IN THE COURT OF APPEALS

FILED

March 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM LEFFEW, and wife,	)	KNOX CIRCUIT
CHRISTINE LEFFEW,	)	C.A. NO. 03A01-9508-CV-00280
	)	
Plaintiffs-Appellants	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. DALE WORKMAN
	)	JUDGE
	)	
	)	
	)	
	)	
	)	
ACandS, Inc., et al	)	REVERSED AND REMANDED
	)	
Defendants-Appellees	)	

GEORGE A. WEBER, III, MIKE G. NASSIOS and JERE FRANKLIN OWNBY III, of the Law Offices of Peter G. Angelos, Knoxville, for Appellants.

WILLIAM D. VINES, III, MARTIN L. ELLIS and VONDA M. LAUGHLIN, of Butler, Vines & Babb, P.L.L.C., Knoxville, for ACandS, Inc.

DWIGHT E. TARWATER, THOMAS A. BICKERS, ANDREW R. TILLMAN and WYNN du M. C. HALL, Paine, Swiney and Tarwater, Knoxville, for Owens-Corning Fiberglas Corporation.

W. MORRIS KIZER, and F. SCOTT MILLIGAN, Gentry, Tipton, Kizer & Little, P.C., Knoxville, for Pittsburgh Corning Corporation.

M. DENISE MORETZ, Wolf, McMclain, Bright, Allen and Carpenter, Knoxville, for Owens-Illinois, Inc., and W. R. Grace & Co. —Conn.

<u>OPINION</u>

McMurray, J.

This is an appeal from a summary judgment dismissing the plaintiffs' claims as being time barred by the one-year statute of limitations found in T.C.A. § 28-3-104. We reverse the judgment of the trial court.

This case is basically in the same posture as that in <u>Wyatt v. A-Best Co., Inc</u>., 910 S.W.2d 851 (Tenn. 1995), affirming <u>Wyatt v. A-Best Co., Inc</u>., Lexis 421 (Tenn. App. 1994). The only difference of any remote significance is that in this case, the plaintiffs, through counsel, filed a claim in bankruptcy court. The defendants assert that the claim as filed in bankruptcy court conclusively establishes that the plaintiffs knew that they had a cause of action more than one year before bringing this action. We respectfully disagree.

In the bankruptcy claim, a statement was filed by counsel for the plaintiffs, which among other things, stated that on June 6, 1990, the plaintiff, William Leffew, was first diagnosed as suffering from interstitial fibrosis and that on June 28, 1990, Mr. Leffew was first diagnosed as having "probable asbestos related lung disease." Defendants during oral argument before this court

and in their briefs argued vehemently that the bankruptcy claim conclusively established that the plaintiffs knew or should have known of their cause of action no later than June 6, 1990, and that since this action was not instituted until June 27, 1991, the one-year statute of limitations now bars the claim. They further assert various theories of judicial admissions, and judicial estoppel as a bar to the plaintiffs' action here.

Since we find the issue relating to the bankruptcy claim to be dispositive of this appeal, we will limit our discussion to the effect, if any, the filing of the bankruptcy claim has on this case. We and the Supreme Court in Wyatt, supra, noted that a diagnosis of interstitial fibrosis consistent with pneumoconiosis and a diagnosis of asbestosis are not synonymous diagnoses. Interstitial fibrosis and pneumoconiosis include, but are not limited to, asbestosis. Asbestosis is a form of interstitial fibrosis and pneumoconiosis but the converse is not necessarily true. Thus, a determination or diagnosis of interstitial fibrosis known to the plaintiffs on June 6, 1990, is not a determination or diagnosis of asbestosis but is simply an indication that further screening and testing should be done to determine the nature of the interstitial fibrosis. Wyatt, supra, specifically held that a preliminary or tentative diagnosis of interstitial fibrosis consistent with pneumoconiosis does not trigger the running of the statute of limitations, but merely triggers a duty on the part of

the plaintiff to determine with due diligence, whether he, in fact, has an asbestos related disease.

In view of the foregoing, even if we accept the notion (which we do not) that the bankruptcy claim would or could create a conclusive admission or conclusive judicial estoppel or other estoppel, as to the facts therein stated, nevertheless, the earliest knowledge that the plaintiffs had of an asbestos related disease was June 28, 1990. This action was instituted on June 27, 1991, was timely filed and is not barred by the statute of limitations.

This case is controlled by Wyatt v. A-Best Co., Inc., supra. There is no meaningful distinction.

We find that the summary judgment in this case was improvidently granted. We reverse the judgment of the trial court and remand this case to the trial court for such other and further action as may be necessary to conclude this litigation. Costs are taxed to the appellees.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

____
Charles D. Susano, Jr., J.

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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court and remand this case to the trial court for such other and further action as may be necessary to conclude this litigation. Costs are taxed to the appellees.

PER CURIAM