

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

VALENT RABOVSKY and	:	CONSOLIDATED UNDER
ANN RABOVSKY,	:	MDL 875
	:	
Plaintiffs,	:	
	:	
	:	
v.	:	
	:	
	:	
FOSTER WHEELER, LLC,	:	
ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:10-03202-ER
Defendants.	:	

O R D E R

AND NOW, this **6th** day of **June, 2012**, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant Foster
Wheeler, LLC (Doc. No. 116) is **DENIED**.¹

¹ This case originated in Pennsylvania state court. In July of 2010, it was removed by a defendant to the Eastern District of Pennsylvania and became part of MDL-875.

Plaintiff Valent Rabovsky ("Plaintiff" or "Mr. Rabovsky") worked as a millwright at various power plants and steel mills throughout Pennsylvania, beginning in the 1950s. Defendant Foster Wheeler, LLC ("Foster Wheeler") manufactured boilers. Plaintiff has alleged that he was exposed to asbestos from insulation used on Foster Wheeler boilers.

Plaintiff was diagnosed with mesothelioma and was deposed thereafter.

Plaintiff has brought claims against various defendants. Defendant Foster Wheeler has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s), and (3) Plaintiff's claims are barred by the statute of repose. The parties agree that Pennsylvania 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

The parties have agreed that Pennsylvania substantive law applies. Therefore, this Court will apply Pennsylvania law in deciding Foster Wheeler'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 Pennsylvania Law

Under Pennsylvania law, a plaintiff must establish, as a threshold matter, "that [his or her] injuries were caused by a product of the particular manufacturer or supplier." Eckenrod v. GAF Corp., 375 Pa. Super. 187, 544 A.2d 50, 52 (Pa. Super. Ct.

1988) (citing Wible v. Keene Corp., No. 86-4451, 1987 WL 15833 at *1 (E.D. Pa. Aug.19, 1987) (in order to defeat defendant's motion, plaintiff must present evidence showing that he or she was exposed to an asbestos product supplied by defendant)). Beyond this initial requirement, a plaintiff must further establish that the plaintiff was exposed to a certain defendant's product with the necessary frequency and regularity, and in close enough proximity to the product, to create a genuine issue of material fact as to whether that specific product was a substantial factor (and thus the proximate cause) of Plaintiff's asbestos related condition. Eckenrod, 544 A.2d at 52-53.

In addition to articulating the "frequency, regularity and proximity" standard, Eckenrod also held that "the mere fact that appellees' asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered." Id. at 53. Gregg v. VJ Auto Parts, Co., 596 Pa. 274, 943 A.2d 216 (Pa. 2007), further upheld the discretion of the trial court in evaluating the evidence to be presented at the trial stage, ruling that, "we believe it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's ... asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury." Id. at 227.

The Gregg court adopted a fact sensitive approach regarding the sufficiency of product identification evidence. Id. at 225. Moreover, "the plaintiff's exposure to each defendant's product should be independently evaluated when determining if such exposure was a substantial factor in causing the plaintiff's injury." Tragarz v. Keene Corp., 980 F.2d 411, 425 (7th Cir. 1992) (discussed by Gregg court in setting out the product identification criteria in Pennsylvania).

In two more recent decisions, the Superior Court of Pennsylvania has reiterated the Gregg holding that "[t]he frequency, regularity and proximity test is not a rigid test with an absolute threshold necessary to support liability," and that application of the test "should be tailored to the facts and circumstances of the case; for example, its application should become 'somewhat less critical' where the plaintiff puts forth

specific evidence of exposure to a defendant's product." Linster v. Allied Signal, Inc., 21 A.3d 220, 223-24 (Pa. Super. 2011); Howard v. A.W. Chesterton Co., 31 A.3d 974, 979 (Pa. Super. 2011). Linster and Howard have each further clarified that "the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases, like mesothelioma, which can develop after only minor exposures to asbestos fibers." Id. However, the Supreme Court of Pennsylvania has made clear that a plaintiff cannot establish substantial factor causation merely by putting forth expert testimony opining that "each and every breath" of asbestos (or inhalation of a single or de minimis number of asbestos fibers) can cause injury. Betz v. Pneumo Abex, LLC, No. 38 WAP 2010, - A.3d - , 2012 WL 1860853, at * 22-25 (Pa. May 23, 2012); see also Gregg, 943 A.2d at 226 (referring to the "each and every exposure" theory as "a fiction").

II. Defendant Foster Wheeler's Motion for Summary Judgment

A. Defendant's Arguments

Bare Metal Defense

Foster Wheeler argues that it is entitled to summary judgment because it cannot be liable for products or component parts that it did not manufacture, sell, supply, or place in the stream of commerce. Foster Wheeler contends there is no evidence that it manufactured, sold, supplied, or placed into the stream of commerce the insulation at issue.

Product Identification / Causation

Foster Wheeler argues that there is no evidence to support a finding of causation with respect to any asbestos-containing product used in connection with its boilers.

Statute of Repose

In the brief accompanying its motion, Foster Wheeler argued that it is entitled to summary judgment pursuant to the statute of repose because the boiler(s) at issue constituted an "improvement to real property." However, during oral argument, Foster Wheeler informed the Court that it had decided to withdraw this argument. Therefore, this argument will not be considered by the Court in deciding Foster Wheeler's motion.

