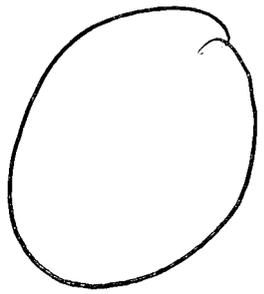


ER

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



WILLIAM J. ROBINSON AND
GAIL A. ROBINSON,

Plaintiffs,

v.

: CONSOLIDATED UNDER
: MDL 875
:

: Transferred from the
: District of New Jersey
: (Case No. 11-04078)

FILED

AIR AND LIQUID SYSTEMS CORP. et al.,
E.D. PA CIVIL ACTION NO. 11-67687-ER

FEB - 7 2013
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

file

Defendants.

O R D E R

AND NOW, this **6th** day of **February, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of Warren Pumps LLC (Doc. No. 116) is **DENIED**, with leave to refile in the transferor court after remand.¹

¹ This case was transferred in September of 2011 from the United States District Court for the District of New Jersey to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Gail Robinson alleges that William Robinson, ("Decedent" or "Mr. Robinson") was exposed to asbestos during his work at (1) a chemical company ("General Chemical") in New Jersey, during the period 1968 to 1999, and (2) the Green River, Wyoming soda ash plant. Mr. Robinson developed mesothelioma and died from that illness.

Plaintiffs have brought claims against various defendants. Defendant Warren Pumps LLC ("Warren" or "Warren Pumps") 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, and (2) it is entitled to summary judgment on grounds of the so-called "bare metal defense." The parties agree that New Jersey law applies.

ENTERED
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CLERK OF COURT

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 substantive 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 Warren Pumps's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

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

Bare Metal Defense

Warren Pumps asserts that it is entitled to summary judgment on grounds of the so-called "bare metal defense," and contends that New Jersey law would recognize the defense. In support of this assertion, it relies upon a transcript from a hearing in Estate of Carol Neal v. Atlantic Richfield Co., MID-L-3292-07 (N.J. Super. Ct. June 25, 2010) (McCormick, J.).

B. Plaintiffs' Arguments

Product Identification / Causation

In response to Defendants' assertion that there is insufficient product identification evidence to establish causation with respect to its product(s), Plaintiffs have

identified the following evidence:

- Deposition of Decedent

Decedent testified that he began working at the Allied Chemical plant in 1968 when it was new, and that it hadn't yet begun to operate at the time he started. He testified that Allied Chemical later became General Chemical. He testified that he believed he was exposed to asbestos from gaskets, packing, and insulation used with pumps, valves, turbines, steam traps, and pipes. He testified that removal of packing from pumps and valves was done with a packing puller, which looked like a corkscrew; and that this process left packing on the floor which - when walked on and pushed around after it dried - created dust. He testified that removal of gaskets required scraping them off with a putty knife and brushing with a steel brush - a process that created dust. He testified that maintenance on pumps, such as repacking them, required removing and disturbing insulation, and that this was a process that created dust. He testified that all of the gaskets used around heat contained asbestos, and that this was generally all of the gaskets at the plant (with perhaps an occasional rubber gasket).

Decedent testified that he recalled Warren pumps being at the Allied facility and that the pumps contained gaskets and packing and were insulated with external insulation. He testified that these pumps were used for either steam or hot liquid (specifically, liquor). He testified that he replaced gaskets on the Warren pumps, which required disturbing the insulation. He also testified that he worked around others replacing gaskets on Warren pumps. When asked if he believed he had been exposed to asbestos from Warren pumps, he answered "Yes," and specified that he believed this occurred from work "taking the gaskets off, the insulation off the pump." He also testified that he believed he came into contact with asbestos from the packing in the pumps. He testified that he did not know what company manufactured or supplied the insulation or packing used with the pumps.

(Doc. No. 142-1, Pl. Ex. 6 at 48-50; Ex 10 at 15, 53-54, 61-63, 72-83, 86, 98-105, 110, 128-30, 201; Ex. 11 at 274-85; Ex. 12 at 348-49, 352-56, 360-63.)

