No. 32654 – *John Edward Goodwin v. Bayer Corporation, et al.*

Starcher, J., dissenting:

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In this case, the majority opinion rested its laurels on its conclusion that the material facts below were not in general dispute. But the mere premise that the facts are not in dispute in a case is insufficient grounds for a circuit court to grant summary judgment. Because the inferences that can be drawn from those facts are favorable to the appellant's case, summary judgment should have been denied by the circuit court.

It is black-letter law that when a party moves for summary judgment, the circuit court must view any permissible inference from the evidence in the light most favorable to the party opposing the motion. The summary judgment motion should be denied even where there is no dispute as to the evidentiary facts in the case, but only as to the conclusions to be drawn therefrom. As we stated in *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (W.Va. 1995):

> The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be

> denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

(Citations and quotations omitted.)

In occupational lung disease cases like this one, the plaintiff files a lawsuit because of a specific lung injury that is sometimes now manifesting itself in shortness of breath. Defense lawyers inevitably ask the plaintiff a series of vague, nebulous questions along the lines of "do you have a breathing problem?" The next serious of questions follow the path of "did you think those breathing problems might be caused by the defendant's product?" The plaintiff inevitably and eagerly responds "Yes!" to both series of questions.

The problem with the defense lawyer's questions is that they never specifically tie the plaintiff's "breathing problems" to the specific lung injury, because the plaintiff – when prodded – can usually list a dozen reasons that he thought, wondered or dreamed about in the decades leading up to his lawsuit that he speculated might be the cause of his "breathing problems." Any defense lawyer worth his/her salt can easily get the plaintiff to admit to "breathing problems" like coughing, choking, or sneezing upon inhaling the defendant's product. But you never see the defense lawyer get the plaintiff to also admit they coughed, choked or sneezed when they worked with flour while baking cookies, breathed cold winter air, or walked in a field of ragweed. The plaintiff who will eagerly say he was out of breath after walking through a cloud of the defendant's product will, if asked, sheepishly admit he is just as out of breath walking up a flight of stairs. The plaintiff who "thought" his problems were caused by the defendant's product might also go so far as to say

that he's been thinking his shortness of breath is a result of old age, weight, some non-occupational disease like asthma, or smoking.

In other words, the defense lawyer's questions rarely reveal a knowledgeable, intelligent connection between the plaintiff's actual symptoms of an occupational disease (like shortness of breath) and the actual occupational injury. The defense lawyer is usually speculating about the existence and cause of the plaintiff's symptoms, and the plaintiff is speculating too. Nine times out of ten, the plaintiff is clueless about the existence of a lung injury until a doctor makes a formal diagnosis. Even after a formal diagnosis of a lung injury, the plaintiff is usually guessing that every ache and pain is a symptom connected to the injury. Moreover, the defense lawyer is just as clueless about the plaintiff's symptoms, and is also guessing in trying to make a connection between the plaintiff's vague knowledge of his "breathing problems" and the plaintiff's affirmative, intelligent knowledge of his lung injury.

In this case, the appellant admitted to having undefined "breathing problems" when he breathed in paint fumes. The circuit court could fairly infer, then, that the appellant reasonably knew he had some lung injury that was caused by inhaling the appellees' paint products. However, as the non-moving party, the circuit court should have focused on inferences favorable to the appellant, not the appellees. The circuit court should, therefore, have fairly inferred that the appellant – like any person – had no idea that he had a lung injury, but instead would cough, choke, sneeze, have shortness of breath or whatever when he breathed in paint fumes and, to avoid those problems, wore a respirator. The appellant's

doctor never connected the appellant's progressive problems to the appellees' paint products, and the appellant was speculating about any connection. It was not until November 1999, less than two years before the appellant's lawsuit was filed, that a doctor actually informed the appellant he had a lung injury that was specifically tied to his occupational exposure to the appellees' paint products. But even that formal diagnosis never connected the appellant's "breathing problems" to the lung injury.

Simply put, I believe inferences can be drawn from the record that the appellant was clueless about the existence of his lung injury until November 1999, and clueless that his "breathing problems" were caused by the appellees. I would have permitted a jury to assess the appellant's story and determine when the appellant first reasonably knew or should have known of the existence of a cause of action against the appellees.

I therefore respectfully dissent.

I am authorized to state that Chief Justice Albright joins in this opinion.