Circuit Court for Baltimore City
Case No. 24-X-14-000545,
24-X-15-000114, 24-X-15-000112

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0566

September Term, 2017

AUDREY VITALE, ET AL.

v.

BURNHAM, LLC, ET AL.

Wright,
Leahy,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 19, 2018

This appeal arises from the Circuit Court for Baltimore City's ruling granting Burnham and Weil-McLain's, appellees, motion to dismiss, Audrey Vitale, and her children, Ralph Vitale, Jr., Tony Vitale, Patricia Smith, Maria Pycha, and Gina Messersmith's, appellants, wrongful death suit, and the court's subsequent denial of appellants' motion to reconsider.

Appellants filed a wrongful death suit against appellees, which alleged that Ralph Vitale, Sr. ("Vitale"), contracted malignant pleural mesothelioma caused by exposure to asbestos.[1] On April 18, 2016, appellees filed for summary judgment on issues including the Statute of Repose. The Statute of Repose, Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP") § 5-108(a),[2] precludes actions for personal injury and death resulting from the defective and unsafe condition of an improvement to real

[1] Mesothelioma is "a disease in which cancer (malignant) cells are found in the sac lining the chest (the pleura) or abdomen (the peritoneum). This is a rare form of cancer and most people with malignant mesothelioma have worked on jobs where they breathed asbestos." *John Crane, Inc. v. Pullen*, 169 Md. App. 1, 19 n.1 (2006) (citation and internal quotation marks omitted).

[2] **§ 5-108. Injury to person or property occurring after completion of improvement to realty.**

> *(a) Injury occurring more than 20 years later.* – Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

property that occurs more than 20 years after the improvement first becomes available for its intended use.

After a hearing on May 27, 2016, the circuit court granted summary judgment based on the Statute of Repose. On June 6, 2016, appellants filed a motion to reconsider. On March 27, 2016, the circuit court denied the motion. Appellants filed this timely appeal.

Appellants ask us three questions:

> 1. Whether the circuit court exceeded its authority by striking the motion for reconsideration of summary judgment?[3]
>
> 2. Whether it was error to preclude the submission of material evidence on reconsideration of summary judgment?
>
> 3. Whether evidence presented on reconsideration showed a dispute of a material fact regarding appellees' status as manufacturers of asbestos-containing products (boilers) for purposes of the exception to the Statute of Repose?

We determine that the first and second questions are allegations that are not supported by the record. We answer the third question in the affirmative and reverse the judgment of the circuit court.

BACKGROUND

[3] The appellants conceded at oral argument that the circuit court denied the motion to reconsider rather than striking it, as there was nothing in the record to support that allegation.

Appellees manufactured boilers which Vitale, a plumbing and heating contractor, installed and serviced. Vitale contracted malignant pleural mesothelioma due to exposure to asbestos. He died on January 11, 2014, and was not deposed prior to his death. Vitale was allegedly exposed to asbestos through the installation, removal, and maintenance of Weil-McLain and Burnham boilers while employed at Vitale Plumbing and Heating. Specifically, appellants allege that Vitale was exposed to asbestos-containing rope, gaskets, cement, and putty.

Vitale's co-worker, Harold Milway, was deposed on September 10, 2015. Milway testified that he worked for Vitale Plumbing and Heating from 1966-1971 and then from 1974-1975. He stated that during that period, he and Vitale, repaired, removed, and installed plumbing fixtures, controls, piping, water, and boilers. He further testified that 80-85% of the boilers they installed were manufactured by Weil-McLain, with the rest being from Burnham. Milway testified that the Weil-McLain and Burnham boilers came packaged with rope packing, cement, and putty, but he had no knowledge of whether Weil-McLain or Burnham manufactured those products. Milway assumed those component parts were manufactured by Weil-McLain and Burnham because they came in the same crate as the boiler.

Robert Vitale, Jr. testified in his October 15, 2015 deposition that he worked for Vitale Plumbing and Heating during the summers of 1973-1976 and full time from 1977-1981. Vitale, Jr. testified that he and his father would install Burnham cast-iron sectional boilers. He further testified that, depending on the years, the boilers either came

packaged, fully assembled, or required some assembly. According to Vitale, Jr., when the boilers required assembly, they would apply asbestos rope around the base and sections, and then apply furnace cement on top of the boilers.[4] During the deposition Vitale, Jr. admitted that he did not know who manufactured the furnace cement or rope.

