NO. 4-10-0406

Filed 1/31/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

LIANA DURBIN, Special Administratrix of the Estate of FREDA BARDEN, Deceased, Plaintiff-Appellant, v. HONEYWELL INTERNATIONAL, INC.; SPRINKMANN SONS CORPORATION OF ILLINOIS; RAPID-AMERICAN CORPORATION; OWENS-ILLINOIS, INC.; SPRINKMANN SONS CORPORATION; PNEUMO ABEX, LLC; PNEUMO ABEX CORPORATION; and GARLOCK SEALING TECHNOLOGIES, LLC, Defendants-Appellees.	)	Appeal from Circuit Court of McLean County No. 07L166 Honorable Scott Drazewski, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

Held: (1) Where a coroner's death certificate and report of investigation were not admissible pursuant to statute or case law, the trial court's grant of summary judgment was proper;

(2) Where coroner's records were not admissible at trial, plaintiff's expert could not rely on them in opposition to motion for summary judgment; and

(3) Where plaintiff's letter did not constitute newly discovered evidence or qualify as an ancient document, the trial court did not err in denying plaintiff's motion to reconsider.

In October 2007, plaintiff, Liana Durbin, special administratrix of the estate of Freda Barden, deceased, filed a complaint against defendants, Honeywell International, Inc.;

Sprinkmann Sons Corporation of Illinois; Rapid-American Corporation; Owens-Illinois, Inc.; Sprinkmann Sons Corporation; Pneumo Abex, LLC; Pneumo Abex Corporation; and Garlock Sealing Technologies, LLC. In September 2009, the trial court granted summary judgment in favor of defendants. In December 2009, plaintiff filed a motion to reconsider, which the court denied.

On appeal, plaintiff argues the trial court erred in (1) ruling the coroner's report and certificate of death were inadmissible to prove cause of death, (2) finding the coroner's report and certificate of death were not reliable for an expert to rely on, and (3) denying her motion to reconsider. We affirm.

I. BACKGROUND

Decedent died on February 4, 1982. In October 2007, plaintiff, as special administratrix of decedent's estate, filed a complaint against various asbestos-related defendants setting forth claims of negligence and conspiracy. Plaintiff alleged decedent died of mesothelioma, which she had contracted as a result of exposure to asbestos-containing products during her employment at the Armour Packing Plant in Peoria from 1959 to 1966 and at Hiram Walker in Peoria from 1964 to 1980.

Plaintiff alleged that neither she, nor decedent, knew or could have known decedent's disease was wrongfully caused by asbestos exposure until March 2007, "since at no time during [decedent's] life did anyone tell [decedent] or her next of kin

that her malignancy was related to asbestos or that her malignancy was something other than 'pleural cancer.'" The March 2007 incident involved plaintiff speaking to Sandra Barber and learning Barber's father had contracted a cancer of the pleura and an asbestos lawsuit had been filed. Plaintiff then searched decedent's records "and first found that the 'pleural cancer' had also been referred to as 'mesothelioma.'"

In December 2007, Owens-Illinois filed a motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-619.1 (West 2006)). Owens-Illinois argued plaintiff's wrongful-death and survival claims were barred by the statute of limitations. Other defendants filed similar motions. In March 2008, the trial court denied the motions.

The only medical records available in this case were the coroner's certificate of death and the physician's report of investigation, both of which listed the cause of death as mesothelioma, stage IV. The Tazewell County coroner at the time was Robert Halles, who is now deceased. The report of investigation was sworn to under oath by Dr. Jack Domnitz, who had "knowledge of the physical condition of the deceased." Dr. Domnitz is also deceased. Plaintiff's medical expert, Dr. Arthur Frank, relied on the above medical evidence and opined that decedent died of a "malignant pleural mesothelioma" caused by asbestos exposure.

