

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

GEORGE C. MALPASS, ET AL.,	:	CONSOLIDATED UNDER
	:	MDL 875
	:	
Plaintiffs,	:	
	:	
	:	Transferred from the Eastern
	:	District of North Carolina
	:	(Case No. 4:90-00060)
v.	:	
	:	
	:	
ARMSTRONG WORLD INDUSTRIES,	:	
ET AL.,	:	
	:	E.D. PA CIVIL ACTION NO.
	:	2:06-68065
Defendants.	:	

FILED

MAR - 2 2011

MICHAEL E. RUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this **28th** day of **February, 2011**, it is hereby

ORDERED that the Motion for Summary Judgment of Defendant Pneumo
Abex LLC, filed on December 23, 2010 (doc. no. 6), is **DENIED**.¹

¹ Plaintiff George Malpass worked at the Wilmington, North Carolina shipyard until 1977. (Malpass Dep. at 63-79.) He recalled handling Abex asbestos-containing products in 1964 and 1965. (*Id.*) The issue in this case is whether Plaintiffs' claims are barred by North Carolina's six year statute of repose, that is whether the statute of repose is applicable to asbestos claims.

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact" Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. *Id.* at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." *El v. SEPTA*, 479

F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. Therefore, this Court will apply North Carolina 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).

The Supreme Court of North Carolina has not yet addressed whether the most recent version of North Carolina's statute of repose applies in asbestos cases. The North Carolina products liability statute of repose states,

No action for recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

N.C. GEN. STAT. § 1-50(a)(6). In Wilder v. Amatex Corp., the Supreme Court of North Carolina considered whether a plaintiff's claim was barred by a North Carolina accrual statute, which stated that a cause of action accrued at the time of "the last act of defense giving rise to the claim for relief." 336 S.E.2d 66, 70 (N.C. 1985). The court held that N.C. GEN. STAT. § 1-15(b), the accrual statute, did not apply to plaintiff's asbestos action. Id. at 73.

In Hyer v. Pittsburgh Corning Corp., the United States Court of Appeals for the Fourth Circuit, in predicting what action the Supreme Court of North Carolina would take, held that the North

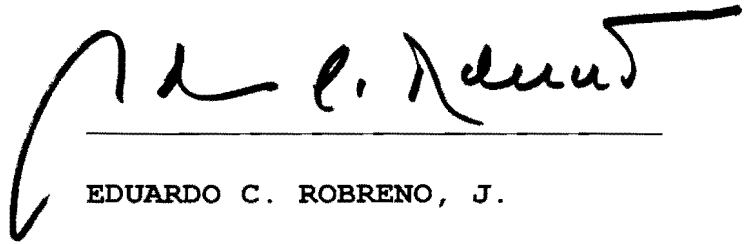
Carolina's products liability statute of repose did not bar a plaintiff's asbestosis claim. 790 F.2d 30, 34 (4th Cir. 1986) (citing Wilder, 336 S.E.2d 66). In Gardner v. Asbestos Corp., Ltd., the United States District Court for the Western District of North Carolina held that "North Carolina's statute of repose does not apply to cases of asbestos disease." 634 F. Supp. 609, 612 (W.D.N.C. 1986). In Jones v. United States, the United States District Court for the Eastern District of North Carolina recognized the latent disease exception to North Carolina's personal injury statute of repose, N.C. GEN. STAT. § 1-52(16). 2010 WL 4663395 at *3-4, No. 7:09-cv-106 (E.D.N.C. Nov. 9, 2010) (citing Hyer, 709 F.2d 30).

In Klein v. Depuy, Inc., the United States Court of Appeals for the Seventh Circuit, applying North Carolina law, disagreed with the Hyer decision. 506 F.3d 553, 558 (7th Cir. 2007). The court held that Hyer improperly interpreted Wilder's disease exception. The court considered the factors laid out in Wilder, including that the purpose of the statute of repose was to shield manufacturers from liability, and granted the defendant's motion for summary judgment finding that plaintiff's claims were barred by North Carolina's statute of repose. Id. at 559.

After comparing the analysis and reasoning of both Hyer and Klein, this Court agrees with the approach taken by the Hyer court. The North Carolina statute of repose is more aptly suited to personal injury claims where the injury is traceable to single moment in time and therefore, the statute of repose does not apply to claims stemming from latent diseases. Hyer, 790 F.2d at 33 (citing Wilder, 336 S.E.2d at 71-72). This Court recognizes that the purpose of the statute of repose is to protect manufacturers, however, the North Carolina legislature sought to limit this protection to personal injury claims, and did not define the term personal injury as including latent disease claims. Hyer, 790 F.2d at 33-34 (citing Gardner, 634 F. Supp. at 612). Accordingly, as this Court agrees with the Hyer court's finding that N.C. GEN. STAT. § 1-50(a)(6) does not apply to latent disease claims, Defendant's Motion for Summary Judgment on the issue of the statute of repose is denied.

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AND IT IS SO ORDERED.



Eduardo C. Robreno
EDUARDO C. ROBRENO, J.