Weil-McLain's corporate representative, Paul Schuelke, testified that Weil-McLain never manufactured any rope packing, gaskets, cement, or putty that may have been packaged with Weil-McLain boilers. Burnham's corporate representative, Roger Pepper, also testified that Burnham supplied wicking or rope to be used between the sections of its boilers during the time it was alleged Vitale was exposed to asbestos. Fred Kendall, a former Burnham employee, testified that Burnham did not manufacture cement or putty, that may have been packaged for use within Burnham's boilers, but purchased the products from other manufacturers.

On April 18, 2016, Burnham moved for summary judgment as to all claims arguing that no cause of action accrued against it based on Maryland's Statute of Repose. Weil-McLain filed a written adoption of the motion, supporting memoranda, and arguments. On May 9, 2016, appellants filed an opposition to Weil-McLain's and Burnham's motions for summary judgment. In appellants' written opposition to the

[4] Boilers were available in three configurations. A packaged boiler would be completely assembled at the factory. A knock down boiler would be shipped completely disassembled. A third configuration, semi-knocked down was between the two extremes described above. During his deposition, Milway testified that he and Vitale installed both knock down and semi-knock down boilers.

motion they only addressed arguments relating to causation, but did not include any argument as to Maryland's Statute of Repose, that would have barred appellants from pursing an action against appellees. The circuit court judge heard oral arguments on the motion for summary judgment on May 27, 2016. The trial judge directly raised the question of appellants' failure to address the Statute of Repose.

> THE COURT: So I wasn't quite sure, but the [appellants] didn't address the statute-of-repose argument?
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> [APPELLANT'S COUNSEL]: That's a complete oversight on my part personally. I don't know why we didn't include an opposition to that.
>
> ***
>
> So the record is clear, [appellants] do oppose Burnham's [and Weil-McLain's] motions on those issues. I am prepared to argue it today. I don't know what happened that a response was not prepared to that part of the motion.
>
> THE COURT: Even after they submitted their reply pointing out that you didn't address it?

During oral argument, appellants' counsel conceded that Weil-McLain and Burnham were not suppliers under the Statute of Repose but argued that their principal business was the manufacture and sale of boilers, which were asbestos-containing products under the Statute of Repose.

> THE COURT: All right. So do you see what the definition of supplier is in the statute?
>
> [APPELLANT'S COUNSEL]: Yes.
>
> THE COURT: So how are they a supplier?

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> If they are individuals or entities whose principal business is to supply, distribution, installation, sale or resale of any product that causes asbestos-related diseases . . . how are they a supplier?
>
> ***
>
> So are you saying their principal business – that was their principal business?
>
> [APPELLANT'S COUNSEL]: I will concede their principal business was the manufacture and sale of boilers.
>
> ***
>
> THE COURT: So your argument is that they are a manufacturer?
>
> [APPELLANT'S COUNSEL]: They are a manufacturer of an asbestos-containing product.

During the hearing, the parties never addressed the question as to whether Weil-McLain's and Burnham's boilers were an improvement to real property.

Following argument, the circuit court granted appellees' motion for summary judgment stating:

> THE COURT: All right. I believe the [Statute of Repose] does apply in this case. I am granting the motion for summary judgment with respect to Burnham LLC and Weil-McLain. And really for all the reasons that the defendants have argued, I don't believe that the exception applies in this case, again, for the reasons that were argued.

In essence, the circuit court ruled that Weil-McLain and Burnham were protected by the Statute of Repose pursuant to CJP § 5-108.

On June 6, 2016, within ten days after the entry of judgment, appellants filed a 42-page motion for reconsideration with 62 exhibits, which argued Weil-McLain and Burnham were not protected by the Statute of Repose. Both Weil-McLain and Burnham filed oppositions to appellants' motion for reconsideration on June 17, 2016. Appellants filed replies and sur-replies were then filed. Some nine months later, on March 27, 2017, the circuit court denied appellants' motion for reconsideration.

