

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1267-05T3

FRANK P. GRAVINA, JR. and  
ERICA N. GRAVINA,

Plaintiffs-Appellants,

v.

PPG INDUSTRIES, INC., PERGAMENT  
DISTRIBUTORS, INC. and THE NEW  
JERSEY CONFERENCE OF SEVENTH-DAY  
ADVENTISTS,

Defendants,

and

HARRIS PINE MILLS CORPORATION and  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,

Defendants-Respondents.

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Argued May 22, 2006 - Decided July 20, 2006

Before Judges Fall, C.S. Fisher and Newman.

On appeal from the Superior Court of New  
Jersey, Law Division, Mercer County, Docket  
No. MER-L-1744-03.

Steven H. Wodka argued the cause for  
appellants.

Jessica Ruch argued the cause for  
respondents (Thomas Dempster, III, attorney;  
William E. Haddix, Jr., on the brief).

PER CURIAM

Plaintiff, Frank P. Gravina, Jr., claims he contracted bladder cancer at forty-two years of age as a result of his exposure to toxic substances when working as a teenager in a factory that stained redwood furniture. His complaint against the now-defunct employer and the employer's liability insurer was dismissed by way of summary judgment. We reverse.

I

On July 2, 2003, plaintiff filed a four-count complaint, naming as defendants: PPG Industries, Inc. (PPG), Pergament Distributors, Inc., the New Jersey Conference of Seventh-Day Adventists (for discovery purposes only), and certain unidentified manufacturers and distributors of carcinogenic dyes, pigments, or coloring agents, or of stains or paints containing carcinogenic dyes, pigments, or coloring agents. Plaintiff later amended his complaint to include claims against Harris Pine Mills Corporation (Harris Pine Mills) for failing to provide a safe workplace. Upon learning that Harris Pine Mills was "defunct and no longer in operation," plaintiff again amended his complaint to add claims against National Union Fire Insurance Co. of Pittsburgh (National Union), which had provided liability insurance coverage for Harris Pine Mills.

Plaintiff's wife also asserted a per quod claim based upon her loss of plaintiff's services.

After summary judgment was entered in favor of PPG on August 5, 2005, only the claims against Harris Pine Mills and National Union remained. On cross-motions for summary judgment, the judge granted summary judgment, on October 7, 2005, in favor of Harris Pine Mills and National Union, dismissing the complaint and all cross-claims. Plaintiff and his wife appealed the October 7, 2005 summary judgment.

## II

The familiar standard applicable to the parties' cross-motions for summary judgment is whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The opponent of a summary judgment motion is entitled to all reasonable and legitimate inferences that the facts, when viewed in a light favorable to the opponent, may generate. Id. at 536. On appeal, we apply the same standard. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). In applying that

standard, we adopt the following factual description of the claims, and the inferences to which plaintiff was entitled.

Plaintiff was born on July 6, 1960, and attended high school at Garden State Academy in Tranquility, New Jersey. During eleventh and twelfth grades, from August 1976 to May 28, 1978, he worked four hours per day, five days per week, in a work-study program at Harris Pine Mills. His job assignment was to dip pieces of redwood furniture into a large vat of brownish-red stain, and then stack the pieces of wood to dry. Plaintiff claimed there was no adequate ventilation and Harris Pine Mills did not provide respirators for its workers, and, as a result, plaintiff was caused to inhale fumes and vapors. He also asserted that neither gloves nor protective clothing was provided, causing the stain to come into contact with plaintiff's skin, and that nobody at Harris Pine Mills ever advised plaintiff that the stain could cause cancer or that precautions should be taken to avoid or limit exposure to the stain.

Plaintiff alleges that he "handled, used, worked with, or was otherwise exposed to fumes, vapor and liquid of carcinogenic dyes, pigments, or coloring agents, or stains or paints containing carcinogenic dyes, pigments or coloring agents, which were manufactured and marketed." In a typical shift, stain

would spill on his arms and hands, splash on his clothes, hair, scalp, and shoes, and stain his socks and feet. Plaintiff asserted that he suffered from headaches as a result of working with certain stains.

