

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

LEO GOLDADE,	:	CONSOLIDATED UNDER
	:	MDL 875
	:	
Plaintiff,	:	
	:	
	:	JUN 23 2011
	:	Transferred from the District
	:	of North Dakota
v.	:	(Case No. 92-00100)
	:	
	:	MICHAEL E. KUNZ, Clerk
	:	By _____ Dep. Clerk
	:	
ACANDS, INC., ET AL.,	:	
	:	
	:	E.D. PA CIVIL ACTION NO.
	:	2:09-68096
Defendants.	:	

O R D E R

AND NOW, this **22nd** day of **June, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Foster Wheeler Corp. (doc. no. 15) is **GRANTED**.¹

¹ In his deposition, Mr. Goldade testified that he worked at the Standard Oil of Indiana/Amoco Refinery in Mandan, North Dakota for two or three weeks in 1961. (Goldade Dep. at 186.) Plaintiff alleges that Mr. Goldade was exposed to the large "Alkylation Unit," which was manufactured by Foster Wheeler and which was present at the Mandan refinery.

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 in North Dakota. Therefore, this Court will apply North Dakota 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 Dakota has not addressed what evidence a Plaintiff must present in order to survive summary judgment in the asbestos context. Under North Dakota law, "a proximate cause is a cause which had a substantial part in bringing about the harm or injury either immediately or through happenings which follow one another." Andrews v. J.W. O'Hearn, 387 N.W.2d 716, 726 (N.D. 1986) (internal citations omitted). There must be a causal link between the defendant's conduct and the injury. Andrews, 387 N.W. 2d at 727 (citing Moum v. Maercklein, 201 N.W.2d 399, 402 (N.D. 1972)). "'Proximate cause [is] that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred.'" Andrews, 387 N.W.2d at 727 (quoting Johnson v. Minneapolis, St. P. & S.S.M. Ry. Co., 209 N.W. 786, 789 (N.D. 1926); Knorr v. K-Mart Corp., 300 N.W.2d 47 (N.D. 1980)).

Magistrate Judge Karen K. Klein of the United States District Court for the District of North Dakota applied a liberal product identification standard in recommending that defendants' motions for summary judgment be denied in Adolph v. A.P.I., Inc. (D.N.D. 1991). Magistrate Judge Klein concluded that coworker testimony or evidence that a plaintiff was employed by a company at the same time that the company was using defendant's asbestos-

containing products could be sufficient to survive summary judgment and that a plaintiff need not specifically describe exposure to the defendant's products. Id. at 3. Magistrate Judge Klein also recognized that, even if the defendants were entitled to summary judgment as to product identification, since they had not moved for summary judgment as to plaintiff's conspiracy claims, "no useful purpose would be served by the piecemeal granting of partial summary judgments on exposure when a defendant must nonetheless remain in the case because of the conspiracy claims." Id. at 4. Magistrate Judge Klein did not consider any of the evidence presented against the defendants and noted that "[t]he motions may be renewed as to particular plaintiffs at trial." Id.

In an unpublished opinion, the United States Court of Appeals for the Eighth Circuit addressed product identification and causation in the asbestos context. Bossert v. Keene Corp., 19 F.3d 1437, 1994 WL 108844 (8th Cir. 1994). The United States District Court for the District of North Dakota denied defendant MacArthur Corp.'s motion for judgment as a matter of law and MacArthur appealed this decision. Id. at *1. The court noted that,

[a] cause is proximate if it 'had a substantial part in bringing about the harm or injury either immediately or through happenings which follow one another.' Andrews, 387 N.W.2d at 727. North Dakota courts have not addressed the standard for proving causation in the specific context of an asbestos personal injury case, and MacArthur urges us to use the 'frequency, regularity, and proximity' test used in other states. See, e.g., Jackson v. Anchor Packing Co., 994 F.2d 1295, 1301-03 (8th Cir. 1993) (applying Arkansas law); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir. 1986) (applying Maryland law).