In March 2009, Owens-Illinois filed a motion for summary judgment pursuant to section 2-1005 of the Civil Procedure Code (735 ILCS 5/2-1005 (West 2008)). Owens-Illinois argued plaintiff lacked any evidence that decedent's cancer was caused by asbestos, and the only medical records consisted of the coroner's certificate of death and the report of investigation. Owens-Illinois claimed coroner's records are not admissible as proof of any fact in controversy under section 8-2201 of the Civil Procedure Code (735 ILCS 5/8-2201 (West 2008)). Further, Owens-Illinois claimed the death certificate and report of investigation did not fall within the scope of section 115-5.1 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115-5.1 (West 2008)). Owens-Illinois argued the action was also time-barred by the statute of limitations. Other defendants filed motions for summary judgment or joined in the motion filed by Owens-Illinois.

In September 2009, the trial court conducted a hearing on the motions for summary judgment. Following the parties' arguments, the court found plaintiff would be unable to introduce either the death certificate or the report of investigation under section 115-5.1 or section 8-2201. Further, the court found Dr. Frank could not rely on the cause of death specified in the coroner's records because they were not sufficiently reliable. The court held defendants were entitled to summary judgment.

In December 2009, plaintiff filed a motion to reconsider. Therein, plaintiff claimed she found additional evidence, a November 18, 1976, letter from Dr. Robert Thompson, an oncologist, to attorney Michael W. Heller. In the letter, Dr. Thompson stated an October 1976 biopsy was taken of decedent's chest wall mass and a diagnosis of mesothelioma was made. Linda Marks, decedent's daughter, stated in an affidavit that she discovered the letter on September 16, 2009, with her mother's personal papers. Dr. Thompson is deceased.

In May 2010, the trial court conducted a hearing on the motion to reconsider. The court found the evidence could have been located had due diligence been engaged in prior to the hearing on the motion for summary judgment. The court also found the Thompson letter would not be admissible either as a business record or an ancient document. The court denied the motion to reconsider. This appeal followed.

II. ANALYSIS

A. Standard of Review

"Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS

5/2-1005(c) (West 2000)). On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

B. Admissibility of Coroner's Report and Certificate of Death

Plaintiff argues the trial court erred in ruling the coroner's report and certificate of death were inadmissible to prove the cause of death. We disagree.

"[P]ublic documents produced by coroners and county medical examiners were generally admissible in evidence until our supreme court decided *Spiegel's House Furnishing Co. v. Industrial Comm'n*, 288 Ill. 422, 123 N.E. 606 (1919)." *Steward v. Crissell*, 289 Ill. App. 3d 66, 70, 681 N.E.2d 1040, 1043 (1997). In *Speigel's*, 288 Ill. at 430, 123 N.E. at 609-10, the supreme court held as follows:

> "[I]t should be no longer *** that a coroner's verdict or inquest should be admissible as evidence in civil suits for the purpose of establishing personal liability against any individual in cases where the death of any person is charged or to establish a defense to such a suit, or for the purpose of establishing other issues between private litigants."

The General Assembly adopted the supreme court's holding, and section 8-2201 of the Civil Procedure Code took effect in July 1982. See *Steward*, 289 Ill. App. 3d at 71, 681 N.E.2d at 1044.

Section 8-2201 of the Civil Procedure Code provides as follows:

> "In actions or proceedings for the recovery of damages arising from or growing out of injuries caused by the negligence of any person, firm[,] or corporation resulting in the death of any person or for the collection of a policy of insurance, neither the coroner's verdict returned upon the inquisition, nor a copy thereof, shall be admissible as evidence to prove or establish any of the facts in controversy in such action or proceeding." 735 ILCS 5/8-2201 (West 2008).

Here, plaintiff seeks to offer the coroner's death certificate and the report of investigation to establish a fact in controversy, that decedent's cause of death was mesothelioma. Although plaintiff attempts to argue that no dispute exists that mesothelioma was the cause of decedent's death, it is hard to imagine what the arguments in the trial court were about if not. That said, a reading of section 8-2201 indicates it would prohibit the admission of these two items of evidence.

