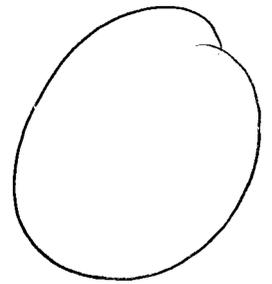


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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLGA PAVLICK,
Plaintiff,

v.

ADVANCE STORES COMPANY,
et al.,
Defendants.

FILED

FEB 20 2013

MICHAEL E. KUNZ, Clerk
By [Signature] Dep. Clerk

: CONSOLIDATED UNDER
: MDL 875

: Transferred from the
: District of Delaware
: (Case No. 10-00174)

: E.D. PA CIVIL ACTION NO.
: 2:10-67147-ER

File

O R D E R

AND NOW, this 19th day of **February, 2013**, it is hereby
ORDERED that the Motion for Summary Judgment of Ford Motor
Company (Doc. No. 251) is **GRANTED in part; DENIED in part.**¹

¹ This case was transferred in May of 2010 from the United States District Court for the District of Delaware to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Olga Pavlick alleges that her husband, John Pavlick ("Decedent" or "Mr. Pavlick"), was exposed to asbestos during his work (1) in the army (in Germany), (2) in an auto parts-related job in New Jersey, and (3) while performing home remodeling. Mr. Pavlick developed mesothelioma and died from that illness.

Plaintiff has brought claims against various defendants. Defendant Ford Motor Company ("Ford") has moved for summary judgment arguing that (1) there is insufficient evidence to support a finding of causation with respect to any product for which it is liable, (2) it is entitled to summary judgment on the grounds of the bare metal defense, and (3) there is insufficient evidence to support Plaintiffs' claims for conspiracy, wrongful death, loss of consortium, and punitive damages.

ENTERED
FEB 21 2013
CLERK OF COURT

Defendant Ford contends that New Jersey law applies to the claims against it (although the alleged exposure at issue occurred exclusively in Germany). Plaintiff agrees that New Jersey law applies to the claims at issue.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

The parties agree that New Jersey law applies. Therefore, this Court will apply New Jersey law in deciding Defendant's Motion for Summary Judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Product Identification / Causation Under New Jersey Law

This Court has previously considered the product identification/causation standard under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

To maintain an asbestos action in New Jersey, a plaintiff must "provide sufficient direct or circumstantial evidence from which a jury could conclude that plaintiff was in close proximity to, and inhaled, defendant's asbestos-containing product on a frequent and regular basis." Kurak v. A.P. Green Refractories Co., 689 A.2d 757, 761 (N.J. Super. Ct. App. Div. 1997) (quoting Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1208 (N.J. Super. Ct. App. Div. 1989)). In order to meet this "frequency, regularity and proximity test," plaintiff must do more than "demonstrate that a defendant's asbestos product was present in the workplace or that he had 'casual or minimal exposure' to it." Kurak, 689 A.2d at 761 (quoting Goss v. American Cyanamid Co., 650 A.2d 1001, 1005 (N.J. Super. Ct. App. Div. 1994)). In addition to meeting the "frequency, regularity, and proximity test," plaintiff must establish causation by presenting "competent evidence, usually supplied by expert proof" showing that there is a nexus between exposure to defendant's product and plaintiff's condition. Kurak, 689 A.2d at 761.

2011 WL 5881183, * 1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.).

D. Presumption Re: Warning Defect Under New Jersey Law

This Court has previously addressed the presumption regarding warning defect claims that exists under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

In Coffman v. Keene Corp., the plaintiff claimed that an asbestos manufacturer's failure to place warnings on its asbestos-related products was a proximate cause of the plaintiff's development of asbestosis. 628 A.2d 710, 715 (N.J. 1993). The court recognized that, "[c]ausation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation-that the defect in the product was

a proximate cause of the injury." Id. at 716 (citing Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982); Vallillo v. Mushkin Corp., 514 A.2d 528 (N.J. App. Div. 1986)). "When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm." 628 A.2d at 715 (citing Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984)). The court adopted a "heeding presumption" in products liability failure to warn cases that the plaintiff "would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded." 628 A.2d at 720. Evidence that the plaintiff was aware of the dangers associated with the defendant's product or that the plaintiff would have disregarded the warnings had they been provided may rebut this heeding presumption. Id. at 721. The court held that "to overcome the heeding presumption in a failure-to-warn case involving a product used in the workplace, the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." Id. at 724.

2011 WL 5881181, * 1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.).

II. Defendant Ford's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant Ford argues that there is insufficient product identification evidence to support a finding of causation with respect to any product(s) for which it is liable.

