

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

CHARLES KRIK, : CONSOLIDATED UNDER
 : MDL 875
Plaintiff, :
 :
 :
 : Transferred from the Northern
v. : District of Illinois
 : (Case No. 10-07435)
 :
BP AMERICA, INC. :
ET AL., : E.D. PA CIVIL ACTION NO.
 : 2:11-63473-ER
Defendants. :

O R D E R

AND NOW, this **14th** day of **May, 2012**, it is hereby
ORDERED that the Motions for Summary Judgment of Defendant
Marley-Wylain (Doc. Nos. 130 and 175) are **DENIED**.¹

¹ This case was transferred in February of 2011 from the United States District Court for the Northern District of Illinois to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Charles Krik ("Plaintiff") worked as a boilerman and boilermaker during his Navy career, from 1954 to 1970. His duties included pipefitting and insulation work. Plaintiff worked on repair ships for about six (6) years of his naval career, including some work in the valve shop when repairing the USS Tutuila. During his civilian career, Plaintiff worked as a boilermaker and pipefitter, including work for two unions in the Chicago area. In 1990, he received training in asbestos removal to recognize what materials were asbestos. Defendant Marley-Wylain Co. ("Marley-Wylain") manufactured boilers under the name Weil-McLain. Plaintiff has alleged that he was exposed to asbestos from Weil-McLain boilers both prior to and after 1980 at the following locations:

- At the home of a judge in Evanston, IL
- 43rd & Western - Chicago, IL

Plaintiff was diagnosed with lung cancer in November of 2008 and bilateral pleural plaque formations in June of 2011. He was deposed for two (2) days in July and August of 2011.

Plaintiff has brought claims against various defendants. On December 2, 2011, Defendant Marley-Wylain moved for summary judgment, arguing that the Indiana statute of repose bars Plaintiff's claims. In that motion, Defendant contends that Indiana law applies to Plaintiff's claims against it because Plaintiff moved to have this case (which it refers to as "the Illinois Krik matter") consolidated with a another action (which it refers to as "the Indiana Krik matter"). Plaintiff contends that Illinois law applies.

On January 10, 2012, four (4) days after the deadline for filing summary judgment motions in this case (see Scheduling Order (Doc. No. 80)), and without having sought or obtained leave to file a motion beyond the deadline, Defendant filed a second motion for summary judgment styled as a "Supplemental Rule 56 Motion for Summary Judgment." In this second motion, Defendant argues that Plaintiff has failed to identify sufficient product identification evidence to support a finding of causation with respect to its product(s).

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 Illinois and transferred from another district court, Illinois choice of law rules must be applied in determining what substantive law to apply to this case.

Generally, under Illinois law, in tort cases, the choice of law problem is governed by "the most significant relationship test." *Gregory v. Beazer East*, 382 Ill.App.3d 178, 196-98, 892 N.E.2d 563, 581-82 (Ill. 2008). In personal injury tort cases, there is a presumption that the local law of the state where the injury occurred is the choice of law that should govern, though there are situations in which the place of injury will not be an important contact, such as where the place of injury is fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue, or when the injury has occurred in two or more states. *Id.* It is undisputed that the alleged exposure pertinent to Defendant Marley-Wylain occurred in Illinois. Plaintiff contends that Illinois law applies. Defendant has provided no evidence or argument to suggest that the place of injury is fortuitous or that there are other reasons it bears little relation to the occurrence and the parties. Defendant argues only that Plaintiff previously moved to have the two *Krik* actions (Illinois and Indiana) consolidated. This is not a compelling reason for application of Indiana law under the considerations of *Gregory*. Therefore, the Court will apply Illinois law in deciding Defendant Marley-Wylain's motion for summary judgment.

II. Defendant Marley-Wylain's Motion for Summary Judgment

A. Defendant's Arguments

Products Liability Statute of Repose (Indiana)

In its brief, Marley-Wylain argues that Plaintiff's claims are barred by the Indiana Products Liability Statute of Repose. It argues that this statute bars claims brought more than ten (10) years after the delivery of the asbestos-containing product to the initial user or consumer, unless the action is brought between eight (8) and ten (10) years after delivery, in which case a plaintiff is entitled to two (2) years from that time to file suit.

At oral argument, Marley-Wylain informed the Court that it no longer intended to pursue summary judgment on this basis.

Product Identification / Causation

In its second motion, filed four (4) days after the deadline for filing dispositive motions, Marley-Wylain argues that there is insufficient product identification evidence to support a finding of causation with respect to its product(s).

B. Plaintiff's Arguments

Products Liability Statute of Repose (Indiana)

Plaintiff argues that Defendant's argument pertaining to the Indiana Products Liability Statute of Repose fails because the asbestos exposure occurred in Illinois and the case is governed by Illinois law - not Indiana law.

Product Identification / Causation

In response to Defendant's second motion, Plaintiff argues that there is sufficient product identification evidence regarding asbestos used in connection with boilers manufactured by Marley-Wylain, to which he was exposed. In support of this argument, he cites to various pieces of evidence that appear in the record.

C. Analysis

Products Liability Statute of Repose (Indiana)

Defendant Marley-Wylain informed the Court at oral argument that it no longer wished to pursue summary judgment on grounds of the Indiana Products Liability Statute of Repose. The Court notes further that, because this case is governed by Illinois law, the Indiana statute is inapplicable. Defendant did not make an argument in the alternative for application of an Illinois statute of repose. For these reasons, Defendant's motion for summary judgment on the basis of a statute of repose is denied.

Product Identification / Causation

Defendant's second motion for summary judgment on grounds of insufficient product identification was untimely and was filed without leave of court. Therefore, it is denied.