships worked on by Mr. Davenport, they did present evidence as to the Appellees' presence at KHS. As we discussed *supra*, the Appellants presented testimony from various witnesses relating to McCormick and W&G's roles as insulation contractors at KHS. The Appellants assert that, even taking into consideration that other insulation contractors performed pipe covering work "on occasion, the most conservative estimate would still make it impossible for Mr. Davenport to not have been exposed to asbestos-containing products being installed by McCormick and [W&G] on scores of ships on a very frequent basis." As we shall explain, the evidence presented does not form the basis of the inference suggested by the Appellants.

The Appellants particularly point to the testimony of an electrician, Mr. Pipken, that establishes that McCormick and W&G performed the "majority" of the insulation work at

KHS. This is the only evidence presented by the Appellants as to an actual percentage of the insulation work performed by the Appellees. Mr. Pipken further testified, however, that W&G and Porter Hayden "worked the same" amount and that he did not know the actual frequency of their work. Mr. Pipken also testified that Porter Hayden handled big jobs at KHS, explaining that "whenever we had a big job, they were there."

The Appellants further emphasize that Mr. Myers, a pipefitter, testified that the Appellees were generally a permanent presence and were the "two major" insulation contractors at KHS. During the five to six years that Mr. Myers's employment at KHS overlapped with Mr. Davenports', however, Mr. Myers worked only on six ships, none of which were identified by Mr. McCray as ships on which Mr. Davenport worked. Furthermore, Mr. Myers testified that Porter Hayden was present at KHS only "a little bit less than" McCormick and W&G. Additional witnesses testified as to the presence of McCormick and W&G trailers, trucks, and workers at KHS.

None of the evidence presented by the Appellants, with the exception of Mr. Pipken's testimony, addresses the actual percentage of work performed by the Appellees at KHS. Given the inconsistencies in Mr. Pipken's testimony, it does not fill the evidentiary gaps. Moreover, even if we were to interpret the evidence presented by the Appellants as establishing that the Appellees, in fact, performed a majority of the insulation work at KHS during the relevant time frame, this would not support the inference that Mr. Davenport was exposed to the Appellees' products or employees. The Appellants put on no evidence addressing whether, if McCormick or W&G were performing work on the same ship as Mr. Davenport, they were working in the same location or at the same time.

Based upon the evidence presented, there is simply no way, absent sheer speculation, to reach the inference suggested by the Appellants.

In past cases, the Court of Appeals has similarly held that summary judgment was appropriately granted when the plaintiff was unable to link a plaintiff to a particular asbestos-containing product at a specific time and place. In *Balbos*, *supra*, the Court of Appeals addressed a claim brought by Sutton Knuckles, an iron worker-erector who worked at KHS for over forty years. 326 Md. at 187. Knuckles worked on the exteriors of ships, on the keel, in engine and boiler rooms, and in the shaft housing. *Id*. at 207. The Court of Appeals held that there was insufficient evidence linking Knuckles to Porter Hayden's products. *Id.* at 213-14.

The evidence presented in *Balbos* was similar to that produced in the instant case. In *Balbos*, witnesses identified multiple different contractors that performed insulation work at KHS, including Porter Hayden. *Id.* at 216. The Court observed that "the residuum of proof is that Bethlehem, between 1964 and 1968, 'sometimes' used outside installers at Key Highway, one of whom was Porter, and that Knuckles was employed at Key Highway during the same period. This does not establish that Knuckles was frequently exposed in proximity to Porter-supplied asbestos products which were regularly used." *Id.* at 216. The Court further emphasized that "the proof here does not even place Knuckles on the same ship, much less during the same repair, where Porter installers were applying Porter-supplied products." *Id*. at 217. In the present case, the Appellants have similarly failed to produce sufficient evidence to establish that Mr. Davenport was frequently exposed in proximity to W&G or McCormick-supplied asbestos products on any regular basis.

The Court of Appeals reached a similar conclusion in *Reiter*, *supra*, holding that the plaintiff had failed to generate a jury issue when plaintiffs worked in a facility approximately "the size of an airplane hanger" but merely produced evidence that asbestos products had generally been used in the facility. 417 Md. at 70. The Court explained that the plaintiffs were required to produce evidence of asbestos use "in proximity to where the decedents actually worked." *Id.* at 69. The entire KHS facility, with two separate shipyards, was far larger than the facility at issue in *Reiter*, and, similarly, specific evidence relating to *when* the Appellees' installers used asbestos-containing products on *specific ships* is required. General evidence that McCormick and W&G performed insulation work at KHS is, as in *Reiter*, insufficient to generate a jury question in this case.

We emphasize that, by holding that the Appellants produced insufficient evidence to establish that Mr. Davenport was exposed to asbestos-containing products installed by the Appellees' employees, we do not suggest that circumstantial evidence cannot, in certain circumstances, be sufficient to generate a jury question on the issues of product/installer identification and substantial factor causation. Indeed, the Court of Appeals has explained that circumstantial evidence "is not inherently insufficient" to prove causation; rather, "all that is necessary is that it amount to a reasonable likelihood or probability rather than a possibility." *Peterson v. Underwood*, 258 Md. 9, 17 (1970). *See also West v. Rochkind*, 212 Md. App. 164, 170-71 (2013) ("There is no dispute that a negligence case may be proven using only circumstantial evidence, so long as it creates a reasonable likelihood or probability rather than a possibility supporting a rational inference of causation, and is not wholly speculative.").

In this case, for the reasons we have explained *supra*, the evidence was insufficient to support a rational inference of causation. We do not presume to set forth the precise quantum of circumstantial evidence which would support such a rational inference, and we observe that no clear test can be applied to determine what amount of circumstantial evidence is sufficient to prove bystander exposure to asbestos. It is necessarily a fact specific inquiry in each case. *Balbos*, *supra*, 326 Md. at 210. In this case, however, we agree with the circuit court that no reasonable fact-finder could have found in favor of the Appellants without resorting to guesswork and speculation. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.