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff argues that, under Pennsylvania law, Foster Wheeler is liable for injuries arising from asbestos insulation used in connection with its boilers because it knew that its boilers would be used with asbestos-containing replacement insulation. Plaintiff contends that Pennsylvania's adoption of Section 402A of the Restatement (Second) of Torts indicates that Pennsylvania does not recognize the defense.

As evidence in support of this theory of liability, Plaintiff cites his own deposition testimony and deposition testimony of Foster Wheeler corporate representative (Robert F. Tracey), which indicate that Foster Wheeler specified use of asbestos insulation for the boiler(s) at issue and knew (or could foresee) that asbestos-containing replacement insulation would be used with those boilers.

Product Identification / Causation

Plaintiff has identified the following evidence pertaining to his exposure to asbestos-containing insulation used in connection with Foster Wheeler boilers, and which Plaintiff contends Foster Wheeler installed:

- Deposition Testimony of Plaintiff
Plaintiff testified that, in 1973 or 1974, he worked at the Homer City Power Plant in Pennsylvania doing work on a floor below a Foster Wheeler boiler that was eight (8) stories high. There is testimony that the "floor" between Plaintiff and the boiler above him was a steel grate separating the two levels. Plaintiff specifically identified the boiler as a Foster Wheeler boiler, and testified that insulators working for Foster Wheeler worked above him removing the insulation on it; and that this work created dust that "rained" down on him from above. He testified that this work lasted for about "a week or two." He testified that he knew the insulation was asbestos insulation because it was asbestos material that was "raining" down on him.

He testified that he breathed in this dust. He also testified that, after the insulators were done removing insulation for a week or two, "boilermakers" came in and did work that disturbed the fallen asbestos dust, which was re-circulated as airborne dust because of the fans in the facility. He testified that he breathed in this re-circulated asbestos dust from the Foster Wheeler boiler as a result of this disturbance of the dust by the boilermakers.

(Pl. Ex. A, Doc. No. 129-1, Dep. of Valent Rabovsky.)

- Deposition Testimony of Defendant 30b6 Witness (Robert F. Tracey)
Plaintiff has pointed to deposition testimony of Foster Wheeler corporate representative Robert F. Tracey, who testified that Foster Wheeler supplied boilers to the Homer City plant and that it supplied those boilers with asbestos-containing insulation. He testified that Foster Wheeler insulated the boilers with hundreds and hundreds of pounds of asbestos insulation. He testified that Foster Wheeler purchased 240 units of twenty (20) bundled boxes of Unibestos pipe covering for the Homer City plant in October of 1969. He also testified that Foster Wheeler handled the labor on the boiler, including hiring asbestos workers to insulate the equipment.

(Pl. Ex. B, Doc. No. 129-2, Dep. of Robert F. Tracey.)

Statute of Repose

Plaintiff contended in his brief that his claims are not barred by the statute of repose. Specifically, he contends that the statute does not apply to asbestos cases because they involve latent disease. Because Defendant Foster Wheeler withdrew this portion of its motion during oral argument, the Court will not address this issue.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from insulation used in connection with Foster Wheeler boilers, including original insulation installed by Foster Wheeler.

There is evidence that Foster Wheeler installed (i.e., supplied) insulation with the boiler at issue. There is evidence that Foster Wheeler purchased 240 units of twenty bundled boxes of Unibestos pipe covering for the Homer City Power Plant in October of 1969. There is evidence that, as a result of work disturbing the insulation on and around an 8-story high Foster Wheeler boiler at the Homer City Power Plant in 1973 or 1974, Plaintiff was exposed to asbestos. There is evidence that this asbestos insulation was "raining" dust down on him from overhead for "about a week or two" while insulators working for Foster Wheeler were removing insulation on the boiler, and that the dust continued to be disturbed and circulated thereafter during work by "boilermakers" who came to work on the scene after the insulators removed the insulation from the boilers. There is evidence that Plaintiff breathed in this asbestos dust from the insulation on the Foster Wheeler boiler, both as it was "raining" down for a couple of weeks and thereafter, when the fallen dust was being disturbed and re-circulated.

Defendant argues, in essence, that there is no evidence that the insulation to which Plaintiff was exposed in 1973 or 1974 is the same insulation that Foster Wheeler installed in 1969. However, Plaintiff testified that the workers who disturbed the insulation in 1973 or 1974 (which led to Plaintiff's exposure) included insulators who were working for Foster Wheeler (as opposed to another company that manufactured or supplied insulation), as well as "boilermakers." Therefore, when construing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude from the evidence that the insulation to which Plaintiff was exposed was the original insulation installed (supplied) by Foster Wheeler and/or that it was the work of Foster Wheeler that caused the exposure. Moreover, a reasonable jury could conclude from the evidence that Plaintiff's exposure to this insulation was a substantial factor in the development of his mesothelioma. See Gregg, 943 A.2d at 225-26; Linster, 21 A.3d at 223-24; Howard, 31 A.3d at 979. Accordingly, summary judgment in favor of Defendant Foster Wheeler is not warranted.

In light of this determination, the Court need not reach Defendant Foster Wheeler's argument pertaining to the bare metal defense.