Plaintiff, however, argues such records are admissible under section 115-5.1 of the Criminal Procedure Code, which provides as follows:

> "In any civil or criminal action the records of the coroner's medical or laboratory examiner summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this [s]ection. These reports, specifically including but not limited to the pathologist's protocol, autopsy reports[,] and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, finding, opinions, diagnoses[,] and conditions stated therein.
>
> A duly certified coroner's protocol or autopsy report, or both, complying with the

requirements of this [s]ection may be duly admitted into evidence as an exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. The records referred to in this [s]ection shall be limited to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations.

Persons who prepare reports or records offered in evidence hereunder may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause. However, if such person is dead, the county coroner or a duly authorized official of the coroner's office may testify to the fact that the examining pathologist, toxicologist[,] or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical report or record was prepared in the ordinary and usual course of the deceased person's duty or employment in conformity

with the provisions of this [s]ection." 725 ILCS 5/115-5.1 (West 2008).

A reading of section 115-5.1 leads us to conclude the death certificate and the report of investigation in this case are not admissible. The records that may be admitted under section 115-5.1 are limited "to the records of the results of post-mortem examinations of the findings of autopsy and toxicological laboratory examinations." 725 ILCS 5/115-5.1 (West 2008). However, no evidence indicates any post-mortem examinations were performed on decedent. In fact, the death certificate states no autopsy was performed.

In considering the interplay between section 8-2201 of the Civil Procedure Code and section 115-5.1 of the Criminal Procedure Code, the First District stated, in part, as follows:

> "The statements of relevant and material facts in certified records of the coroner or medical examiner, kept in the ordinary course of business, are all admissible in evidence, as long as the preparers of the reports are available for examination upon the request of either party. Such admissible facts include measurements of the scene, descriptions of the wounds, and medical reports, including toxicology reports, concerning the deceased.

> Assessments of the cause of death have more limited admissibility: the coroner's verdict, concerning the cause and material circumstances surrounding the death (see 55 ILCS 5/3-3025 (West 1994)), is entirely inadmissible in all civil proceedings for damages. 735 ILCS 5/8-2201 ([West] 1994). Only the coroner's protocol or autopsy report is admissible as evidence of the cause of death, again providing that the preparer is available by subpoena for examination." *Steward*, 289 Ill. App. 3d at 72, 681 N.E.2d at 1044.

In the case *sub judice*, the evidence in question is simply a conclusory statement that decedent died from mesothelioma. No records exist summarizing and detailing the performance of the coroner's official duties in performing a medical examination upon decedent or an autopsy, as none was performed. Moreover, the preparers who could shed light on their conclusions are no longer living. Thus, the records are neither admissible under section 8-2201 of the Civil Procedure Code nor under the exception set forth in section 115-5.1 of the Criminal Procedure Code.

Plaintiff's citation to case law does not alter our conclusion. Relying heavily on *Maddox v. MFA Life Insurance Co.*, 132 Ill. App. 2d 109, 267 N.E.2d 723 (1971), plaintiff contends

the coroner's records are admissible to show the cause of death. In *Maddox*, 132 Ill. App. 2d at 110-11, 267 N.E.2d at 724, the case involved a life-insurance dispute as to whether the decedent's lethal gunshot wound was an accident or suicide. The coroner's certified copy of the death certificate indicated the cause of death was a gunshot wound to the chest, it was a self-inflicted wound, and the cause of death was suicide. *Maddox*, 132 Ill. App. 2d at 111-12, 267 N.E.2d at 725. The trial court admitted the death certificate "for the limited purpose of showing that death was the result of a gunshot wound in the chest." *Maddox*, 132 Ill. App. 2d at 112, 267 N.E.2d at 725. The appellate court agreed with this ruling. *Maddox*, 132 Ill. App. 2d at 112, 267 N.E.2d at 725.

In *Maddox*, the parties did not dispute the decedent died by a gunshot wound. Instead, the fact in controversy was whether it was an accidental death or a suicide. Thus, the trial court limited the admission of the death certificate simply to show the death by gunshot wound, and not to show it was a self-inflicted suicide. Here, the diagnosis of mesothelioma is a fact in controversy, and thus the coroner's conclusion as to the cause of death is not admissible.