Bare Metal Defense

Defendant Ford contends that it is entitled to summary judgment on grounds of the "bare metal defense," and that New Jersey law would recognize the defense. In support of this assertion, it relies upon two unpublished decisions: (1) Berglund v. Goulds, No. MSX-L-329207 (N.J. Super. Ct. June 25, 2010) (McCormick, J.), and (2) Mystrena/Fayer v. A.W. Chesterton Co., MID-L-4208-10 (N.J. Super. Ct. May 8, 2012) (McCormick, J.).

Conspiracy, Wrongful Death, and Loss of Consortium Claims

Defendant Ford contends that it is entitled to summary judgment on Plaintiff's claims for conspiracy, wrongful death, and loss of consortium because Plaintiff has failed to identify sufficient evidence to survive summary judgment with respect to these claims.

Punitive Damages Claims

Defendant Ford contends that it is entitled to summary judgment on Plaintiff's punitive damages claims because Plaintiff has failed to identify sufficient evidence to support an award of punitive damages.

B. Plaintiff's Arguments

Product Identification / Causation

In response to Defendant's assertion that there is insufficient product identification evidence to establish causation with respect to its product(s), Plaintiff asserts that there is evidence that Defendant Ford is liable with respect to five (5) different products:

- (1) Ford M151-A1 jeeps
- (2) Braking systems incorporated into Ford M151-A1 jeeps
- (3) Brake shoes used in connection with the jeeps
- (4) Ford-manufactured replacement brakes (Salvio Rampolla)
- (5) Ford-manufactured replacement clutches (Salvio Rampolla)

Plaintiff's evidence is summarized below:

- Testimony of Co-Worker Dolores Rampolla
Dolores Rampolla, who worked with Decedent at Salvio Rampolla (an auto export business), and who was also his mother-in-law, testified that Salvio Rampolla never dealt with "after market" or "secondhand" parts and only exported replacement parts that were manufactured by Ford, such as clutches or brakes.

(Pl. Ex. 6 at 43-45, Doc. No. 267-7.)

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- Testimony of Co-Worker Kenneth Rampolla
Kenneth Rampolla, who worked with Decedent at Salvio Rampolla, and who was also his brother-in-law, testified that Salvio Rampolla exported component parts such as clutches or brakes that were Ford parts. He testified that "a lot of times" Salvio Rampolla would get parts that were not packaged very well, such that he and Decedent would have to actually handle the parts in order to repackage them. He testified that he specifically recalled Mr. Pavlick handling Ford-manufactured brakes and clutches, and that Ford parts were "a big portion of our business."

(Pl. Ex. 7 at 24-27, 45-47, Doc. No. 267-8.)

- Various Documents
Plaintiff points to various discovery responses and internal documents from Ford which she contends indicate that Ford concedes that replacement brake linings, drum brake shoes, and clutches supplied during the relevant time period (and up until approximately 1978 for clutches and 1983 for brakes) contained asbestos.

(Pl. Exs. 8, 9, 10, 11, 13, Doc. Nos. 267-9 to 267-14.)

- Published study by A.K. Madl
Plaintiff points to a study by A.K. Madl et al., published in May 2008 and entitled "Exposure to Chrysotile Asbestos Associated With Unpacking and Repacking Boxes of Automobile Brake Pads and Shoes," which found that unpacking and repacking automobile brake pads and shoes generates respirable asbestos dust in amounts between .086 and .368 f/cc for a worker unpacking 4 to 20 boxes of brake pads, and .021-.126 f/cc for 4 to 20 boxes of brake shoes. The study concludes that "a worker handling a relatively large number of boxes of brakes over short periods of time will not be exposed to airborne asbestos in excess of its historical or current short-term occupational exposure limits."

(Pl. Ex. 14, Doc. No. 267-15.)

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- Published study by Ronald Dodson
Plaintiff points to a study by Mark A.L. Atkinson, Ronald Dodson et al., published in 2004, entitled "Evaluation of the Size and Type of Free Particulates Collected from Unused Asbestos-Containing Brake Components As Related to Potential for Respirability." The study concludes that "any manipulation of new asbestos-containing brake components would be expected to yield free dust containing chrysotile asbestos of respirable size."

(Pl. Ex. 15, Doc. No. 267-16.)

- Expert Report of Dr. James Millette
Plaintiff points to the expert report of Dr. James Millette, an industrial hygienist, who opines that Decedent was exposed to asbestos from the handling of friction products and during the servicing of brakes (or work around others servicing brakes).

(Pl. Ex. 16, Doc. NO. 267-17.)

