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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL DABALDO, JR., and MARLENE DABALDO,	:	No. 254, 2013
Plaintiffs Below/ Appellants,	:	On Appeal from the Superior Court of the State of Delaware in and for New Castle County C.A. No. N09C-05-048 ASB
v.	:	
URS ENERGY & CONSTRUCTION, FKA WASHINGTON GROUP INTERNATIONAL, AS SUCCESSOR TO RAYTHEON CONSTRUCTORS, FKA CATALYTIC, INC., and CRANE CO.,	:	
Defendants Below/Appellees.	:	

APPELLEES' ANSWERING BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

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NATURE AND STAGE OF THE PROCEEDINGS

On May 5, 2009, Plaintiffs Paul DaBaldo Jr. and Marlene DaBaldo (collectively "the DaBaldos") filed a complaint against 19 defendants, including Appellees URS Energy & Construction f/k/a Washington Group International, as successor to Raytheon Constructors f/k/a Catalytic, Inc. and Crane Co. (collectively "Defendants"). The DaBaldos alleged that Mr. DaBaldo had developed "pulmonary asbestosis; asbestosis" as a result of exposure to asbestos and sought recovery for those alleged injuries.[1]

After the completion of fact discovery, Defendants moved for summary judgment, arguing that the DaBaldos' claims were barred under 10 DEL. C. § 8119, the two-year statute of limitations applicable to personal injury claims.

On April 9, 2012, the Superior Court heard oral argument on the Defendants' motions for summary judgment and granted them, ruling that the DaBaldos' claims were time-barred. On April 16, 2012, the DaBaldos filed a motion for reargument in the Superior Court, which finally denied that motion on April 27, 2012. This appeal followed. This is Defendants' Answering Brief.

[1] Complaint, Paul DaBaldo, Jr. and Marlene DaBaldo, v. A.W. Chesterton Co., et al., C.A. No. N09C-05-048 ASB (Del. Super. May 5, 2009) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A037-A063.

SUMMARY OF THE ARGUMENT

1. Denied. The DaBaldos never made the "disease confusion" argument before the trial court; thus, this argument is being raised for the first time on appeal in violation of Supreme Court Rules 8 and 14.

2. Denied. The Trial Court applied well-settled Delaware law to the undisputed facts in this case when it correctly held that Mr. DaBaldo was on inquiry notice as to whether he had asbestosis as early as 1992 and no later than 1999.

STATEMENT OF THE FACTS

Paul DaBaldo worked at the Getty Tidewater Oil Refinery in Delaware City, Delaware, from 1967 until his retirement in 2001. During this time, Mr. DaBaldo was allegedly exposed to asbestos. As the excerpted material from Mr. DaBaldo's medical records set forth below demonstrates, as early as 1992, Mr. DaBaldo's physicians diagnosed him with an asbestos-related injury (calcified pleural plaques). By 1999, Mr. DaBaldo's physicians found his condition to be consistent with a history of asbestosis. It was not until 2009, however, that Plaintiffs filed this lawsuit on account of Mr. DaBaldo's alleged asbestos-related lung injuries.

In 1992, Mr. DaBaldo was examined by Dr. Mansoory, a radiologist, who ordered a chest x-ray.[2] On August 19, 1992, Dr. Mansoory wrote to Dr. Nottingham, Mr. DaBaldo's primary care physician, noting that the x-ray revealed "findings of bilateral calcified plaques suspicious for asbestosis exposure. No definite evidence of active lung disease."[3]

On October 16, 1992, Dr. Myung Lee, another radiologist, noted in a report that Mr. DaBaldo's x-rays indicated "[m]ultiple short segments of calcified or

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[2] Report from Dr. Majid Mansoory, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A073.

[3] Report from Dr. Majid Mansoory, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Aug. 19, 1992) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A073.

noncalcified pleural plaques in the anterior and posterior pleural surfaces of both hemithoraces. These are consistent with mild degree of asbestos related pleural disease."[4]

On October 22, 1992, Dr. Nottingham wrote to Mr. DaBaldo, stating: "[t]here seems to be little doubt that there is a mild degree of asbestos related pleural disease which had been seen originally on the plain chest x-ray."[5]

On July 29, 1999, Dr. Philip Chao, a neuroradiologist, in writing to Dr. Wesley Young, Mr. DaBaldo's primary care physician at that time, noted "HISTORY: Known history of asbestosis."[6] Dr. Chao further noted that his "[f]indings are compatible with given history of asbestosis."

