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**IN THE
COURT OF APPEALS OF INDIANA**

TECHNISAND, INC.,)
)
Appellant-Defendant,)
)
vs.) No. 30A01-0608-CV-334
)
JESSIE MELTON, Personal Representative)
of the Estate of PATTY MELTON, Deceased,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-0310-CT-687

JULY 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Technisand, Inc. (“Technisand”) brings this interlocutory appeal from the trial court’s order denying its motion for summary judgment in this cause of action brought by Plaintiff-Appellee Jessie Melton (“Melton”), personal representative of the Estate of Patty Melton.

We affirm.

ISSUE

The issue presented by this appeal is: whether the trial court erred by denying Technisand’s motion for summary judgment alleging that Melton’s claim against Technisand was barred by the running of the statute of limitations for a wrongful death action.

FACTS AND PROCEDURAL HISTORY

Patty Melton (“Patty”) worked for Keihin IPT Manufacturing, Inc. (“KIPT”) from August of 1991 until December of 2001. Patty worked as a production associate in the GDC Die Cast Area. In December 2001, Patty was diagnosed with chronic myeloid leukemia (“CML”) from which she died on July 25, 2002. Patty’s exposure to chemicals in the workplace was then investigated. On July 11, 2003, KIPT provided Melton’s counsel with a Material Safety Data Sheet (“MSDS”) for resin-coated sand supplied by Technisand, as well as for chemicals provided by other corporations. The cover letter sent to Melton’s counsel stated that the chemicals, including the resin-coated sand product, might have been used in KIPT’s die-cast area where Patty might have been exposed to them. The MSDS for resin-coated sand notes that during normal use the

material will give off fumes of formaldehyde, among other things, and that formaldehyde is listed as a carcinogen.

Melton, Patty's husband, filed a complaint against KIPT, and Arkansas Aluminum Alloys, Inc. ("AAA") on October 28, 2003. In that complaint, Melton alleged in relevant part that Patty died of severe and fatal physical injuries she suffered as a result of workplace exposure to unnamed chemicals while employed by KIPT. On April 7, 2004, Melton filed with the trial court a motion for leave to amend his complaint to add Betco Corporation ("Betco") and CRC Industries, Inc., ("CRC") as defendants. The trial court granted Melton's motion on April 8, 2004.

On November 29, 2004, Dr. James K. Hwang, one of Patty's physicians, wrote a letter stating that formaldehyde exposure may have placed her at a greater risk for leukemia. Melton's counsel received a copy of that letter by fax on January 12, 2005.

On December 20, 2004, Betco filed a motion for summary judgment. On March 15, 2005, Melton filed a response to the motion stating no objection to dismissing Betco from the cause of action. The trial court granted Betco's motion for summary judgment on June 30, 2005.

On February 16, 2005, Melton filed with the trial court a motion for leave to file a second amended complaint, adding Technisand as a defendant. The trial court granted the motion on March 8, 2005. Melton amended his complaint to add the allegation that exposure to chemicals manufactured, produced and sold by Technisand caused or contributed to Patty's injuries and death.

On May 3, 2005, Technisand filed an answer raising a statute of limitations defense. On March 1, 2006, Technisand filed a motion for summary judgment alleging that Melton's claim against it was barred by the Indiana Wrongful Death Act, Ind. Code §34-23-1-1 *et seq.* The Wrongful Death Act requires that all claims for wrongful death be brought within two years of the decedent's death. On April 28, 2006, Melton filed a brief and designated evidence in opposition to Technisand's motion. Melton argued that the claim was properly brought pursuant to the Products Liability Act. By stipulation of counsel, no hearing was held on the motion. The trial court denied Technisand's motion for summary judgment on June 2, 2006.

Technisand brings this interlocutory appeal from that order.

DISCUSSION AND DECISION

STANDARD OF REVIEW

When reviewing a grant of summary judgment the well-settled standard of review is the same as it is for the trial court: whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. *Rood v. Mobile Lithotripter of Indiana, Ltd.*, 844 N.E.2d 502, 506 (Ind. Ct. App. 2006). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Id.* The review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

Technisand argued in its motion that Melton's claim against Technisand was barred by the provision of the Indiana Wrongful Death Act requiring that a wrongful death claim be brought within two years of the decedent's death. Melton countered that

the claim against Technisand was not barred because it was brought pursuant to the Indiana Product Liability Act, Ind. Code §34-20-1-1 *et seq.* The trial judge did not state his reasons for denying Technisand's motion.

WHICH STATUTE OF LIMITATION APPLIES TO TECHNISAND?

Indiana's Wrongful Death Act provides in relevant part as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two (2) years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission.

Ind. Code §34-23-1-1. Indiana's Product Liability Act provides in relevant part as follows:

a product liability action must be commenced:
within two (2) years after the cause of action accrues.

Ind. Code §34-20-3-1. By case law, however, courts on review have adopted a discovery rule for the accrual of claims arising out of injuries allegedly caused by exposure to a foreign substance. *See Degussa Corp. v. Mullens*, 744 N.E.2d 407, 410 (Ind. 2001). The two-year statute of limitations begins to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another. *Id.* Once a plaintiff's doctor expressly informs the plaintiff

that there is a reasonable possibility, if not a probability that an injury was caused by an act or product, then the statute of limitations begins to run. *Id.* at 411.

Technisand acknowledges that this is an action for both products liability and wrongful death. Technisand advanced below and advances here on appeal that only one statute of limitation should control, and that the wrongful death act applies.

Technisand directs our attention to *Holmes v. AcandS, Inc.*, 709 N.E.2d 36 (Ind. Ct. App. 1999) *on rehearing*, 711 N.E.2d 1289 (Ind. Ct. App. 1999), a case involving both a products liability and wrongful death claim. However, that case arose from exposure to asbestos. Cases involving injury and death from exposure to asbestos are governed by a separate statute, Ind. Code §34-20-3-2. The caselaw that has developed as a result of the provisions of that statute is unique to asbestos-related cases and we decline to follow that caselaw here.

Melton argued below and argues here on appeal that the cause of action as it relates to wrongful death claims was timely filed against those defendants. Melton argues, and the trial court apparently agreed, that his claim against Technisand is related to products liability and not wrongful death. Melton's counsel became aware of the physician's opinion that formaldehyde exposure placed Patty at a greater risk for CML on January 12, 2005. Melton was granted leave from the court to file his second amended complaint adding Technisand as a defendant on March 8, 2005. Melton's claim against Technisand was filed within two years of the accrual of the products liability claim.

If the moving party asserts the statute of limitations as an affirmative defense and establishes that the action was commenced outside the statutory period, the non-movant

has the burden of establishing an issue of fact material to a theory that overcomes the affirmative defense. *KPMG Peat Marwick, LLP v. Carmel Fin. Corp., Inc.*, 784 N.E.2d 1057, 1059-1060 (Ind. Ct. App. 2003). Here, Technisand established that it was added as a defendant after the statute of limitations had run pursuant to the Wrongful Death Act. However, Melton established, and Technisand agreed, that the claim also involves products liability. Technisand was added timely pursuant to the Products Liability Act. Therefore, the trial court properly denied Technisand's motion for summary judgment.

CONCLUSION

The trial court did not err by denying Technisand's motion for summary judgment. While the statute of limitations had run with respect to a wrongful death claim against Technisand, the claim against it was timely filed with respect to the Products Liability Act.

VAIDIK, J., and CRONE, J., concur.