

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

BOBBY FLOYD AND : CONSOLIDATED UNDER
BARBARA FLOYD, : MDL 875

Plaintiffs,

FILED

FEB - 9 2012

v.

MICHAEL E. KUNZ, Clerk
By _____ Dep: Clerk

Transferred from the
Northern District of
California
(Case No. 10-01960)

AIR & LIQUID SYSTEMS
CORPORATION, ET AL.,

Defendants.

E.D. PA CIVIL ACTION NO.
2:10-CV-69379-ER

ORDER

AND NOW, this **8th** day of **February, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Aurora
Pump Company (Doc. No. 274) is **GRANTED**.¹

¹ This case was originally filed in April of 2010 in California state court. It was thereafter removed to the United States District Court for the Northern District of California, and later transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Decedent Bobby Floyd has alleged exposure to asbestos while working aboard various Navy ships - and, for one assignment, on "shore duty," performing land-based work - throughout his employment with the Navy (January 1953 to August 1972). He has also alleged exposure to asbestos during the course of work for two private entities, in which he performed work on Navy ships and/or at a land-based machine shop, after he left the Navy: (1) RAM Enterprises, and (2) PacOrd. Defendant Aurora Pump Company ("Aurora") manufactured pumps that were used on Navy ships. The alleged exposure pertinent to Defendant Aurora occurred during the follow periods of Decedent's work:

- RAM Enterprises (1975 to September 1976) - servicing products removed from Navy ships and brought back to a machine shop on land
- PacOrd (September 1976 to 1998)- servicing products

removed from Navy ships and brought back to a machine shop on land

Decedent died of mesothelioma in January of 2011. He was deposed for eight (8) days prior to his death.

Plaintiffs have brought claims against various defendants, including, inter alia, strict products liability claims and negligent failure to warn claims. Defendant Aurora has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification to support a finding of causation with respect to its product(s), and (3) there is no evidence to support a claim that it made false representations. Aurora asserts that California law applies.

Plaintiffs contend that summary judgment is not warranted because (1) the bare metal defense is not available under maritime or California law, and (2) even if the bare metal defense is available, there are genuine issues of material fact regarding Decedent's alleged exposure to original asbestos-containing component parts that were incorporated into Defendant's products at the time they were distributed and/or asbestos-containing replacement parts that were supplied by Defendant for later use with its products, (3) there is sufficient product identification evidence, and (4) there are genuine issues of material fact precluding summary judgment on their false representation claim. Plaintiffs assert that California law applies.

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

The parties have agreed that California substantive law applies. Therefore, this Court will apply California law in deciding Aurora'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. Bare Metal Defense Under California Law

The Supreme Court of California recently held that, under California law, a product manufacturer generally is not liable in strict liability or negligence for harm caused by a third party's products. O'Neil v. Crane Co., No. S177401, 2012 WL 88533 (Cal. Jan. 12, 2012). There, O'Neil, who formerly served on an aircraft carrier, brought products liability claims against Crane Co. and Warren Pumps, which manufactured equipment used in the ship's steam propulsion system. Pursuant to Navy specifications, asbestos insulation, gaskets, and other parts were used with the defendant manufacturer's equipment, some of which was originally supplied by the defendants. O'Neil, however, worked aboard the ship twenty years after the defendants supplied the equipment and original parts. There was no evidence that the defendants made any of the replacement parts to which O'Neil was exposed or, for that matter, that the defendants manufactured or distributed asbestos products to which O'Neil was exposed.

The court firmly held that the defendant manufacturers were not liable for harm caused by asbestos products they did not manufacture or distribute. O'Neil, 2012 WL 88533, at *5. With regard to the plaintiff's design-defect claim, the court noted that "strict products liability in California has always been premised on harm caused by deficiencies in the defendant's own

product." Id. And that the "defective product . . . was the asbestos insulation, not the pumps and valves to which it was applied after defendants' manufacture and delivery." Id. at *7.

Similarly, the Court rejected the plaintiff's claim that the defendants are strictly liable for failure to warn of the hazards of the release of asbestos dust surrounding their products. The plaintiff asserted that the defendants were under a duty to warn because it was reasonably foreseeable that their products would be used with asbestos insulation. Nevertheless, the court held, "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." Id. at *16. Accordingly, the Court refused to hold the defendants strictly liable. Id. at *17.

And the O'Neil court conducted a similar analysis to the plaintiff's claim based on the defendants' negligent failure to warn. The court concluded that "expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." Id. at *19. Thus, as a matter of law, the court refused to hold the defendants liable on the plaintiff's strict liability or negligence claims.

