

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

BOBBY FLOYD AND : CONSOLIDATED UNDER  
BARBARA FLOYD, : MDL 875  
 :  
Plaintiffs, **FILED** :  
 :  
 : FEB 10 2012 : Transferred from the  
 : Northern District of  
v. : California  
 : (Case No. 10-01960)  
 :  
 : **MICHAEL E. KUNZ, Clerk**  
 : **By \_\_\_\_\_ Dep. Clerk**  
 :  
AIR & LIQUID SYSTEMS :  
CORPORATION, ET AL., : E.D. PA CIVIL ACTION NO.  
 : 2:10-CV-69379-ER  
 :  
Defendants. :

**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  
Campbell Industries (Doc. No. 264) is **GRANTED**.<sup>1</sup>

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<sup>1</sup> 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 Campbell Industries ("Campbell") was a contractor that removed insulation materials. The alleged exposure arising from work performed by Defendant Campbell occurred during the following periods of work:

- RAM Enterprises - 1974 (or 1975) to Sept. 1976 - work as an outside machinist (on land)
- PacOrd - Sept. 1976 to 1980 - work as an outside machinist (on land)

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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 Campbell 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 Campbell, (2) it is immune from liability by way of the government contractor defense, and (3) the evidence does not support an award of punitive damages. Campbell asserts that California law applies.

Plaintiffs contend that summary judgment is not warranted because (1) there is sufficient circumstantial evidence to support a finding of causation with respect to work performed by Campbell, and (2) there are genuine issues of material fact regarding the availability to Defendant of the government contractor defense. Plaintiffs (3) 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

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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 Campbell'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).

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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.

D. Unsworn Expert Report at the Summary Judgment Stage

Federal Rule of Civil Procedure 56(c)(1)(A) provides that a party asserting that a fact is genuinely disputed must support that assertion with particular parts of material in the record, such as an affidavit or declaration. The United States Court of Appeals for the Third Circuit has found that an unsworn expert report "is not competent to be considered on a motion for summary judgment." Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1980)); see also Bock v. CVS Pharmacy, Inc., No. 07-CV-412, 2008 WL 3834266, at \*3 (E.D. Pa. 2008) (refusing to consider an expert report when no sworn affidavit was provided with the report); Jackson v. Egyptian Navigation Co., 222 F. Supp. 2d 700, 709 (E.D. Pa. 2002) (finding that an unsworn expert report cannot be considered as evidence for a motion for summary judgment).

This Court has previously held that an unsworn expert report cannot be relied upon to defeat a motion for summary judgment. Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at \*6 (E.D. Pa. Oct. 20, 2010) (Robreno, J.) (citing Woloszyn v. County of Lawrence, 396 F.3d 314, 323 (3d Cir. 2005)). In Faddish, although the Court determined that the unsigned expert report could not be relied upon to defeat summary judgment, the Court instead relied upon deposition testimony of the expert, which the Court permitted, noting that such testimony is sworn testimony.

It is true that Federal Rule of Civil Procedure 56 was amended effective December of 2010 to provide that a declaration, that is an unsworn statement subscribed to under penalty of perjury, can substitute for an affidavit. See Fed. R. Civ. P. 56 advisory committee's note; see also Ray v. Pinnacle Health Hosps., Inc., F.App'x, at 164 n.8 (3d Cir. 2010) (noting that

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"unsworn declarations may substitute for sworn affidavits where they are made under penalty of perjury and otherwise comply with the requirements of 28 U.S.C § 1746"). However, an expert report that is not sworn to under penalty of perjury or accompanied by an affidavit is not proper support in disputing a fact in connection with a motion for summary judgment. Burrell v. Minnesota Mining Manufacturing Co., No. 2:08-87293, 2011 WL 5458324 (E.D. Pa. June 9, 2011) (Robreno, J.) (refusing to consider expert reports when no timely sworn affidavits were provided with the reports and the reports were not sworn to under penalty of perjury).

## **II. Defendant Campbell's Motion for Summary Judgment**

### **A. Defendant's Arguments**

#### Causation

Defendant Campbell argues that there is insufficient evidence of frequent, regular, proximate exposure to asbestos as a result of Campbell's work to support a finding of causation with respect to work done by its employees.

#### Punitive Damages Claim

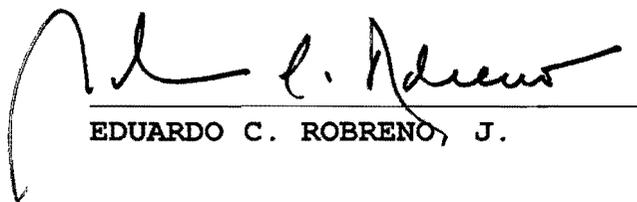
Defendant Campbell argues that summary judgment on Plaintiffs' punitive damages claim is appropriate because there is no evidence that conduct of Campbell was "intentional and with malice" as is necessary to support an award of punitive damages.

### **B. Plaintiffs' Arguments**

#### Causation

Plaintiffs acknowledge that Decedent did not testify that the dust to which he was exposed as a result of work performed by Campbell contained asbestos. However, Plaintiffs assert that there is sufficient circumstantial evidence to support a finding of causation with respect to work performed by Campbell. In support of this claim, Plaintiffs cite to:

- Deposition Testimony of Decedent Mr. Floyd - Decedent testified that he worked around Campbell insulation removers both at the Campbell shipyard and in shops of his own employers during the time period 1974 or 1975 to 1980 (or later). He testified that he worked in



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close proximity to those employees, that the insulation removal created dust, and that he inhaled this dust.

- Expert Report of Theodore Hogan, Ph.D., CIH - Plaintiffs point to a report of Dr. Hogan, who opines that Decedent was exposed to asbestos (at levels above background) through insulation removal work performed around him by Defendant Campbell; the report is signed but is not sworn or signed under penalty of perjury and is not accompanied by a sworn affidavit

#### 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**

As an initial matter, this Court notes that the expert report of Dr. Hogan cannot be relied upon by Plaintiffs to defeat summary judgment because it is not sworn, signed under penalty of perjury, or accompanied by an affidavit. See Faddish, 2010 WL 4146108 at \*6. See also Fowle, 868 F.2d at 67; Ray, F.App'x, at 164 n.8; Burrell, 2011 WL 5458324, at \*1 n.1.

Without this expert report, there is no evidence that the insulation dust to which Decedent was exposed as a result of work performed by Campbell contained asbestos. Accordingly, no reasonable jury could conclude from the admissible evidence that Decedent was exposed to asbestos as a result of this work. Therefore, summary judgment in favor of Campbell is warranted.

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