STANDARD OF REVIEW

This appeal arises from the circuit court's ruling which denied appellants' motion to reconsider, Md. Rule 2-534 governs the court's revisory power.[5] The circuit court "has broad discretion whether to grant motions to alter or amend filed within ten days of the entry of judgment," and "[i]ts discretion is to be applied liberally so that a technicality does not triumph over justice." *Benson v. State*, 389 Md. 615, 653 (2005) (citing *Maryland Bd. of Nursing v. Nechay*, 347 Md. 396, 408 (1997)).

[5] Md. Rule 2-534 states in relevant part:

Motion to Alter or Amend a judgment -- Court Decision.

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

Generally, "the denial of a motion to alter or amend a judgment is reviewed by appellate courts for abuse of discretion." *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015), *aff'd*, 449 Md. 217 (2016) (citations and quotations omitted). That discretion is limited by the requirement that the court correctly applied the law applicable to the case. *Id*.

The motion to reconsider was based on the circuit court's ruling granting summary judgment in favor of the appellees. "We review a circuit court's entry of summary judgment *de novo*." *Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 53 (2014) (citations omitted). "If no material facts are in dispute, we must determine whether summary judgment was correctly entered as a matter of law." *Prop. & Cas. Ins. Guar. Corp. v. Yanni*, 397 Md. 474, 480 (2007) (citations omitted). "A material fact is one that will alter the outcome of the case, depending upon how the fact-finder resolves the disputes." *Injured Workers' Ins. Fund v. Orient Express Delivery Serv., Inc.*, 190 Md. App. 438, 451 (2010) (citations and quotations omitted). "Mere general allegations of conclusory assertions will not suffice." *Id*. (citations omitted). Additionally, "a mere *scintilla* of evidence in support of the non-moving party's claim is insufficient to avoid the grant of summary judgment." *Danielewicz v. Arnold*, 137 Md. App. 602, 613 (2001) (citations and quotations omitted) (emphasis added).

We are "obliged to conduct an independent review of the record to determine if there is a dispute of material fact." *Injured Workers' Ins. Fund*, 190 Md. App. at 450-51. During our review, we do not try the case or decide the factual disputes; rather, we

determine whether there is an issue of fact that is sufficiently material to be tried. *Castruccio v. Estate of Castruccio*, 456 Md. 1, 16 (2017).

DISCUSSION

As to the first question posed to this Court, there is nothing in the record that would support appellants' argument that the circuit court struck the motion to reconsider. The trial judge *denied* the motion to reconsider. This fact is clearly supported by the record. This first misplaced argument is intertwined with the appellants' second argument that the circuit court abdicated its duty to rule on the merits of the motion to reconsider. After erecting the straw man argument that the court struck the motion to reconsider, appellants spent considerable energy knocking it down, arguing that the court failed to exercise discretion by ignoring what was submitted in the motion to reconsider, and therefore committed reversible error.

Based on the order by the circuit court judge, we presume that she considered the motion for reconsideration and denied it on its merits. As a judge is presumed to know the law and to properly apply it. *Bangs v. Bangs*, 59 Md. App. 350, 370 (1984) (quoting *Hebb v. State*, 31 Md. App. 493, 499 (1976)). That presumption is not rebutted by mere silence. *Id*. Appellants assumed, incorrectly, that in denying the motion without issuing a memorandum opinion, the court ruled without considering the merits of their 42-page motion. While we may have responded differently to the motion, nothing in the record suggested that the motion was not considered.

Now we will pivot away from the procedural posture of this appeal, address the substantive arguments about whether it was proper for the court to grant summary judgment, and deny reconsidering its ruling.

"[T]he ruling on a motion for reconsideration is ordinarily discretionary, and . . . the standard of review in such a circumstance is whether the court abused its discretion in denying the motion." *Wilson-X v. Dep't of Human Res*., 403 Md. 667, 674-75 (2008). "The 'abuse of discretion' standard of review is premised, at least in part, on the concept that matters within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts[.]'" *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007) (quotations omitted). A ruling reviewed under an abuse of discretion standard will not be reversed unless "[t]he decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1944). "Thus, an abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case." *Wilson v. John Crane, Inc.*, 385 Md. 185 (1005).

