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

OLGA PAVLICK,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
v.	:	District of Delaware
	:	(Case No. 10-00174)
ADVANCE STORES COMPANY, et al.,	:	E.D. PA CIVIL ACTION NO. 2:10-67147-ER
Defendants.	:	

FILED
FEB 20 2013
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **19th** day of **February, 2013**, it is hereby **ORDERED** that the Motion for Summary Judgment of AM General LLC (Doc. No. 249) is **DENIED with leave to refile after remand.** [1]

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[1] This case was transferred in May of 2010 from the United States District Court for the District of Delaware to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Olga Pavlick alleges that her husband, John Pavlick ("Decedent" or "Mr. Pavlick"), was exposed to asbestos during his work (1) in the army (in Germany), (2) in an auto parts-related job in New Jersey, and (3) while performing home remodeling. Mr. Pavlick developed mesothelioma and died from that illness.

Plaintiff has brought claims against various defendants. Defendant AM General LLC ("AM General") has moved for summary judgment arguing that (1) there is insufficient evidence to support a finding of causation with respect to any product for which it is liable, (2) it is entitled to summary judgment on grounds of the bare metal defense, (3) it is immune from liability by way of the government contractor defense, and (4) there is no evidence to support a punitive damages award.

Defendant AM General contends that New Jersey law applies to the claims against it (although the alleged exposure at issue occurred exclusively in Germany). Plaintiff agrees that New Jersey law applies to the claims at issue.

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 agree that New Jersey law applies. Therefore, this Court will apply New Jersey 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 New Jersey Law

This Court has previously considered the product identification/causation standard under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

> To maintain an asbestos action in New Jersey, a plaintiff must "provide sufficient direct or circumstantial evidence from which a jury could conclude that plaintiff was in close proximity to, and inhaled, defendant's asbestos-containing product on a frequent and regular basis." Kurak v. A.P. Green Refractories Co., 689 A.2d 757, 761 (N.J. Super. Ct. App. Div. 1997) (quoting Sholtis v. American Cyanamid Co., 568 A.2d 1196, 1208 (N.J. Super. Ct. App. Div. 1989)). In order to meet this "frequency, regularity and proximity test," plaintiff must do more than "demonstrate that a defendant's asbestos product was present in the workplace or that he had 'casual or minimal exposure' to it." Kurak, 689 A.2d at 761 (quoting Goss v. American Cyanamid Co., 650 A.2d 1001, 1005 (N.J. Super. Ct. App. Div. 1994)). In addition to meeting the "frequency, regularity, and proximity test," plaintiff must establish causation by presenting "competent evidence, usually supplied by expert proof" showing that there is a nexus between exposure to defendant's product and plaintiff's condition. Kurak, 689 A.2d at 761.

2011 WL 5881183, * 1 n.1 (E.D. Pa. Aug. 2, 2011)(Robreno, J.).

D. Presumption Re: Warning Defect Under New Jersey Law

This Court has previously addressed the presumption regarding warning defect claims that exists under New Jersey law. In Lewis v. Asbestos Corp, (No. 10-64625), this Court wrote:

> In Coffman v. Keene Corp., the plaintiff claimed that an asbestos manufacturer's failure to place warnings on its asbestos-related products was a proximate cause of the plaintiff's development of asbestosis. 628 A.2d 710, 715 (N.J. 1993). The court recognized that, "[c]ausation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation-that the defect in the product was a proximate cause of the injury." Id. at 716 (citing Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982); Vallillo v. Mushkin Corp., 514 A.2d 528 (N.J. App. Div. 1986)). "When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm."

628 A.2d at 715 (citing Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984)). The court adopted a "heeding presumption" in products liability failure to warn cases that the plaintiff "would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded." 628 A.2d at 720. Evidence that the plaintiff was aware of the dangers associated with the defendant's product or that the plaintiff would have disregarded the warnings had they been provided may rebut this heeding presumption. Id. at 721. The court held that "to overcome the heeding presumption in a failure-to-warn case involving a product used in the workplace, the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." Id. at 724.

2011 WL 5881181, * 1 n.1 (E.D. Pa. Aug. 2, 2011)(Robreno, J.).

E. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010)(Robreno, J.)(citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more

than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011)(Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

F. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010)(Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. Defendant AM General's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant AM General argues that there is insufficient product identification evidence to support a finding of causation with respect to any product(s) for which it is liable.

Bare Metal Defense

Defendant AM General contends that it is entitled to summary judgment on grounds of the "bare metal defense," and that New Jersey law would recognize the defense.

Government Contractor Defense

Defendant AM General asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Army exercised discretion and approved reasonably precise specifications for the products at issue, Defendants provided warnings that conformed to the Army-approved warnings, and the Army knew about the hazards of asbestos. In asserting this defense, AM General relies upon the affidavit and deposition testimony of John Camblin.

Punitive Damages Claim

Defendant AM General argues that summary judgment is warranted with respect to Plaintiffs' punitive damages claim because there is no evidence to support this claim.