In 2007, Dr. Orn Eliasson, the DaBaldos' medical causation expert, noted that "a recent chest x-ray showed asbestosis."[7] Under the "Diagnosis" section of his report, Dr. Eliasson writes: "Diagnosis Asbestosis." None of the previously-identified physicians were deposed as part of fact discovery.

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[4] Report from Dr. Myung Soo Lee, Papastavros' Associates Medical Imaging, to Dr. William Nottingham, Internal Medicine (Oct. 19, 1992) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A084.

[5] Letter from Dr. William R. Nottingham, Internal Medicine, to Paul DaBaldo, Plaintiff (Oct. 22, 1992) (A086) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A085.

[6] Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A115.

[7] Report from Dr. Orn Eliasson to Robert Denitzio (July 5, 2007) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A065-A067.

Consistent with the medical records, Mr. DaBaldo testified that his doctors diagnosed him with an asbestos-related disease in 1992:

> Q. [] Were you given the results of your chest x-ray back in 1992?
> A. I was told -- it was reviewed with me. And I was told that I had pleural plaque, asbestos-related, I believe that's how it was.
> Q. Who told you that?
> A. That came from the report, whoever did the reading, through Dr. Nottingham to me.
> Q. So Dr. Nottingham discussed that with you?
> A. Yeah.[8]

In addition to the chest x-rays performed on Mr. DaBaldo, in 1992, Mr. DaBaldo, at Dr. Nottingham's direction, underwent a pulmonary function test and a CAT scan, the results of which were relayed to Mr. DaBaldo:

> Q. You also took a PFT, a pulmonary function test?
> A. Yes; at [Dr. Nottingham's] direction.
> Q. Did you do that in 1992 as well?
> A. I believe so.
> Q. And were you told the results of your pulmonary function test?
> A. I guess, kind of. I did a number of tests that he performed. And I think the outcome was things, things were okay.
> Q. And then that CAT scan or MRI, whatever the test was, did you do one of those in 1992?
> A. Yeah. That was priority the PFT.
> Q. And did anyone discuss with you the results of the CAT scan?
> A. Yes; to the extent that I had pleural plaque that was thought to be asbestos-related.
> Q. And who told you that?
> A. Dr. Nottingham.
> Q. Were you ever told you had interstitial fibrosis related to asbestos?
> A. I don't, I don't specially recall that term.

[8] Deposition of Plaintiff Paul DaBaldo, Jr., 213:8-17, July 27, 2011, included in the accompanying appendix at R003.

Q. In 1992 were you told that you had an asbestos-related lung disease?
A. Well, I, I always thought it was a pleural, referenced as a pleural disease.
Q. A pleural disease?
A. Yes.
Q. And that was by Dr. Nottingham?
A. Initially, yes.[9]

Despite knowing that he suffered from an asbestos-related disease in the early 1990s, Mr. DaBaldo waited until 2007 to contact an attorney to pursue this lawsuit.[10]

[9] Deposition of Plaintiff Paul DaBaldo, Jr., 213:18-214:24, July 27, 2011, included in the accompanying appendix at R003-R004.

[10] Deposition of Plaintiff Paul DaBaldo, Jr., 216:8-217:10, July 27, 2011, included in the accompanying appendix at R006-R007.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT MR. DABALDO WAS ON NOTICE THAT HE HAD AN ASBESTOS-RELATED DISEASE AS EARLY AS 1992, AND NO LATER THAN 1999

A. Questions Presented. Whether the DaBaldos' claims are time-barred by Delaware's two-year statute of limitations for personal injury actions, 10 DEL. C. § 8119, because Mr. DaBaldo was diagnosed with asbestosis by his doctors in 1999, at the latest.

B. Scope of Review. This Court reviews the grant of a motion for summary judgment "*de novo* both as to the facts and the law in order to determine whether or not the undisputed facts entitled the movant to judgment as a matter of law." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (citing *Arnold v. Society for Savings Bancorp, Inc.*, 678 A.2d 533, 535 (1996)). The analysis on appeal involves a determination "whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law." *United Vanguard Fund*, 693 A.2d at 1079 (Del. 1997).