In particular, plaintiff stated in his deposition that both water-based and oil-based stains were used at Harris Pine Mills. Defendants claim that only water-based stains were used, but, again, the proper application of the summary judgment standard required that the trial judge assume the truth of plaintiff's assertions that he worked with oil-based stains, containing benzidine, without proper ventilation, without proper clothing and protection, and without adequate instruction as to the hazards posed.

Plaintiff's expert, Dr. Steven Markowitz, M.D., stated in his February 18, 2005 report that "[a]lthough the particular stain products to which [plaintiff] was exposed have not been identified, it is probable that wood stains were the substantial contributing factor in the development of [his] cancer." Dr. Markowitz reviewed occupational risk factors for bladder cancer and discussed studies which indicated that woodworkers and painters had high rates of bladder cancer.

These studies, to which Dr. Markowitz referred, showed that benzidine-based dyes were used on wood products, and that some

wood stains contained benzidine, which, according to Dr. Markowitz, is an established human bladder carcinogen. Dr. Markowitz wrote in his report "that established human bladder carcinogens were known to be used to stain wood during the relevant era when [plaintiff] worked." In addition, Dr. Markowitz wrote that "[t]he plausibility [of plaintiff's claim] is also enhanced" by plaintiff's exposure "to wood stains in 1976-1978, leading to routine absorption into his body for 18 months." Dr. Markowitz opined that other potential causes of bladder cancer should be ruled out, so "[t]he only bladder cancer risk factor that is extant in this case was [plaintiff's] occupational exposures to wood stains at Harris Pine Mills."

Dr. Jonathan Briskin, M.D., defendants' expert, stated in his deposition that he agreed "on an epidemiologic ground" that plaintiff's work as a stainer at Harris Pine Mills was a risk factor for his development of bladder cancer.

### III

Defendants claimed they were entitled to summary judgment because plaintiff could not identify a manufacturer of the stain to which he was exposed between August 1976 and May 1978, and because he could not identify the stain's components. Defendants also argued that Dr. Markowitz's report constituted a net opinion and was highly speculative because, without

identifying a known carcinogen that allegedly caused the cancer, plaintiff could not establish exposure or negligence in regard to his unsafe workplace claims.

In considering these contentions, the trial judge mistakenly viewed plaintiff's claim as consisting of the following three legal theories: "(1) products liability toxic tort, (2) failure to warn the plaintiff that he was working with toxic substances, and (3) . . . defendant Harris Pine Mills breached its duty under the statute prohibiting employment of minors in handling dangerous dyes and exposure to injurious quantities of toxic fumes." Because plaintiff never asserted products liability claims against Harris Pine Mills, the trial judge mistakenly examined the sufficiency of plaintiff's opposition to summary judgment through that lens and not through the proper lens -- namely, whether plaintiff would be able to prove that his bladder cancer arose out of and in the course of his employment, and as the natural and proximate cause of the employer's negligent failure to maintain a safe workplace.

Since plaintiff was a minor at the time of his employment with Harris Pine Mills, his common law claim for damages is not barred by the availability of a workers' compensation remedy. The workers' compensation laws permit plaintiff to seek common law damages based upon injuries or illnesses resulting from an

unsafe workplace. N.J.S.A. 34:15-10.<sup>1</sup> The intent of N.J.S.A. 34:15-10 was to place "injured minors in a more favorable position than other employees." Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co., 172 N.J. Super. 10, 17 (App. Div. 1980). In this regard, plaintiff was required to establish that "the work was at least a contributing cause of the injury and that the risk of the occurrence was reasonably incident to the employment." Coleman v. Cycle Transformer Corp., 105 N.J. 285, 290 (1986). In considering whether plaintiff will be able to establish these elements at trial, it should be further observed that the burden of persuasion is alleviated by the fact that plaintiff's exposure to alleged hazards occurred while he was a minor:

The rule is well settled that it is the duty of an employer to provide his employee with a safe place to work and when a minor is involved, it is the duty of an employer to explain to him fully the hazards and dangers connected with the business and to instruct him to avoid them.

[Ludwig v. Kirby, 13 N.J. Super. 116, 123-24 (App. Div. 1951).]