D. Product Identification/Causation Under California Law

Under California law, a plaintiff need only show (1) some threshold exposure to the defendant's asbestos-containing product and (2) that the exposure "in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." McGonnell v. Kaiser Gypsum Co., Inc., 98 Cal. App. 4th 1098, 1103 (Cal. Ct. App. 2002); see also, Rutherford v. Owens-Illinois, 16 Cal. 4th 953, 977 n.11, 982-83 (Cal. Ct. App. 1997) ("proof of causation through expert medical evidence" is required). The plaintiff's evidence must indicate that the defendant's product contributed to his disease in a way that is "more than negligible or theoretical," but courts ought not to place "undue burden" on the term "substantial." Jones v. John Crane, Inc., 132 Cal. App. 4th 990, 998-999 (Cal. Ct. App. 2005).

The standard is a broad one, and was "formulated to aid plaintiffs as a broader rule of causality than the 'but for'

test." Accordingly, California courts have warned against misuse of the rule to preclude claims where a particular exposure is a "but for" cause, but defendants argue it is "nevertheless. . . an insubstantial contribution to the injury." Lineaweaver v. Plant Insulation Co., 31 Cal. App.4th 1409, 1415 (Cal. Ct. App. 1995). Such use "undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby." Mitchell v. Gonzales, 54 Cal. 3d 1041, 1053 (Cal. 1991).

In Lineaweaver, the California Court of Appeals for the First District concluded that "[a] possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.'" 31 Cal. App.4th at 1416. Additionally, "[f]requency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case." Id.

II. Defendant Aurora's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Defendant Aurora asserts the bare metal defense, arguing that it is immune from liability in this case under the defense as a matter of law and that it is, therefore, entitled to summary judgment.

Product Identification / Causation

Defendant Aurora does not dispute that it supplied pumps for use aboard various Navy ships. Aurora argues, however, that there is no evidence that Decedent was exposed to any asbestos-containing product or component part that Aurora manufactured or distributed.

False Representation Claim

Defendant Aurora asserts that it is entitled to summary judgment on Plaintiffs' claim for false representation, as there is no evidence to support this claim and Decedent specifically testified that Aurora made no representations to him.

B. Plaintiffs' Arguments

Bare Metal Defense

Plaintiffs assert that the bare metal defense is not available under California law. Furthermore, Plaintiffs assert that, even if the bare metal defense is available, Defendant Aurora is liable for original asbestos-containing component parts that were incorporated into and supplied with its pumps and/or asbestos-containing replacement parts supplied by Aurora for later use with its pumps, and to which Plaintiffs assert Decedent was exposed.

During oral argument, Plaintiffs asserted that, even under the California Supreme Court's recent ruling in O'Neil, 2012 WL 88533, Defendant Aurora is liable for asbestos-containing component parts that were used with its pumps but that it did not manufacture or supply because its pumps required (or "called for") the use of defective (i.e., asbestos-containing) component parts in order to operate. In asserting this argument, Plaintiffs rely upon footnote 6 of O'Neil. See 2012 WL 88533, at *7 n.6.

Product Identification / Causation

Plaintiffs allege that Decedent was exposed to original and/or replacement asbestos-containing parts (gaskets and packing) that were supplied by Aurora to the Navy in (or for later use with) its pumps. In support of this claim, Plaintiffs cite to:

- Deposition Testimony of Decedent Mr. Floyd - Mr. Floyd testified that he was exposed to asbestos dust as a result of changing gaskets and packing on "quite a few" Aurora pumps during his post-Navy work (1975 to 1998)
- Deposition Testimony of Aurora's 30b6 Witness Leroy Franklin - Plaintiffs point to the testimony of Mr. Franklin in support of their assertion that Aurora's pumps required asbestos-containing component parts and that Aurora therefore kept replacement parts in stock for its customers' convenience

False Representation Claims

Plaintiffs assert that, "[u]nder California law, a misrepresentation claim under Section 402B [of the Restatement

(Second) of Torts] is 'one of strict liability for physical harm to the consumer, resulting from a misrepresentation of the character or quality of the chattel sold, even though the misrepresentation is an innocent one, and not made fraudulently or negligently'." (Pl. Opp. (Doc. No. 288) at 6.) Plaintiffs assert that this claim turns on a duty on the part of the defendant to warn or disclose information about the hazards of asbestos. (Pl. Opp. (Doc. No. 288) at 6-7.) Plaintiffs assert that there is sufficient evidence to create genuine issues of material fact regarding Defendant's liability as to this claim.