• Deposition of Co-Worker Jack Jereb

Mr. Jereb (a co-worker) testified that he and Decedent began working together at the Allied Chemical plant on the same day in 1961, when it first opened, and that they worked together on the dayshift for 31 years. He testified that the plant was new and had not yet become operational, and that all of the equipment there at that time (including, specifically, pumps and valves) was new. He testified that he and Decedent changed the gaskets and packing on pumps on a regular basis (which he specified meant that every day something was done on pumps or valves). He testified that changing the gaskets involved removing gaskets with a scraper and wire brush, and that this process created dust from the gaskets. He testified that insulation would have to be removed from pumps and that this was done by scraping it with a wire brush, which would create dust "off the flange." He testified that he knew from his training in the industry that the gaskets, packing, and insulation were made of asbestos. He testified that it was necessary to use asbestos gaskets, packing, and insulation because "everything got hot." He testified that removal of insulation created dust that could be breathed by someone working on or near the equipment from which the insulation was removed. Mr. Jereb specified that he saw Decedent working on or near pumps when gaskets, packing, and insulation were removed/changed from pumps. He testified that he saw Decedent making gaskets out of sheet material with a ball peen hammer. When asked to identify the manufacturer of the pumps, Mr. Jereb answered that there were "so many," but that he recalled Durco and Morris. He also stated that BorgWarner sounded familiar. Mr. Jereb testified that no warnings were given about asbestos in the various products and that no dust masks or respirators were given to the employees.

(Doc. No. 142-1, Pl. Ex. 9 at 12-19, 26-27, 47-48, 142-43.)

- Various Documents
Plaintiffs point to documents which they contend indicate that (1) Warren sold pumps with asbestos-containing gaskets and packing, (2) Warren sold asbestos-containing replacement gaskets and packing for its pump, and (3) Warren sold asbestos-containing insulation for use on its pumps, and would ship pumps already insulated from its manufacturing facility if requested.

(Doc. Nos. 142-1 and 142-2, Pl. Ex. 13 at 40-49, 65-72; Ex. 14 at 24-26, 47, 56-57, 60-63, 164-71, 192-95, 204-211; Ex. 15 at 497.)

- Various Documents
Plaintiffs point to documents which they contend indicate that Warren was aware that its pumps would require asbestos-containing replacement gaskets, and which provided instructions regarding cutting new, replacement gaskets from sheet material in order to replace old gaskets.

(Doc. Nos. 142-1 and 142-2, Pl. Ex. 13 at 49-56; Ex. 15 at 367-69.)

- Medical Expert Report
Plaintiffs point to an expert report of Dr. Jacqueline Moline regarding causation.

(Doc. No. 145-9, Pl. Ex. 29.)

Bare Metal Defense

Plaintiffs contend that New Jersey law would not recognize the "bare metal defense." In support of this assertion, Plaintiffs cite to: (1) Seeley v. Cincinnatti Shaper Co., 256 N.J. Super 1, 18 (N.J. App. 1992), (2) Feldman v. Lederle Laboratories, 97 N.J. 429, 456 (N.J. 1984), (3) Molino v. BF Goodrich, 617 A.2d 1235, 1240 (N.J. App. 1992), (4) Lally v. Printing Machinery Sales, 240 N.J. Super. 181, 185 (N.J. App. 1990), (5) Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410 (N.J. 1972), (6) Lamendola v. Mizell, 115 N.J. Super. 514, 518 (N.J. Super. Ct. Law Div. 1971), and (7) Porch/Ritchie v. Foster-

Wheeler, CAM-L-5053, 05 (N.J. Super. Ct. Law Div Feb. 15, 2008)
(hearing transcript only; no written decision).