In *Morton v. Schlotzhauer*, 449 Md. 217 (2016), where the Court of Appeals affirmed this Court's decision, the Court stated:

> A case may be decided by the court when there is a bench trial in which the court is the factfinder. A case may also be decided by the court when, as in this case, the court awards summary judgment to a party as a matter of law. Thus, a circuit court's decision on a motion to alter or amend under [Md.] Rule 2-534 may depend, in some cases, on that court's assessment of the facts or it may depend entirely on the court's assessment of the legal principles that apply to the particular case. If the court's ruling is rooted in

> its role as a factfinder, an appellate court typically would accord its decision substantial deference. If the circuit court's decision is based on an application of legal principles, an appellate court does not accord the circuit court any special deference.

Id. at 232 (internal citations omitted). Put another way, although we examine the grant or denial of a motion to reconsider using the abuse of discretion standard, if the trial court's decision is based on legal principles, then as the reviewing court, our review amounts to a *de novo* inquiry.

Through these lenses, we now view the motion to reconsider as it applies to granting the motion for summary judgment and Maryland's Statute of Repose. Subsection (a) above "creates a broad grant of immunity for all persons who might otherwise be held liable for a defect in an improvement to real property, subject only to the express exclusions of [CJP] § 5-108(d)." *Rose v. Fox Pool Corp.*, 335 Md. 351, 370-71 (1994). A defendant's identity, occupation, or the type of service or product it provides "plays no role in determining whether subsection (a) applies." *Id*. at 371. Further, subsection (a) above applies to products – including asbestos-containing products – used during the construction of improvements to realty, subject to the exceptions contained in CJP § 5-108(d)(2). *Burns v. Bechtel Corp*., 212 Md. App. 237, 244-247 (2012), *cert. denied*, 434 Md. 12 (2013).

The Statute of Repose contains two exceptions that appellants claim apply in this matter. Those exceptions state in relevant part:

> (2) This section does not apply if:

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> (ii) In a cause of action against a manufacturer or supplier for damages for personal injury or death caused by asbestos or a product that contains asbestos, the injury or death results from exposure to asbestos dust or fibers which are shed or emitted prior to or in the course of the affixation, application, or installation of the asbestos or the product that contains asbestos to an improvement to real property;
>
> (iii) In other causes of action for damages for personal injury or death caused by asbestos or a product that contains asbestos, the defendant is a manufacturer of a product that contains asbestos;

CJP §§ 5-108(d)(2)(ii)-(iii). The statute defines a "supplier" as "any individual or entity whose principal business is the supply, distribution, installation, sale, or resale of any product that causes asbestos-related disease." CJP § 5-108(d)(1).

The applicability of CJP § 5-108(d)(2)(i) depends on whether the product in question is an "improvement to real property." CJP § 5-108 does not define "improvement to real property" and there is no indication in the legislative history of the statute as to what the term is meant to encompass. *Rose,* 335 Md. at 370.

Maryland courts have employed a common sense or common usage test where the relevant inquiry is whether the object is an "improvement" within the common dictionary meaning of that term. *Id*. at 376. Specifically, the courts have utilized Black's Law Dictionary definition in defining improvements under CJP § 5-108. *Id.*[6]

[6] The appellants have not raised the issue of whether the installation of residential backers was "improvements to real property" in this appeal. Md. Rule 8-131.

In the instant case, as to the issue of whether there was a material dispute of fact regarding appellees' status as a manufacturer of asbestos containing products (*e.g.* boilers), the circuit court provided us no insight as to why the motion to reconsider was denied. Therefore, we are left to rely exclusively on the transcript from the hearing, the motion to reconsider, and the court's order denying the motion to determine if a reversible error occurred.

With respect to appellees' motion for summary judgment, first we must determine, initially, whether a dispute of material fact exists. *Serio v. Baltimore County*, 384 Md. 373, 388 (2004). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Clark v. O'Malley*, 434 Md. 171, 195 (2013) (citations omitted). "If the record reveals that a material fact is in dispute, summary judgment is not appropriate." *Serio*, 384 Md. at 388 (citations omitted).

