

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

KELLY MCCORMICK,	:	CONSOLIDATED UNDER
Individually, and as	:	MDL 875
Administratrix of the Estate	:	
of Kit L. McCormick,	:	
	:	
Plaintiff,	:	
	:	Transferred from the Eastern
	:	District of New York
v.	:	(Case No. 04-02405)
	:	
	:	
A.W. CHESTERTON COMPANY,	:	
ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:07-67128-ER
Defendants.	:	

ORDER

AND NOW, this **14th** day of **May, 2012**, it is hereby

ORDERED that the Motion for Summary Judgment of Defendant Burnham LLC (Doc. No. 87) is **DENIED**.¹

¹ This case was transferred in July of 2007 from the United States District Court for the Eastern District of New York to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Kelly McCormick brought this lawsuit, individually and as administrator of the estate of Kit McCormick ("Decedent" or "Mr. McCormick"). Defendant Burnham LLC ("Burnham") manufactured boilers. Plaintiff has alleged that Mr. McCormick was exposed to asbestos from Burnham boilers during the following work:

- Boiler operator - McConnell Air Force Base - Wichita, Kansas (1974-92)

Mr. McCormick was diagnosed with mesothelioma in September of 2004 and died in August of 2005. He was not deposed prior to his death.

Plaintiff has brought claims against various defendants. Defendant Burnham has moved for summary judgment,

arguing that there is insufficient product identification evidence to establish causation with respect to its product(s). Defendant contends that New York law applies. Plaintiff contends that Kansas law applies.

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

In deciding what substantive law governs a claim based in state law, a federal transferee court applies the choice of law rules of the state in which the action was initiated. *Van Dusen v. Barrack*, 376 U.S. 612, 637-40 (1964) (applying the *Erie* doctrine rationale to case held in diversity jurisdiction and transferred from one federal district court to another as a result of defendant's initiation of transfer); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 474-77 (1967) (confirming applicability of *Erie* doctrine rationale to cases held in federal

question jurisdiction). Therefore, because this case was initiated in New York and transferred from another district court, New York choice of law rules must be applied in determining what substantive law to apply to this case.

Generally, under New York choice of law principles, in tort cases in which the parties are domiciled in different states, the applicable law is that of the situs of the injury. Locke v. Aston, 814 N.Y.S.2d 38, 42 (N.Y. App. Div. 2006); DaSilva v. C & E Ventures, Inc., 922 N.Y.S.2d 32, 35 (N.Y. App. Div. 2011). Plaintiff and Defendant are domiciled in different states. It is undisputed that the alleged exposure pertinent to Defendant Burnham occurred in Kansas. Therefore, the Court will apply Kansas substantive law in deciding Defendant Burnham's motion for summary judgment.

C. Product Identification/Causation Under Kansas Law

The Kansas Silica and Asbestos Claims Act provides:

- (a) In any civil action under this act, and amendments thereto, alleging an asbestos or silica claim, the party with the burden of establishing the claim or affirmative defense must show that the alleged exposure attributable to a given person or party was a substantial factor in causing the injury, loss or damages.
- (b) In determining whether any given claimed or alleged exposure was a substantial factor in causing the plaintiff's injury, loss or damages, the court shall consider, without limitation, all of the following:
 - (1) the manner in which the plaintiff was exposed;
 - (2) the proximity to the plaintiff when the exposure occurred;
 - (3) the frequency and length of the plaintiff's exposure; and
 - (4) any factors that mitigated or enhanced the plaintiff's exposure.

K.S.A. § 60-4907. Kansas courts have not yet applied or interpreted this statute.

II. Defendant Burnham's Motion for Summary Judgment

A. Defendant's Arguments

Burnham argues that there is insufficient product identification evidence to support a finding of causation with respect to its product(s).

B. Plaintiff's Arguments

In response to Defendant's motion, Plaintiff has identified the following evidence pertaining to Mr. McCormick's exposure to Burnham boilers:

- Deposition Testimony of Co-Worker Mr. Schlabach
Darryl Schlabach, a co-worker of Mr. McCormick, testified that he believed Mr. McCormick was exposed to asbestos from boilers at the McConnell Air Force Base as a result of his work installing and replacing firebrick within those boilers. He testified that there was also asbestos in the insulation located under the boilers' sheet metal jackets. He testified specifically that Mr. McCormick was exposed to airborne asbestos dust, which he breathed in, and that this occurred during the replacement of firebrick. Mr. Schlabach testified that Mr. McCormick worked on every brand of boiler present in the six to eight small buildings that contained boilers.

(Pl. Ex. A, Doc. 96-1 and 96-2.)

- Discovery Responses of Defendant
Plaintiff points to discovery responses of Defendant from another case, which indicate that its boilers had asbestos-containing component parts.

(Pl. Ex. C, Doc. 96-4.)

C. Analysis

Plaintiff alleges that Mr. McCormick was exposed to asbestos from Burnham boilers. There is evidence that Mr. McCormick worked as a boiler tender at the Air Force Base for years. There is evidence that his work tending boilers led to

inhalation of asbestos dust, particularly during the installation or replacement of firebrick and insulation in and on the boilers. There is evidence that he worked as a boilertender on Burnham boilers (as well as boilers from other manufacturers) in a small number of small buildings. Defendant does not contend that it did not manufacture or supply the firebrick and/or insulation used on and in its boilers.

The Court notes that the evidence in the case renders the determination of the sufficiency of product identification evidence pertaining to Burnham an extremely close call. However, because Kansas courts have not yet interpreted the applicable statute such that this Court would have guidance on applying the statute, and because the evidence must be construed in the light most favorable to the Plaintiff, *Pignataro*, 593 F.3d at 268, the Court believes it appropriate to err on the side of denying summary judgment. Therefore, in light of Mr. McCormick's role as a boilertender - with primary duties of directly and regularly tending a relatively small number of boilers for an extended period of time - the Court concludes that a reasonable jury could conclude from the evidence that Mr. Harding was exposed to asbestos from a Burnham boiler such that it was a substantial factor in the development of his mesothelioma. See K.S.A. § 60-4907. Accordingly, summary judgment in favor of Defendant Burnham is not warranted. See *id.*; *Anderson*, 477 U.S. at 248.