

IN THE CIRCUIT COURT FOR BALTIMORE CITY

IN RE: BALTIMORE CITY
ASBESTOS LITIGATION

* November 29, 2016
Lung Cancer Trial Cluster
*
* Consolidated Case No.:
24X16000053

James Harrell, et al.,	*	Lead Case No.:
		24X13000048
Plaintiffs,	*	
v.	*	
ACandS, INC., et al.,	*	
Defendants.	*	

Cases Affected:		
James Harrell	*	Case No. 24X13000048
Elmer Horst	*	Case No. 24X09000220
Robert Siperek	*	Case No. 24X11000014
	*	Case No. 24X89244533
Earl Thomas	*	Case No. 24X11000331
	*	Case No. 24X87278751
Walter Watson	*	Case No. 24X04000600
	*	Case No. 24X88103531

MEMORANDUM OPINION

Upon Consideration of Certain Defendants' Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence, Plaintiffs' Opposition to Certain Defendants' Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence, Certain Defendants' Reply in Support of Their Motion for Summary Judgment on basis of Assumption of Risk and Contributory Negligence and Objections to Plaintiffs' Summary Judgment Evidence, and the hearings held on November 7, 2016, it is, by the Circuit Court for

Baltimore City, this 15th day of November, 2016, hereby, **ORDERED** that Certain Defendants' Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence is **GRANTED**.

I. STANDARD

Summary judgment is appropriate where “there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. Maryland Rule 2-501(e). The purpose of the summary judgment procedure is “to decide whether there is an issue of fact, which is sufficiently material to be tried.” *Matthews v. Howell*, 359 Md. 152, 161 (2000). Once the moving party has provided the Court with sufficient grounds for summary judgment, the non-moving party “must produce sufficient evidence to the trial court that a genuine dispute to a material fact exists.” *Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 93 (2000).

II. ANALYSIS

Defendants move to dismiss claims against Plaintiffs, alleging that Plaintiffs assumed the risk of developing lung cancer by knowing of the addictiveness and potential of cigarettes to cause lung cancer, and proceeding, despite this knowledge, to smoke cigarettes on thousands of instances.

In Maryland, it is well established that in order to assert the affirmative defense of assumption of risk, the defendant must show that the plaintiff (1) had knowledge of the risk of the danger; (2) appreciated the risk; and (3) voluntarily confronted the risk of danger. *ADM P'ship v. Martin*, 348 Md. 84, 90-91 (1997).

A. Plaintiffs had Knowledge and Appreciation of the Risk that Cigarettes are Addictive and Cause Lung Cancer

The Court finds that Plaintiffs had knowledge and appreciated the risk that cigarettes were addictive. Defendants present substantial evidence that the addictiveness of cigarettes has been common knowledge for decades. Defs.’ Mem. Supp. Mot. Summ. J. 5-7. For example, *Reader’s Digest*, one of the most widely read publications in the 1920s and 1930s published articles discussing the addictiveness of cigarettes. *Id.* at 6. A popular country artist Tex Williams recorded “Smoke, Smoke, Smoke That Cigarette” in 1947, which recognized the habit-forming and harmful nature of cigarette smoking with such phrases as “nicotine slave” and “smoke yourself to death.” Norrell Aff. ¶ 53. This song became a number one hit on the popular song charts and became the first platinum recording for Capitol Records. *Id.* Additionally, Maryland courts have arrived at the conclusion that the ordinary consumer was aware of smoking hazards, including addiction, since the 1950s. *Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433 (D. Md. 2000).

The Court also finds that Plaintiffs had knowledge and appreciated the risk that smoking cigarettes caused lung cancer because the link between the two was common knowledge by the 1950s. In the 1940s thoracic surgeon, Alton Oschser, announced he believed smoking caused lung cancer. Defs.’ Mem. Supp. Mot. Summ. J. 9. In 1949 and 1950 medical researchers began to release results of studies of lung cancer patients that revealed an extremely high proportions of smokers among persons with the disease. Norrell Aff. ¶ 23. Doctors Ernst Wynder and Evarts Graham at Washington University in St. Louis studied smokers and announced their findings of extremely high correlations between heavy smoking and lung cancer *Id.* By 1950, the generally held belief that cigarette smoking caused lung cancer led to cigarettes being referred to as “cancer

sticks.” Defs.’ Mem. Supp. Mot. Summ. J. 9. CBS News’s program “See It Now” in 1955 ran a two-part series that examined the connection between smoking and lung cancer. Norrell Aff. ¶ 50. Print media in the 1950s also reported on the scientific confirmation that smoking caused lung cancer. Defs.’ Mem. Supp. Mot. Summ. J. 10. Furthermore, the U.S. District Court District of Maryland has found that from 1947 to 1984 the dangers of smoking were obvious and generally known so as to bar the plaintiff’s claims. *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 432, 437-38 (D. Md. 2005).