- Testimony of Co-Workers Edward Carlson and Daniel DiLoretto
Plaintiff points to testimony of co-workers Edward Carlson and Daniel DiLoretto, who worked with Decedent in Germany during the period 1971 to 1974. These co-workers provide testimony that Decedent (with others) was responsible for the maintenance and service of all the troops' vehicles, and that Decedent's responsibilities included supervision of all activities associated with the maintenance and repair of the troops' vehicles, which included brake and clutch removal and replacements. They provide testimony that the most frequently serviced vehicles included Ford M151-A1 jeeps. They testify that Decedent spent the majority of his time on the floor in Troop C's maintenance bay in close proximity to Ford jeeps when their brakes and braking systems were maintained, repaired, and replaced.

(Pl. Exs. 17 and 18, Doc. Nos. 267-18 and 267-19.)

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- Testimony of Ford Corporate Representative (Mark Taylor)
Plaintiff points to testimony of Mr. Taylor, who she contends provides testimony to establish that Ford was the exclusive supplier of quarter-ton jeeps (M151-A1s) to the Army.

(Pl. Ex. 19, Doc. No. 267-20.)
 - Testimony of Sheldon Rabinowitz
Plaintiff points to testimony of Sheldon Rabinowitz, a former Ford employee, who explains how dust is created during a brake repair job.

(Pl. Ex. 30, Doc. No. 267-53.)

Conspiracy, Wrongful Death, and Loss of Consortium Claims

Plaintiff has not responded to Defendant's motion for summary judgment regarding her claims for conspiracy, wrongful death, and loss of consortium.

Punitive Damages Claims

Plaintiff has not responded to Defendant's motion for summary judgment regarding her claims for punitive damages.

Bare Metal Defense

Plaintiff contends that New Jersey law would not recognize the "bare metal defense." In support of this assertion, Plaintiff cites to: (1) Beshada v. Johns Manville, 447 A.2d 359, 547-49 (N.J. 1982), (2) Freund v. Cellofilm Properties, 432 A.2d 925, 932 (N.J. 1981), (3) Waterson v. General Motors, 544 A.2d 357 (N.J. 1988), (4) Becker v. Baron Bros., 649 A.2d 613 (N.J. 1994), (5) Molino v. BF Goodrich, 617 A.2d 1235, 1240 (N.J. App. 1992), (6) Campos v. Firestone, 485 A.2d 305 (N.J. 1984), and (7) Michalko v. Cooke Color & Chemical, 451 A.2d 179 (N.J. 1982).

C. Analysis

Conspiracy, Wrongful Death, and Loss of Consortium Claims

In responding to Defendant Ford's motion for summary judgment, Plaintiff has not presented any evidence to support her claims for conspiracy, wrongful death, or loss of consortium. As

such, she has failed to identify a genuine dispute of material fact for trial, and no reasonable jury could conclude from the evidence that she has established any of these claims. See Anderson, 477 U.S. at 248-50. Accordingly, summary judgment in favor of Defendant is warranted with respect to each of these claims. Id.

Punitive Damages Claims

The Court has previously determined that the issue of punitive damages must be resolved at a future date with regard to the entire MDL-875 action and, therefore, all claims for punitive or exemplary damages are to be severed from the case and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania. See, e.g., Ferguson v. Lorillard Tobacco Co., 2011 WL 4915784, at n.2 (E.D. Pa. Mar. 2, 2011) (Robreno, J.). Accordingly, Defendant's motion for summary judgment as to claims for punitive damages is denied.

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that Defendant Ford is liable for asbestos exposure arising from five (5) different products: (1) M151-A1 jeeps, (2) braking systems incorporated into M151-A1 jeeps, (3) brake shoes used in connection with the jeeps, (4) Ford-manufactured replacement brakes (at Salvio Rampolla), and (5) Ford-manufactured replacement clutches (at Salvio Rampolla). The court considers the evidence regarding each product separately:

(i) M151-A1 Jeeps

There is evidence that Decedent worked in close proximity to maintenance and repair work (including removal and replacement of brakes and clutches) being done on M151-A1 Jeeps on a frequent and regular basis. There is evidence that this work created dust. There is evidence that Ford manufactured and supplied the Jeeps. However, there is no evidence that any of the brakes or clutches creating dust to which Decedent was exposed were manufactured or supplied by Defendant Ford. Moreover, because there is no evidence that these were Ford parts, there is no evidence that the parts at issue contained asbestos because the only evidence of asbestos content in parts pertains to Ford parts. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to dust from Ford parts - or any other component or replacement manufacturer's parts - such

that it was a substantial factor in the development of his mesothelioma. See Kurak, 689 A.2d at 761. Therefore, summary judgment in favor of Defendant Ford is warranted with respect to alleged asbestos exposure arising from M151-A1 Jeeps, regardless of whether or not New Jersey law recognizes the so-called "bare metal defense." . Anderson, 477 U.S. at 248-50.

(ii) Braking Systems Incorporated Into M151-A1 Jeeps

There is evidence that Decedent worked in close proximity to maintenance and repair work (including removal and replacement of brakes and clutches) being done on M151-A1 Jeeps on a frequent and regular basis. There is evidence that this work created dust. There is evidence that Ford manufactured and supplied the Jeeps. However, there is no evidence that any of the brakes creating dust to which Decedent was exposed were manufactured or supplied by Defendant Ford. Moreover, because there is no evidence that these were Ford parts, there is no evidence that the parts at issue contained asbestos because the only evidence of asbestos content in parts pertains to Ford parts. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to dust from Ford braking systems - or any other manufacturer's or supplier's braking systems - such that it was a substantial factor in the development of his mesothelioma. See Kurak, 689 A.2d at 761. Therefore, summary judgment in favor of Defendant Ford is warranted with respect to alleged asbestos exposure arising from braking systems incorporated into M151-A1 Jeeps, regardless of whether or not New Jersey law recognizes the so-called "bare metal defense." Anderson, 477 U.S. at 248-50.

(iii) Brake Shoes Used in Connection With M151-AJ Jeeps

There is evidence that Decedent worked in close proximity to maintenance and repair work (including removal and replacement of brakes and clutches) being done on M151-A1 Jeeps on a frequent and regular basis. There is evidence that this work created dust. There is evidence that Ford manufactured and supplied the Jeeps. However, there is no evidence that any of the brakes creating dust to which Decedent was exposed were manufactured or supplied by Defendant Ford. Moreover, because there is no evidence that these were Ford parts, there is no evidence that the parts at issue contained asbestos because the only evidence of asbestos content in parts pertains to Ford parts. As such, no reasonable jury could conclude from the evidence that Decedent was exposed to dust from Ford brake shoes

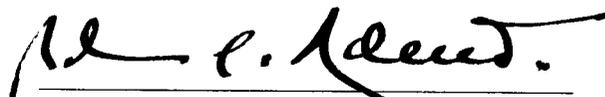
- or any other manufacturer's or supplier's brake shoes - such that it was a substantial factor in the development of his mesothelioma. See Kurak, 689 A.2d at 761. Therefore, summary judgment in favor of Defendant Ford is warranted with respect to alleged asbestos exposure arising from brake shoes incorporated into M151-A1 Jeeps, regardless of whether or not New Jersey law recognizes the so-called "bare metal defense." Anderson, 477 U.S. at 248-50.

(iv) Ford-manufactured Replacement Brakes (Salvio Rampolla)

There is evidence that Decedent was exposed to dust from Ford-manufactured replacement brakes during his time working at Salvio Rampolla. There is evidence that the dust was asbestos dust. There is evidence that this exposure occurred on a frequent and regular basis while Decedent was in close proximity to the products at issue. There is evidence that this exposure caused or contributed to his mesothelioma. Therefore, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from replacement brakes manufactured and/or supplied by Ford such that it was a substantial factor in the development of his mesothelioma. See Kurak, 689 A.2d at 761. Accordingly, summary judgment in favor of Defendant Ford is not warranted with respect to alleged asbestos exposure arising from Ford-manufactured replacement brakes at Salvio Rampolla. Anderson, 477 U.S. at 248-50.

(v) Ford-manufactured Replacement Clutches (Salvio Rampolla)

There is evidence that Decedent was exposed to dust from Ford-manufactured replacement clutches during his time working at Salvio Rampolla. There is evidence that the dust was asbestos dust. There is evidence that this exposure occurred on a frequent and regular basis while Decedent was in close proximity to the products at issue. There is evidence that this exposure caused or contributed to his mesothelioma. Therefore, a reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from replacement clutches manufactured and/or supplied by Ford such that it was a substantial factor in the development of his mesothelioma. See Kurak, 689 A.2d at 761. Accordingly, summary judgment in favor of Defendant Ford is not warranted with respect to alleged asbestos exposure arising from Ford-manufactured replacement clutches at Salvio Rampolla. Anderson, 477 U.S. at 248-50.


EDUARDO C. ROBRENO, J.

D. Conclusion

Summary judgment in favor of Defendant Ford is granted with respect to Plaintiff's claims for conspiracy, wrongful death, and loss of consortium.

Summary judgment in favor of Defendant Ford is denied with respect to Plaintiff's claims for punitive damages, as all such claims in MDL-875 have been severed and will be addressed at a future date.

Summary judgment in favor of Defendant Ford is granted with respect to claims arising from alleged asbestos exposure stemming from M151-A1 Jeeps, the braking systems incorporated into those jeeps, and the brake shoes used in connection with those jeeps.

Summary judgment in favor of Defendant Ford is denied with respect to claims arising from alleged asbestos exposure stemming from Ford-manufactured replacement brakes and clutches to which Decedent was exposed during his work at Salvio Rampolla.