

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

BOBBY FLOYD AND	:	CONSOLIDATED UNDER
BARBARA FLOYD,	:	MDL 875
	:	
Plaintiffs,	:	
	:	
	:	
v.	:	Transferred from the
	:	Northern District of
	:	California
	:	(Case No. 10-01960)
	:	
AIR & LIQUID SYSTEMS	:	
CORPORATION, ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:10-CV-69379-ER
Defendants.	:	

FILED

FEB 13 2012

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **9th** day of **February, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Fryer-Knowles, Inc. (Doc. Nos. 270-273) 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 Fryer-Knowles, Inc. ("Fryer-Knowles") was identified by Decedent as a contractor whose employees worked around him removing onboard decking and floor tile and the associated underlayers of materials. The alleged exposure arising from work performed by Defendant Fryer-Knowles occurred during the following periods of Decedent's work:

- RAM Enterprises - 1974 (or 1975) to Sept. 1976 - work as an outside machinist (during work on ship)

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- PacOrd - Sept. 1976 to 1980 - work as an outside machinist (during work on ship)

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, negligent failure to warn claims. Defendant Fryer-Knowles has moved for summary judgment, arguing that (1) there is insufficient product identification to support a finding of causation with respect to work performed by Fryer-Knowles, and (2) the evidence does not support an award of punitive damages. Fryer-Knowles asserts that California law applies.

Plaintiffs (1) contend that summary judgment is not warranted because there is sufficient circumstantial evidence to support a finding of causation with respect to work performed by Fryer-Knowles. Plaintiffs (2) concede that summary judgment (on grounds of mootness) is warranted at this time on their punitive damages claim, as the Court has previously ruled that such claims are severed. 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 Fryer-Knowles'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. Causation in Asbestos Cases Under California Law

Under California law, a plaintiff need only show (1) some threshold exposure to asbestos attributable to defendant 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 (or conduct) 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 Fryer-Knowles's Motion for Summary Judgment

A. Defendant's Arguments

Causation

Defendant Fryer-Knowles argues that there is insufficient evidence that Decedent was exposed to asbestos as a result of Fryer-Knowles's work to support a finding of causation with respect to work done by its employees.

Punitive Damages Claim

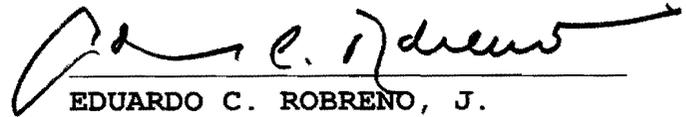
Defendant Fryer-Knowles argues that summary judgment is appropriate because there is no evidence that the conduct of Fryer-Knowles involved "oppression, fraud, or malice" as is necessary to support an award of punitive damages.

B. Plaintiffs' Arguments

Causation

Plaintiffs assert that there is sufficient circumstantial evidence to support a finding of causation with respect to work performed by Fryer-Knowles. In support of this claim, Plaintiffs cite to:

- Deposition Testimony of Decedent Mr. Floyd - Decedent testified that he worked around Fryer-Knowles workers on some occasions while they were removing onboard decking and floor tile - and the associated underlayment and mastic materials - and that he was in close proximity to this. He testified that he saw these workers removing glue - which he described as a "dirty, yellowish color" - by scraping and wire brushing it



EDUARDO C. ROBRENO, J.

Punitive Damages Claim

Plaintiffs assert that, since this Court has previously ruled that punitive damages claims will be severed, summary judgment is warranted with respect to this claim on grounds of mootness, to be dealt with by the Court at a future date.

C. Analysis

There is evidence that Decedent work around Fryer-Knowles employees on occasion. However, there is no evidence that the work performed by Fryer-Knowles in the presence of Decedent involved any asbestos-containing product. Although Decedent testified that the glue scraped off with wire brushes was a "dirty, yellowish color," he does not state that he believed this to contain asbestos and Plaintiffs do not cite to any evidence (e.g., an expert report) to suggest that this description would indicate that the glue contained asbestos. Accordingly, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos as a result of this work. Therefore, summary judgment in favor of Fryer-Knowles is warranted.

In light of this ruling, the issue of punitive damages is now moot.