

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

ANTON WAGNER,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Southern District of
v.	:	Mississippi
	:	(Case No. 06-01277)
	:	
MISSISSIPPI RUBBER AND SPECIALTY COMPANY, et al.,	:	E.D. PA CIVIL ACTION NO. 5:08-87085-ER
	:	
Defendants.	:	

FILED

APR - 3 2013
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this 2nd day of April, 2013, it is hereby
ORDERED that the Motion for Summary Judgment of Defendant
Honeywell International, Inc. (Doc. No. 157) is GRANTED.¹

¹ This case was transferred in April of 2008 from the United States District Court for the Southern District of Mississippi to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that he was exposed to asbestos during his work as a mechanic in Gulfport, Mississippi from approximately 1966 to 1980. He alleges that he developed asbestosis and lung cancer as a result of this exposure.

Plaintiff has brought claims against various defendants. Defendant Honeywell International, Inc., a successor in interest to the Bendix Corporation ("Honeywell"), has moved for summary judgment arguing that (1) there is insufficient product identification evidence to support a finding of causation with respect to any product for which it could be liable. (2) Defendant also seeks summary judgment on Plaintiff's claims for fraudulent concealment, misrepresentation, alteration of medical studies, conspiracy, breach of warranty, and punitive damages, on grounds of insufficient evidence. The parties agree that Mississippi law applies to Plaintiff's claims.

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 Mississippi substantive law applies in these cases. Therefore, this Court will apply Mississippi law in deciding Defendant's Motions for Summary Judgment in those cases. 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. Unsworn Declaration 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 unsworn

testimony "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. Aug. 14, 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 declaration 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) (refusing to consider unsworn declaration of a lay witness)). 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., 416 F. App'x, at 164 n.8 (3d Cir. 2010) (noting that "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, a declaration 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. 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 Honeywell's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant Honeywell argues that it is entitled to summary judgment because Plaintiff has failed to identify sufficient product identification evidence to support a finding of causation with respect to any product for which it may be liable. In its reply brief, Defendant asserts that the report of

Plaintiff's expert (Richard Hatfield) is unsworn and therefore inadmissible.

Miscellaneous Claims

Defendant argues that it is entitled to summary judgment on Plaintiff's claims for fraudulent concealment, misrepresentation, alteration of medical studies, conspiracy, breach of warranty, and punitive damages, because Plaintiff has no evidence to support these claims.

B. Plaintiff's Arguments

Product Identification / Causation

In response to Defendant's argument that Plaintiff has failed to identify sufficient evidence of product identification/causation, Plaintiff points to the following evidence:

- Unsworn Expert Report of Richard Hatfield
In an unsworn report, expert Richard Hatfield identifies Bendix as a manufacturer of Volkswagon brakes.

(Pl. Ex. A, Doc. No. 164-1.)

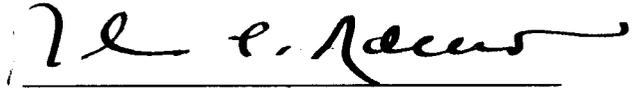
Miscellaneous Claims

Plaintiff has not responded to Defendant's motion for summary judgment as to Plaintiff's claims for fraudulent concealment, misrepresentation, alteration of medical studies, conspiracy, breach of warranty, and punitive damages - and has not identified any evidence to support any of these claims.

C. Analysis

Product Identification / Causation

The only product identification/causation evidence identified by Plaintiff is an unsworn expert report. This Court has repeatedly ruled that an unsworn expert report cannot be relied upon to defeat a motion for summary judgment. See, e.g., Faddish, No. 09-70626, 2010 WL 4146108 at *6; Burrell, No. 08-87293, 2011 WL 5458324; Deuber v. Asbestos Corp., Ltd., No. 10-78931, 2012 WL 7761244 (E.D. Pa. Oct. 15, 2012) (Robreno, J.).



EDUARDO C. ROBRENO, J.

Therefore, in assessing the sufficiency of Plaintiff's evidence, the Court will not consider the unsworn expert report of Richard Hatfield. Because Plaintiff has identified no product identification/ causation evidence other than this inadmissible expert report, Plaintiff has failed to identify sufficient evidence to support a finding of causation with respect to any product for which Defendant Honeywell may be liable. Accordingly, summary judgment in favor of Defendant Honeywell is warranted on Plaintiff's claims for asbestos illness. Anderson, 477 U.S. at 248-50.

Miscellaneous Claims

To the extent that any of Plaintiff's miscellaneous claims can survive independent of his claims for asbestos illness, Defendant's motion for summary judgment on those claims is granted as unopposed. See Local R. Civ. P. 7.1(c); Fed. R. Civ. P. 56(c).

D. Conclusion

Defendant Honeywell is entitled to summary judgment on all of Plaintiff's claims.