IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN RAFTER, as Personal Representative of the Estate of JAMES T. BUTLER, deceased, Appellant, v. AMERICAN BILTRITE, INC.; DOMCO PRODUCTS TEXAS, L.P.; KENTILE FLOORS, INC.; SEA-PAC SALES COMPANY; SOUND FLOOR COVERINGS, INC.; TILE COUNCIL OF AMERICA, INC.; and FIRST DOE THROUGH ONE HUNDREDTH DOE, Respondents.	)	No. 60203-9-I DIVISION ONE UNPUBLISHED FILED: June 9, 2008

PER CURIAM — After saying in response to general deposition questions that he did not recall all the facts, a witness' recall of specific facts in a declaration opposing summary judgment does not necessarily amount to a contradiction of his earlier testimony. Douglas Stewart's declaration testimony that his former employer used certain products in his flooring business after Stewart had not earlier been able to recall those particular products was not a contradiction to be excluded from consideration at summary judgment. Stewart's testimony by declaration shows there is a genuine issue of material fact for trial. We reverse and remand for trial.[1]

[1] Kathleen Rafter moved to strike a portion of Brief of Respondent American Biltrite, Inc. She claims that the first full sentence at page 7 is misleading. Because the focus of our review is the evidence and argument that were before the trial court when it granted summary judgment, not representations made in a brief on appeal, we deny the motion.

In 2006, Kathleen Rafter commenced this wrongful death action on behalf of herself and other beneficiaries of the estate of her late husband James Butler against several entities, including American Biltrite, Inc. (Biltrite). Rafter alleged that Biltrite manufactured flooring materials containing asbestos that Butler used in his flooring business, and that those products caused Butler to develop and die from mesothelioma and other asbestos related illnesses.

Because Biltrite did not appear at Butler's deposition taken during an earlier lawsuit, the parties stipulated that any references to Biltrite products Butler made in that deposition would not be used at trial in this case. During discovery in this case, Rafter took the deposition of Douglas Stewart, a former employee of Butler. When asked about manufacturers of asbestos flooring products the company used, Stewart did not mention Biltrite. Nor was he asked whether Biltrite was one of the manufacturers whose products were used. Although Stewart stated at one point in the deposition that the list of manufacturers he mentioned was exhaustive, he later said that he could not remember all the products his company used.

Biltrite moved for summary judgment on the basis that Rafter had failed to produce any competent or admissible evidence that Butler inhaled asbestos fibers from Biltrite products. Biltrite based the motion on the stipulation not to use Butler's deposition and Stewart's failure to specifically identify Biltrite as a manufacturer in his deposition. In response to the summary judgment motion, Rafter filed a declaration by Stewart. In the declaration, Stewart stated that he had personal recollection of Butler installing Biltrite products sold under the name

Amtico. In response, Biltrite argued that the trial court should not consider the Stewart declaration because it contradicted Stewart's deposition testimony and Stewart had not explained the contradiction. The trial court agreed that the declaration contradicted the deposition testimony and declined to consider it. The trial court granted Biltrite's motion for summary judgment.

Rafter appeals.

Rafter contends that the trial court erred in refusing to consider Stewart's declaration and in granting Biltrite's motion for summary judgment. This court reviews an order on summary judgment de novo, performing the same inquiry as the trial court.[2] We consider the facts and reasonable inferences from the facts in the light most favorable to the non-moving party.[3] Summary judgment is appropriate where "the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[4]

"[U]nder traditional product liability theory, the plaintiff must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product."[5] Biltrite argues that Rafter failed to establish this connection because Stewart did not state in his deposition that Butler used any Biltrite product in his flooring business. Rafter contends that the trial court erred in refusing to consider Stewart's declaration stating that Butler used Biltrite

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[2] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).
[3] Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).
[4] Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002), citing Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000); CR 56(c).
[5] Lockwood v. AC & S, Inc., 109 Wn.2d 235, 245, 744 P.2d 605 (1987).

products. Although Stewart identified Biltrite products in his later declaration, Biltrite argues that the declaration contradicted Stewart's prior deposition testimony and failed to create an issue of material fact.

Both parties agree that the rule of Marshall v. AC & S, Inc.[6] applies in this case. The question here is how to apply that rule. In Marshall, the plaintiff stated in a deposition that he first learned that he had asbestosis on his first visit to a doctor in Seattle in 1982. Medical records and the plaintiff's worker's compensation claim substantiated the 1982 date. In response to a summary judgment motion based on failure to bring the action within the statute of limitations, the plaintiff submitted an affidavit stating that he first learned of his physical problems in 1983 and argued that this created an issue of material fact regarding the date he learned of his illness. The court considered the entire record including the affidavit on summary judgment and found that the only reasonable inference was that the plaintiff learned of his illness in 1982, given that the affidavit was obviously self-serving, was the only contradictory evidence, and was offered without any explanation of the inconsistency. The court stated:

> When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.[7]

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[6] 56 Wn. App. 181, 782 P.2d 1107 (1989).

[7] Marshall, 56 Wn. App. at 185, citing Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984); accord, Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271 (9th Cir. 1988); Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975).

In a subsequent opinion, Division Two of this court noted that the Marshall court did not find the affidavit to be inadmissible. Rather, the court considered the affidavit with the other evidence on summary judgment and found that it was insufficient to create an issue of material fact.[8]

In Sun Mountain Productions, Inc. v. Pierre, this court said that a minor contradiction may be insufficient where a witness stated that he could not remember hearing an individual indicate knowledge of certain activities and in a later affidavit stated that he did recall a specific incident, because "[a]n inability to recall a specific event ... in response to a general question, does not necessarily amount to a contradiction."[9]

At his deposition, Stewart was asked generally whether he remembered any brands of flooring that he and Butler used in the flooring business. In response, Stewart named several manufacturers, but he also said, "If I had a list put in front of me, I could probably pick it out, but I can't remember them all."[10] Stewart did not say that he and Butler did not use any Biltrite products. The record does not indicate that he was ever asked about Biltrite or its products. Because he left open the possibility that he might recall other products, his later recall of some specific Biltrite products does not contradict his earlier deposition testimony. Rather, Stewart recalled particular products more fully in his declaration than he had in his deposition.

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[8] Schonauer v. DCR Entertainment, 79 Wn. App. 808, 817-18, 905 P.2d 392 (1995).
[9] 84 Wn. App. 608, 618, 929 P.2d 494 (1997).
[10] Clerk's Papers at 148.

The declaration shows there is a genuine issue of material fact: the potential liability of Biltrite for this claim. It was not necessary for Stewart to explain the assertions in his declaration. They did not contradict his earlier testimony.

We reverse the trial court's grant of Biltrite's motion for summary judgment and remand for trial.

For the Court:

Cox, J.

Becker, J.

Grosse, J.