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<sup>1</sup>N.J.S.A. 34:15-10 states that "[n]othing [contained in this chapter] shall deprive an infant under the age of 18 years of the right or rights now existing to recover damages in a common law or other appropriate action or proceeding for injuries received by reason of the negligence of his or her master."



We are satisfied that plaintiff's factual presentation, when applied to these standards and not those that relate to product liability claims -- which the trial judge mistakenly applied -- warranted a denial of defendants' motion for summary judgment.

The trial judge concluded that because plaintiff could not identify the particular stains to which he was exposed he could not sustain his burden of proving an unsafe workplace claim. We disagree. Plaintiff's claim should have survived summary judgment because he asserted that he was exposed at the workplace to oil-based stains (known for containing benzidine) in an unsafe manner and that this exposure proximately caused his illness. Admittedly, aspects of this claim are based upon inferences that may be drawn by a factfinder from the evidence provided. That, however, does not warrant the entry of summary judgment against him. Brill, supra, 142 N.J. at 536.

Plaintiff asserted, in opposition to summary judgment, that he worked with oil-based stains while employed by Harris Pine Mills. In opposing defendants' motion, and in seeking his own summary judgment, plaintiff asserted that "benzidine-based dyes were used in wood stains," and that "established human bladder carcinogens were known to be used to stain wood during the relevant era" when plaintiff worked for Harris Pine Mills. He also asserted that oil-based stains, some of which may contain

benzidine, were used at the workplace and that Harris Pine Mills violated various standards promulgated by the Occupational Safety and Health Administration in its handling of these products, in its instructions to employees regarding these products, and in the absence of other safety precautions. Defendants did not respond to these factual statements that were contained in plaintiff's statement of undisputed material facts, thus requiring the trial judge to accept these factual assertions as true in considering defendants' motion for summary judgment. See R. 4:46-2(b); Housel v. Theodoridis, 314 N.J. Super. 597, 602 (App. Div. 1998).

In addition, the trial judge was required to accept the truth of Dr. Markowitz's opinion for purposes of summary judgment. Dr. Markowitz asserted that the following factors -- derived, in part, from a differential diagnosis -- demonstrated that plaintiff's exposure to carcinogens likely occurred while he was employed at Harris Pine Mills and brought about his bladder cancer:

- bladder cancer in a forty-two year old man is rare;

- while employed at Harris Pine Mills as a teenager he was subjected to "intense and unprotected" exposure to wood stains;

- "established medical literature" identifies woodworkers and painters, the two occupational groups known to use wood

stains, as having a consistent excess incidence of bladder cancer;

-- toxicological literature identifies benzidine as an established human bladder carcinogen and as a component of wood stains, either directly or through benzidine-based dyes, during the era that plaintiff worked at Harris Pine Mills;

-- there was a lack of any other known risk factors for plaintiff's development of bladder cancer.

The trial judge was obligated to accept the truth of these assertions in considering the propriety of summary judgment. Although defendants argued that Dr. Markowitz presented only a net opinion, we do not understand the trial judge to have based his dismissal of plaintiff's complaint on this argument. Moreover, we reject the contention that Dr. Markowitz would not be permitted to offer these opinions at trial because his report was speculative or did not contain a sufficient foundation. To the extent defendants' argument is based upon the criticism of Dr. Markowitz's report as including a differential diagnosis, we find that this approach alone is by no means a basis for ultimately excluding his testimony at trial. See Creanqa v. Jardal, 185 N.J. 345, 355-58 (2005). Moreover, to the extent it could be argued that any aspect of Dr. Markowitz's opinion might be viewed as constituting a net opinion or otherwise arguably inadequate, the sufficiency of his opinions should have at least

been explored at a N.J.R.E. 104 hearing. Accordingly, barring a deeper analysis of Dr. Markowitz's opinions, which has not yet occurred, the contents of his report should have been given weight in determining the propriety of summary judgment.

In considering the factual evidence of exposure to benzidene-based products provided by plaintiff's sworn statements, together with the link of that exposure to plaintiff's bladder cancer, which was provided by the opinion of Dr. Markowitz, the trial judge was obligated to deny defendants' motion for summary judgment.

The summary judgment in favor of defendants Harris Pine Mills and National Union is reversed and the matter remanded for further proceedings.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION