

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

CHARLES BUNNELL,	:	CONSOLIDATED UNDER
	:	MDL 875
	:	
Plaintiff,	:	
	:	Transferred from the Southern
	:	District of Mississippi
v.	:	(Case No. 05-00328)
	:	
	:	
METROPOLITAN LIFE INSURANCE	:	E.D. PA CIVIL ACTION N
CO., ET AL.,	:	2:08-85610
	:	
Defendants.	:	

**FILED**

MAY 17 2011

MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

ORDER

**AND NOW**, this 17th day of **May, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CertainTeed Corp., filed on February 15, 2011 (doc. no. 13), is **GRANTED**.<sup>1</sup>

<sup>1</sup> Plaintiff Charles Bunnell was an assembly worker and lab technician at various plants throughout Mississippi from 1964 until 1976. (Pl.'s Resp., doc. no. 15 at 1.) Plaintiff alleges that Mr. Bunnell was exposed to Johns-Manville products while working at the Masonite plant in Laurel, Mississippi. (Id. at 4.) On May 28, 1997, Mr. Bunnell was diagnosed with asbestos-related lung cancer. (Id. at 1.)

Plaintiff filed his original complaint on April 13, 1998 in the Jones County Circuit Court in Mississippi. On May 17, 2001, Plaintiff filed his first amended complaint. CertainTeed was never served with the original complaint and was served with the first amended complaint on Sept. 17, 2001. On August 19, 2004, the Circuit Court of Jones County denied CertainTeed's Motion for Summary Judgment based on the statute of limitations. (Doc. no. 15-3.) On October 13, 2004, the Supreme Court of Mississippi denied a Petition for Permission to Appeal Interlocutory Order in this case. (Doc. no. 15-4.) On July 1, 2005, CertainTeed Corp. removed this action to the United States District Court for the Southern District of Mississippi. Subsequently, this case was transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

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**I. LEGAL STANDARD**

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. The alleged exposures which are relevant to this motion occurred while Mr. Bunnell worked at the Masonite plant in Mississippi. Therefore, this Court will apply Mississippi substantive 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).

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1. Statute of Limitations

MISS. CODE. ANN. § 15-1-49 provides the applicable statute of limitations for latent injury claims. MISS. CODE. ANN. § 15-1-49 states that,

(1) All actions for which no other period of limitation is prescribed shall be commenced within three years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

In Angle v. Koppers, Inc., plaintiff filed her complaint on March 17, 2006 alleging that she was exposed to harmful levels of toxic chemicals released into the environment from defendants' railroad tank cars, trucks, and from a wood-treatment facility. 42 So.3d 1, 2 (Miss. 2010). Plaintiff's illnesses were diagnosed no later than 2001. Id. at 4. The court held that, "the plain language of [Miss. CODE. ANN. § 15-1-49] supports Defendants' argument that the cause of action accrued upon discovery of the injury, not discovery of the injury and its cause." Id. at 6. The court found that plaintiff's claims were barred by the statute of limitations since nothing in MISS. CODE. ANN. § 15-1-49 indicates that the plaintiff must have knowledge of the cause of his or her injury in order to trigger the statute of limitations. Id. at 8.

2. Civil Conspiracy/Fraud

Civil conspiracy is "a combination of persons for the purpose of accomplishing an unlawful purpose or lawful purpose unlawfully." Roussel v. Hutton, 638 So. 2d 1305, 1315 (Miss. 1994) (citing Shaw v. Burchfield, 481 So. 2d 247, 255 (Miss. 1985); Mississippi Power & Light Co. v. Coldwater, 106 So. 2d 375, 381 (Miss. 1985); Ryals v. Pigott, 580 So. 2d 1140, 1156 (Miss. 1990)). To establish civil conspiracy, a plaintiff must show "(1) the existence of a conspiracy, (2) an overt act in furtherance of that conspiracy, and (3) damages arising therefrom." Wells v. Shelter General Ins. Co., 217 F. Supp. 2d

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744, 753 (S.D. Miss. 2002) (citing Delta Chem. and Petroleum, Inc. v. Citizens Bank, 790 So. 2d 862, 877 (Miss. Ct. App. 2001)).

3. Product Identification

In Gorman-Rupp Co. v. Hall, the Supreme Court of Mississippi adopted the "frequency, regularity, and proximity" test. 908 So. 2d 749, 757 (Miss. 2005). The plaintiff must prove product identification, exposure, and proximate cause with regularity, frequency, and proximity in order to survive summary judgment. Monsanto Co. v. Hall, 912 So. 2d 134, 137 (Miss. 2005) (citing Gorman-Rupp Co., 908 So. 2d at 754-57).