Plaintiff's proof of exposure consisted of Mr. Bossert's testimony that he worked at the Amoco refinery for a total of approximately eight months and the testimony of Robert Clooten, a former insulation tradesperson at the Amoco refinery who testified that about half of the cements installed in the Amoco refinery from 1954 until 1965 were manufactured by MacArthur and that about half of this pipe covering was still in place. 1994 WL 108844, at *2. The court concluded that the plaintiff's proof of exposure was "entirely circumstantial" and that "[b]ecause Bossert failed to produce substantial evidence of exposure to MacArthur's products . . . Bossert cannot satisfy any proximate

cause standard." Id. at *1-2. Accordingly, the court reversed the district court and granted MacArthur's motion for judgment as a matter of law. Id. at *2.

The Bossert court granted defendant's motion for summary judgment based on evidence that the plaintiff worked a refinery and coworker testimony that the defendant's product was present at the refinery. In Adolf, Magistrate Judge Klein denied defendants' motions for summary judgment in this scenario, but relied on the fact that the defendants would not be dismissed from the cases even if the motions were granted and noted that the defendants would have the opportunity to renew these motions. This Court will not attempt to predict the law of North Dakota when the Supreme Court of North Dakota has not yet addressed product identification in the asbestos context. Rather, in keeping with the general products liability standard, Plaintiff must merely raise a genuine issue of material fact as to whether exposure to the Defendant's product proximately caused the Plaintiff's injury. Andrews, 387 N.W.2d at 727.

II. MOTION FOR SUMMARY JUDGMENT OF FOSTER WHEELER CORP.

In his deposition, Mr. Goldade testified that he worked at the Standard Oil of Indiana/Amoco Refinery in Mandan, North Dakota for two or three weeks in 1961. (Goldade Dep. at 186.) He worked on a turn-around, but could not recall what area of the refinery he worked in. (Id. at 187.) He removed valves, took the valves back to the shop, packed the valves, cleaned the valves, and removed strainers. (Id.)

Plaintiff cites to Defendant's answers to interrogatories as establishing that in 1957-1958, Defendant "manufactured, sold, and delivered a 140-foot high 'Alkylation Unit'" to the Mandan refinery. (Pl.'s Resp. at 2-3.) Plaintiff asserts that this unit contained asbestos. (Id. at 3.)

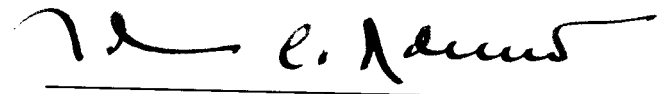
Plaintiff cites to the "1991 federal court trial testimony given by Standard Oil/Amoco plant worker Robert Clooten - who worked at the Mandan refinery as a craftsman in the pipefitting, welding, and insulation trades from 1955 through 1983 to establish the "longevity of the asbestos-containing pipe covering and other asbestos insulation products at industrial jobsites such as the sites where Mr. Goldade worked." (Id. at 4-5.) Mr. Clooten described the dusty work associated with the use of "Kaylo" pipecovering and insulation block at this Standard Oil/Amoco oil refinery from 1954, when Mr. Clooten worked for a contractor building the refinery through the year 1983 when Mr.

Clooten retired." (Id. at 4 (citing Adolf trial transcript at 36-38, 36, 52-54, 62-65, and 215.)) Mr. Clooten testified that, "during turnarounds, why everybody would be ripping off old insulation and they'd have to put in - maybe they had to change the valves, put in new valves; all that insulation had to be ripped off." (Clooten Trial Transcript at 58-59.)

Plaintiff has presented evidence that in 1961, for two or three weeks, Mr. Goldade worked on a turn-around project at the Mandan refinery. Foster Wheeler has admitted that it constructed the Alkylation Unit at the Mandan refinery in 1957. Mr. Goldade never testified as to working in the Alkylation Unit or working with any Foster Wheeler product. The only coworker that Plaintiff has presented is Mr. Clooten, who did not provide any testimony relevant to any Foster Wheeler product and did not mention Mr. Goldade in his testimony. Plaintiff has merely presented evidence that Mr. Goldade worked at the Mandan refinery and that Foster Wheeler manufactured the Alkylation Unit at the Mandan refinery. Plaintiff has presented no testimony from which a jury could conclude that exposure to a Foster Wheeler asbestos-containing product was a proximate cause of Mr. Goldade's development of an asbestos-related disease. Accordingly, Defendant's Motion for Summary Judgment is granted.

E.D. PA NO. 2:09-cv-68096

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno", written over a horizontal line.

EDUARDO C. ROBRENO, J.