Plaintiffs argue that Defendants’ view that for many decades it was common knowledge that cigarettes were addictive and caused lung cancer is demonstrably false. Pls.’ Opp’n Defs.’ Mot. Summ. J. 3. However, Plaintiffs fail to show that there was an absence of general public awareness regarding the addictiveness and propensity of cigarettes to cause lung cancer. Plaintiffs point to the fact the tobacco industry had a substantial role in shaping public awareness which impaired the public’s ability to fully comprehend the dangers of smoking. Kyriakoudes Aff. ¶ 40. However, the “existence of information downplaying the dangers of smoking” does not undermine the ordinary consumer’s ability to contemplate the dangers of smoking *Estate of White ex rel. White*, 109 F. Supp. 2d at 432.

B. Plaintiffs Voluntarily Confronted the Risks Associated with Smoking

The Court finds that Defendants have presented substantial evidence that Plaintiffs voluntarily confronted the risks associated with smoking. Maryland courts employ an objective standard to determine if a plaintiff’s decision to take a chance with a common-knowledge risk was “voluntary.” *Morgan State Univ. v. Walker*, 397 Md. 509, 519 (2007). A plaintiff’s conduct is “voluntary when the plaintiff had clear and reasonable choices either to act or not act, and then chose to willingly act. *ADM P’ship*, 349 Md. at 93. After knowing and appreciating the risks of

smoking, Plaintiffs continued to smoke cigarettes. Four of the five Plaintiffs appear to have begun smoking cigarettes in the year 1950 or later.¹ In 1965, the U.S. Congress enacted legislation requiring that a warning label go on every package of cigarettes manufactured in the United States. Norrell Aff. ¶ 31. This warning read: “CAUTION: Cigarette Smoking May Be Hazardous to Your Health.” *Id.*² In light of this warning, Plaintiffs smoked the following approximate number of cigarettes in spite of the common knowledge of the health risks associated with smoking and the warnings present on the packs: Mr. Harrell, 233,600; Mr. Horst, 459,900; Mr. Siperek, 167,900; Mr. Thomas, 54,750; and Mr. Watson, 10,950. Defs.’ Mem. Supp. of Mot. Summ. 17-20. Consequently, there exists no question of fact as to whether Plaintiffs voluntarily confronted the risks related to smoking.

As Defendants argue, lung cancer is a single, indivisible injury incapable of apportionment. *Carter v. Wallace & Gale Asbestos Settlement Trust*, 439 Md. 333, 351 (2014). As such, apportioning causation or damages between smoking and asbestos is impermissible and because Plaintiffs’ smoking caused some portion of their lung cancer, they are barred from recovery.

III. CONCLUSION

There is no dispute of material fact that exists as to whether Plaintiffs had knowledge of the risk of danger of smoking cigarettes, appreciated the risks of such danger, and voluntarily

¹ Plaintiffs began smoking in the following years: James Harrell, 1952; Elmer Horst, Jr., 1964; Robert Siperek, 1947 (according to Plaintiffs’ Response to Defendants Joint Interrogatories (Siperek) No. 50 (Exhibit 7)) or 1950 (according to Dr. Stuart Jacobs’ Report on Robert Siperek (Exhibit 8)); Earl Thomas, 1953; and Walter Watson, 1942. Defs.’ Mem. Supp. of Mot. Summ. 19–20.

² As noted in Dr. Norrell’s affidavit, the warning label “was immediately effective in gaining the attention of Americans. In 1966 the U.S. Department of Health, Education, and Welfare conducted a poll that asked almost 6,000 Americans: ‘Have you ever seen or heard about the health warning label that is required on the outside of each package of cigarettes?’ Among all respondents, 84.1 of males and 75.3 of females answered ‘Yes.’ Among current smokers at the time, 91.8 percent of men and ninety-four of women answered in the affirmative.” Norrell Aff. ¶ 32. In addition, Defendants note that in 1969 “Congress revised the warning label on cigarette packages, and on January 2, 1971, cigarette ads were removed from radio and television. During 1972, warnings identical to those on cigarette packages were placed in all cigarette advertisements. By the end of 1972, health warnings appeared on every package of cigarettes sold or displayed, cigarettes were no longer advertised on television or radio, and every cigarette advertisement carried a health warning from the Surgeon General.” *Id.* ¶ 40.

confronted the risk of danger. As such, as a matter of law. Defendants' Motion for Summary Judgment on the Basis of Assumption of Risk is **GRANTED**.³

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**ORDER GRANTING CERTAIN DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ON BASIS OF ASSUMPTION OF RISK AND CONTRIBUTORY
NEGLIGENCE**

Upon Consideration of Certain Defendants' Motion for Summary Judgment on Basis of

³ Maryland Rule 2-501(f) states that: By order pursuant to Rule 2-602(b), the court may direct entry of judgment . . . (2) upon one or more but less than all of the claims presented by a party to the action

Assumption of Risk and Contributory Negligence, Plaintiffs' Opposition to Certain Defendants' Motion for Summary Judgment on Basis of Assumption of Risk and Contributory Negligence, Certain Defendants' Reply in Support of Their Motion for Summary Judgment on basis of Assumption of Risk and Contributory Negligence and Objections to Plaintiffs' Summary Judgment Evidence, and the hearings held on November 7, 2016, it is, by the Circuit Court for Baltimore City, this 15th day of November, 2016, hereby,

ORDERED that Certain Defendants' Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED that the case is **DISMISSED**.

/s/
ALTHEA M. HANDY
Judge

Notice to Clerk:

Please send courtesy copies to all parties.