C. Merits of Argument. Applying well-settled Delaware law to the undisputed facts in this case, the Superior Court correctly held "perhaps as early as 1992, and certainly no later than 1999, that [Mr. DaBaldo] knew that he had

asbestosis, or, at a minimum, was on inquiry notice as to whether he had asbestosis. And, therefore, . . . his claim is barred by the statute of limitations."[11] *See In re Asbestos Litigation (Collins v. Pittsburgh Corning Corp.)*, 673 A.2d 159, 162–63 (Del. 1996).

In Delaware, the two-year statute of limitations for personal injuries actions begins to run when a plaintiff has actual or inquiry notice of the injury. 10 DEL. C. § 8119; *Meekins v. Barnes*, 745 A.2d 893, 896 (Del. 2000). The two year period of limitations set forth in 10 DEL. C. § 8119 "begins to run when the plaintiff is chargeable with knowledge that his condition is attributable to asbestos exposure." *In re Asbestos Litigation (Collins v. Pittsburgh Corning Corp.)*, 673 A.2d 159, 162 (Del. 1996). "A plaintiff who seeks to toll the statutory period through reliance on the discovery rule must show that he 'acted reasonably and promptly in seeking a diagnosis and in pursuing the cause of action.'" *Id.* (quoting *In re Asbestos Litig., West Trial Group*, Del.Super., 622 A.2d 1090, 1092 (1992)).

Mr. DaBaldo's deposition testimony and medical records demonstrate he was chargeable with the knowledge, and therefore on notice, that he had a respiratory condition attributable to asbestos in 1992. Mr. DaBaldo began having symptoms related to asbestos-related disease in the late-1980s or early-1990s. In

[11] Transcript of Summary Judgment Oral Arguments, 16:7-14, In Re: Asbestos Litig.: Paul Dabaldo, Limited to: URS Energy & Construction and Crane Co. (Apr. 9, 2012) C.A. No. C.A. No. N09C-05-048 ASB included as Attachment A to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County.

1992, Mr. DaBaldo sought medical attention for his asbestos related disease. At that point, Mr. DaBaldo should have been aware of his asbestos-related disease and his potential claim.

Specifically, in 1992, Mr. DaBaldo underwent a chest x-ray in addition to other testing, which caused Dr. Nottingham, Mr. DaBaldo's primary care physician, to inform Mr. DaBaldo that he suffered from asbestos-related pleural disease. Mr. DaBaldo's medical records are littered with references to asbestos-related disease throughout 1992. Mr. DaBaldo also testified that he was aware of the dangers of asbestos by this point in time:

> Q. When did you first become aware of the potential dangers of asbestos?
> A. It was probably in the late '80s, mid to late '80s.[12]

The discussion between Dr. Nottingham and Mr. DaBaldo, in 1992, provided Mr. DaBaldo with actual notice that he suffered from a medical condition attributable to asbestos. *See In re Asbestos Litigation (Collins v. Pittsburgh Corning Corp.)*, 673 A.2d at 162. Thus, the statute of limitation on Mr. DaBaldo's claim for asbestos-related disease began to run in 1992.

Assuming, *arguendo*, that Mr. DaBaldo was not chargeable with the knowledge that he suffered from asbestosis in 1992, at the very latest, Mr. DaBaldo received such knowledge in 1999, when Dr. Chao noted in Mr.

[12] Deposition of Plaintiff Paul DaBaldo, Jr., 150:1-4, July 27, 2011, included in the accompanying appendix at R002.

DaBaldo's medical record that Mr. DaBaldo had a "[k]nown history of asbestosis."[13] At this point in time, Mr. DaBaldo was chargeable with the knowledge that he suffered from asbestos-related medical issues, which were described in his medical records as asbestosis, pleural disease, or pleural plaque. Despite having this knowledge from 1992 to 1999, Mr. DaBaldo failed to act reasonably and promptly in pursuing a cause of action to recover damages related to his asbestos-related disease. The DaBaldos' original complaint in this action was filed on May 5, 2009; therefore, their claims are barred by 10 DEL. C. § 8119 and must be dismissed.