B. Plaintiff's Arguments

Product Identification / Causation

In response to Defendant's assertion that there is insufficient product identification evidence to establish causation with respect to its product(s), Plaintiff asserts that Defendant AM General is liable because Defendant's vehicles required asbestos-containing brake linings, and because Defendant not only could foresee - but called for - the use of asbestos-containing brake linings with its vehicles. Plaintiff also asserts that Defendant should be liable as part of the "chain of distribution" of the brake linings because it supplied replacement component parts for use with its vehicles.

Plaintiff has not identified any evidence that Defendant AM General manufactured or supplied any of the asbestos-containing brake linings to which she contends Decedent was exposed.

Bare Metal Defense

Plaintiff contends that New Jersey law would not recognize the "bare metal defense." In support of this assertion, Plaintiff cites to: (1) Beshada v. Johns Manville, 447 A.2d 359, 547-49 (N.J. 1982), (2) Freund v. Cellofilm Properties, 432 A.2d 925, 932 (N.J. 1981), (3) Waterson v. General Motors, 544 A.2d 357 (N.J. 1988), (4) Becker v. Baron Bros., 649 A.2d 613 (N.J. 1994), (5) Molino v. BF Goodrich, 617 A.2d 1235, 1240 (N.J. App. 1992), (6) Campos v. Firestone, 485 A.2d 305 (N.J. 1984), and (7) Michalko v. Cooke Color & Chemical, 451 A.2d 179 (N.J. 1982).

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because, inter alia, there is no evidence in the record that the Army was aware of the hazards of asbestos.

Punitive Damages Claim

Plaintiff has not responded to Defendant's argument regarding punitive damages.

C. Analysis

Punitive Damages Claim

The Court has previously determined that the issue of punitive damages must be resolved at a future date with regard to the entire MDL-875 action and, therefore, all claims for punitive or exemplary damages are to be severed from the case and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania. See, e.g., Ferguson v. Lorillard Tobacco Co., 2011 WL 4915784, at n.2 (E.D. Pa. Mar. 2, 2011) (Robreno, J.). Accordingly, Defendant's motion for summary judgment as to claims for punitive damages is denied.

Government Contractor Defense

As noted by Plaintiff, Defendant AM General has failed to provide any evidence that the Army knew of the hazards of asbestos contained in brakes. In order to satisfy the third prong of the Boyle test Defendant relies solely on caselaw (rather than evidence) in which another defendant presented evidence of the military's knowledge of asbestos hazards. As such, Defendant has

failed to carry its burden in establishing this affirmative defense and summary judgment is therefore not warranted on this basis. See Boyle, 487 U.S. at 512; Willis, 811 F. Supp. 2d at 1157.

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that Defendant AM General is liable for asbestos-containing brake linings used with its vehicles, and from which Decedent was exposed to respirable asbestos. Plaintiff has not identified any evidence that Defendant AM General manufactured or supplied any of the asbestos-containing brake linings to which she contends Decedent was exposed. Rather, Plaintiff contends that Defendant is liable because its vehicles required asbestos-containing brake linings, and because Defendant not only could foresee - but called for - the use of asbestos-containing brake linings with its vehicles. Plaintiff also asserts that Defendant should be liable as part of the "chain of distribution" of the brake linings because it supplied replacement component parts for use with its vehicles. Therefore, Defendant is liable only if New Jersey law does not recognize the so-called "bare metal defense."

The Court has reviewed New Jersey law on this issue (as cited by the parties) and has determined that it has not been fully and squarely addressed by any appellate court in New Jersey in the context of asbestos litigation. As such, there is no clear and settled statement of New Jersey law on the issue. Whether New Jersey law recognizes this defense (i.e., whether New Jersey law holds a vehicle manufacturer liable for injury arising from asbestos-containing replacement brake linings that it specified and/or recommended for use in connection with its vehicle, or which its vehicles required to function, or which it could foresee being used with its vehicles, but which it did not manufacture or supply) is a matter of policy. A court situated in New Jersey is closer to - and has more familiarity with - New Jersey law and policy. As such, rather than predicting what the Supreme Court of New Jersey would do, the Court deems it appropriate for a court in New Jersey to decide this issue. See, e.g., Faddish v. CBS Corp., No. 09-70626, 2010 WL 4159238 (E.D. Pa. Oct. 22, 2010) (Robreno, J.).

However, this MDL court is not permitted to invoke 28 U.S.C. § 1404(a) to transfer this case to any district other than that from which it was transferred, see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998). On the

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

ENTERED
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CLERK OF COURT

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other hand, the transferor court (District of Delaware) has the authority to transfer to a New Jersey court an unsettled issue of New Jersey law (which a New Jersey court, albeit a federal court, is best suited to address), § 1404(a). The Court notes that, given New Jersey's many connections to the case, it appears that the Delaware conflicts of law analysis would ultimately result in application of New Jersey substantive law, as a result of Delaware's application of the "most significant relationship" test. See Travelers Indemnity Co., 594 A.2d at 47. Thus, it would seem that the case may ultimately be best addressed by transfer to a New Jersey court because the substantive, unsettled legal issues are best predicted by a district court in New Jersey.

Accordingly, this Court has determined that this case is to be remanded to the transferor court, with a recommendation that it be transferred to the District of New Jersey. Summary judgment in favor of Defendant is denied with leave to refile in the court in which the case is ultimately situated after remand.