C. Expert Testimony

Plaintiff argues the trial court erred in finding the coroner's report and certificate of death were not reliable for

an expert to rely on. We disagree.

In rendering his opinion on the cause of decedent's death, Dr. Frank relied solely on the coroner's records. Based on those records, Dr. Frank opined in a letter attached to plaintiff's motion in opposition to summary judgment that decedent developed and died of a malignant pleural mesothelioma caused by exposure to asbestos. The trial court found Dr. Frank could not rely on these records as they were not admissible under existing statutes and they did not meet the reliability test set forth in *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).

In *Wilson*, 84 Ill. 2d at 192, 417 N.E.2d at 1326, the supreme court held hospital records need not be admitted to elicit an opinion from a medical expert at trial. Moreover, "due to the high degree of reliability of hospital records, an expert may give his response to a hypothetical question based on facts contained in those records, even if the hospital records themselves are not in evidence." *Wilson*, 84 Ill. 2d at 194, 417 N.E.2d at 1326.

In *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339, 775 N.E.2d 987, 995 (2002), the supreme court held "*Wilson* is inapplicable to a summary[-]judgment situation." Instead, an expert's affidavit supporting or opposing a motion for summary judgment must adhere to the requirements of Supreme Court Rule 191(a) and, among other things, "'shall not consist of conclu-

sions but of facts admissible in evidence.'" *Robidoux*, 201 Ill. 2d at 333, 775 N.E.2d at 992 (quoting Ill. S. Ct. R. 191(a) (eff. Aug. 1, 1992)). The supreme court has also stated "any evidence which would be inadmissible at trial cannot be considered by the court in support of or opposition to a motion for summary judgment." *Watkins v. Schmitt*, 172 Ill. 2d 193, 203-04, 665 N.E.2d 1379, 1385 (1996).

In this case, Dr. Frank's conclusion that decedent died from mesothelioma was based on evidence that would not be admissible into evidence at trial. As this evidence was not reliable at this stage of the proceedings and would not be admissible at trial, the trial court did not err in granting summary judgment.

D. Motion To Reconsider

Following the trial court's summary-judgment ruling, plaintiff filed a motion to reconsider based, in part, on newly discovered evidence. In her affidavit, Linda Marks stated she was contacted by attorneys in September 2009 and asked whether she knew the whereabouts of Coroner Halles and Dr. Domnitz. Upon looking through decedent's personal papers, she discovered the November 1976 letter from Dr. Thompson to Attorney Heller. In the letter, Dr. Thompson stated decedent was referred to him by Dr. Domnitz and in October 1976 "a diagnosis of [m]esothelioma was made." The court found the evidence could have been discovered upon due diligence and would not be admissible as a

business record or an ancient document.

"The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand." *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 492, 919 N.E.2d 426, 436 (2009). To justify a hearing on newly discovered evidence, "a party must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable." *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1141, 815 N.E.2d 476, 481 (2004); see also *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1072 (1993) ("the party seeking the rehearing must establish due diligence and demonstrate that real justice has been denied"). "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248, 571 N.E.2d 1107, 1111 (1991).

Here, Dr. Thompson's letter does not constitute newly discovered evidence. Although Marks stated in her affidavit that she had not seen the letter before September 16, 2009, five days after the hearing, it was found in a box of decedent's personal

papers that Marks kept since her death. As the letter was in her possession long before the hearing on the motion for summary judgment, plaintiff cannot establish due diligence.

Plaintiff also argues Dr. Thompson's letter was admissible as an exception to the hearsay rule as an ancient document. However, the hearsay exception for 30-year-old documents relates to matters involving property rights, which are not present here. See *People ex rel. Adams Electrical Cooperative v. Village of Camp Point*, 286 Ill. App. 3d 247, 254-55, 675 N.E.2d 1371, 1376 (1997). Plaintiff's one-sentence claim without argument or citation to authority that Dr. Thompson's letter was admissible as a record kept in the usual course of medical treatment will not be considered. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Accordingly, the trial court did not err in denying plaintiff's motion to reconsider.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.