

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

DONNA PALMER, : CONSOLIDATED UNDER  
 : MDL 875  
Plaintiff, :  
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 :  
v. :  
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 :  
HEIDELBERG USA, INC., :  
ET AL., : E.D. PA CIVIL ACTION NO.  
 : 5:12-05034-ER  
Defendants. :

O R D E R

**AND NOW**, this 15th day of **October, 2014**, it is hereby  
**ORDERED** that the Motion for Summary Judgment of Defendant  
Heidelberg USA, Inc. (Doc. No. 25) is **GRANTED**.<sup>1</sup>

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<sup>1</sup> This case originated in Pennsylvania state court. In August of 2012, it was removed by a defendant to the Eastern District of Pennsylvania and became part of MDL-875.

Plaintiff alleges that James Palmer ("Decedent" or "Mr. Palmer") was exposed to asbestos while working as a machinist at various locations in New Jersey and Pennsylvania from 1962 to 1977. Defendant Heidelberg USA, Inc. ("Heidelberg"), is a successor to the Mergenthaler Linotype company, which manufactured Mergenthaler Linotype machines, which Plaintiff alleges was used with raw asbestos as specified by Defendant.

Plaintiff was diagnosed with an asbestos-related illness and passed away in October of 2012.

Plaintiff has brought claims against various defendants. Defendant Heidelberg has moved for summary judgment, arguing that (1) there is insufficient product identification evidence to establish causation with respect to its product(s), and (2) it is entitled to the bare metal defense.

The parties agree that Pennsylvania law applies.

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## 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 Defendant'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.

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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

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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 Heidelberg's Motion for Summary Judgment**

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

#### Product Identification / Causation / Bare Metal Defense

Heidelberg argues that Plaintiff's evidence is insufficient to support a finding of causation with respect to any product for which it could be liable.

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

### **B. Plaintiff's Arguments**

#### Product Identification / Causation / Bare Metal Defense

Plaintiff contends that she has identified sufficient evidence to support a finding of causation with respect to Defendant. As represented by Plaintiff, that evidence is summarized below, in pertinent part:

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- Deposition Testimony of Mr. Palmer  
Plaintiff testified that he was exposed to respirable dust from raw asbestos used in Mergenthaler Linotype machines to pack the space between the crucible and the pot jacket. He explained that this exposure occurred by using compressed air to blow off the machines. He testified that cracks on the Mergenthaler machines were "common," and that asbestos reached his breathing area "many times." He identified a few different locations where he worked on Mergenthaler machines.

(Pl. Ex. A, Doc. No. 26-2.)

- Deposition Testimony of Defendant's 30b6 Witness (Michael Niesen)  
Plaintiff has pointed to deposition testimony of Heidelberg corporate representative Michael Niesen, who Plaintiff asserts testified that (1) six pounds of raw asbestos were used in Mergenthaler Linotype machines to pack the space between the crucible and the pot jacket, (2) Mergenthaler mandated that dry asbestos "must" be used, and (3) Mergenthaler offered raw asbestos for sale in its catalogs, to be used in packing the crucibles.

(Pl. Ex. B, Doc. No. 26-2.)

### C. Analysis

Plaintiff alleges that Decedent was exposed to raw asbestos used in Mergenthaler Linotype machines between the crucible and the pot. There is evidence that Decedent was exposed to respirable dust from raw asbestos used in Mergenthaler Linotype machines to pack the space between the crucible and the pot jacket. There is evidence that cracks on the Mergenthaler machines were "common," and that asbestos reached Decedent's breathing area "many times." There is also evidence that Decedent worked on Mergenthaler machines at a few different locations during the period 1962 to 1977. Importantly, however, Plaintiff's evidence does not establish that Decedent was exposed to respirable asbestos from Mergenthaler machines with the requisite frequency and regularity required by Pennsylvania law. Even

  
EDUARDO C. ROBRENO, J.

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assuming that Defendant could be liable for this raw asbestos exposure without evidence that it manufactured or supplied the asbestos - an issue the Court need not reach - at best, Plaintiff's evidence establishes that, during a fifteen year period, Decedent experienced such exposures a handful of times. Therefore, applying Pennsylvania law, no reasonable jury could conclude from the evidence that Plaintiff's exposure to this asbestos 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 Heidelberg is warranted.

In light of this determination, the Court reiterates that it need not reach the issue of the bare metal defense under Pennsylvania law.