C. Analysis

To the extent that Decedent's alleged exposure pertains to asbestos-containing component parts used in connection with Aurora's pumps but not manufactured or supplied by Aurora, summary judgment is warranted. However, to the extent that the alleged exposure pertains to original asbestos-containing component parts or asbestos-containing replacement parts supplied by Aurora, summary judgment in favor of defendant is not warranted on grounds of the bare metal defense. This is the holding of the so-called bare metal defense recently recognized and applied by the California Supreme Court. See O'Neil, 2012 WL 88533.

The Court has considered Plaintiffs' argument, made during oral argument on Defendant's motion, that Defendant is liable for asbestos-containing component parts that were used with its pumps but that it did not manufacture or supply because its pumps required (or "called for") the use of defective (i.e., asbestos-containing) component parts in order to operate. However, the Court rejects this argument because California law does not provide for such liability, and notes that footnote 6 of O'Neil is dictum.

As this Court has noted, the bare metal defense is more properly understood as a challenge to a plaintiff's prima facie case to prove the duty or causation element of its cause of action. See Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at *1 n.2 (E.D. Pa. Feb. 1, 2012) (Robreno, J.) (discussing the bare metal defense under maritime law). Plaintiffs have alleged exposure to asbestos from original gaskets and packing supplied with Aurora's pumps and asbestos-containing replacement gaskets or packing supplied by Aurora for later use with its pumps. The Court now examines the evidence pertinent to each source of alleged exposure in turn.

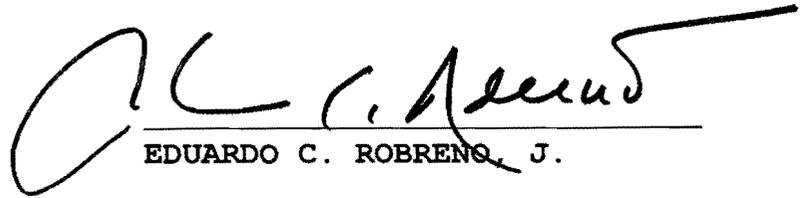
a. Original asbestos-containing gaskets and packing

It is undisputed that Aurora supplied pumps to which Decedent was exposed. Plaintiffs have provided evidence that Decedent was exposed to asbestos as a result of his work changing gaskets and packing on these pumps. However, there is no evidence that Decedent was exposed to asbestos from original asbestos-containing component parts supplied by Aurora with the pumps (as opposed to replacement parts later installed in the pumps after they were supplied to the Navy). Even construing the evidence in the light most favorable to Plaintiffs, the evidence demonstrates only that Decedent was exposed to asbestos-containing gaskets and packing in Aurora pumps. It does not demonstrate that Aurora manufactured or supplied the asbestos-containing gaskets and/or packing to which Decedent was exposed. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by original gaskets or packing supplied by Aurora with its pumps. Accordingly, summary judgment in favor of Defendant Aurora is warranted with respect to this alleged exposure.

b. Asbestos-containing replacement gaskets and packing

Plaintiffs have provided evidence that Aurora may have sometimes supplied its customers with asbestos-containing replacement gaskets and/or packing. However there is no evidence that these replacement parts were actually supplied to the Navy, that any such parts that may have been supplied to the Navy were aboard any ship on which Decedent worked, or that Decedent was exposed to any such parts that may have been supplied and used aboard a ship on which he worked. Therefore, no reasonable jury could conclude from the evidence that Decedent's injury was caused by replacement gaskets or packing supplied by Aurora. Accordingly, summary judgment in favor of Defendant Aurora is warranted with respect to this alleged exposure.

With respect to Plaintiffs' false representation claim, the Court notes that Plaintiffs contend in their briefing that this claim turns on the existence of a duty on the part of Defendant to warn of or disclose the hazards associated with asbestos used in connection with its products. However, the California Supreme Court has made clear that Defendant Aurora cannot be liable for harms caused by - and has no duty to warn about hazards associated with - products it did not manufacture or supply, or products it manufactured or supplied but for which there is no evidence of exposure of the Decedent. See O'Neil,



EDUARDO C. ROBRENO, J.

2012 WL 88533. Therefore, Plaintiffs' theory of liability on this claim fails and summary judgment in favor of Defendant Aurora is warranted with respect to this claim.

D. Conclusion

Applying California law, Defendant Aurora is not liable for harms arising from any product that it did not manufacture or supply. O'Neil, 2012 WL 88533, at *5. Plaintiffs have failed to provide evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos-containing component parts for which Defendant Aurora could potentially be liable in light of the California Supreme Court's recent ruling in O'Neil, 2012 WL 88533 (i.e., original asbestos-containing component parts or asbestos-containing replacement parts). Accordingly, summary judgment in favor of Defendant Aurora is warranted on all claims.