The DaBaldos' reliance upon this Court's ruling in *In re Asbestos Litig. (Collins v. Pittsburgh Corning Corp.)*, 673 A.2d 159 (1996) is misplaced. Appellants in *Collins* appealed a grant of summary judgment from the Superior Court, which held that: "Collins' long-held belief that he had incurred an asbestos related ailment was sufficient to place him on notice of the existence of a viable claim even in the absence of objective evidence to support his belief." *Collins*, 673 A.2d at 160. This Court, after considering the facts presented below, noted: "[t]his case presents the unusual situation of a plaintiff who had a strong subjective belief that he had contracted an asbestos-related disease but lacked any objective medical

[13] Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A115.

support for his concern." *Id.* at 163. "Under the Superior Court ruling," the Court continued, "such a plaintiff would be required to file his complaint based on the strength of his belief alone. In our view, such a result is not supportable under Delaware decisional law and represents an impermissible application of the standards governing summary judgment." *Id.* In reversing and remanding, this Court concluded: "that Collins' subjective belief that he had an asbestos related ailment, in the absence of medical diagnostic support, did not, as a matter of law, require him to file suit prior to 1992." *Id.* at 164.

In essence, the plaintiffs/appellants in *Collins* were contesting a ruling based upon a factual impossibility – a plaintiff cannot file suit for a disease or injury that he or she does not have. While Mr. Collins may have *believed* he had an asbestos-related ailment, all medical testing for such an injury produced negative results until he was evaluated by Dr. Daum in early-1992. *Id.* at 161. Therefore, his complaint, filed in 1992, was timely. *Collins* is inapplicable here because Mr. DaBaldo's physicians documented Mr. DaBaldo's asbestos-related conditions for years.

The Superior Court's decision in *Sheppard v. A.C.& S. Co.*, 498 A.2d 1096 (Del. Super. Ct. 1986), is also distinguishable. In that case, the treating doctors had "ruled out" that plaintiff had asbestosis. *Id.* at 1131–32 n.7. Although the doctors concluded that plaintiff had asbestos-related pleural disease, they either

stated unequivocally that plaintiff did *not* have asbestosis or did not mention that condition at all in their reports. *Id.* In this case, however, Dr. Chao explicitly noted that Mr. DaBaldo had a history of asbestosis in his 1999 report, and found his own examination of Mr. DaBaldo's radiology to reveal a condition compatible with that history of asbestosis.

Accordingly, and unlike in *Sheppard*, by 1999, Mr. DaBaldo was said to have a "*known*" and "*given history of asbestosis*."[14] The DaBaldos, in their Opening Brief, claim: "it was not until Dr. Eliasson's report in 2007 that there was any medical report that contained a claim of an unequivocal diagnosis of asbestosis. *No previous medical report stated that Plaintiff had asbestosis*." Op. Br. at 17 (emphasis added). That is not true. Mr. DaBaldo knew he had an asbestos-related disease as early as 1992. He had a "known" and "given" history of asbestosis as early as 1999. At the very latest, his claims were barred as of 2001, approximately 8 years prior to his bringing suit.

[14] Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A115 (emphasis added).

II. THE DABALDOS ARGUE FOR REVERSAL ON GROUNDS PRESENTED FOR THE FIRST TIME ON APPEAL, VIOLATING RULES 8 AND 14.

A. Questions Presented. Whether the DaBaldos waived argument that the court below confused the diseases with which Mr. DaBaldo had been diagnosed by not presenting such arguments to the trial court, and, if so, whether the interests of justice require this Court to consider and determine this question even though it was not preserved.

B. Scope of Review. Summary judgment orders are reviewed *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Shuba v. United Services Auto. Ass'n*, 2013 WL 5494587, at *2 (Del. 2013) (quoting *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010)). It is a well-settled rule that a party is precluded from attacking a judgment on a theory that he failed to advance before the trial judge. *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013); *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 25 (Del. 2009); and *Danby v. Osteopathic Hosp. Ass'n of Del.*, 104 A.2d 903, 907-08 (Del. 1954).

C. Merits of Argument.

The DaBaldos never made the "disease confusion" argument before the trial court; thus, they are arguing for the first time on appeal that the trial court

"essentially confused the diseases the Plaintiff had been diagnosed with as a result of his exposure to asbestos." Op. Br. at 8. Not only was this argument never presented to the trial court, but there is no factual basis in the record to determine whether the DaBaldos' position has merit. In 1999, Mr. DaBaldo was said to have a "known" and "given history of asbestosis."[15] In the trial court, the DaBaldos argued that this "known" and "given history of asbestosis" was never relayed to Mr. DaBaldo.[16]

The DaBaldos now argue that Dr. Chao's use of the term "asbestosis" was meant to refer to "pleural asbestosis," as opposed to "pulmonary asbestosis." In so doing, the DaBaldos have presented this Court with an alternate theory to rebut the statute of limitations defense, which was never fairly presented below.