In appellants' motion for reconsideration, they requested that the circuit court reconsider its ruling and deny appellees' motion for summary judgment as to the Statute of Repose. They argue that the legislative history of the Statute of Repose establishes that it was never intended to preclude claims for asbestos-caused malignant mesothelioma. More importantly, appellants contended that the Statute of Repose does not apply to Vitale as appellees are not entitled to this protection from litigation because both were manufacturers of products that contained asbestos, *i.e.*, boilers that contained asbestos. Specifically, appellants aver that appellees are manufacturers of products that contain asbestos, which was a factual matter to be resolved by the trier of fact.

To further support their claim that appellees manufactured a product containing asbestos, appellants submitted its boiler expert's, Larry Jones, testimony at deposition in this case that there is no difference in the operation of any Burnham or Weil-McLain cast iron boiler regardless of its size, shape, or configuration and significantly there is no difference in the requirement to seal parts of the boiler with asbestos components during assembly. Specifically, Jones's testimony was that parts of the Burnham cast iron boiler needed to be sealed in the assembly or installation of the boilers, and that Burnham sealed its boilers with asbestos rope, asbestos millboard, and loose asbestos. Weil-McLain used rope between the sections where Burnham used furnace cement on the outside where the two sections meet on a joint. Jones also testified that asbestos components were critical for the safe and proper operation of boilers manufactured by Burnham and Weil-McLain from 1960's until the early 1980's.[7]

Additionally, there was evidence presented to the circuit court that there were two types of boilers; one that had asbestos incorporated in the product, and others that required the application of asbestos to function properly, *i.e.*, "not burn down the house."

Burnham conceded that they used asbestos rope but attempted to diminish its admission with the phrase "except for in a few limited circumstances." Because Burnham had national exposure as to the sale of its boilers, there were discovery

[7] The cited pages of Larry Jones's May 19, 2016 deposition were collectively attached as Exhibits to the motion to reconsider.

responses submitted to the circuit court from litigation in sister states that indicated that Burnham, in the past, designed and manufactured boilers that contained some asbestos components. This included the use of twisted asbestos rope, asbestos cement, asbestos millboard, asbestos furnace cement, asbestos tape gaskets, and asbestos manhole gaskets. There was also testimony that specific models were the simplex gas boiler, yellow jack boiler, dual purpose gas boiler, pack, and holiday gas boilers. In addition, Burnham purchased large quantities of products for the use and assembly of its boilers to include asbestos cement.

Testimony was also submitted from Burnham's corporate designee that the installation and operations guide ("INO") referred to asbestos product, like boiler putty, that was supplied with the boiler. The corporate designee conceded that furnace cement would be used in areas where extra heat would have been an issue. This was to "keep the house from burning down." There was also asbestos millboard used in connection with clean-out plates and the Burnham boilers. Also submitted was an incomplete list of over 20 different boilers that used asbestos.

As to Weil-McLain, a document prepared by a member of the Weil-McLain engineering staff identified asbestos components within each Weil-McLain boiler manufactured and sold by it between the mid 1960's to the early 1980's. The list contained 34 different boiler types. Like Burnham, Weil-McLain purchased large quantities of asbestos contained in its components for use in its boiler manufacturing plant as well as supplies to installers, like Vitale, for field erection of its boilers. Weil-

McLain purchased asbestos cement in either 50-pound or 100-pound bags. One employee measured, cut, and filled about 20 bags of asbestos rope per day. That employee also measured and repacked smaller bags with asbestos cement. Typically, she filled between 100 and 200 bags per day. The bags of rope and asbestos cement were packaged by her and were sent out by Weil-McLain with its boilers to be used in field assembly.

In 1970 alone, Weil-McLain purchased 300 tons of asbestos cement for use in its boilers assembled at its plant as well as to supply those boilers to be field assembled. Weil-McLain's corporate designee admitted that powered asbestos was used to connect the sections in between the sections of the boiler and the base in the 1970's. Powdered asbestos cement was packaged in 2-pound, 5-pound, or 10 bags of cement. On the largest commercial boilers, they may have been shipped in 50-pound bags. Burnham supplied semi-packaged as well as totally packaged boilers. In completely packaged boilers, the putty, and in certain cases, cement, would have been there. There would not be rope in those models.