C. Analysis

Plaintiffs have alleged that Warren pumps is liable for exposure to asbestos arising from gaskets, packing, and insulation used in connection with pumps manufactured and/or supplied by Defendant Warren. The Court examines the evidence pertaining to each alleged source of exposure separately:

(i) Gaskets

There is evidence that Decedent was exposed to respirable asbestos dust from gaskets used in connection with pumps manufactured and/or supplied by Defendant Warren. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. However, there is no evidence that any of these gaskets were manufactured or supplied by Warren. Unlike the testimony pertaining to another defendant in this action (Goulds pumps), there is no testimony that the Warren pumps at issue were new, such that a reasonable jury could infer that the gaskets to which Decedent was exposed were the original gaskets supplied by Warren (and the testimony pertinent to Warren was not given in the context of questioning about the pumps that were original to the facility when it was first opened). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from gaskets supplied by Defendant Warren such that it was a substantial factor in the development of his illness. See Kurak, 689 A.2d at 761; Anderson, 477 U.S. at 248-50.

Therefore, Defendant Warren could only potentially face liability in this action if New Jersey law holds Defendant liable for alleged exposure to asbestos arising from gaskets that were used with Warren pumps but were not manufactured or supplied by Warren, such as replacement gaskets. In other words, Warren only faces potential liability in this action if New Jersey law does not recognize the so-called "bare metal defense." The Court has reviewed New Jersey law on this issue (as cited by the parties) and has determined that it has not been fully and squarely addressed by any appellate court in New Jersey in the context of asbestos litigation. As such, there is no clear and settled statement of New Jersey law on the issue. Whether New Jersey law

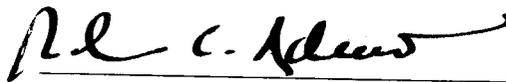
recognizes this defense is a matter of policy. A court situated in New Jersey is closer to - and has more familiarity with - New Jersey law and policy. As such, rather than predicting what the Supreme Court of New Jersey would do, the Court deems it appropriate to remand this case such that a court in New Jersey may decide this issue. See, e.g., Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.). Accordingly, with respect to claims arising from alleged asbestos exposure stemming from gaskets used with Warren pumps but not manufactured or supplied by Warren, summary judgment in favor of Defendant is denied, with leave to refile in the transferor court after remand.

(ii) Packing

There is evidence that Decedent was exposed to respirable asbestos dust from packing used in connection with pumps manufactured and/or supplied by Defendant Warren. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. However, there is no evidence that any of this packing was manufactured or supplied by Warren. Unlike the testimony pertaining to another defendant in this action (Goulds pumps), there is no testimony that the Warren pumps at issue were new, such that a reasonable jury could infer that the packing to which Decedent was exposed was the original packing supplied by Warren (and the testimony pertinent to Warren was not given in the context of questioning about the pumps that were original to the facility when it was first opened). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from packing supplied by Defendant Warren such that it was a substantial factor in the development of his illness. See Kurak, 689 A.2d at 761; Anderson, 477 U.S. at 248-50.

Therefore, Defendant Warren could only potentially face liability in this action if New Jersey law holds Defendant liable for alleged exposure to asbestos arising from packing that was used with Warren pumps but were not manufactured or supplied by Warren, such as replacement packing. Accordingly, with respect to claims arising from alleged asbestos exposure stemming from packing used with Warren pumps but not manufactured or supplied by Warren (for the reasons already set forth above), summary judgment in favor of Defendant is denied, with leave to refile in the transferor court after remand.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

(iii) Insulation

There is evidence that Decedent was exposed to respirable asbestos dust from insulation used in connection with pumps manufactured and/or supplied by Defendant Warren. There is evidence that this exposure occurred on a frequent and regular basis, while Decedent was in close proximity to the asbestos source. There is evidence that this exposure was a substantial factor in the development of Decedent's illness. However, there is no evidence that this insulation was manufactured or supplied by Defendant (as insulation "originally" applied externally to the pump or as replacement insulation later applied). Plaintiffs contend that Defendant is liable for this insulation because it specified and/or recommended that asbestos-containing insulation was to be used with its pumps. Under this theory, Defendant is only liable for this exposure if New Jersey law does not recognize the so-called "bare metal defense." Accordingly, with respect to claims arising from alleged asbestos exposure stemming from insulation used with Warren pumps but not manufactured or supplied by Warren, summary judgment in favor of Defendant is denied, with leave to refile in the transferor court after remand.