Supreme Court Rule 14(b)(vi)A.(1), pertaining to questions presented, states:

> The first shall state the question or questions presented, with a clear and exact reference to the pages of the appendix where a party preserved each question in the trial court. *Where a party did not preserve the question in the trial court, counsel shall state why the interests of justice exception to Rule 8 may be applicable*.

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[15] Report from Dr. Philip Chao, Diagnostic Imaging Associates, to Dr. Wesley Young, Internal Medicine (July 29, 1999) included within Appendix to Appellants' Opening Brief on Appeal from the Superior Court in and for New Castle County at A115.

[16] Plaintiffs' Opposition to URS Energy's Motion for Summary Judgment, D.I. No. 118, pp. 8-9; Transcript from Hearing on Motions for Summary Judgment, Attachment A to the DaBaldos' Opening Brief on Appeal, p. 12:3-8 ("Your Honor, I don't think it's the diagnosis that was explained to Mr. DaBaldo.") The DaBaldos' Motion for Reargument, D.I. No. 204, at p.1.

(emphasis added). Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Supr. Ct. R. 8. It is well-settled that a party may not challenge a judgment on a theory he did not raise in the trial court. *See, e.g.*, *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 25 (Del. 2009). The facts of *Riedel* are particularly relevant here.

In *Riedel*, an employee's wife brought a negligence action against her husband's employer, alleging that her husband's employer failed to prevent her husband from taking asbestos home on his clothing and failed to warn her of the dangers of asbestos exposure. *Riedel*, 968 A.2d at 17. The Superior Court entered summary judgment for the employer because the defendant ICI and Mrs. Riedel did not share a legally significant relationship that would create a duty ICI owed to her, and the employee's wife appealed. *Id.* In discussing Mrs. Riedel's new theory of liability, presented on appeal, this Court wrote:

> In this appeal, Mrs. Riedel alleges that the trial judge erred by focusing on her relationship with ICI, rather than on the foreseeability of her harm. Contrary to her characterization of ICI's alleged misconduct to the trial judge (*i.e.*, ICI's alleged failures to warn or prevent, which are fairly described as allegations of nonfeasance), Mrs. Riedel *now* claims that ICI acted affirmatively by releasing asbestos into the environment. She *now* describes ICI's alleged negligence as 'nothing less than actively releas[ing] asbestos toxins out of its plant and into [her] home," which would constitute acts of misfeasance.

Id. at 18–19 (emphasis in original). As to Mrs. Riedel's new theory of liability, this Court ruled: "Because Mrs. Riedel presented a theory of negligence grounded in nonfeasance to the trial judge and did not fairly present a claim of misfeasance, she is precluded from arguing on appeal that the trial judge erred by analyzing ICI's summary judgment motion in terms of nonfeasance." *Id.* at 19. The Court later continued:

> Because Mrs. Riedel did not fairly present her current theory of misfeasance to the trial judge, Supreme Court Rule 8 precludes her from arguing to us that the trial judge erred by focusing on her lack of a legally significant relationship with ICI. We 'adhere to the well settled rule which precludes a party from attacking a judgment on a theory which was not advanced in the court below.'

Id. at 25 (internal citations omitted).

The DaBaldos did not argue, in opposition to Motions for Summary Judgment or in their Motion for Reargument, that the use of the term "asbestosis" in Dr. Chao's 1999 correspondence was incorrect, was different than the term "asbestosis" used in Dr. Eliasson's 2007 report, that there was a misdiagnosis, or that there was any other conceivable explanation. Instead, comparing this matter to *Sheppard v. A.C.& S. Co.*, 498 A.2d 1126 (Del. Super. 1985) , they argued that Mr. DaBaldo "had no knowledge of the statement on the x-ray that he had a history of asbestosis."[17]

[17] D.I. No. 204, at p. 1.

This new theory was never presented to the trial court, and in accordance with Supreme Court Rule 8, and the holdings of *Riedel*, *surpa*, the DaBaldos should be precluded from raising it now.

CONCLUSION

For these reasons, Appellees URS Energy & Construction f/k/a Washington Group International, as successor to Raytheon Constructors f/k/a Catalytic, Inc. and Crane Co. respectfully request that this Honorable Court affirm the Superior Court's ruling.

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