In response, the appellees argue that they were not a "manufacturer" or seller of asbestos-containing materials, and that the exceptions to the State of Repose under CJP § 5-108(b)(2)(ii) and (iii) do not apply. Burnham argued in its reply to appellants' motion for reconsideration that its principal business was limited to the design and manufacture of boilers. As demonstrated by Burnham in its motion for summary judgment, and at the May 27, 2016 hearing, appellees contended that there was no evidence in the record that

the boilers in question were manufactured with asbestos-containing components, or that Burnham manufactured or supplied any of the asbestos-containing materials which appellants alleged were used by or around Vitale to install the boilers. Burnham argued that it was not a supplier as defined in CJP § 5-108(b)(1) and that appellants offered nothing in their motion for reconsideration to demonstrate otherwise.

Burnham averred that appellants' witnesses could not identify the model of any of the Burnham residential boilers which were allegedly installed by or in the presence of Vitale, or his co-workers. Milway and Vitale, Jr. testified that the boilers installed by Vitale Plumbing and Heating were purchased from supply houses and came with rope and boiler cement/putty. Burnham relied on this fact to prove that neither witness could say that the rope or cement/putty material came from, or that it was manufactured by Burnham. Finally, Burnham argued that appellants' argument that the boilers were an asbestos-containing product, because they required the use of asbestos-containing product to function, was not supported by the record, because there was no testimony that the residential boilers were manufactured with these materials, or came with these materials already incorporated.

In response to appellants' motion for reconsideration exhibits, which contained various examples of Burnham boiler manuals and installation instructions for different boiler models, appellees contended that appellants could not demonstrate that any of the models of Burnham boilers associated with these manuals were the models installed by or around Vitale. They further posited that the manuals do not support appellants' argument

that the Burnham boilers were asbestos-containing products themselves, since the manuals and instructions merely show that "boiler putty" was a product to be used to install the boilers, not that asbestos containing products were incorporated into the boilers themselves during manufacturing.

Finally, pointing to appellants' reliance on discovery responses of Burnham filed in other jurisdictions in which Burnham stated that "previously" or "in the past" Burnham manufactured boilers which contained asbestos, Burnham argues that these responses do not assist appellants because they do not state when such boilers were made, or whether the asbestos was the rope or cement/putty products identified by appellants' witness for the installation of boilers. Appellees asserted that it was not clear whether the responses refer to a boiler made in the past, which had an asbestos component incorporated into it, or whether it was referring to the use of materials used to install a boiler. In any event, there was no evidence that the reference to "in the past" referred to a Burnham residential boiler of the type allegedly installed by Vitale Plumbing and Heating in the 1960's to 1980's or that the "in the past" language was referring to residential boilers, as opposed to industrial boilers.[8]

What is evident from above is that appellees were asking the circuit court to resolve the factual dispute based on conflicting evidence as to whether the boilers installed by Vitale were products that contained asbestos. As we stated *supra*, while the

[8] Weil-McClain adopted Burnham's reply to appellants' motion.

circuit court does have discretion in granting motions to reconsider, as the reviewing Court it is our duty to ensure that when the trial court exercises its discretion it should be applied in a way that does not allow a technicality to triumph over justice. Md. Rule 2-535; *Benson*, 389 Md. at 653.

In its motion to reconsider, the appellants met their burden to identify the portions of the record that identify with particularity the material facts that were in dispute. *Nerenberg v. Rica of Southern Maryland,* 131 Md. App. 646, 660 (2000). In fact, the responses by the appellees increased in size and effect the evidentiary matter and material facts in dispute. The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue which, is sufficiently material to be tried. *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675 (2001). Put side by side the testimony and documents before the circuit court demonstrate that a factfinder should resolve the dispute as to what were the types of boilers, assembled or unassembled, installed by Vitale and whether their specific components, either incorporated or add-ons were, "product[s] that contain asbestos." It follows that the circuit court erred in denying appellants' motion to reconsider its decision to grant appellees' motion for summary judgment.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.