**II. MOTION FOR SUMMARY JUDGMENT OF CERTAINTEED CORP.**

Plaintiff admits that, in accordance with the Angle decision, his product identification and negligence claims are barred by the statute of limitations, but asserts that his civil conspiracy claim is not barred since the statute of limitations was not triggered until Plaintiff learned of the alleged fraud in 1999. Even assuming that Plaintiff's civil conspiracy claim is not barred by the statute of limitations, Defendant is entitled to summary judgment.

Plaintiff asserts that Mr. Bunnell was exposed to Johns-Manville asbestos-containing products and that "CertainTeed conspired with Johns-Manville and other asbestos product manufacturers to conceal and misrepresent the dangers of asbestos." (Pl.'s Resp. at 2.) Plaintiff submits letters detailing meetings among asbestos manufacturers, including Johns-Manville and Certainteed Corp., about the potential risk of getting cancer by drinking water through asbestos-cement pipe. This Courts notes that these documents are irrelevant to the specific products at issue in this case, Johns-Manville mud and Johns-Manville half-round insulation.

Moreover, in order to prevail on the civil conspiracy claim, that Certainteed should be held liable as a co-conspirator for injuries caused by Johns-Manville asbestos-containing products, Plaintiff must raise a genuine issue of material fact as to whether Mr. Bunnell was exposed to Johns-Manville asbestos-containing products. At oral argument, Plaintiff's counsel asserted that Mr. Bunnell identified Johns-Manville products in

his deposition. In Plaintiff's Response to Defendant's Motion for Summary Judgment, Plaintiff averred that, "[h]ere, Mr. Bunnell was exposed to Johns-Manville products while working at the Masonite lab in Laurel, Mississippi. (Pl.'s Resp. at 4-5) (citing Bunnell Dep., doc. No. 15-1 at 25.) At no point in his deposition did Mr. Bunnell identify working around Johns-Manville products. Mr. Bunnell merely stated that he worked at the Masonite plant. (Bunnell Dep. at 25.)


Plaintiff then cites to the testimony of William Crocker and C.H. Crumbley, who both worked at the Masonite plant. Mr. Crocker testified that workers at the Masonite plant used Johns-Manville half-round insulation. Mr. Crumbley testified that the workers used Johns-Manville mud. This testimony fails to raise a genuine issue of material fact as to whether Mr. Bunnell was exposed to Johns-Manville asbestos-containing products. First, Defendant alleges that the depositions of Mr. Crocker and Mr. Crumbley were taken on February 12, 2001, approximately seven (7) months before Certainteed was a party to this case and that therefore, Certainteed was not present for these depositions. Plaintiff has not shown that Mr. Crocker or Mr. Crumbley meet the unavailability requirement of Federal Rule of Evidence 804(a). Even if they did meet this requirement, there is no evidence that any defendant present at the deposition would have had a motive or similar opportunity to cross-examine these witnesses about the conspiracy claims alleged here. This Court has previously examined this issue and found that even where the unavailability requirement is met, if a party was not present at a deposition and no party present at the deposition had a motive similar to the absent party in developing the witness' testimony, the deposition testimony is inadmissible under Federal Rule of Evidence 804(b)(1). See Cowley v. ACandS, Inc., 2010 WL 5376338, at \*6 (E.D. Pa. Dec. 23, 2010).

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Second, even assuming that these depositions are admissible, neither Mr. Crocker nor Mr. Crumbley mentioned Mr. Bunnell in their testimony. They merely worked at the same plant as Mr. Bunnell and testified that they were exposed to Johns-Manville asbestos-containing products. Mr. Bunnell testified that he did not know these individuals. (Bunnell Dep., doc. no. 19-2 at 73-74.) Under Mississippi law, mere presence of defendant's asbestos-containing product in the plaintiff's workplace is insufficient to survive summary judgment. Accordingly, as Plaintiff has failed to raise a genuine issue of material fact as to whether Mr. Bunnell was exposed to Johns-Manville asbestos-containing products, Plaintiff's civil conspiracy claim fails as a matter of law and Defendant's Motion for Summary Judgment is granted.

E.D. PA NO. 2:08-cv-85610

AND IT IS SO ORDERED.

  
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EDUARDO C. ROBRENO, J.